



## ReFORMed & Revised Changes to the 2022 GAR Contracts

It's that time of year to review the changes that the Forms Committee made for the 2022 GAR forms.

### 1. PURCHASE AND SALE AGREEMENT (GAR FORM F201)

a. **Option Money Paid Directly to Seller.** The GAR Forms Committee tried to clarify that if the buyer pays option money for a right to have a Due Diligence Period, that money is paid “directly” to the Seller and is not held in escrow. Who gets the option money and when they get it has been a question commonly asked by REALTORS® during this past year. Language was also added that option money could be paid by check, ACH, or wire transfer of immediately available funds.

b. **Buyer May Examine Title and/or Obtain a Survey.** The GAR Forms Committee tried to clarify that the buyer can examine title to the property and/or obtain a survey of the property but is not required to do both. The previous language merely provided that buyer could examine title **and** obtain a survey. The GAR Forms Committee wanted to clarify that these were independent rights and that buyers could do one without the other.

c. **How Earnest Money is Paid.** The 2022 GAR Forms gives the holder of earnest money the right to dictate how the earnest money will be paid. The new language now states that the earnest money “will be paid to Holder in a method of payment acceptable to Holder.” For example, the holder can now require that the earnest money be wired to the holder. The revisions to this section also give the holder the right to pass on “any cost associated with receiving the earnest money”. This language is not intended to allow the holder to charge a fee for holding the earnest money. However, if the holder has to pay, for example, a fee to receive a wire, that cost can now be passed on to the buyer.

d. **When is Notice Deemed Delivered.** The GAR Forms Committee tried to clarify when an email or facsimile notice is deemed delivered by providing that this occurs on the date and time it is sent to an email address or facsimile number of a party to the contract “even if it is not opened by the recipient”. So, for example, if an email notice is sent to the email address of the seller at 10:00 p.m. on a Sunday night, but is not opened by the seller until 8:00 a.m. the following morning, the notice is still deemed delivered on Sunday night at 10:00 p.m.

e. **Broker's Lack of Authority to Bind Client Clarified.** A broker's lack of authority to bind their clients was clarified for 2022. Language was added stating that “no broker or affiliated licensee of broker has the authority to bind any party to any contract, provisions therein, amendments thereto, termination thereof or to notices signed by broker but not the party”. The new language further states that a broker may not “send notices from Broker on behalf of a party unless they are signed by the party”. This change was made to try to prevent ongoing problems where one party treats a notice from another party's broker as having significance when in fact it is meaningless unless signed by the party to the contract giving the notice.

f. **Clarification of Filling Out the Binding Agreement Date.** One of the more frequent questions on the GAR Legal Helpline is who can fill out the Binding Agreement Date. The 2022 GAR Forms make it clear that any party or broker can fill in the Binding Agreement Date. What has been created for the first time is a procedure for either party to object to the Binding Agreement Date if the party believes it has been filled in incorrectly. Specifically, if a party believes that the Binding Agreement Date was filled out incorrectly, the party has one (1) day from receiving a notice of the Binding Agreement Date to object to the same by sending a notice of objection to the other party. If no objection is made, then it constitutes acceptance of whatever Binding Agreement Date was entered. This change was made to avoid parties raising objections to the Binding Agreement Date well into the transaction when some of the deadlines in the contract may already have passed. The contract then provides that objection will be resolved by a written agreement signed by the parties. Hopefully, the parties can review the definition of “Binding Agreement Date” and quickly reach an agreement on the “Binding Agreement Date”. However, language was also added that “The absence of an agreement on the Binding Agreement Date shall not render this Agreement unenforceable”. This would effectively mean that the parties would litigate the issue of the correct Binding Agreement Date.

g. **Rules for Interpreting This Agreement.** A new section was added to the Purchase and Sale Agreement providing users with rules on how the Agreement should be interpreted. The rules are as follows:

“Rules for Interpreting This Agreement: In the event of internal conflicts or inconsistencies in this Agreement, the following rules for how those conflicts or inconsistencies shall be resolved will apply:

- Handwritten changes shall control over pre-printed or typed provisions;
- Exhibits shall control over the main body of the Agreement;
- Special Stipulations shall control over both exhibits and the main body of the Agreement;
- Notwithstanding the above, any amendatory clause in an FHA or VA exhibit shall control over inconsistent or conflicting provisions contained in a special stipulation, another exhibit or the main body of the Agreement.”

The rules continue to provide that exhibits control over the main body of the Agreement and special stipulations control over exhibits and the main body of the Agreement. However, a new rule was added that handwritten changes control over pre-printed or typed provisions. Also, and most importantly, any amendatory clause in an FHA or VA exhibit controls over inconsistent or conflicting provisions in a special stipulation, an exhibit or in the main body of the Agreement. This should help resolve questions that have arisen over the last year when attempts were made in special stipulations to alter the amendatory clause. The amendatory clause includes language making it superior to all other provisions of the contract. Therefore, there has been a lot of confusion as to whether the amendatory clause can be amended in a special stipulation. The new language helps make it clear that the answer to this question is no since the rules for interpreting contracts now make the amendatory clause superior to all other provisions.

h. **Definition of a Day Added.** To avoid disputes over when a day ends, a definition of a “day” was added for the first time to the GAR Purchase and Sale Agreement. Specifically, the term “Day” is defined as “For the purposes of this Agreement, the term “Day” shall mean a full calendar day ending at 11:59 p.m., except as may be provided for elsewhere herein. For the purposes of counting days for determining deadlines, the specific date referenced as either the Binding Agreement Date or the date from which the deadline shall be counted will be day zero”.

Guidance was also given on how to count days from the Binding Agreement Date. Specifically, language was added to clarify that the Binding Agreement Date is day zero for the purposes of counting days from the Binding Agreement Date. So, for example, if the Due Diligence Period is five (5) days from the Binding Agreement Date of Sunday the Due Diligence Period would end on the following Friday at the end of the day at midnight.

2. **EXCLUSIVE SELLER BROKERAGE ENGAGEMENT AGREEMENT (GAR FORM F101)**

**Consent to Dual Agency Clarified.** Language was added to all of the brokerage engagement agreements giving consumers a clear choice as to whether or not to consent to dual agency, if that is one of the agency options being offered by the broker.

3. **EXCLUSIVE BUYER BROKERAGE ENGAGEMENT AGREEMENT (GAR FORM F110)**

a. **Buyer's Commission Obligations Clarified.** The Exclusive Buyer Brokerage Engagement Agreement was clarified to state what commission is to be paid to the buyer's broker at closing. Rather than stating that the commission is normally paid for by the seller, the new section states what amount is owed by the buyer to the buyer's broker and then clarifies that the amount owed is "minus any commission paid to Broker by either the seller's broker or the seller." The new language also includes an acknowledgment that the commission, if any, being offered by the seller's broker is usually set forth in the multiple listing service in which the property is listed.

In this seller's market, we are seeing more sellers' brokers not offering compensation to the broker working with the buyer. As such, the buyer's broker needs to have a clearer agreement with the buyer that the buyer has the obligation to pay the buyer broker's commission in that situation and that this obligation is then offset by any commission amounts agreed to be paid by the seller or seller's broker. This change reflects what may be the start of an eventual shift in how real estate brokers working with buyers are paid. If the trend continues, buyer's brokers will need to be able to more clearly articulate the value of the services they perform to their buyer clients.

b. **Risks of Buying Property Sight Unseen More Clearly Explained.** The Exclusive Buyer's Brokerage Engagement Agreement was modified for 2022 to more clearly explain the significant risks in buying property sight unseen. The new section states in part that "pictures, videos and other information about the property may not accurately reflect the true nature and condition of the property or area in which the property is located". This new section also requires the buyer to indemnify and hold the broker harmless from any claims arising out of what the buyer or buyer's representative would have observed had the buyer visited the property and surrounding area. Buying a property sight unseen is risky business and this new language will hopefully discourage buyers from doing so except when it cannot otherwise be avoided.

c. **Buyer Default Language Expanded in Exclusive Buyer Brokerage Engagement Agreements.** The default section of the Exclusive Buyer Brokerage Engagement Agreement was expanded to require the buyer to immediately pay broker its commission if "Buyer enters into a Contract to Purchase real property during the term of this Agreement and later closes on the same (even if the Closing is after the expiration of this Agreement) where Broker is not paid its entire Commission". This new language makes it clear that the buyer broker is entitled to a commission if the buyer enters into a purchase contract during the term of the Agreement but then closes on the transaction after the brokerage agreement has ended.

4. **LAND PURCHASE AND SALE AGREEMENT (GAR FORM F213)**

**Land Contract Modified to Reflect CUVA Taxes.** Many large tracts of land benefit from a Conservation Use Valuation Assessment for where the owner of the property pledges not to develop the land for a period of years in exchange for reduced property tax assessments based on the land's productivity not its fair market value. However, if the property is sold and the conservation use is terminated prior to the end of the agreed upon term that it was supposed to remain undeveloped, there is a rollback of taxes that would otherwise have been due had the property been taxed at its fair market value.

The closing cost and prorations section of the Land Purchase and Sale Agreement was modified to state that if the buyer's change in the ownership or use of the property will result in rollback taxes being owed, then the seller will pay those taxes at the closing. However, if the buyer warrants to the seller that there will be a continuation of a conservation use entitling the buyer to preferential property tax treatment and the buyer then changes the use of the property, the buyer then holds the seller harmless from and against any liability for rollback taxes. Therefore, when selling land that is receiving preferential tax treatment, it is important to address whether or not the buyer is going to be continuing with the conservation use and for all parties to understand the implications of that decision.

5. **TEMPORARY OCCUPANCY FOR SELLER AFTER CLOSING EXHIBIT (GAR FORM F219)**

**End of Temporary Occupancy Period Clarified.** The end of the Temporary Occupancy Period was clarified for 2022 to have it end at a specific time and date rather than just on a specific date. The end date and time is also now measured "from" the date of closing rather than "after" the date of closing to make it consistent with how we count days "from" the Binding Agreement Date. Language was also added to this Form to clarify that the "Buyer, as the new owner shall be responsible for making all other repairs to the Property" excluding damage caused by the seller and others under the control of the seller. Therefore, if a system or appliance in the property happens to break after closing but before the occupancy of the property by the buyer, the buyer is still responsible for repairing the system or appliance unless the seller was at fault in causing the system or appliance to break.

6. **TEMPORARY OCCUPANCY AGREEMENT FOR BUYER PRIOR TO CLOSING EXHIBIT (GAR FORM F222)**

**Seller to Remove All Property if Temporary Occupancy Agreement Starts Before Closing.** Language was added to this Form for 2022 requiring the seller to remove all of seller's personal property prior to occupancy by the buyer prior to closing. The one exception to this requirement is for personal property that is to remain with the house after the closing. This change was made to avoid disputes where the seller tries to keep his or her personal property on the property at the same time the buyer is trying to move the buyer's personal belongings into the property.

7. **PROPERTY SOLD WITH RIGHT TO REQUEST REPAIRS (GAR FORM F273)**

**Property Sold with Right to Request Repairs Clarified to Address What Happens if Parties Cannot Agree to Repairs.** The Property Sold with Right to Request Repairs Form was clarified to address what happens if the parties cannot agree on the defects that are to be repaired. For 2022, the Form states that if the parties cannot agree on repairs, then the Agreement shall terminate and “Buyer shall be entitled to the return of Buyer’s earnest money”. Language was also added to provide that if the seller agrees to repair all defects timely presented by the buyer to the seller, then the buyer may not use the Right to Request Repairs Exhibit as a basis to terminate the Agreement.

8. **SELLER’S PROPERTY DISCLOSURE STATEMENT (GAR FORM 301)**

**Seller’s Property Disclosure Statement Modified.** A number of very small changes were made to the Seller’s Property Disclosure Statement for 2022. The first question that was added was “Is the Property receiving preferential tax treatment as an agricultural property?” This question was added to alert buyers of land to think about whether a conservation use of the property will continue or not after a sale. The second question that was added was “Are you aware of any wildlife accessing the attic or other interior portions of the residence?” This question was added so that sellers with squirrels or mice in their attics would disclose this to their buyers. The third question that was added deals with houses whose water comes from a well. Specifically, the question that was added was “If the drinking water is from a well, give the date of last service”. Language was added to give the date of testing if there was ever a test indicating that the water was not safe. Finally, the word “solar systems” in Section 5(h) was changed to “alternate energy systems.”

9. **CONVENTIONAL LOAN CONTINGENCY (GAR FORM F404)**

**Conventional Loan Contingency Revised.** The GAR Forms Committee tried to address the issue of when buyers are entitled to receive back their earnest money due to an inability to obtain a mortgage loan. Specifically, language was added that “the lender not having completed underwriting the loan request” was not a legitimate basis for a loan denial letter. Therefore, if the loan denial letter is based on this, the buyer would lose his or her earnest money. In addition, the loan denial letter section was also rewritten so that if the loan denial letter is based on any invalid reason, the buyer is in default and would lose his or her earnest money.

Finally, an invalid reason for the loan denial letter also now includes “the Property not appraising for at least the purchase price unless this Agreement is subject to an appraisal contingency and an appraisal meeting the requirements of this Agreement has been performed”. So, for example, if the purchase is not subject to an appraisal contingency, the property not appraising would be an invalid reason for a loan denial letter or the buyer not getting back his or her earnest money.

10. LEASE FOR RESIDENTIAL PROPERTY (GAR FORM F913)

**Changes to the Lease.** Two changes were made in the residential lease for 2022. The first change clarifies whether or not the landlord has a right to terminate the lease early. Previously, the form assumed that the lease could be terminated early. This created some confusion on how best to reflect the scenario where the landlord gave up this right in entering into the lease. The second change clarified to tenants that when the property is being listed for sale or relisted for rent, visitors may take photos and videos of the property. Tenants are then advised in the form to take whatever precautions they deem necessary.

11. OPTION AGREEMENT REVISED (GAR FORM F240)

The Option Agreement was substantially revised for 2022. One challenge with the Option Agreement is that it has to reference a Purchase and Sale Agreement that reflects the business agreement of the parties in the event the option is exercised. However, the Purchase and Sale Agreement is not intended to be enforceable unless and until the option is exercised. To make this clear to persons using the Option Agreement, the GAR Forms Committee added in the following boldface disclosure to the Option Agreement:

**“THE FOLLOWING SHALL BE DEEMED TO BE INCLUDED IN THE PURCHASE AND SALE AGREEMENT SPECIAL STIPULATIONS REGARDLESS OF WHETHER IT IS INCLUDED THEREIN: “THIS PURCHASE AND SALE AGREEMENT SHALL BECOME BINDING UPON THE PARTIES ONLY WHEN THE BUYER EXERCISES BUYER’S OPTION TO PURCHASE UNDER THE OPTION AGREEMENT ENTERED INTO BY THE PARTIES SIMULTANEOUSLY WITH THE EXECUTION OF THIS PURCHASE AND SALE AGREEMENT.”**

The GAR Forms Committee also added checkboxes where the payment for the right to have an Option is or is not credited against the purchase price of the property. The Committee also added a seller warranty that the seller has the legal authority to enter into the Option Agreement and that the consideration paid for the option will be fully and immediately refunded if the seller was unable to fulfill the seller’s obligations to sell the property to the buyer in accordance with the terms of the purchase and sale agreement.

In conclusion, while most of the changes made to the 2022 Forms were small modifications, they continue make our Forms more precise and easier to use. The GAR Forms Committee will continue the process of trying to make our GAR Forms second to none in 2022.

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