



SPECIAL STIPULATIONS FOR EVERY OCCASION

Many REALTORS® have favorite special stipulations that they regularly encourage their clients to add to the GAR Purchase and Sale Agreement. Making modifications to the GAR Forms is part of the normal process of protecting a client's interests. It also recognizes the reality that the GAR Purchase and Sale Agreement is a one-size fits all contract that attempts to balance the rights of buyers and sellers. Since REALTORS® often look to tilt the scales in favor of their clients (when the market allows them to do so), it should come as no surprise that REALTORS® regularly recommend that their clients make changes to the GAR Purchase and Sale Agreement.

What is particularly interesting is how popular special stipulations often work their way into the GAR Forms over a period of years. This article will discuss some of the more popular special stipulations so that REALTORS® can see what their colleagues often view as important issues for their clients to consider when modifying the GAR Purchase and Sale Agreement.

1. Changing the Time Deadline for Obligations to be Performed from Midnight to 9:00 P.M.

Most of our timelines in the GAR Purchase and Sale Agreement end at midnight. When I recently polled more than 300 REALTORS® on whether they would like timelines to end at 9:00 p.m. rather than midnight, I was surprised that more than 90 percent of them favored an earlier time deadline. Well, an earlier time can be included in the GAR Purchase and Sale Agreement by simply adding special stipulation 627, which states:

"All time deadlines set forth herein shall expire at _____ a.m. OR p.m. on the day of the deadline."

2. Allowing Notices to be Sent via Text

Many REALTORS® communicate with each other by text. Still, texting is not an acceptable means of providing notice under the GAR Purchase and Sale Agreement. The prohibition against text notices was put in place years ago largely because at that time, adding attachments to texts, sending copies of texts after the fact and saving texts was often difficult. Technology appears to have largely overcome the original concerns of the GAR Forms Committee regarding text notices. If a REALTOR® wants text notices to be allowed, they merely need to include the following special stipulation.

Notwithstanding any provision to the contrary contained herein, notices by text shall expressly be permitted in this Agreement provided that the party receiving the text has provided a cell phone number below, all other terms of the notice provision are met, and the sender saves a copy of the text. The text shall be deemed signed by the party sending the text if the sender types their name at the

end of the text or the notice is attached to the text and that notice is signed. The notice shall be deemed delivered when it is received on the receiving device of the party to whom it was sent, and not when it is opened. The name of the party who is consenting to receiving notices by text and their phone number is set forth below:

3. Cleanliness of House at Closing

Section C.3 of the GAR Purchase and Sale Agreement provides that the seller shall “deliver Property clean and free of trash, debris, and personal property of Seller not identified as remaining with the Property”. Many agents add special stipulations requiring the property to be professionally cleaned prior to closing and even specify the cleaning activities they want to see performed. Other REALTORS® have added language that all personal property of seller shall be removed at least four hours prior to closing to make it easier to do a final walk-through. REALTORS® whose buyers want a more stringent cleaning regimen and an empty house prior to doing a final walk-through can include the following special stipulation:

“Seller agrees that not more than three days prior to the Closing, all carpeted areas in the house shall be steam cleaned by a professional carpet cleaning company, all non-carpeted areas shall be swept clean and mopped (with areas with hardwood floors being damp mopped), all toilets, sinks, kitchen and sink counters, bathtubs, showers, ovens and stovetops shall be cleaned such that dirt and stains, to the extent reasonably possible, are removed and all dirt and hand marks around door handles on doors and on door frames shall be cleaned. Seller agrees to have removed all personal property from the Property at least four (4) hours prior to Closing to make it easier for Buyer to do a final walk-through of the Property.”

4. Buyer Warrants That Buyer Does Not Have Other Nearby Property Under Contract

One of the problems in the current housing market has been buyers trying to tie up multiple properties and then using the Due Diligence Period to decide which one to buy. Since walking away from a property can raise questions in the minds of subsequent buyers as to whether there is something wrong with the property, some sellers have tried to limit this practice by having the buyer warrant that they have no other property under contract within a certain distance from the property. The following special stipulation can help prevent this practice by buyers. While determining whether buyers are being truthful in giving this warranty may be difficult to prove, if the buyer is found not to be truthful, the buyer would be in breach of contract and their earnest money would be at risk.

“Buyer warrants that Buyer is not currently a party to any other purchase and sale contract to buy real property within _____ miles of the Property and will not contract to purchase any other property within _____ miles from this Property during the pendency of this Agreement. If Buyer breaches this warranty, Seller may terminate this Agreement due to Buyer’s breach upon notice to Buyer. Buyer acknowledges that Seller will be significantly damaged as a result of such breach and Buyer and Seller agree that Seller shall be entitled to keep Buyer’s earnest money as liquidated damages (even if not all of the conditions or contingencies in the Agreement have been fulfilled), or if the Due Diligence Period has not yet expired, it being agreed that the amount is a reasonable pre-estimate of Seller’s actual damages and is not a penalty.”

5. Getting a Copy of the Covenants and Determining Whether the Property is Subject to Easements and Covenants.

Buyers agree to take whatever property they are buying subject to drainage and utility easements and covenants of record. Since buyers cannot object later on to such easements and covenants as title defects, it is important that buyers review them prior to the end of the Due Diligence Period. With regards to covenants, it is common to add the following type of special stipulation requiring the seller to provide the buyer with a current set of the covenants.

“Seller agrees to provide Buyer within ____ days from the Binding Agreement Date with a complete and current set of all covenants, Declarations of Covenants, Conditions, Restrictions and Easements, Declarations of Condominium and other similar documents binding the Property.”

Of course, some sellers do not even know whether there are any easements, and in a few cases, even covenants, affecting their properties. One way to get a head start in figuring out whether there are such encumbrances binding a property is to request a copy of the Owner’s and/or Lender’s Title Policy at the beginning of the Due Diligence Period. This is because recorded easements and covenants should be listed as permitted title exceptions in the policy. It should be noted that asking for the seller’s or lender’s title policy will not give a buyer the actual easement or covenant but will instead merely describe the easement being referred to in general terms. The title policy will also not include any information about the property’s title after the seller purchased it. Still, it will give the buyer a head start with regard to understanding the title to the property up through the date that the seller purchased it.

“Seller shall within three days of the Binding Agreement Date provide Buyer with a copy of the Owner’s Title Policy or Lender’s Title Policy Seller, if any, received when Seller closed on the purchase of the Property.”

6. Paying Cash for the Difference Between the Appraised Price and the Sales Price

Buyers are increasingly willing to pay cash for the difference between the purchase price and the appraised price as a way of becoming the winning bidder on a property. There is a right way of doing this and a wrong way. The right way of doing this is to use a special stipulation similar to the one below.

“In the event the Property does not appraise for at least the purchase price, Buyer agrees to pay Seller at closing the difference between the sales price and the appraised value in cash and not use the failure of the Property to appraise for the purchase price as a basis to either terminate this Agreement or ask for a reduction in the sales price. Notwithstanding the above, if the difference between the sales price and the appraised value of the Property is more than \$_____, Buyer shall have the right, but not the obligation, to terminate this Agreement provided that Buyer gives notice to Seller within ____ days of receiving the appraisal of the Property, in which case Buyer shall be entitled to the return of Buyer’s earnest money. If Buyer does not terminate the Agreement within this time frame, Buyer’s right to terminate on this basis shall be waived and Buyer shall pay cash to Seller at the closing for the entire difference between the appraised value and the sales price of the Property.”

The absolute wrong way of doing this, at least if you are the seller is to include the following special stipulation:

“Buyer shall pay Seller as the purchase price an amount equal to \$5,000 over the appraised price but not to exceed the sales price set forth herein.”

There have been any number of instances where the appraised value is \$50,000-\$100,000 under the sales price and the buyer obtains the deal of a lifetime because the special stipulation above results in the buyer paying so much less than the actual sales price. From a seller’s perspective, the obvious problem with the special stipulation is that it doesn’t set a floor below which the seller does not have to sell. As an aside, some buyer agents have argued that if the seller and seller’s broker are not smart enough to figure out that the buyer could end up paying significantly less than the sales price, then shame on them. However, since the use of such a special stipulation creates a significant risk of potential litigation between the parties, I strongly recommend against its usage.

7. Right of Buyer to Terminate Agreement if Amendment to Address Concerns is Not Agreed Upon

One of the bigger concerns of agents is missing the end of the Due Diligence Period where the buyer is then obligated to purchase the property in “as-is” condition without repairs. As a result, agents frequently write special stipulations to terminate the Purchase and Sale Agreement automatically if an agreement on the Amendment to Address Concerns is not reached by the end of the Due Diligence Period. Some of these special stipulations terminate the Purchase and Sale Agreement if the first request for repairs is not agreed upon. A better approach is for the Purchase and Sale Agreement only to be terminated if the parties have not reached an agreement on an Amendment to Address Concerns shortly before the Due Diligence Period ends. An example of such a special stipulation is set forth below.

“In the event Buyer and Seller have not agreed in writing to an Amendment to Address Concerns with Property where a fully-signed copy of the same is delivered to Buyer and Seller by 11:59 p.m. on the last day of the Due Diligence Period, this special stipulation shall serve as notice from Buyer to Seller of Buyer’s decision to terminate this Agreement immediately thereafter and prior to the end of the Due Diligence Period.”

8. Condition of Systems and Appliances

The GAR Purchase and Sale Agreement provides that the property and its fixtures will be in substantially the same condition at closing as it was in on the Binding Agreement Date. Unfortunately, this means that if the dishwasher was broken on the Binding Agreement Date, it is okay for it to be broken on the closing date. Some buyer agents have tried to remedy this problem by adding the following special stipulation.

“Seller agrees that as of the date of Closing, all systems in the Property, including, but not limited to, the HVAC, electrical, plumbing, roofing, sewer and structural and all fixtures and appliances remaining in the Property shall be in good working order and repair.”

In conclusion, special stipulations are constantly changing in response to different markets and the special needs of buyers and sellers. Fortunately, the GAR Forms offer dozens of special stipulations to help buyers and sellers modify the offers and counteroffers they are making to protect their interests.