

2007 OREF FORMS REVISIONS

By

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RESIDENTIAL REAL ESTATE SALE AGREEMENT

The following summary addresses the substantive changes made to the OREF sale agreement forms which will become available in January 2007. Some changes were stylistic and grammatical, and will not be discussed here as they do not materially affect Realtor® practice. The primary focus below will be on the substantive changes, the reason for those changes, and their impact on use of the forms.

1. SECTION 10. (SELLER REPRESENTATIONS) A new subsection (9) has been added which provides that the seller knows of no material discrepancies between visible lines of possession and use – such as existing fences, hedges, landscaping, structures, driveways, and other such improvements – currently existing on the property offered for sale and the legal description of the property.

Comment: If the seller has, over the years, knowingly encroached on their neighbor's property, or visa versa – regardless of whether the encroachment has been by agreement or otherwise - they have the responsibility to disclose it. This new provision in the Sale Agreement is a “representation” upon which a buyer may rely. Accordingly, listing agents should review with their sellers the representations found in this Section 10. They should make sure that their clients understand that buyers will be relying upon what they see, and if the seller knows that the lines of occupation around their property do not represent the legal boundaries as they understand them, it should be disclosed. Although the Sale Agreement makes it clear that buyers should have the property surveyed if size, dimensions or acreage are important, in standard residential transactions - especially those involving property in platted subdivisions, where lines of occupation are usually open and apparent - most buyers do not request a survey, and most Realtors® do not recommend one. However, there are instances in which a seller knows that the property they are holding out for sale may actually include more or less land than what they are entitled to convey under their deed. This new provision attempts to address that problem.

2. SECTION 14. (LEAD-BASED PAINT) OREF has done away with the box that buyers were to check if they wanted to have a lead-based paint inspection. Additionally, the text of this Section 14 has been re-worded due to elimination of the box.

Comment: Almost every year, at the request of Realtors® throughout the State, OREF re-visits this provision. Opinions vary widely, with some brokers wanting to see it substantially reduced, and others lobbying for its expansion. Because of the significant liability associated with noncompliance, and the fact that without a special endorsement there may be no insurance coverage for lead-based paint claims against Realtors®, OREF has resisted attempts to significantly shorten this provision – even though the frequency of transactions involving actual lead-based paint inspections are very few. The box was initially inserted into the form when the lead-based paint law was first enacted so that sellers would know at the beginning of the transaction whether their buyer intended it to be a purchase contingency – even though the federal law made it clear that transactions were not binding upon buyers until the separate Lead-Based Paint Disclosure Addendum (OREF Form No. 021), was fully executed. However, it appears that in some areas of the State the lead-based paint box was routinely checked by agents even though their buyers had no real intent to actually conduct a lead-based paint inspection. It was also believed that the failure to check the box in the Sale Agreement would not

really prevent a buyer from conducting a lead-based paint inspection unless the waiver portion of the Lead-Based Paint Disclosure Addendum was appropriately selected. It was therefore decided that the box be eliminated altogether, since it was causing more problems than it was solving.

Accordingly, when using the new 2007 OREF Sale Agreement, Realtors[®] should now rely solely upon the fully executed Lead-Based Paint Disclosure Addendum as the operative document that determines whether or not a buyer intends to conduct or waive their right to a lead-based paint inspection.

3. SECTION 15. (ESCROW) Added to this Section is language previously found at Section 41 (formerly entitled “AGREEMENT TO SELL/PAY COMMISSION”) which authorized the listing firm to order a preliminary title report on behalf of the seller and included other instructions to escrow. Additionally, as noted in the discussion below, identification of the actual dollar amount of commission has been eliminated from Section 41. Section 15 now addresses that issue by adding the following clause: “Real estate fees, commissions or other compensation for professional real estate services provided by Listing and/or Selling Firms shall be paid at closing in accordance with the listing agreement, Buyer Service Agreement or other written agreement for compensation.”

***Comment:** It was felt that since Section 15 was intended to deal with information for escrow, this was where the instructions should appear, rather than in Section 41 which related primarily to the seller’s agreement to sell. In addition to relocating the existing language from Section 41, new escrow information has been added concerning the sellers’ and buyers’ payment of closing costs and fees. Note, that if the parties have made arrangements regarding the sharing or payment of closing costs and fees different than those contained in Section 15, these arrangements should be specifically added into the Sale Agreement or an addendum.*

4. SECTION 26. (APPROVED USES) The reference to “Chapter 1, Oregon Laws 2005 (Ballot Measure 37 (2004))” was replaced with the specific statutory reference, which became available after the 2006 Sale Agreement forms were printed. It now reads “ORS 197.352 (Measure 37).”

5. SECTION 32. (MEDIATION BETWEEN SELLER AND BUYER) Minor changes were made in this Section to further clarify that if non-Realtors[®] are involved in a disputed transaction, the seller and buyer are still required to mediate, although it would not be through the National Association of REALTORS[®] dispute resolution program, but rather through either Arbitration Service of Portland or any other impartial private mediator(s) or program(s) with services available in the county where the property is located.

6. SECTION 41. (AGREEMENT TO SELL/PAY COMMISSION) The caption has been renamed to “AGREEMENT TO SELL/ACKNOWLEDGMENTS/DISPOSITION OF EARNEST MONEY” to more accurately reflect the content of the Section. As noted above, the agreement to pay a commission clause has been eliminated, although the subject is now addressed in Section 15 (ESCROW).

***Comment:** The reason for removing the commission amount was because the blank line available for inserting an actual dollar figure was not being routinely filled in. Instead, Realtors[®] favored inserting terms such as “per listing.” Accordingly, the agreement to pay commission language was relocated to Section 15 (Escrow), as discussed above. The substance of the remaining language in Section 41, which (a) stated that the seller is not relying upon other written or oral statements and (b) addressed the disposition of forfeited earnest money, has not been changed.*

7. SECTION 44. (CO-OP TRANSACTION) This Section was re-named to “FIRMS/LICENSEES” and the reference to the percentage and/or dollar amount of the commission was eliminated here, as well.

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SELLER'S AND BUYER'S COUNTEROFFER FORMS

There were several changes to this form due to the fact that OREF had received reports of disagreements resulting following when it was used in two or more rounds of counteroffers in the same transaction. In such instances, it can become confusing for the parties and their Realtors[®] to know which terms are intended to drop out and which survive.

Example: Buyer offers to purchase Seller's property for \$350,000 upon condition that Seller (a) removes all dryrot from the deck; (b) repairs the furnace; and (c) replaces the roof. Seller makes a counteroffer accepting all terms except he/she increases the price to \$375,000 and agrees to (a) and (b) but not (c). Buyer executes a counteroffer, accepting all of Seller's counter-offered terms, except offering to pay \$365,000 if Seller will replace the roof. Seller executes another counteroffer, accepting Buyer's counteroffer if Buyer will pay \$370,000. Buyer executes another counteroffer accepting Seller's counteroffer if Seller will accept \$367,500 and Seller agrees. What happened to the repair/replacement items? Did any of them survive? Sometimes incidental terms such as these get blurred in the flurry of counteroffers which focus on some, but not all, of the counter-offered terms.

Comment: *The OREF Forms Committee discussed several approaches to the problem, the most radical of which was to provide in the counteroffer form itself, that it could not be used for more than one round of counteroffers. This would force the parties to draw up a new sale agreement if there was a second round of counteroffers. Although this approach was not adopted, an effort was made to tighten up the text of the forms to clarify that: (a) Everything in the prior offer (or counteroffer) is accepted "except as modified as follows _____" and, (b) That "all remaining provisions" in the offer and counteroffers, "where applicable, are approved and accepted...." This forces the parties to reject what they don't want and clarifies that those remaining terms will become a part of the contract.*

Regardless of the form used, Realtors[®] must exercise caution when dealing with multiple counteroffers. If in doubt, listing and selling agents should consider re-writing the entire transaction or, alternatively, prepare an addendum which expressly replaces all prior counteroffers and summarizes the remaining terms that the parties have agreed upon.

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REPAIR ADDENDUM

OREF-022 Repair Addendum form has been replaced by two new forms:

OREF-022A – Buyer’s Repair Addendum and

OREF-022B – Seller’s Response to Repair Addendum

The previous version of the Repair Addendum did not allow enough room to write in more than a small amount of requested repairs. By separating the form into two parts it gives both Buyer and Seller more space to work with and keeps the paperwork trail cleaner.

In addition this form is now available in a printed, 3-part NCR format as well.

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CONTINGENT RIGHT TO PURCHASE

A contingent right to purchase form is designed to deal with situations in which the buyer makes their offer of purchase contingent upon the sale of their existing home. OREF has two forms that deal with such contingencies; OREF Form #052 and OREF Form #083.

OREF Form #052 – This form contains in its caption, check boxes for 24-hours, 48-hours, 72-hours and blank-hours. These selections represent the period of time a buyer will be given to remove their contingency once the seller notifies them that they have received an acceptable offer from another buyer. Form #052 is probably utilized most often in the Portland metropolitan area as it bears a close resemblance to the pre-OREF form which many local Realtors[®] are familiar with. Besides the easy check boxes and the simple verbiage, the main substantive difference between this form and OREF Form #083, is in what is required of the buyer upon removal of the contingency. Form #052 is more favorable to buyers. It allows them to remove the contingency upon finding an acceptable buyer of their home, but still makes their purchase transaction "subject to closing of the sale" of the buyer's home. (Emphasis added) Thus, even though the home-sale contingency is officially removed, if the buyer's home sale transaction does not close, the main transaction will fail as well, and the earnest money will be returned.

OREF Form #083 - This form is captioned "Contingent Right to Purchase." It is much less favorable to buyers and much more favorable to sellers. Specifically, upon notification that the seller has received another offer, the buyer is given the choice of either terminating the transaction, or staying in and removing all contingencies related to the sale or closing of the buyer's property as well as all contingencies related to the buyer's financing. Essentially, if a buyer stays in the transaction under this form, their earnest money is at much greater risk than might be the case if Form #052 is used.

Comment: Realtors[®] must be very careful to fully understand the contingent right to purchase form they have selected and be able to fully explain to their clients how it will work in the transaction.

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NOTICE OF DEMAND FOR DISBURSAL OF DISPUTED FUNDS

This is an entirely new form and was created because of the 2006 enactment of Oregon Administrative Rule 863-15-0186. In summary, the new rule – which purports to be discretionary for brokers – attempts to deal with situations in which a party, usually the buyer, makes demand for the return of funds deposited in a broker’s trust account. Although the Rule says only that the funds “may be disbursed” (Emphasis added) by the broker upon such demand, it also says that “...after receipt of a demand...for disbursement of funds...the sole practitioner or principal broker must deliver written notice to all parties that a demand has been made....” (Emphasis added) This suggests that while the broker is not required to actually make a disbursement following demand, he or she must send a letter to the parties notifying them that the demand has been made and that disbursement may occur. The Rule describes the contents of the letter and requires that it inform the parties that disbursement may occur within 20 days.

***Comment:** OREF felt that there was some potential liability to brokers who might make disbursement from their trust account following the sending of a defective letter which failed to conform to the requirements of the Administrative Rule. Accordingly, OREF created this standard form letter, which conforms precisely to the Administrative Rule. It contains the required information on the front side and sets out the text of the Rule verbatim on the reverse side.*

Realtors[®] with trust accounts must be careful to follow the Sale Agreement instructions concerning disposition of earnest money deposits. Holding earnest money funds too long in their trust account, where they can become susceptible to demands for disbursement under the new Administrative Rule, creates risk to brokers – especially those representing both sides of the transaction. If the Sale Agreement calls for funds to be promptly deposited in escrow following, say, redemption of a promissory note, leaving the funds in the broker’s trust account could result in a disbursement that never would have occurred in escrow where they cannot be reached by a demand for disbursement unless both parties give their written consent.

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