

# 2008 REVISIONS TO THE OREF SALE AGREEMENTS AND OTHER FORMS

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The following summary addresses the changes made to the OREF Residential Real Estate Sale Agreement and other forms that will become available in January 2008. Some changes were stylistic and grammatical, and will not be discussed here as they do not materially affect Realtor® practice. The primary focus of the discussion below will be on the substantive changes which bear on Realtor® practice, the reason for the changes, and their risk management impact. *This summary should not be relied upon in lieu of a thorough review of the documents and provisions by each individual broker, principal broker and sole proprietor.*

**TIME/ESSENCE** The phrase “Time is of the essence of this Agreement” has been inserted immediately under the title of the Sale Agreement, following the existing words “This Agreement is intended to be a legal and binding contract. If it is not understood, seek competent legal advice before signing.”

**Comment:** This provision was relocated from Section 17 (Closing), in order to clarify that time is of the essence of *all* of the terms of the agreement, and not just the events of closing.

**Risk Management Tip:** The legal effect of this clause is to underscore the requirement that performance dates, times, and deadlines are firm. For example, in the Professional Inspection portion of Section 14 (Inspections), the Inspection Contingency Period expires on midnight of the last day of that period. Since time is declared to be “of the essence,” this means that performance *after* midnight will be too late. Listing and selling brokers should make sure that their clients understand this, as missing a deadline could result in a termination of the transaction, loss of the earnest money deposit, and/or waiver of a contingency.

## **SECTION 7. (ADDITIONAL LAND SALE CONTRACT/TRUST DEED/MORTGAGE PROVISIONS)**

This section was relocated from Section 29 of last year’s Sale Agreement form. However, the text was not changed. This section provides that if the transaction calls for the Seller to carry back any form of financing (e.g. land sale contract, trust deed or mortgage), the Seller and Buyer must agree upon the terms of the carry-back document within a set period of time. If they are unable to do so, the transaction “...shall be terminated, and all earnest money shall be promptly refunded to Buyer.”

**Comment:** The reason for relocating the section was twofold: (a) Today, the chance of third party financing is much more likely than in years past. Since the provision states

that it is necessary for the Seller and Buyer to reach agreement upon the terms of the carry-back document, OREF felt that in today's marketplace it should be located sooner in the document, and (b) It seemed more appropriate to locate this section next to the Deed provision (Section 6), since both sections deal with conveyancing documents the seller and buyer will exchange at the time of closing.

**Risk Management Tip:** If the transaction is to provide for the Seller to carry back a portion of the sale price, both Seller and Buyer brokers must make sure their clients promptly secure legal counsel to negotiate and draft the paperwork. If no final agreement is reached within the applicable time frame (ten business days if no other time is filled in) the transaction will *automatically* terminate. To expedite the negotiations, a buyer might consider having the document prepared and included as a part of the offer.

**SECTION 11. (SELLER REPRESENTATIONS)** This section contains ten separate seller representations. Previously, the sentence that followed these representations stated that they were based upon the best of seller's "actual knowledge." OREF re-examined this language and decided to change the statement to the following: "These representations are made to the best of Seller's knowledge."

**Comment:** Although the "actual knowledge" language had appeared in the Sale Agreement for some time,<sup>1</sup> upon examination (and anecdotal reports), OREF became concerned that it could be misconstrued as meaning the *represented* conditions were the *actual* conditions. Not only was this not the intent of the provision, but it could have the unintended effect of burdening the Seller with greater liability. Since the intent of the language was to state only that the representation was being made based upon information the Seller currently had at hand at the time of signing the Sale Agreement, OREF concluded that a "best knowledge" representation was a more accurate statement.

**Risk Management Tip:** It is suggested that listing brokers discuss with their Sellers each of these representation one-by-one, just to make sure that the client *believes* them to be true and correct before accepting the Buyer's offer. Otherwise, the consequences could be critical: For example if a Seller *knew* that their fence was located five feet onto the neighbor's property but failed to disclose it, the following representation would be untrue at the time it was made:

(9) 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.

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<sup>1</sup> It should be noted that the language of the Seller Property Disclosure form states that the representations are based upon the seller's "actual knowledge" at the time of disclosure See, ORS 105.464. However, a "best knowledge" representation is commonly understood in the industry to mean only that the speaker *believes* it to be true at the time based upon the information they currently have at hand.

Without correcting the above representation, a Seller could be inadvertently subjected to a breach of contract claim the moment he/she signed the Sale Agreement.

**SECTION 14. (INSPECTIONS)** OREF has added the words “knowingly and voluntarily” to the waiver portion of the inspection section. It now reads as follows:

Buyer represents to Seller and all Licensees and Firms that Buyer is fully satisfied with the condition of the Property and all elements and systems thereof and knowingly and voluntarily elects to waive the right to have any inspections performed as a contingency to the closing of the transaction. Buyer’s election to waive the right of inspection is solely Buyer’s decision and at Buyer’s own risk. (Underscoring is not contained in last year’s form.)

**Comment:** As most Realtors® know, this Section 14 gives buyers three choices: (a) To have one or more professional inspections following the protocol used in the industry for the last several years; (b) To follow an alternative inspection procedure using OREF Form #058 or some other addendum; or (c) waiving the inspection contingency entirely. Because of the risks inherent in waiving the right of inspection, OREF wanted to make sure that if a buyer selected this option, they acknowledged that it was a “knowing and voluntary” decision.

**Risk Management Tip:** Whenever a Buyer (acting without legal assistance) wants to waive their right of inspection, their Realtor® should: (a) Try to persuade them of the importance of a professional inspection, and (b) Consider documenting for the file their efforts to encourage the buyer to have the property inspected. While the Sale Agreement contains express language encouraging Buyers to have the property professionally inspected, the printed word can only go so far. Realtors® should verbally encourage their buyer clients to do so as well.

**SECTION 26. (SELLER ADVISORY: TAX WITHHOLDING OBLIGATIONS)**

Previously, Section 26 dealt solely with the “Foreign Investment in Real Property Tax Act” (FIRPTA). The section has been renamed, and addresses both FIRPTA and the new Oregon state tax withholding requirement for out-of-state residents. It now reads as follows:

Seller is advised that upon closing, Federal and State law may require Escrow to withhold a portion of Seller’s proceeds. Under Federal law, the Foreign Investment in Real Property Tax Act ("FIRPTA") requires every person who purchases real property located within the United States from a "foreign person" to deduct and withhold from Seller's proceeds ten percent (10%) of the gross sales price, with certain exceptions, and to pay the amount withheld to the Internal Revenue Service. A "foreign person" includes a non-resident alien individual, foreign corporation, foreign partnership, foreign trust and foreign estate. Additionally, subject to certain exceptions, Escrow is required to withhold a portion of Seller’s proceeds if they are a non-resident individual or corporation as defined under Oregon law. Seller and Buyer agree to

execute and deliver, as appropriate, any instrument, affidavit or statement, and to perform any acts reasonable or necessary to carry out the provisions of FIRPTA or Oregon law. If Seller is a foreign person as defined by FIRPTA, or a non-resident individual or corporation as defined under Oregon law, Seller and Buyer instruct Escrow to take all necessary steps to comply therewith.

**Comment:** HB 2592 was passed in the 2007 Legislative Session. This law requires mandatory withholding for income taxes when Oregon real property interests are sold by nonresidents. It applies to sales occurring on or after January 1, 2008 and requires that escrow withhold the money from the Seller's proceeds at the time of closing.<sup>2</sup> Accordingly, OREF renamed this section to "Seller Advisory: Tax Withholding Obligations" (from "Foreign Investment in Real Property Tax Act"). Additionally, the new section advises Sellers of both the federal (i.e. FIRPTA) and state (HB 2592) withholding requirements.

**Risk Management Tips:** Since it is far more likely that Sellers may be out-of-state residents than non-resident aliens, this new law is something Realtors® should be prepared to discuss with their out-of-state clients.

**SECTION 27. (APPROVED USES)** A portion of this section has been revised to conform to HB 2723. The new language is underscored below<sup>3</sup>:

BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY THAT THE UNIT OF LAND BEING TRANSFERRED IS A LAWFULLY ESTABLISHED LOT OR PARCEL, AS DEFINED IN ORS 92.010 OR 215.010, TO VERIFY THE APPROVED USES OF THE LOT OR PARCEL, TO VERIFY THE EXISTENCE OF FIRE PROTECTION FOR STRUCTURES AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER CHAPTER 424, OREGON LAWS 2007 (MEASURE 49 (2007)).

**Comment:** HB 2723 amends ORS 93.040(2) which requires that all sale agreements include a statutory warning advising the person acquiring fee title to check with the appropriate city or county planning department. The new language now includes a warning to purchasers to *verify that the unit of land being transferred is a lawfully established lot or parcel*. The Bill also amended the Seller's Property Disclosure form by adding the following question: "Is the property being transferred an unlawfully established unit of land?"

**Risk Management Tip:** Now that the statutory warning in the Sale Agreement and the Seller's Property Disclosure form both address the legal lot issue, Realtors® should encourage their buyer-clients to conduct their due diligence in those cases where there is any question about whether the lot has been lawfully created. In all such cases Realtors®

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<sup>2</sup> The withheld amount is to be the lesser of: (1) Four percent of the consideration for the real property interest being conveyed; (2) Four percent of the net proceeds resulting from the conveyance; or (3) Ten percent of the gain includable in taxable income.

<sup>3</sup> Note: The entire Section 27 is not reprinted above – only the affected portion.

should encourage their buyer-clients to check with the appropriate city or county planning departments and/or secure competent professional assistance. Realtors should always be careful about personally rendering their own “opinion” as to whether a lot has been “legally” created. The issue is a complicated one, and clients should be instructed to secure the answer from the local jurisdiction or a land use expert.

All of the changes noted above were also applied as appropriate to the other sale agreements: Commercial, Vacant Land, New Construction and Farms & Ranches.

### OTHER FORMS

1. **Buyer and Seller Counter-Offers.** Some of the text and formatting of these forms has been changed, but the substance remains the same. *However, agents are cautioned that when becoming involved in multiple counteroffers, confusion can arise as to which provisions survive each counteroffer, and which ones are superseded. If in doubt about which provisions are intended to be a part of the final deal, the matter should be clarified with the other agent and the parties.*
2. **Condo and Townhouse Addendum** – The title of this document has been changed to “Planned Community/Condominium/Townhouse Addendum” to make it clear that it may be used in all situations (including planned communities) where there exists a homeowners’ or unit owners’ association. There were several changes to the text of this document: (a) The term “Documents,” i.e. those items being requested, is specifically defined; (b) A checkbox was added to ask about rules regarding pets, parking and rental restrictions, since these are frequent issues; and (c) A checkbox was added to ask for Documents relating to claims being made by or against the association involving structural integrity or safety of the Property.
3. **Seller’s Property Disclosure Form** – There have been two changes to this form: (a) as noted above, HB 2723 amended the Seller’s Property Disclosure form by adding the following question: “Is the property being transferred an unlawfully established unit of land?” (b) Additionally, Senate Bill 99 also amended the Seller’s Property Disclosure form by adding the question: “Has the property been classified as forestland-urban interface?” ORS 477.015(1) defines a "forestland-urban interface" as “a geographic area of forestland inside a forest protection district where there exists a concentration of structures in an urban or suburban setting.” Accordingly, OREF has added these two questions to the form for use on or after January 1, 2008.
4. **Termination Agreement** – Section 7(b) of HB 2490, which was enacted in the 2007 Legislative Session, provides that in the release of earnest money from escrow, title companies “...may not impose any additional requirements on the principals in the transaction, including a requirement that the principals sign a release of liability in favor of the escrow agent.” Although some title companies are interpreting this provision differently, some are taking it to mean that they may not even include a

release from further liability after making the disbursement that the parties agreed upon. Originally, the language in OREF's Termination Agreement was intended to work for *both* the real estate brokers and title companies. The intent was to avoid sellers and buyers having to sign one release to the real estate brokerage and another to the title company. Our form included general release language "...from all further liability for disbursement of any funds held by Selling Firm/Escrow Company...." In light of HB 2490, OREF feels that it should modify its Termination Agreement, to delete language suggesting that the release provisions apply to the escrow companies. This change affects title and escrow companies only. Real estate brokerages will still receive the benefit of the existing release language, which is not addressed in HB 2490. Now, if a title company wishes to secure a separate release for disbursement of funds, they will have to provide their own form to the buyer and seller.

### NEW FORMS

5. **Notice of Real Estate Compensation (OREF-091)** - ORS 696.582 is the statute which permits licensed brokers to file a demand of commission with escrow at the time of closing. It is used in those cases in which the principal, usually the Seller, instructs escrow not to pay a commission to the broker (or to pay an amount different than the broker believes is due). When the broker makes a formal demand to escrow following the requirements of the statute, the disputed commission is held in escrow or interpleaded into court until the matter can either be settled or the court makes a final decision. This statutorily-mandated form was previously entitled "Demand for Commission." The statute was amended in the 2007 Legislative Session. Besides changing the title of the form to "Notice of Real Estate Compensation," the primary substantive change was to provide that if the Notice is filed with escrow within 10 days of the scheduled closing date, a copy must be provided by escrow to the principal identified in the Notice at the time of closing. Otherwise, if the Notice is given to escrow more than 10 days prior to the scheduled closing date, the broker filing it must provide a copy to the principal. The purpose of ORS 696.582 was not changed by the new legislation.
6. **Selling Broker Compensation (OREF-090)** - This document is intended to assist escrow in calculating and disbursing the selling broker's compensation and is *informational only*. It is *not* a legally required document. It may be signed and submitted to escrow by the listing and selling brokers jointly, or separately by each one. *Caveat:* This document should *not* be confused with the Notice of Compensation form, above. This Selling Broker Compensation form merely seeks to inform escrow of the amount the selling broker believes is due as his/her compensation. In the event of a dispute between broker and principal over the amount, or payment, of a commission, the statutorily required Notice of Real Estate Compensation must be filed with escrow before closing, if the broker seeks to have a portion of the distributable proceeds retained until the dispute is resolved.