



2018 TransFORMations

A Closer Look at Revisions to the GAR Contract Forms

The GAR Forms Committee continues to work hard to make the GAR Forms (“Forms”) the best and most widely used real estate forms in Georgia. This article will summarize the major changes in the Forms for 2018.

1. **Protect Yourself When Buying a Home Brochure (GAR Form B2)**. There were three major changes made to this brochure. The first is a new section explaining to buyers the risks of cybercrime. Cybercriminals are hacking into the e-mail accounts of mortgage lenders, closing attorneys - and even REALTORS® - and impersonating these people online to trick buyers into wiring them money intended for closings. The most common scam is for the cybercriminals, disguised as a legitimate professional in the transaction, to send a second set of wiring instructions to the buyer directing monies to be sent to the account of the cybercriminal on the pretext that the professional’s bank account had recently changed. Buyers should verify that all wiring instructions are correct and should use extreme caution if they receive a second set of wiring instructions directing monies to be sent to a new account. Buyers in Georgia have lost hundreds of thousands of dollars as a result of these scams. In addition to this warning in the brochure, similar warnings have also been included in all of the GAR brokerage engagement agreements and in the GAR Purchase and Sale Agreements.

An additional section was also added to the brochure advising buyers that surveillance equipment may be in use when buyers visit properties. Sellers with such equipment in use are often privy to private conversations of buyers taking place in a house regarding their level of interest in the property and their negotiating strategy. Buyers are cautioned to assume that they are being recorded when they are inside a home and to be careful about what they say.

A third section was also added to the brochure encouraging buyers to have their drinking water tested for lead. Some water service lines are constructed of lead or use lead solder. This can result in lead leaching into the water. Since lead poisoning is an extremely serious medical problem, this change was made to try to prevent additional cases of lead poisoning. If the buyer tests the water and it has high levels of lead, the buyer can try to negotiate for the replacement of water lines which include lead.

2. **Community Association Fees, Disclosure and Related Issues Form (GAR Form F55 – formerly GAR Form 123)**. Besides changing the name of this form, a line was

added to the form so that the name of the community association(s) in which the buyer of the property will be a member can be disclosed. Second, the Community Association Disclosure form was revised to add back in the services / amenities paid for through general assessments.

A question was also added to the form regarding whether the owner (seller) is in violation of any rule, regulation or covenant of the community association and if so, asking the owner to explain all such violations. Since a buyer can be responsible for such violations upon becoming the owner, this disclosure can help prevent buyers from finding themselves in the middle of a covenant enforcement action upon purchasing a property.

Additionally, a new section was added in which the buyer gives the closing attorney permission to provide any community association with which the closing attorney is communicating with the name and contact information of the buyer. Closing attorneys often have to provide this information to the community association in order to obtain a closing or assessment clearance letter. Some attorneys are reluctant to reveal this information without this type of authorization from the buyer, which is now included in the form.

Finally, who pays different fees owing to the community association or its manager was clarified. Specifically, the form now states that the seller will pay for the closing or assessment clearance letter in all cases. Since a clearance letter is needed for the seller to provide good title to the property to the buyer, the Forms Committee decided that it made sense to have the seller always pay this cost. The form was also revised to more clearly state that the seller will pay any other fees or charges which the community association or its manager requires to be paid as a condition of issuing the closing letter.

The form then provides that all other fees including all transfer and initiation fees shall be paid by the buyer, with two exceptions. The first exception is for move-in fees (such as a fee to reserve an elevator) which the Forms Committee decided should be paid for by the buyer. The second exception is if the seller fails to accurately disclose the amount of a fee or fails to disclose the fee in its entirety. In this case, the seller is required to pay any undisclosed fee and any extra fees resulting from an inaccurate disclosure of the fees by the seller. So, for example, if a fee is \$100, but the seller disclosed it as \$80, the buyer will be responsible for paying the \$80 that was disclosed, but the seller will be obligated to pay the \$20 difference that was not disclosed.

3. **Exclusive Seller Listing Agreement (GAR Form F1)**. The most significant change to this form was the removal of the blanket consent by sellers to allow all brokers and their licensees to be able to call the seller, even if the seller is on a "Do Not Call" list. The form still allows the listing broker to be able to call the seller even if the seller is on a "Do Not Call" list. This is necessary in order for the listing broker to be able to do his or her job. However, other brokers and their licensees will no longer be allowed to call the seller without first checking to see if the seller is on a "Do Not Call" list. This change was made to protect REALTORS® in that if the consent to call the seller section is crossed out of the listing agreement by the seller, other REALTORS® will not know that this occurred and might therefore call, and be in violation of the "Do Not Call" law. Increasingly, REALTORS® calling sellers who are on "Do Not Call" lists are receiving threats of legal action for violating the law in this area. Therefore, the Forms Committee decided that it was too risky to keep the blanket consent to call sellers even if they are on the "Do Not Call" list. To avoid claims, REALTORS® now need to adjust their practices and check to see if a seller is on a "Do Not Call" list before calling.

The other significant change made to this form is a clarification that media created or purchased by broker is not the property of the seller but is instead the property of the broker.

4. **Closing Attorney Acting as Holder of Earnest Money Exhibit (**New** GAR Form F84(A))**. A new exhibit, "Closing Attorney Acting as Holder of Earnest Money", was created to address the issues which can arise when the closing attorney is going to be the Holder of the earnest money under the Purchase and Sale Agreement. This exhibit should always be attached to the Purchase and Sale Agreement whenever the closing attorney is going to be the Holder of the earnest money. In this new exhibit, the buyer and seller identify the closing attorney who will be holding the earnest money and what his or her duties will be. This new form is in addition to the "Agreement of Closing Attorney to Serve as Holder of Earnest Money" (GAR Form F84(B), formerly GAR Form F84) in which the closing attorney actually agrees to become the Holder. Both forms need to be completed when the closing attorney is going to be the Holder of the earnest money. In most transactions the "Closing Attorney Acting as Holder of Earnest Money" exhibit will be signed as part of the Purchase and Sale Agreement. The "Agreement of Closing Attorney to Serve as Holder of Earnest Money" form will usually be signed by the closing attorney after the Purchase and Sale Agreement has already been signed by the parties.

The new "Closing Attorney Acting as Holder of Earnest Money Exhibit" includes a space for the parties to identify an "Alternate Holder" (who must be a broker in the transaction) in the event the closing attorney is unwilling to serve as Holder. The Forms Committee was concerned an argument could be made that a contract naming a closing attorney as the Holder of earnest money might not be enforceable as a contract until the closing attorney agreed to serve as the Holder. Hopefully, the courts will find that such a contract is enforceable, but subject to a contingency of the Holder agreeing to serve in that capacity. Since an Alternate Holder, who is a broker to the contract, is named as the Holder if the closing attorney will not serve, it should ensure that there will never be a situation where there is no Holder.

The form requires the buyer to get the Purchase and Sale Agreement and any amendment to that Agreement to the closing attorney within one business day of the Binding Agreement Date. This language was added to avoid the situation where the closing attorney is willing to serve but cannot perform his or her duties because the contract or an amendment thereto has not been provided to the closing attorney. It also provides that the buyer is in breach of contract if the buyer fails to deliver the Purchase and Sale Agreement or an amendment thereto to the Holder within the one business day time period. The seller is given the right to terminate the contract for a breach of this provision. While termination is a strong remedy, the Holder cannot do his or her job without the contract.

The closing attorney then has three business days to sign the form agreeing to be the Holder and to deliver a copy to the buyer and seller. If the closing attorney does not become the Holder within this three-day time frame from the Binding Agreement Date, the Alternate Holder named in the exhibit automatically becomes the Holder. The effect of this new form is that the casual approach we have seen to date with closing attorneys becoming the Holder of earnest money is being replaced with a specific procedure and time frame.

New language in these forms also makes it clear that the duties of the closing attorney, as the Holder of earnest money and the time frames for the Holder to perform his or her duties do not commence until the closing attorney has agreed in writing to serve as the Holder using the "Agreement of Closing Attorney to Serve as Holder of Escrow (GAR Form F84(B)) and the closing attorney has received a fully-executed copy of the Purchase and Sale Agreement. In requiring this, the Forms Committee was trying to solve the problem of imposing duties on a closing attorney who may not have yet agreed to serve as the Holder or even received a copy of the contract.

Finally, the form includes a notice section, which will ensure that notices to the Holder are sent to the contact information provided by the Holder. With many residential closing firms having

multiple offices, this will help ensure that notices are sent to a place where the closing attorney acting as the Holder of earnest money will receive it.

5. **Agreement of Closing Attorney to Serve as Holder of Earnest Money Exhibit (**New** GAR Form F84(B) – formerly GAR Form F84)**. This form was revised to make it easier for closing attorneys to consent to holding earnest money in real estate transactions. In the form, the closing attorney is appointed to serve as the holder with all of the rights and duties of the Holder set forth in the Purchase and Sale Agreement. The form also reiterates that the duties of the Holder and the time frame for performing them do not begin until the Holder actually receives the Purchase and Sale Agreement. The form also includes a line for the closing attorney to charge a fee for acting as the Holder.

6. **VA Loan Contingency (GAR Form F65)**. The VA Loan Contingency was revised to try to make the Form easier to use and understand. The section entitled “Certain Fees Paid by Seller” was clarified so that the seller always pays certain amounts even if they exceed the amount of the Seller’s Contributions at Closing. Specifically, the Home Warranty section was revised so that if the home is less than a year old at the time of closing and a home warranty is required, the same will be provided by the seller at the seller’s cost.

The Public Water and Sewer section was revised to clarify what happens if the local authority requires connection to a public water or public sewer system. The form has always provided that the seller agrees to make a contribution to this cost not to exceed a specified amount. Language was added that if the cost exceeds this amount and the seller is unwilling to pay the extra cost, the Purchase and Sale Agreement shall terminate upon the seller giving notice to buyer that seller is unwilling to pay the extra cost. If seller is willing to pay the extra cost, the seller is then responsible for providing a certification from the proper authority that the property is connected to and serviced by the public system.

7. **Consent to Take Pictures and Video of Apartment (**New** GAR Form F46)**. A new form was created for landlords to obtain the consent of tenants to allow pictures and video to be taken of the tenant’s occupied apartment to be used and distributed. Not obtaining such consent can lead to a variety of claims by the tenant, including invasion of privacy. Moreover, if, for example, a picture is taken without permission of a room with an expensive television and the apartment is then broken into and the television stolen, the claim may be for damages arising out of an unauthorized picture being used and distributed. This new form should help protect the landlord and the landlord’s agents who take such pictures and video by creating a written record that consent was obtained.

8. **Seller Property Disclosure Statement (GAR Form F50)**. Two small changes were made to the Seller’s Property Disclosure Statement. The first was to clarify the types of refrigerator / freezers available on the market including a:

- 1) Refrigerator w/o freezer;
- 2) Refrigerator / Freezer; and
- 3) Freestanding Freezer.

The second was to clarify that there are both wall mirrors which are typically glued to the wall and vanity mirrors which are typically hung on a wall with a nail or other hanger. Both options are now included on the Seller’s Property Disclosure Statement.

9. **Conventional Loan Contingency (GAR Form F64)**. The Conventional Loan Contingency form was modified to give the seller the right to terminate the Purchase and Sale

Agreement if the buyer fails to give the seller evidence in a timely manner that the buyer has the financial ability to close on the property within the timeframe set forth in the agreement. The new language gives the seller the option to terminate the contract, rather than obligating the seller to terminate. Moreover, if the seller fails to terminate within seven days of the buyer's default, the seller waives his or her right to terminate due to the failure of the buyer to timely present evidence of the buyer's ability to close.

10. **Lease for Residential Property (GAR Form F40).** Several changes were made to the GAR Residential Lease. The first was to add vaping and electronic cigarettes in the definition of smoking. The lease provides that the leased premises will be smoke free zone and smoking shall not be permitted unless specifically authorized in the lease.

The second change was to revise the required disclosures regarding the owner of record of the premises, the manager of the premises, and the person authorized to receive service of process and demands and notices. The revised section provides that these parties are named in the owner disclosure and manager disclosure paragraph of the lease.

The revision also provides that if no manager is identified in the manager disclosure paragraph, the owner is self-managing the premises and shall be deemed the landlord for all purposes under the lease. The revision also provides that if a manager is named, the manager shall have no rights, duties, obligations, or liabilities greater than what is set forth in the management agreement between the owner and manager. The revision also states more clearly that no real estate broker or the broker's affiliated licensees shall be responsible for any aspect of managing the property unless they have agreed to serve in that capacity.

Finally, an addition was made to the lease providing tenants with the website on known houses where methamphetamine was manufactured so that tenants can check on this if it is a concern to them.

11. **Retainer Fee Exhibit (**New** GAR Form F19).** A new retainer fee exhibit was created allowing for the collection of a retainer fee and specifying when the retainer fee can be disbursed. The retainer fee was taken out of the various brokerage engagement agreements and included as its own freestanding exhibit.

12. **Notice for Lease Agreement (**New** GAR Form F45).** A new notice form was also created to make it easier for landlords and tenants to give notices to one another.

13. **Broker to Builder Referral Agreement (**New** GAR Form CO14).** A new "Broker to Builder Referral Agreement" was created to make it easier for a broker to collect a commission or a referral fee from a builder when the broker is referring a buyer to a builder for the builder to construct a new home for the party. In many cases, this agreement will be used when the buyer already owns the lot but is hiring a builder to construct a new home on the lot.

14. **Acknowledgement of Person Contributing Earnest Money on Behalf of Buyer (**New** GAR Form CO13).** A new acknowledgement was created when the earnest money is being paid by someone other than the buyer. The acknowledgement makes it clear that once the earnest money is paid by the third party, he or she has no claim to the funds and his or her recourse is only against the buyer. The acknowledgement also provides that the broker owes no duty to deal with the third party in the event of a buyer default. This acknowledgement was created to try to prevent third parties paying earnest money on behalf of buyers from claiming they were entitled to notice or a reimbursement of the earnest money in the event of a buyer default.

CONCLUSION

The changes to the GAR Forms should help solve specific problems and issues that REALTORS® were having and keep our Forms state of the art.

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