

Memo

To: Teresa Lightbody, Forms Subcommittee Chairperson
From: James A. Bowditch, Boone Karlberg P.C., Missoula, Montana
Date: September 10, 2020
Subject: Form Changes from 2019 and June 2020 Forms Subcommittee Meetings

The form changes approved by the Forms Subcommittee of the Montana Association of REALTORS® in 2019 and a few that were made pursuant to a virtual meeting in mid-June, 2020, are finally complete, uploaded to the system of all of MAR's licensed form vendors, and available for use by MAR members. A description of these approved changes are below.

I. Buy-Sell Agreements

- a. For all buy-sell agreements, some significant restructuring was done in an attempt to make the agreements easier to use and understand.
 - i. Association special assessments (such as a one-time HOA special assessment for a specific project) related to the current (e.g. closing) tax year was added to the section concerning proration of taxes and assessments. The proration section of all buy-sell agreements as revised is located in the following areas:
 1. Buy-Sell Agreement (Residential): Lines 322-325.
 2. Buy-Sell Agreement (Commercial): Lines 242-245.
 3. Buy-Sell Agreement (Land): Lines 222-225.
 4. Buy-Sell Agreement (New Construction): Lines 343-346.
 5. Buy-Sell Agreement (Farm & Ranch): Lines 149-152.
 - ii. The sections formerly titled Special Improvement Districts and Association Special Assessments were combined into one section now titled "Special Improvement Districts and Association Special Assessments" found at the areas of each buy-sell agreement listed below. Additionally, and perhaps more importantly, the checkboxes were removed that formerly permitted the buyer and seller to negotiate as to whether any non-perpetual SIDs/assessments would be paid off by the seller or assumed by the buyer at closing. The default language now states that all assessments are assumed by the buyer at closing unless otherwise agreed. Therefore, buyers who do not desire to assume the assessments will need to add language to that effect into the additional provisions section of the applicable buy-sell agreement.
 1. Buy-Sell Agreement (Residential): Lines 317-320.
 2. Buy-Sell Agreement (Commercial): Lines 238-241.
 3. Buy-Sell Agreement (Land): Lines 217-220.
 4. Buy-Sell Agreement (New Construction): Lines 338-341.
 5. Buy-Sell Agreement (Farm & Ranch): Lines 321-324.

- iii. The section governing the *payment* of earnest money by a buyer was slightly revised and separated from the section governing the *deposit or delivery* of any earnest money received by a Broker/Salesperson. The revised section that only addresses the payment is largely in the same area as it was previously. However, the language governing the deposit or delivery of earnest money, or of any other funds held by an agent, is now toward the latter part of the buy-sell agreements. MAR hopes that separating these sections together with the revisions made will clarify confusion that has continued to exist concerning the difference between when a buyer must pay earnest money and when an agent must deposit that earnest money into the agent's trust account or deliver said funds to the closing agent.
1. Buy-Sell Agreement (Residential): Revised language concerning the buyer's payment of earnest money is at lines 70-80 and revised language concerning the deposit of the earnest money at lines 303-307.
 2. Buy-Sell Agreement (Commercial): Revised language concerning the buyer's payment of earnest money is at lines 53-63 and revised language concerning the deposit of the earnest money at lines 224-228.
 3. Buy-Sell Agreement (Land): Revised language concerning the buyer's payment of earnest money is at lines 50-60 and revised language concerning the deposit of the earnest money at lines 203-207.
 4. Buy-Sell Agreement (New Construction): Revised language concerning the buyer's payment of earnest money is at lines 55-65 and revised language concerning the deposit of the earnest money at lines 325-329.
 5. Buy-Sell Agreement (Farm & Ranch): Revised language concerning the buyer's payment of earnest money is at lines 126-136 and revised language concerning the deposit of the earnest money at lines 307-311.

- iv. In the Buyer's Acknowledgment section, at the areas set forth below, language was added whereby the buyer represents to the seller, by checking a box, whether the buyer has or has not physically visited the property prior to submitting the offer to purchase. Given the increase in buyers who are submitting offers "sight unseen", the MAR Forms Subcommittee felt that sellers should be entitled to know whether a buyer has visited the seller's property when evaluating a buyer's offer.
 1. Buy-Sell Agreement (Residential): Lines 475-479.
 2. Buy-Sell Agreement (Commercial): Lines 371-375.
 3. Buy-Sell Agreement (Land): Lines 363-367.
 4. Buy-Sell Agreement (New Construction): Lines 527-531.
 5. Buy-Sell Agreement (Farm & Ranch): Lines 468-472.

- v. At the request of a Montana Legislator from Western Montana, language was added to all buy-sell agreements that informs buyers of the potential need to obtain permits before doing any work in or around any stream, river, wetland, floodplain or other water body. The intent is to advise buyers or property located near water of the potential need to get approval before doing any work. This Legislator had originally proposed introducing legislation during the 2021 Session and MAR thought it might be better to propose adding language to buy-sell agreements thereby maintaining the ability to better control the impact on Montana real estate licensees. The new language is found at the following areas of the MAR buy-sell agreements:
 1. Buy-Sell Agreement (Residential): Lines 269-275.
 2. Buy-Sell Agreement (Commercial): Lines 188-195.
 3. Buy-Sell Agreement (Land): Lines 168-175.
 4. Buy-Sell Agreement (New Construction): Lines 287-294.
 5. Buy-Sell Agreement (Farm & Ranch): Lines 269-276.

- vi. The Buyer's Remedies and Seller's Remedies were slightly modified to provide clarification:
 1. Section 1) under Buyer's remedies was modified to change monies to earnest money to be consistent with other language concerning earnest money in the agreement; and
 2. Section 1) under Seller's Remedies was modified to add language that specifies that if the Seller elects to retain earnest money as the remedy due to a Buyer's breach, the rights and duties of the parties under the agreement terminate.

The areas of the buy-sell agreements modified as set forth above are as follows:

- a. Buy-Sell Agreement (Residential): Lines 360-376.
 - b. Buy-Sell Agreement (Commercial): Lines 274-289.
 - c. Buy-Sell Agreement (Land): Lines 243-258.
 - d. Buy-Sell Agreement (New Construction): Lines 388-403.
 - e. Buy-Sell Agreement (Farm & Ranch): Lines 359-375.
- b. For all buy-sell agreements, the checkbox was removed from the beginning of the Seller's Commitment section (e.g. the area a seller signs if the seller intends to accept a buyer's offer as presented). Therefore, if a seller intends to accept a buyer's offer as presented by the buyer the seller simply signs the buy-sell agreement. If the seller intends to reject the buyer's offer or provide a counter offer, the seller still checks the applicable boxes and initials in the applicable area.
- c. For **only** the Residential Buy-Sell Agreement the following changes, in addition to those set forth above, were made:
- i. In the Addenda and/or Disclosures Attached section (lines 437-443), a check box was added for the Rent-Back Agreement (Post-Closing Seller Occupancy) form.
 - ii. A line for the licensee phone number was added to the Relationship Confirmation section at lines 454-455 and lines 467-468.
- d. For **only** the Farm & Ranch Buy-Sell Agreement the Possession Date section (lines 114-118) contained excess language concerning the failure of the seller to deliver possession as agreed to – that was not found in any of the other MAR buy-sell agreements – and was therefore removed.
- II. **Residential Sight Unseen Acknowledgment** – This is a new form that was added for use by buyer agents who are representing buyers who are considering submitting an offer on property in Montana without having physically visited the property. It is a document whereby a buyer acknowledges potential risks inherent in making an offer on property sight unseen.

- III. Listing Agreements, Commission Agreement and Statutory Broker Compensation Agreement – In the Authorization for Broker’s Use of Information sections of these agreements, language was added to clarify that the listing agent is authorized to disseminate sold data concerning the property (e.g., for reporting to the MLS) notwithstanding the expiration or termination of the listing agreement. The purpose of this addition was to eliminate sellers terminating the listing agreement at closing and arguing that as a result the right to provide sold data to the MLS also terminated. The new language is found at the following areas of all listing agreements:
- i. Listing Agreement – Residential: Lines 245-247
 - ii. Listing Agreement – Farm & Ranch: Lines 285-286
 - iii. Listing Agreement – Land: Lines 191-193
 - iv. Listing Agreement – Commercial (Exclusive Right to Lease): Lines 237-238
 - v. Listing Agreement – Commercial (Exclusive Right to Sell): Lines 247-249
 - vi. Commission Agreement: Lines 104-106
 - vii. Statutory Broker Compensation Agreement: Lines 114-116
- IV. Owner’s Disclosure Statements – On the cover sheets of all three of the disclosure statements the line to insert the name of the Buyer Agent was moved down to the bottom of the cover sheet – just above the signature line for the Buyer Agent.
- V. Montana Unit Ownership Act – This document was updated to reflect various changes that have been made to the MUOA by the Montana Legislature and to ensure that MAR members are using the most recent version of the MUOA when providing this document to clients or customers.
- VI. Relationships/Consents in Real Estate Transactions – Under the Seller Agent and Buyer Agent checkboxes on page three, new boxes were added that more clearly provide for the ability of a buyer or seller to consent to dual agency that may not currently exist but that may occur in the future. The check boxes were also reformatted and the language consenting to multiple representation and refusing to consent to multiple representation was slightly modified for clarity.
- VII. Earnest Money Disbursement Agreement – While most of the changes to this form were relating to reformatting or non-substantive clarification, check boxes were added providing earnest money recipients the ability to elect to receive earnest money via wire transfer, ACH, etc.
- VIII. Inspection Notice (Buyer’s Withdrawal) – Some MAR members have been confused as to whether the buyer’s withdrawal of buyer requested concessions as set forth in a prior inspection notice could be used where the seller has provided a response that is not acceptable to the buyer or, more likely, when a seller has responded refusing to make any concessions. This confusion was based on the language at lines 1-2 of this form. That language at lines 1-2 has been modified to clarify that unless the buyer and seller have reached an agreement, up until the expiration date a buyer can withdraw all prior inspection notices to avoid an automatic termination of the transaction per the language set forth in the Residential Buy-Sell Agreement.

- IX. Termination Agreement of Buy-Sell Agreement (Mutual Agreement) – As announced by MAR in late March of this year, this new form was released to address situations caused by the COVID-19 pandemic. While not limited to COVID-19 based events, as a reminder this form is to be used only in situations when all parties to the applicable buy-sell agreement have agreed to terminate the transaction. Often this will be when all contingencies have expired or when any remaining contingencies are not applicable. If a buyer is terminating a transaction due to an unexpired inspection contingency or any other unexpired contingency, the form a buyer should use remains the same – respectively, the “Inspection Notice (Results/Remedies)” form or the “Termination of Buy-Sell Agreement, Notice of Non-Release of Contingencies (Buyer)” form, both together with the “Earnest Money Deposit Disbursement Agreement.”
- X. Rent-Back Agreement (Post-Closing Seller Occupancy) – A section was added concerning heating fuel and propane use that obligates a seller to reimburse the buyer for any heating fuel and/or propane used during the period of the seller’s post-closing occupancy of the property. This new language is found at lines 63-66.
- XI. Statement of Non-Foreign Status – This is a new form created for MAR members to use in transactions where withholding may be otherwise required under the Foreign Investors Real Property Tax Act (FIRPTA). The statement is for use by a seller where the seller is able to affirm that the seller is not a foreign person, foreign corporation, foreign partnership, foreign trust, or foreign estate and, therefore, not subject to FIRPTA withholding by a buyer.
- XII. Counter Offer – Page two of this form was reformatted to make the choices concerning the performance dates in the applicable buy-sell agreement (lines 47-53) more distinguishable.
- XIII. Authorization/Consent for Communication – The two forms that used to exist – one for a seller and one for a buyer – were identical other than using the terms buyer and seller. Having two forms was determined not to be necessary so now there is one form that is slightly more generic as to titles so it can be used for both sellers and buyers.
- XIV. Termination of Buy-Sell Agreement, Notice of Non-Release of Contingencies – These two forms, both the one for use by the buyer and the one for a seller’s use, were reformatted (without any substantive changes) to make the two forms easier to use and understand.
- XV. Lead Based Paint Disclosures – While no language has been modified in these two disclosure forms (sale and rentals), the new (January 2020) brochure from the EPA titled “Protect Your Family from Lead in Your Home” is now attached to both of these forms and is no longer a separate document.
- XVI. All Forms – As MAR creates or changes forms, a diligent and detailed small group is reviewing these forms and making changes to correct internal inconsistencies, spelling errors and minor formatting issues. For example, on many forms you will now see a line to insert a date at the top. While detailing all of these non-substantive changes is neither productive nor necessary, understand that MAR is continuing to improve the forms so valued by MAR members even if the changes are not obvious.