

Memo

To: Ken Joiner, Forms Subcommittee Chairman
From: James A. Bowditch, Boone Karlberg P.C., Missoula, Montana
Date: March 29, 2017
Subject: Form Changes from October 2016 Forms Subcommittee Meeting

The Forms Subcommittee of the Montana Association of REALTORS® met in October 2016. The changes that were approved at the meeting are described below.

NEW REAL ESTATE FORMS

A new property disclosure statement was created to be completed by a seller of commercial property. This new form is entitled “Owner’s property Disclosure Statement (Commercial).” While it is similar to the existing disclosure forms it does have items that are specific to commercial properties.

REVISIONS TO REAL ESTATE FORMS

- I. Relationships/Consents in Real Estate Transactions (combined Explanation and Disclosure) – Language was added to this form just below the title to clarify, based on a recent Montana Supreme Court case, that the relationship disclosure form is a document disclosing the relationship status between an agent and a client and not a written contract between the agent and client. The language added is as follows:

THIS IS A RELATIONSHIP DISCLOSURE REQUIRED BY MONTANA LAW. NEITHER THE EXECUTION OF THIS DOCUMENT NOR ANYTHING CONTAINED IN THIS DOCUMENT SHALL BE CONSTRUED AS CREATING A BINDING CONTRACT OR OTHER AGREEMENT BETWEEN THE PARTIES

- II. Buy-Sell Agreements (All)

- a. The “Purchase Price and Terms” section was restructured. The primary change is to clarify the amount of the down payment a buyer is proposing. As restructured, an agent must insert the purchase price and any earnest money and the form will auto-calculate the balance owing. Programming will also limit the boxes that can be checked. For example, a user will not be able to check both that the buyer will pay cash at closing and that the balance owing will be financed. Additionally, the amount of the buyer’s down payment may now be specified as either a dollar amount or as a percentage of the purchase price. The specific line numbers of these modifications are as follows:

- i. Buy-Sell Agreement (Residential): Lines 41-52
- ii. Buy-Sell Agreement (Commercial): Lines 28-45
- iii. Buy-Sell Agreement (Farm & Ranch): Lines 81-97
- iv. Buy-Sell Agreement (Land): Lines 23-41
- v. Buy-Sell Agreement (New Construction): Lines 24-36

- b. The section concerning payment of interest on any earnest money has been revised to remove the blank line where the recipient of said interest was to be inserted. The new language simply states that any interest is to be paid to the party that is holding the earnest money unless otherwise agreed to by the parties (e.g. by specifying something different in the additional provisions section or in an addendum). The line numbers where these revisions were made are as follows:
 - i. Buy-Sell Agreement (Residential): Lines 86-88
 - ii. Buy-Sell Agreement (Commercial): Lines 81-83
 - iii. Buy-Sell Agreement (Farm & Ranch): Lines 149-151
 - iv. Buy-Sell Agreement (Land): Lines 75-77
 - v. Buy-Sell Agreement (New Construction): Lines 82-84

- c. Language was added to the Title Contingency section detailing the process and timing if the buyer objects to any of the exceptions in a preliminary title commitment, other than the standard pre-printed exceptions. If the seller is unable or unwilling to satisfy the buyer's noted objections, the new language also limits the buyer's remedies to either taking the property subject to the noted objections or terminating the transaction. This new title contingency language is located in the following areas of the all buy-sell agreements:
 - i. Buy-Sell Agreement (Residential): Lines 207-221
 - ii. Buy-Sell Agreement (Commercial): Lines 161-175
 - iii. Buy-Sell Agreement (Farm & Ranch): Lines 206-220
 - iv. Buy-Sell Agreement (Land): Lines 118-132
 - v. Buy-Sell Agreement (New Construction): Lines 247-261

III. Buy-Sell Agreements (Residential and Farm & Ranch)

- a. In discussions at meetings of the MAR Risk Management Committee, it was determined that in a large percentage of transactions the lead based paint disclosure, pamphlet, and other documents (the "LBP Documents") were not being provided to potential buyers of target housing until after the buy-sell agreement had been fully executed. This is technically in violation of federal law unless the buyer has the unconditional right to cancel the buy-sell agreement for a period of time after the LBP Documents are actually provided. Therefore, a contingency entitled "Lead Based Paint Contingency" was added to the Residential and Farm & Ranch Buy-Sell agreements providing that a buyer has the unconditional right to cancel the agreement (without risk of loss or other adverse effects) within three (3) days after electronic or hand delivery of the LBP Documents, or five (5) days after deposit of the LBP Document in the mail. The specific line numbers of this new contingency are as follows:
 - i. Buy-Sell Agreement (Residential): Lines 225-231
 - ii. Buy-Sell Agreement (Farm & Ranch): Lines 235-241

IV. Buy-Sell Agreement (Residential)

- a. The “Home Inspection” checkbox on line 155 was renamed “Home/Property Inspection.” The primary reason for this change is that home inspectors will sometimes include the condition of outbuildings in their inspection report. The addition of the word “Property” expands this inspection contingency to include the condition of outbuildings as well as the home if so noted in the inspector’s report.

V. Lead Based Paint Contingency Addendum – To accommodate the practice of providing the LBP Documents after a buy-sell agreement has been fully executed, language was added after the checkbox on lines 16-17 stating that a buyer has 10 days from the date of the buy-sell agreement *or receipt of the LBP Documents, whichever is later*, to give the seller notice that the buyer disapproves of any lead based paint risk assessment conducted by the buyer.

VI. Lead Based Paint Disclosure

- a. To be consistent with the EPA model form and the lead based paint disclosure form used for rental properties, blank lines were added for the buyer to insert the buyer’s initials on lines 30 (section (c)), 31 (section (d)), 34 (section (e)), and 43 (section (f)). Language was also added to line 29 stating that by initialing on any or all of the blank lines, a buyer acknowledges the matters next to where the buyer’s initials were placed.
- b. Language was added at lines 32 and 33 referencing the buyer’s right to cancel a buy-sell agreement, for a defined period of time after receipt of the LBP Documents, if the buyer did not receive the LBP Documents until after the buy-sell agreement was executed – all as set forth in the applicable buy-sell agreement.
- c. The time frame for a buyer to conduct a risk assessment, as set forth on line 35-37, has been changed from 10 business days to 10 (calendar) days.
- d. Language was also added to line 42 stating that by initialing on line 43 the applicable broker/salesperson is acknowledging his or her obligations to ensure that a seller complies with federal law concerning disclosure of lead based paint.

VII. Listing Agreements (All Except Commercial – Exclusive Right to Lease) – In all listing agreements except the “Commercial – Exclusive Right to Lease” document (at the locations identified below) the representation of the seller has been modified to reflect recent changes in the amount of withholding that must be made on behalf of a foreign seller under the Foreign Investor Real Property Tax Act of 1980:

- a. Listing Agreement (Farm & Ranch): Lines 159-164.
- b. Listing Agreement (Land): Lines 57-62.
- c. Listing Agreement (Residential): Lines 104-109.
- d. Listing Agreement (Commercial - Exclusive Right to Sell): Lines 109-113.

- VIII. Inspection Notice (Seller's Response) – Language was added, similar to that which is found in the Counter Offer form, that allows a seller to withdraw the seller's "offer" contained in the Inspection Notice at any time prior to receiving the buyer's written acceptance. This new language is located at lines 41-42.
- IX. Commission Agreement and Statutory Broker Compensation Agreement – In both of these forms the language concerning mold has been updated to match the language that exists in the listing agreements. The new language is found at the following locations:
- a. Commission Agreement: Lines 73-78
 - b. Statutory Broker Compensation Agreement: Lines 81-86
- X. Multi-Family Disclosure/Fair Housing Accessibility – The signature line for the buyer agent, line 32, was changed from "Buyer's Broker" to "Buyer's Broker/Salesperson".

REVISIONS TO PROPERTY MANAGEMENT FORMS

- I. Agreement to Manage Property – Added language at lines 161-169 regarding property manager's obligation to withhold taxed from gross rent for certain rental property owned by a foreign entity or person unless Form W-8ECI is provided.
- II. Manager – Tenant Statement of Condition of the Rental Property
- a. The table at lines 22-209 was modified as follows:
 - i. A second blank row after was inserted after each item to allow users to insert more information on the Conditions & Comments column.
 - ii. A new column, titled "Photos Attached" and that allows for the insertion of 5 characters, was inserted between column titled "Rating" and column titled "Conditions & Comments"
 - b. The language just above the tenant's signature, line 227, was changed from "I have inspected the premises and believe that the foregoing statement of condition is truthful and accurate" to "I received a copy of the foregoing."
- III. Residential Lease-Rental Agreement
- a. The monthly rent amount on lines 69-70 was revised to add a section to insert any additional rent for pets.
 - b. The language regarding inspections at lines 233-238 was modified to clarify that the tenant shall not unreasonably withhold consent to the property manager to enter the premises, on 24 hours' notice, for certain reasons including exhibiting the property to prospective purchasers or tenants.

IV. Pet Agreement

- a. A new paragraph 3 was inserted at line 25 referencing and additional pet rent that must be paid in accordance with the rental agreement.
- b. The table at lines 44-48 has been reformatted to add two additional rows, lengthen the width of the “Breed” column and shorten the width of the “Name” column.
- c. Language has been added to subparagraph 7.b. (lines 60-64) that requires the tenant to promptly remove all pet solid waste and that states that pets must be leashed or confined to the leased premises at all times.
- d. Paragraph 10.b. concerning a tenant’s obligations on moving out (lines 93-97) has been revised to remove the requirement that the carpets be cleaned by a professional and to instead allow the property manager to specify the cleaning that must be accomplished and by whom.

- V. Tenant Deposit Transfer Form – This form was completely redrafted to make it clearly and to allow users to select boxes concerning what documents and other items are being transferred. The new form is entitled “Tenant Document and Deposit Transfer Form.”