

The 2018 OREF Residential Real Estate Sale Agreement

What Sellers and Buyers Need to Know



THE RESIDENTIAL REAL ESTATE SALE AGREEMENT FORM CONTAINS PRINTED PROVISIONS APPLICABLE TO MOST STANDARD PURCHASE AND SALE TRANSACTIONS INVOLVING RESIDENTIAL REAL ESTATE. IT IS INTENDED TO BECOME A LEGALLY BINDING DOCUMENT. UNWRITTEN UNDERSTANDINGS OR ORAL AGREEMENTS AFFECTING LEGAL RIGHTS IN REAL ESTATE CAN BE VERY DIFFICULT TO ENFORCE, SO ALL OF THE IMPORTANT TERMS OF THE TRANSACTION SHOULD BE CONTAINED IN THIS DOCUMENT. IF YOU WANT TO CHANGE OR ADD OTHER PROVISIONS TO THE SALE AGREEMENT, IT SHOULD BE DONE BY A WRITTEN ADDENDUM WHICH IS ALSO SIGNED AND DATED. YOU SHOULD OBTAIN LEGAL COUNSEL IF NECESSARY. WHAT FOLLOWS IS A SHORT SUMMARY OF A FEW OF THE IMPORTANT SECTIONS OF THE SALE AGREEMENT. THERE MAY BE OTHER PROVISIONS WHICH ARE NOT COVERED BELOW THAT MAY AFFECT YOUR LEGAL RIGHTS AND DUTIES.

IT IS IMPORTANT TO THOROUGHLY READ AND UNDERSTAND THE ENTIRE SALE AGREEMENT BEFORE SIGNING. THIS BROCHURE IS NOT A

SUBSTITUTE FOR OBTAINING COMPETENT LEGAL ADVICE, IF NEEDED.

FINAL AGENCY ACKNOWLEDGMENT

This section of the Sale Agreement, located at the top of the form, is intended as final acknowledgement by the parties that they understand who is representing them in the transaction. The name of the real estate broker and company representing the seller and buyer should be disclosed here. The seller and buyer should then sign this acknowledgement confirming that they are aware of, and consent to, the disclosed representation.

Sellers are expected to sign the Final Agency Acknowledgement even though they may intend to reject their buyer's offer, or submit a counteroffer.

CONTINGENCIES A "contingency" is an event that must occur (e.g. loan approval, satisfactory professional inspection, etc.) before the transaction becomes binding on all parties. There are several standard contingencies in the Sale Agreement. All of them are for the benefit of the buyer. If a contingency fails to occur through no fault of the buyer (e.g. failure to obtain loan approval or unsatisfactory professional inspection), it means the buyer has the right (but not the obligation) to terminate the transaction and obtain a full refund of the earnest money deposit.

All contingencies (except financing) provide that they are deemed waived if the buyer does not exercise them within a fixed period of time. For this reason, it is very important for buyers to make sure they know exactly how long each period is for each contingency.

FINANCING If a new loan is required, the transaction is contingent upon the buyer and the property qualifying for the loan and the property appraising out for at least the agreed-upon sale price. Buyer represents that they will submit a completed loan application to their lender within an agreed-upon amount of time, e.g. 5 business days. The phrase "completed loan application" means that the following information must be submitted to the lender: (1) Buyer's name(s); (2) Buyer's income(s); (3) Buyer's social security number(s); (4) The property address; (5) Estimate of the value of the property (i.e. agreed-upon sale price); and (6) The loan amount. Note also, the Sale Agreement contains the following buyer requirements when financing the purchase of a home: (a) Buyer's loan application is to

be submitted to the same lender that provided the Pre-Approval Letter; (b) Upon receipt of the lender's Loan Estimate, the buyer has a fixed period of time within which to respond if they intend to proceed with the offered loan; (c) The buyer is to timely complete all loan paperwork; (d) The buyer is to keep the seller timely informed regarding the loan status; (e) Significantly, a buyer may *not* replace the lender or the loan program identified in their Pre-Approval Letter (e.g. conventional, DVA, FHA, USDA loan programs) without seller's consent; and (f) Lastly, the Sale Agreement also contains a provision stating that the source of buyer's funds (i.e. for earnest money, and down payment) are *not contingent*, unless disclosed in the document. This means that if the buyer is obtaining any funds from third-party sources (e.g. relatives, or withdrawals from IRAs, 401-Ks, 529s, or proceeds from another closing, etc.), it must be disclosed in the Sale Agreement.

The failure to disclose this information can result in the loss of buyer's deposit if the sale does not close on account of the failure to obtain that funding.

TITLE INSURANCE The Sale Agreement makes the buyer's approval of the condition of title another contingency in the transaction. Although there is no law requiring that the seller pay for the buyer's title policy, this is the standard practice in Oregon, and the Sale Agreement provides for this. If the parties want to vary from that procedure, it should be contained in a written Addendum to the Sale Agreement, and signed by seller and buyer. Shortly after escrow is opened, the title insurance company will provide the parties and their brokers with a *preliminary title report* identifying all deed restrictions, easements, liens, taxes, judgments, mortgages, etc. and other matters appearing on the public record, together with actual copies of these recorded documents. Buyers should closely review the preliminary title report and the recorded documents, especially the deed restrictions (also known as "Conditions, Covenants and Restrictions" or "CC&Rs") as soon as they are received. Again, if timely exercised, this contingency permits buyers to terminate their transaction if they do not approve of the preliminary title report.

If there are questions, or if further information is required, buyers should check with the title company, or a real estate attorney. Real estate brokers are not title insurance experts. In almost all cases, buyers should always obtain a title insurance policy when

acquiring real estate, regardless of whether the property is new or used, or whether bank financing is involved.

PROFESSIONAL(S) INSPECTIONS Having the property thoroughly inspected by a licensed professional is probably the single most important thing buyers can do to protect themselves from surprises when purchasing a home, new or used. The Sale Agreement provides that buyers have the right, at their expense, to have the home and all systems thoroughly inspected. The Sale Agreement also provides that the buyer has the right, within the agreed-upon contingency period, to reject the inspection report(s), terminate the transaction, and obtain a complete refund of their earnest money deposit. Prior to expiration of this deadline, a buyer is completely free to negotiate with the seller regarding the repair of any adverse conditions that are noted in the professional inspection report.

However, since the Sale Agreement provides that "time is of the essence," buyers must be extremely vigilant, since the failure to timely reject the inspection report(s) can mean that the buyer has accepted the condition of the property, with all defects, apparent or not apparent. Failing to give timely notice of withdrawal within the inspection contingency period means that if the buyer wants out of the transaction on account of the condition of the home, they may have to forfeit their earnest money deposit in order to do so.

See: <https://oregonrealtors.org/resources/membership-resources/buyer-seller-advisories>

OTHER IMPORTANT CONTINGENCIES There are other important buyer contingencies in the Sale Agreement regarding such things as lead-based paint, wells, well water, and septic systems. If the property contains any of these conditions or systems, buyers must make sure they have timely inspections and/or testing conducted within the applicable contingency period. If there is concern about completing the work before the end of the contingency period, buyers should either provide for a longer period before signing the Sale Agreement, or after signing, try to obtain an extension of time from the seller.

AS-IS CONDITION The Sale Agreement provides that the buyer is accepting the property in its "AS-IS" condition. This is a standard provision, and generally means the buyer assumes all risks of adverse

conditions that may be discovered after closing. Most residential property is sold “AS-IS,” subject to certain written disclosures or other representations that the seller may make to the buyer at or before the Sale Agreement is signed. In Oregon, subject to limited exceptions, sales of owner-occupied homes almost always include a Seller Property Disclosure Statement, which addresses many important aspects of the property, such as the status of title, the known condition of all systems (e.g. heating, cooling, plumbing, and electrical), whether there have been any leaks or other water problems, the structural condition of the home, etc. (See, ORS 105.464.) The Sale Agreement provides that subject only to the seller’s written agreements and representations, and the information in the Seller’s Property Disclosure Statement, the home is being sold in its “AS-IS” condition.

Note: The AS-IS clause will not protect a seller from liability if known adverse conditions in the home are intentionally concealed from the buyer.

SELLER REPRESENTATIONS The Sale Agreement contains a section that has several standard representations about the condition of the home, including such things as sewer, water, hazardous substances, known material defects or violations of law, etc. These representations are based upon the seller’s “best knowledge”. They are not contractual warranties or guarantees, and are not a substitute for the buyer’s duty to be vigilant and conduct their own independent investigation.

Sellers should read these printed representations closely before signing the Sale Agreement to make sure they accurately describe the condition of the home and property to the best of their knowledge. If a seller feels that any of these representations are not correct, it should be immediately discussed with their agent before signing the Sale Agreement.

CLOSING AND POSSESSION A common misconception is that “Closing” means the date the transactional documents are signed. However, in many cases, signing documents, including loan papers, may occur one or two days prior to closing. Under the Sale Agreement, “Closing” is technically the final event in the transaction process, where the loan is funded, costs such as title, escrow and loan fees are paid, taxes are prorated, proceeds are disbursed, and documents are recorded. The Sale Agreement contains a place for the parties to insert

“no later than” date for closing to occur. Parties should be realistic in selecting the closing date, so that there is no risk that one side or the other will not be ready. If the transaction fails to close by the closing date identified in the Sale Agreement, it could constitute a breach of contract. Although there are many exceptions, most standard residential transactions involving the issuance of a conventional loan to qualified buyers are closed within 30 to 60 days. Possession is usually transferred from the seller to the buyer at the time of closing or shortly thereafter. If the seller needs extra time after closing to vacate, and the buyer agrees, they should enter into a written agreement providing for a fixed period for the seller to retain possession.

Note: The TILA-RESPA Integrated Disclosure Rules (TRID) have specific regulations on the lender’s delivery of a Closing Disclosure to the buyer and escrow. In some cases, this could delay closing. Buyers should be sure to discuss this with their lenders ahead of time.

DEFINITIONS AND INSTRUCTIONS The Sale Agreement contains a series of definitions and instructions that sellers and buyers should review. In summary, they include the following: (1) References to “Agent” and “Firm” refer to the buyer’s and seller’s real estate brokers and their companies; (2) Time is of the essence of the Sale Agreement; (3) In most cases, delivery of written notices or documents to buyers or sellers may be delivered to their respective agents with the same legal effect; (4) Upon opening of escrow, buyers, sellers, and their respective agents should provide it with their preferred means of notification which will serve as the primary location for receipt of notices or transactional documents; (5) The agent and firm(s) identified in the Final Agency Acknowledgment Section of the Sale Agreement are not “parties” to the transaction; (6) A “business day” is Monday through Friday, unless it falls on a recognized state or federal holiday; (7) Unless the parties provide otherwise, the phrase “signed and accepted” in the transactional documents mean when the seller and/or buyer have: (a) signed their acceptance of the Sale Agreement or Counteroffer received from the other party and (b) transmitted it to the sending party either by manual delivery or electronic transmission. (8) When the Sale Agreement or Counteroffer is “signed and accepted” by all parties it becomes legally binding upon them and cannot be withdrawn without the consent of all; (9) The sending of a signed document

of agreement via electronic transmission between parties has the same effect as manual delivery of the signed original; (10) Time calculated in days after the date buyer and seller have signed and accepted the Sale Agreement or Counteroffer shall start on the first full business day after the date they have signed and accepted it; (11) The Sale Agreement is binding upon the heirs, personal representatives, successors and assigns of parties; (12) Unless otherwise provided, the buyer's rights under the Sale Agreement or in the Property are not assignable without prior written consent of the seller; (13) The Sale Agreement and all related documents may be signed in multiple legible counterparts with the same legal effect as if all parties signed the same document; (14) Excepting only the Lead-Based Paint Contingency Period, unless a different time is specified in the Agreement, all deadlines for performance, however designated, that are measured in business or calendar days, terminate as of 5:00 p.m. on the last day of that deadline.

EARLY TERMINATION, DEFAULT, AND ALTERNATIVE DISPUTE RESOLUTION

Although we don't like it when it occurs, some residential transactions fail before closing. Accordingly, it is important to know, in advance, the rights, duties and liabilities of the parties, should something occur that causes an early termination. The Sale Agreement has a section specifically dealing with default. It provides that if a certain contingency fails or other adverse events occur through no fault of the buyer (e.g. loan is not approved, appraisal comes in under the sale price, a title defect cannot be removed, etc.), if the buyer gives timely written notice of intent to withdraw, the earnest money will be refunded and the transaction terminated. But if the transaction fails because a buyer changes their mind, or has an unanticipated job loss that prevents closing, the seller may declare the entire deposit forfeited. Since the Sale Agreement provides that retaining the earnest money deposit is the seller's only remedy for a buyer's nonperformance, sellers should pay special attention to the amount of the agreed-upon deposit. Will the deposit sufficiently compensate the seller should the buyer fail or refuse to close? It is also important for sellers to understand that if they change their mind after agreeing to sell their home, the buyer may declare them in breach of the Sale Agreement, and ask that an arbitrator "specifically enforce" the terms of the transaction.

The Sale Agreement contains a section for alternative dispute resolution, and subject to certain limitations, it mandates that all disputes between seller, buyers and agents, are to go to private mediation and arbitration. If a dispute between seller and buyer involves a money claim for \$10,000 or less, it may only be tried in Small Claims Court, and cannot be removed for a jury trial.

PERSONAL PROPERTY AND FIXTURES In its simplest terms, personal property is movable (such as furniture, pictures, etc.) and fixtures are firmly attached to the structure (such as chandeliers, built-in shelving, etc.). The Sale Agreement provides that, unless otherwise agreed in the Sale Agreement, all personal property belongs to the seller, and all fixtures remain with the home and belong to the buyer. Note, however, it also provides that certain types of built-in appliances, such as ranges and ovens, must remain with the home after closing (even though they may be capable of being removed). If the parties wish to negotiate another arrangement, it should be specifically written into the Sale Agreement, since otherwise there can be confusion on these issues.

Note that it is generally not enough for the seller to advertise or promote in the listing that certain items of personal property will stay, or certain fixtures will go. These arrangements should be memorialized in the body of the Sale Agreement or other written and signed Addenda.

THERE ARE MANY OTHER PRINTED PROVISIONS IN THE SALE AGREEMENT IMPORTANT TO SELLERS AND BUYERS. YOUR REALTOR® IS LICENSED TO ASSIST YOU IN THE SALE AND PURCHASE OF REAL ESTATE. HOWEVER, HE/SHE IS NOT TRAINED AS A LAWYER, HOME INSPECTOR, TITLE EXAMINER, OR SIMILAR PROFESSIONAL. IF YOU HAVE ANY QUESTIONS THAT YOUR REALTOR® IS NOT QUALIFIED TO ANSWER, YOU SHOULD CONTACT AN EXPERT OF YOUR CHOICE.