

The OREF Residential Real Estate Sale Agreement

What Sellers and Buyers Need to Know



The residential Real Estate Sale Agreement contains certain printed provisions useful for most standard purchase and sale transactions. It is intended to become a legally binding document. Unwritten or oral agreements affecting legal rights in real estate can be very difficult to enforce, so it is important to include all material terms of the transaction in this document. If you want to change or add other provisions to the Sale Agreement, it should be done by a written addendum to the document 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, should be signed by the buyer and his/her Realtor® at the time the offer is submitted to the seller. It identifies the parties and the real estate agent(s) representing them. *The seller and his/her agent should sign at this section even if the seller intends to reject the buyer's offer.*

FINANCING

The printed portion of the Sale Agreement states that if a new loan is required, the transaction is subject to the buyer and property qualifying for a loan. It also states that the lender's appraisal must not be less than the purchase price. These provisions are known as "contingencies," which means that certain events, such as financing or appropriate appraisal, must occur before the transaction becomes binding upon one or both of the parties. The Sale Agreement also contains a provision requiring that, in addition to bank financing, buyers must disclose any other contingent sources of funds intended to be used toward the purchase of the home, such as gifts from relatives, retirement plan distributions, or the sale of another residence. *If a disclosed financing contingency fails to occur, such as loan approval, and the buyer cannot close the transaction, after having made timely application for the loan, the buyer's earnest money deposit will normally be refunded. But if a buyer does not disclose a necessary source of funds they will need to purchase the home, and the funds are unavailable at closing, the seller may claim that the earnest money deposit is forfeited because it was not disclosed as a contingency in the Sale Agreement.*

TITLE INSURANCE

The Sale Agreement makes the buyer's approval of the condition of title a contingency in the transaction. Shortly after escrow is opened, the Sale Agreement states that the title insurance company will provide the parties with a preliminary title report disclosing all recorded liens, taxes, judgments, mortgages, etc. (frequently referred to as "encumbrances") 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. If there are questions or if further information is required, the buyer should check with the title company or a real estate attorney. The Sale Agreement provides that the seller will pay for the buyer's title insurance policy which is issued shortly after closing. Although there is no law requiring that the seller pay for the

buyer's title policy, it is the standard practice in Oregon. *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 any bank financing is involved.*

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 has a section which addresses personal property and fixtures. It provides that all personal property belongs to the seller and the fixtures shall belong to the buyer. Note, however, the Sale Agreement 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 there can be confusion on these issues. *If there is any doubt about whether an item goes or stays with the property, the issue should be specifically addressed in writing in the Sale Agreement or an addendum.*

SELLER REPRESENTATIONS

The Sale Agreement contains a section which has several standard representations about the condition of the home, relating to such things as sewer, water, hazardous substances, known material defects or violations of law, etc. These representations are based upon the seller's actual 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 to make sure that 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 they sign the Sale Agreement.*

AS-IS CONDITION

When property is being sold "AS-IS" it generally means the buyer assumes all risks of adverse conditions that may be discovered after closing. Most property, residential and commercial, is sold "AS-IS," subject to certain written disclosures

or other representations that the seller may make to the buyer before closing. In Oregon, sales of owner-occupied homes almost always include a seller property disclosure form, which addresses many important aspects of the property, such as the status of title, the known condition of all systems (such as heating, cooling, plumbing, and electrical), whether there have been any leaks or other water problems, the structural condition of the home, etc. The Sale Agreement provides that subject only to the seller's written agreements and representations, and the

information in the seller's property disclosure form, the home is being sold in its "AS-IS" condition. If the seller and buyer agree to modify this arrangement, it should be done in writing and included as a part of the Sale Agreement or an addendum. *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.*

INSPECTIONS

Having the property thoroughly inspected 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 the buyer has the right, at his/her expense, to have the home and all systems thoroughly inspected. The Sale Agreement also provides that the buyer has the right to reject the inspection report(s), terminate the transaction and obtain a complete refund of the earnest money deposit.

However, this right of rejection must be exercised before the inspection contingency deadline that was agreed upon between the parties in the Sale Agreement. Prior to this deadline, the 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. Thereafter, if the buyer wants out of the transaction, they may have to forfeit their earnest money deposit in order to do so. Buyers are encouraged to review the Oregon Property Buyer Advisory for a more complete summary of important issues and conditions in residential property that they may wish to have inspected or tested. The website is: <http://rea.state.or.us>.*



CLOSING AND POSSESSION

Closing is 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 to the seller, documents get recorded and possession is transferred. The Sale Agreement contains a place for the parties to insert an outside 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. 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, a rent-back agreement should be added to the Sale Agreement or by separate addendum.

DEFAULT AND EARLY TERMINATION

Although we don't like it when it happens to us, some residential transactions cannot be completed. Accordingly, it is important to know, in advance, the rights, duties and liabilities of the parties, should something occur which causes the sale to fail. The Sale Agreement has a section specifically dealing with this possibility. It provides that if a certain contingency fails or other adverse events occur through no fault of the buyer, such as the failure to obtain a loan, defects in title which cannot be cured, or an unacceptable inspection report, the earnest money will be refunded and the transaction is terminated. But if the transaction fails because a buyer changes their mind or has an unanticipated job transfer which prevents closing, the seller may declare the entire deposit forfeited. *Since the Sale Agreement provides that keeping 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 complete the transaction in violation of the Sale Agreement?* It is also important for sellers to understand that if they change their mind after agreeing to sell the home, the buyer may declare them in breach of the Sale Agreement, asking that a court or arbitrator require the seller to "specifically perform" the contract by selling the property to them. If either party wants to change these remedies that are found in the printed terms of the Sale Agreement, it should be negotiated and agreed upon before the final document is signed. However, such important changes should only be made following competent legal advice.

DISPUTE RESOLUTION BETWEEN SELLERS AND BUYERS

The Sale Agreement contains an extensive section addressing the method of resolving disputes exclusively between sellers and buyers. Again, while the parties are free to change any portion of the printed form, it is suggested that the decision to do so should only be made with legal guidance. Basically, if there is a dispute over money (for example, whether the earnest money deposit has been forfeited) and the amount at issue is not more than \$5,000, which is the current jurisdictional limit of Small Claims Court, the entire matter must be heard and decided there. For all other disputes, the Sale Agreement provides that the seller and buyer must attempt to mediate the matter through a dispute resolution service. If that fails, the matter may be submitted to final and binding arbitration before one or more trained arbitrators. *In arbitration there is no automatic right to a jury trial and the right to appeal the decision is very limited.* Mediation and arbitration are private proceedings and are generally considered faster and less expensive than public litigation in court. Since the mediation process frequently results in a complete resolution of the dispute between sellers and buyers, it is strongly encouraged. *Note: The Sale Agreement provides that a prevailing party in arbitration may not recover attorney fees if the arbitrator determines that they did not first offer or agree to mediate the dispute prior to or promptly after the filing for arbitration. If the dispute involves one or more Realtors® in the transaction, the process for resolution is somewhat different than the preceding summary, and should be closely reviewed by sellers and buyers before signing.*

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 other professional. If you have any questions that your Realtor® is not qualified to answer, you should contact an expert of your choice.

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