OREF Residential Real Estate Sale Agreement

Things to Know Before Signing

For many people, buying a house is the most complicated and expensive transaction of their lives. Therefore, a real estate sale agreement must cover all the details to help the process go smoothly. Because sale agreements are lengthy and become legally binding on the buyer and seller, it is important to understand what they mean.

Oregon Real Estate Forms, LLC, created this summary to help buyers and sellers understand their rights and duties under the OREF Sale Agreement. Please read the entire Agreement before signing it and talk with a real estate lawyer to answer any questions about what is being agreed to.

FINAL AGENCY ACKNOWLEDGMENT

The law requires this section to appear at the top of the Sale Agreement so that the buyer and seller know exactly who their real estate agent is in the transaction, how to contact their real estate agent, and whether a real estate agent represents one or both sides of the transaction.

REAL PROPERTY, PERSONAL PROPERTY, AND FIXTURES

The Sale Agreement usually includes the address of the real estate being sold. "Real property" generally means the land at that address and any structures attached in a permanent manner to that land. The deed to the property will include the legal description of the real property.

"Personal property" is property that is movable, such as furniture, pictures, and hoses. "Fixtures" might have been personal property at one time, but now they are items that have been firmly attached to the structure, such as chandeliers, built-in shelving, and garage door openers. The Sale Agreement says that, unless the parties agree to some other arrangement, all personal property belongs to the seller, and all fixtures remain with the home and belong to the buyer. However, it also says 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 must be written explicitly into the Sale Agreement.

A buyer should not rely on an advertisement or listing information as a promise that certain items of personal property will stay or certain fixtures will go. These agreements must be written in the Sale Agreement or an Addendum.

CONTINGENCIES

A "contingency" allows a party to terminate the transaction and get their earnest money back if an event does not occur. There are several standard contingencies in the Sale Agreement, including financing, inspection, and title review (these are covered in greater detail below). All of these contingencies are for the benefit of the buyer. Additional contingencies benefiting both the buyer and seller can be added. If a contingency fails to occur through no fault of the buyer (such as failure to obtain loan approval or an unsatisfactory inspection), the buyer usually has the right to terminate the transaction and obtain a full refund of all earnest money deposited.

All contingencies (except financing) are deemed waived if the buyer does not exercise them within a fixed period of time. For this reason, it is important to keep track of exactly how long each period is for each contingency.

FINANCING CONTINGENCY

If a buyer needs a loan to buy a property, the transaction is contingent on the buyer and the property qualifying for the loan, the property appraising for at least the agreed-upon sale price, and the buyer obtaining the loan. The buyer promises to:

(a) submit a completed loan application to the same lender that provided the pre-approval letter within an agreed-upon amount of time;
(b) promptly notify the lender if the buyer is satisfied with the lender's loan estimate;
(c) timely complete all loan paperwork and pay all fees requested by the lender;

(d) keep the seller informed regarding the loan status;
(e) not replace the lender or the loan program identified in their pre-approval letter without the seller's consent; and
(f) authorize the lender to order an appraisal of the property and provide certain information about the loan status to the seller.

The buyer also promises that the buyer actually has the money for earnest money and a down payment unless a contingency is disclosed. If the buyer is obtaining any funds from third-party sources (such as relatives, withdrawals from investment accounts, or proceeds from another closing), it must be disclosed in the Sale Agreement.

The failure to disclose contingent financing can result in the loss of the buyer's earnest money if the sale does not close due to the failure to obtain that funding.

TITLE REVIEW CONTINGENCY

The buyer's approval of the condition of the title is another contingency in the transaction. Shortly after escrow is opened, the title insurance company selected will provide the parties and their real estate agents with a preliminary title report identifying all deed restrictions, easements, liens, taxes, judgments, mortgages, and other matters appearing in the public records, together with links to these recorded documents. Buyers should promptly review the preliminary title report and the recorded documents, especially the "Covenants, Conditions and Restrictions" or "CC&Rs." If timely exercised, this contingency allows the buyer to terminate the transaction if the buyer does not approve of the restrictions recorded against the property's title. In Oregon, the seller generally pays for the buyer's title insurance policy, but the parties are free to vary from that procedure by signing an addendum to the Sale Agreement. The buyer generally pays for their lender's title insurance.

If the buyer has questions or concerns about the property's title, they should talk with their title company or a real estate attorney. Real estate agents are not title insurance experts. Buyers should always obtain a title insurance policy when acquiring real estate, regardless of whether the property is new construction or re-sale and whether or not lender financing is involved.

PROFESSIONAL INSPECTIONS CONTINGENCY

Having the property thoroughly inspected by a licensed professional is probably the most important thing buyers can do to protect themselves from surprises when purchasing a home – regardless of the age of the home. The Sale Agreement gives the buyer the right to have the home and all systems thoroughly inspected at the buyer's expense. That Agreement also provides the buyer with the right, during the inspection period, to terminate the transaction because of the inspection report and to obtain a complete refund of all earnest money deposits. Before the expiration of this deadline, the buyer is free to negotiate with the seller regarding the repair of any conditions noted in the inspection report. Still, the seller does not have to agree to perform any repairs.

Be vigilant about deadlines: failure to timely reject the inspection report can mean that the buyer has accepted the condition of the property, even defects that are not visible. If a buyer fails to terminate during the inspection period and later decides that the home's condition is unacceptable, the buyer may have to forfeit their earnest money deposit to terminate.

OTHER IMPORTANT CONTINGENCIES

There are other important contingencies in the Sale Agreement, such as those related to lead-based paint, wells, and septic systems. If the property contains any of these conditions or systems, the buyer should make sure they are inspected or tested during the applicable contingency period. If there is concern about completing the work before the end of the contingency period, the buyer should ask for a longer period before signing the Sale Agreement.

AS-IS CONDITION

The Sale Agreement says that subject only to the seller's written agreements, representations, and disclosures, the buyer accepts the property in "AS-IS" condition. This means that the seller has no obligation to repair anything unless otherwise agreed in writing. The buyer assumes all risks of adverse conditions that may be discovered after closing. Most properties are sold AS-IS, subject to certain disclosures or promises that the seller may make to the buyer. In Oregon, sales of homes almost always include a Seller Property Disclosure Statement, which addresses many aspects of the property, including the status of title, the condition of heating, cooling, plumbing, and electrical systems, whether there have been any leaks or other water problems, and the structural condition of the home (see ORS 105.464).

Every seller has an obligation to disclose important information that the seller knows. The AS-IS clause will not protect a seller from liability if important, known adverse conditions in the home are not disclosed to the buyer.

SELLER REPRESENTATIONS

The Sale Agreement contains several representations about the property's condition, including such things as sewer, water, hazardous substances, known material defects, encroachments, or violations of law. These representations are based upon the seller's "best knowledge." They are not 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 representations closely before signing the Sale Agreement to make sure they accurately describe the condition of the home and property to the best of the seller's knowledge. If a seller believes any of these representations are incorrect, the seller should immediately discuss it with their real estate agent so that a correction can be made when signing the Sale Agreement.

CLOSING AND POSSESSION

"Closing" does NOT mean the date the transaction documents are signed. In fact, in many cases, signing documents, including loan papers, may occur one or two days before 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 a "no later than" deadline 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 deadline identified in the Sale Agreement, it could constitute a breach of contract. 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.

The lender must deliver a Closing Disclosure to the buyer and escrow before closing. In some cases, this delivery could delay closing. Buyers should be sure to discuss this with their lenders ahead of time.

DEFINITIONS

Near the end of the Sale Agreement, there are a few definitions that sellers and buyers should review. They include the following: (a) & (i) "Agent" and "Firm" refer to the buyer's and seller's real estate agents and their brokerage companies; (c) a "Business Day" is Monday through Friday, unless it falls on a recognized state or federal holiday; (e) "Closing Date" is the day that the deed is recorded and sale proceeds are disbursed; and (m) "Signed and Delivered" means when the seller and buyer have both signed a document and delivered it to the other party by either manual delivery or electronic transmission.

MISCELLANEOUS

Also near the end of the Sale Agreement are a series of general contractual provisions, including the following:

(a) agreements become legally binding upon the parties when they are "Signed and Delivered;"
(b) buyers cannot assign agreements to purchase without the seller's consent;
(c) time calculated in days after a document has been Signed and Delivered starts on the first full business day after the date they have been Signed and Delivered;
(d) most deadlines for performance that are measured in days terminate as of 5:00 p.m. on the last day of that deadline;
(e) documents can be delivered electronically;
(f) real estate agents and firms identified in the Sale Agreement are not "parties" to the transaction;
(g) delivery of notices or documents to a party's real estate agent has the same legal effect as delivery to the party. Buyers, sellers, and their real estate agents must tell escrow how they prefer to receive notices (mail, email, fax, etc.); and
(h) time is of the essence, meaning that deadlines are important and will be enforced.

EARLY TERMINATION, DEFAULT, AND ALTERNATIVE DISPUTE RESOLUTION

Some transactions fail before closing, so it is important to know, in advance, the buyer's and seller's rights, duties, and liabilities if something occurs that causes an early termination. The Sale Agreement provides that (a) if certain contingencies are not satisfied or other events occur through no fault of the buyer (for example, if the loan is not approved, or the home appraises for less than the sale price, or a title defect cannot be removed), and (b) if the buyer gives notice of termination, the earnest money will be refunded and the transaction terminated. But if the transaction fails because a buyer changes their mind or terminates for some other unpermitted reason, the seller is entitled to the earnest money. Because the Sale Agreement says that keeping the earnest money is the seller's only remedy for a buyer's nonperformance, sellers should, before the Sale Agreement is signed, think about how much earnest money they want: will the deposit sufficiently compensate the seller if the buyer fails or refuses to close? Also, sellers should understand that if they change their mind after agreeing to sell their home, the buyer can ask an arbitrator to force the seller to close.

The Sale Agreement contains a section for alternative dispute resolution, which mandates that most disputes between sellers, buyers, and real estate agents must be resolved through private mediation and arbitration instead of using the courts. But if a dispute between a seller and buyer involves a money claim for $10,000 or less, it may only be brought to Small Claims Court.

MULTIPLE FORM PROVIDERS

With multiple form provider options in Oregon, buyers and sellers should understand their options. Those options can be reviewed in OREF 108 – Advisory and Instructions Regarding Real Estate Purchase and Sale Forms, which also allows buyers and sellers to select a form preference.

The "Offer to Purchase" and "Seller's Response" sections in the Sale Agreement explain that since an OREF Sale Agreement is being used, the parties agree to only use OREF forms for the remainder of the transaction because of the importance of consistent terminology and compatible documents.

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REAL ESTATE COMPENSATION

Compensation for real estate agents is not set by law and there is no standard or minimum level of compensation for real estate agents. Buyers and sellers are free to negotiate the amount of compensation with their real estate agent.

There are two kinds of real estate compensation agreements: agreements with sellers – frequently called "Listing Agreements," and agreements with buyers – frequently called "Buyer Representation Agreements." These agreements describe the services that real estate agents perform and provide them with a right to receive compensation. A written representation agreement is required by state law for a real estate agent to represent either a buyer or seller in a transaction.

Real estate agents have many duties and responsibilities required by Oregon law. Two of those duties are: (a) to be loyal to their clients by not taking action that is adverse or detrimental to the clients' interests in transactions; and (b) to disclose in a timely manner to their clients any conflict of interest, existing or contemplated.

Real estate agents may have a conflict of interest when they are advocating for their own compensation at the same time that they are advocating for their client's interests in a transaction. Real estate agents do not introduce discussions of their compensation into transactions because they are prioritizing client's interests ahead of their own. However, if the client wants their real estate agent to be paid by the other party in a transaction, the client can instruct their real estate agent to make that request in the sale agreement or an addendum. Parties are not required to agree to any such request. Buyers who are obtaining financing for a purchase should ask their lender whether there are limitations on the financing of real estate compensation or seller payment of closing costs.

Many other provisions in the Sale Agreement are important to buyers and sellers. Real estate agents are licensed to assist in purchasing and selling real estate. Still, real estate agents are not trained as lawyers, home inspectors, title examiners, or similar professionals. If a buyer or seller has questions that a real estate agent is not qualified to answer, the buyer or seller should contact an expert of their choice.

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 the Sale Agreement. If a buyer or seller wants to change or add other provisions to the Sale Agreement, it should be done by a written addendum that is also signed and dated.