CHANGES TO THE 2024 GAR FORMS

As has become an annual tradition, each new year brings REALTORS® a revised set of GAR Forms. As always, the GAR Forms Committee has been busy modifying its forms to hopefully make them clearer and easier to use. This article will discuss some of the more important changes to the GAR Forms for 2024. It should be noted that changes to one type of form, such as purchase and sale contracts, typically result in the same changes being made to all forms of that type. To avoid repetition, this article will only discuss the changes to one of each type of form rather than repeating the same changes to every form of a particular type.

1. CHANGES TO THE GAR PURCHASE AND SALE AGREEMENT (GAR FORM F201)

a. **Earnest Money Section Revised (Section A.7. and B.6.–.)**. This section was revised so that the method of payment of earnest money is determined by the holder of the earnest money. In other words, the buyer no longer has a choice regarding whether the earnest money is paid in cash, by check, wire, or ACH. This revision creates a bit of awkwardness if the earnest money is paid at the time the offer is made since the buyer would need to determine who the holder will be and what manner of payment is acceptable to the holder prior to making the offer. However, most earnest money is now paid several days after the binding agreement date where determining who is going to be the holder and the way that holder accepts earnest money is known.

b. **New "Smart Home" Section on Devices and Fixtures Added (Section B.4.c.)**. A new section was added requiring sellers either to provide buyers with all usernames, passwords, access codes and guest codes for electronic devices and fixtures remaining with the property or to reset those devices to factory defaults. The section also requires sellers to terminate their administrative access to such devices and any access they may have granted to third parties so that after the closing (and for obvious reasons) the seller or a third party related to the seller cannot control those devices or observe what is taking place in the house.

c. **Disbursement of Earnest Money Section Revised (Section B.7.b)**. This section was revised to provide that while the holder of earnest money can disburse the earnest money based upon a reasonable interpretation of the Agreement, this right does not include a right of the holder to divide the earnest money between the buyer and the seller. In other words, the holder can reasonably interpret the Purchase and Sale Agreement to give the earnest money in its entirety to either the buyer or the seller. Since dividing the earnest money is to some degree a finding that neither party was completely without fault, it was decided that this decision should be left to a judge after the earnest money was interpleaded into court. Of course, nothing prevents the buyer and seller from negotiating a settlement between themselves in which each party receives a portion of the earnest money and for the holder to then disburse based upon that agreement.

d. **Section on Damage Resulting from Inspection Revised (Section B.8.d.)**. New language was added that the obligation of the buyer to indemnify the seller for damage done to the property during an inspection does not apply to damage resulting from defects in the property uncovered during the inspection of the property. So, for example, if an inspector touches a piece

of rotted deck railing during an inspection and it falls to the ground, the buyer does not have to pay to replace the rotted wood.

e. **Buyer Must Get Seller Permission to List Property in a MLS (Section C.4.e.)**. The "Entire Agreement, Modification and Assignment" section (Section C.4.e.) was modified so that buyers cannot list the property for sale in a multiple listing service prior to closing without first getting the written permission of the seller. The goal in making this change was to avoid a scenario where the seller and the buyer are both listing or attempting to list for sale the same property at the same time.

f. **Language Regarding Assignment of Contract Modified (Section C.4.e.)**. The GAR Forms continue to provide that the contract cannot be assigned with the prior written consent of the seller. However, the section on the assignment of the contract was modified to provide that if the assignment is approved, any assignee is required to fulfill all the terms of the contract including the obligation to pay any commission owed by the assignor. This should help solve a problem that has arisen where investors assign the contract, and the assignee then argues that they have no obligation to pay any commission owed by the assignor. Language was also added to the Buyer Brokerage Engagement Agreement providing that if the commission is not paid by the assignee, the original buyer shall remain obligated to immediately pay such commission.

g. **Rules for Interpreting the Contract Revised (Section C.4.m.)**. This section of the contract was revised to make it clear that the Amendatory Clause in the FHA and VA Financing Contingency Exhibits controls over any other section of the GAR Purchase and Sale Agreement, including special stipulations. The Amendatory Clause in both of those exhibits was also revised to largely revert back to the language as written by FHA and VA. Since buyers are often required to resign the Amendatory Clause at or prior to the closing, having that clause be the same in all legal documents should help avoid confusion.

h. **What Survives Closing Expanded (Section C.4.o.)**. The section on what survives the closing was expanded to include the seller's liability for not timely removing items from the property (that the seller agreed to remove) and the section on fixtures and devices generally. Therefore, claims involving these matters do not get merged into the deed at closing and survive the closing. In other words, if the seller did not, for example, remove a heavy pool table from a house, and the buyer has to pay movers for the cost, the buyer can sue the seller after closing to recoup the cost.

i. **New Section Defining Closing Added (Section C.5.f.)**. A long definition of what constitutes a closing was added to the contract for the first time. The main point of the definition is that the sale has not closed until all of the closing documents and the deed have been signed and the closing attorney has received the funds to purchase the property. Of course, there are times when closings occur late in the day where the closing attorney receives all of the funds but cannot wire the funds to the seller until the next business day. Under the new definition, the transaction will be deemed to have closed on the day the funds are received by the closing attorney, not when the seller receives the proceeds from the sale. This is because the closing attorney could have given the seller a check for the sales proceeds even though that would likely result in the seller actually getting their hands on the cash later than if the sales proceeds were wired the next day.

j. **Changes Relating to Identity Theft (Section C.7.)**. This last year has brought more cases of fraudsters impersonating property owners, attempting to sell the legitimate owner's property, and, when successful, keeping the sales proceeds. Fraudsters appear to be particularly focused on trying to sell vacant lots they do not own to unsuspecting buyers. As a result, the "Disclaimer" section (Section B.10.c.) was revised to make it clear that the Broker is not

responsible for verifying whether the purported seller is really the true owner of the property. In addition, a new "Heightened Identification Procedures to Help Prevent Fraud" section was added (Section C.7.) warning buyers of the risks of identity fraud and encouraging them to be extra vigilant in verifying that the seller is the true owner of the property. The new section also requires the seller to comply with heightened identification procedures of the closing attorney. If the seller refuses to do so, the seller will be in breach of contract. Finally, the new language recognizes that some fraudsters have gotten so sophisticated, it is, in some cases, very difficult to detect that they are indeed fraudsters. Therefore, the new language includes a covenant not to sue either the broker or the closing attorney if the fraud is not detected and the buyer ends up buying the property from a fraudster who did not own the property. The safe solution for all buyers is to purchase a title insurance policy covering the buyers against seller identity fraud.

2. CHANGES TO THE EXCLUSIVE SELLER BROKERAGE ENGAGEMENT AGREEMENT (GAR FORM F101)

a. **Commission Section Revised (Sections A.4.a, A.4.b. and B.4.b.)** . Unlike many states, the GAR Brokerage Engagement Agreements have long made it clear that real estate commissions can be paid by either the seller or the buyer. However, in light of the various lawsuits that have been filed around the country alleging anti-trust violations, the GAR Forms Committee looked for ways to make this disclosure even clearer. For 2024, a boldface disclosure to this effect was added to the various brokerage engagement agreements. The disclaimer in the Exclusive Seller Brokerage Engagement Agreement (GAR Form F101) now provides as follows:

"NOTHING HEREIN SHALL OBLIGATE SELLER TO DIRECT BROKER TO PAY ANY PORTION OF ITS COMMISSION TO A COOPERATING BROKER. IN SUCH EVENT, THE BUYER SHALL BE RESPONSIBLE FOR PAYING THE COOPERATING BROKER'S COMMISSION."

A checkbox is then included for the seller to direct the seller's broker to either "☐ pay or ☐ not to pay a Cooperating Broker a portion of Seller's commission . . .". Similar language, which clarifies that the seller and seller's broker are not obligated to pay a commission to buyer's broker was added to the Buyer Exclusive Buyer Brokerage Engagement Agreement (GAR Form F110).

b. **New Section Added on Hazardous Conditions (Section C.2.)**. A new boldface disclosure was added to the Seller Brokerage Engagement Agreements regarding hazardous conditions on the property. The new language includes a seller acknowledgment that the broker has no duty to inspect the property for defects, hazardous conditions, repairs, or any other matter. The seller's duty under Georgia law to keep the property safe for prospective buyers and others coming onto the property and to warn such persons of dangerous conditions is also now included in the agreement. Sellers are encouraged in the new section to correct all hazardous conditions on the property. Finally, the seller agrees to indemnify and hold the broker harmless from and against all claims resulting from a person being injured on the property. This new section was added to try to help protect seller's brokers from lawsuits arising when buyers and others visiting the property as part of a real estate transaction get injured on the property as a result of a hazardous condition.

c. **FIRPTA Language Added to Exclusive Seller Brokerage Engagement Agreement (Section C.6.h.)**. Language was added to the Exclusive Seller Brokerage Engagement Agreement (GAR Form F101) explaining that under FIRPTA, foreign persons may have to pay additional taxes at the closing. This was done so that foreign persons are not surprised at closing by a possible need to pay a portion of the sales proceeds in taxes and can determine in advance what tax liability they might owe.

3. **CHANGES TO EXCLUSIVE BUYER BROKERAGE ENGAGEMENT AGREEMENT (GAR FORM F110)**

Many of the same changes made to the Exclusive Seller Broker Engagement Agreement (GAR Form 101) were also made to the Exclusive Buyer Brokerage Engagement Agreement (GAR Form F110).

a. **Clarification of Commission Obligations of Buyer Added (Sections A.4.a., A.4.e. and B.4.a.)**. While the commission obligations of the buyer were previously disclosed in earlier versions of this form, they have now been disclosed in all capital letters reading as follows:

"BUYER AGREES TO PAY BROKER THE COMMISSION SET FORTH BELOW ("COMMISSION") AT THE CLOSING OF A CONTRACT TO PURCHASE (AS THAT TERM IS HEREINAFTER DEFINED) ENTERED INTO DURING THE TERM OF THIS AGREEMENT MINUS ANY COMMISSION PAID TO BROKER BY EITHER THE SELLER'S BROKER OR THE SELLER. BUYER ACKNOWLEDGES THAT NEITHER SELLERS NOR SELLERS' BROKERS ARE OBLIGATED TO PAY ANY COMMISSION TO BROKER."

This new language in capital letters highlights what has long been the buyer's obligation to pay the buyer broker's commission in Georgia.

b. **Hazardous Conditions Disclosures Added (Section C.7.k.)**. This new section was added to warn buyers to use extreme caution in viewing properties to avoid injuring themselves. In particular, buyers are alerted to risks with "STEPS OR STEP DOWNS; POORLY LIT, DARK OR UNFINISHED AREAS; LOOSE HANDRAILS; WET, SLIPPERY OR UNEVEN FLOORING AND THE LIKE". In a related Hold Harmless section, the buyer also agrees to hold the broker harmless from claims related to injuries arising out of viewing properties. Hopefully, warning buyers to use extra care in viewing properties will help eliminate injuries.

4. **SELLER'S PROPERTY DISCLOSURE STATEMENT EXHIBIT REVISED (GAR FORM F301)**

a. **New Definition of "Knowledge" (Section A.2.)**. The instructions to seller in completing the Seller's Property Disclosure Statement Exhibit were revised for 2024 to include a definition of the term "Knowledge". Sellers are obligated to answer all questions based on their "knowledge". This term is defined as "fully, accurately and to the actual knowledge and belief of all Sellers".

b. **How Sellers Should Use the Disclosure Statement Revised (Section B.)**. This section was revised to try to more clearly explain that a "No" answer to a question means that the seller either knows a condition does not exist on the property or has no knowledge whether such condition exists on the property or not. The language in this section continues to warn buyers that caveat emptor or buyer beware remains the law in Georgia, so the buyer should conduct a thorough inspection of the property and not rely on the answers of seller as a guarantee or warranty of the actual condition of the property.

c. **Modifications to Questions Regarding Flooding (Sections C.8.a. and C.8.b.)**. The two questions about flooding were slightly modified to clarify that what is being asked about is flooding from the exterior of the home. The two questions are as follows:

i. Is there now or has there been any water intrusion into the basement, crawl space or other interior parts of any dwelling or garage or damage therefrom from the exterior?

ii. Have any repairs been made to control water intrusion into the basement, crawl space, or other interior parts of any dwelling or garage from the exterior?

d. **New Questions Added (Sections C.5.i. and C.9.c.)**. Some new questions were also added to the Seller's Property Disclosure Statement as follows:

i. Are there any remotely accessed thermostats, lighting systems, security camera, video doorbells, locks, appliances, etc. servicing the Property?

ii. Are there any shared improvements which benefit or burden the Property, including, but not limited to a shared dock, septic system, well, driveway, alleyway, or private road?

e. **Language Added on Removal of Items from Property (Section D.2.)**. New language was also added that items being removed from the property must be removed in a manner designed to do minimal damage. However, such items do not need to be replaced with a similar item. Moreover, the language now provides that reasonable efforts to repair damage shall not extend to painting newly exposed areas that do not match the surrounding paint color. So, if the area beneath a removed chandelier is pink and the rest of the ceiling is white, the seller does not have to paint the pink area white.

5. REVISIONS TO THE COMMUNITY ASSOCIATION DISCLOSURE STATEMENT (GAR FORM F322)

a. **Language Regarding Special Assessments Clarified (Section B.4.a.)**. This section was modified to make it clear that neither the broker nor the seller are under any obligation to disclose special assessments that are not yet "Under Consideration". This term means that a notice of a meeting at which a special assessment will be voted upon has been sent to the members of the association. The GAR Forms Committee felt that until such a notice of a meeting to vote on the special assessment is sent out to the members, the possibility of a special assessment is too speculative to require disclosure.

b. **Seller Pay for Undisclosed Assessments (Section B.4.c.)**. A new provision requires sellers to pay for not accurately disclosing the amount of the regular assessment owed by the seller. Specifically, the new language requires the seller to pay any assessment owed by the new owner in excess of the amount disclosed by the seller. So, for example, let's say that the assessment is $320 per month, but the seller discloses that it is $300 per month. Under this scenario, the seller would be obligated to pay the buyer at closing the $20 difference multiplied by the remaining months in the year.

c. **Language Regarding Who Pays for Special Assessments Clarified (Section B.4.c.)**. This section was modified to clarify who pays for special assessments. Specifically, if a special assessment is due, but may be paid in installments, then the installments coming due before or at closing would be the obligation of the seller, and the special assessments coming due after closing would be the obligation of the buyer. Of course, if the association requires payment of the entire special assessment at closing,~~,~~ then the entire special assessment would need to be paid by the seller.

6. CONVENTIONAL LOAN CONTINGENCY EXHIBIT (GAR FORM F404)

a. **Source of Loan Removed (Sections 1.A. and 1.B.)**. The source of the loan was removed from the Conventional Financing Contingency Exhibit (GAR Form F404) because it was felt not to be of particular importance in most real estate transactions. Most loans are with

institutional mortgage lenders, and the parties are still free to identify a specific mortgage lender in the form.

b. **Appraisal Contingency Revised (Section 13)**. An additional sentence of clarification was added to this form. Specifically, if the property does not appraise, and the buyer does not seek a price reduction, language was added requiring the buyer to purchase the property at the price agreed to by the parties. While this was always implied, it was not specifically stated.

7. FHA and VA LOAN CONTINGENCY EXHIBITS (GAR FORMS F407 AND F410, RESPECTIVELY)

a. **Amendatory Clause Revised (Sections 12 and 13)**. The amendatory clause was revised to largely revert back to the amendatory clauses as written by FHA and VA. A new "Further Agreement Pertaining to Amendatory Clause" was then added providing that if the property did not appraise and the seller was willing to reduce the sales price to the appraised price, the buyer had to move forward and purchase the property.

8. LOAN ASSUMPTION EXHIBIT SUBSTANTIALLY REVISED (GAR FORM F416)

The Loan Assumption Exhibit was one of those forms that had long been in the GAR Forms package, but it was rarely used. However, with interest rates having risen so dramatically over the last year, houses where the seller has an assumable loan have become a hot commodity. As a result, the GAR Forms Committee decided it was time to take a fresh look at this form and substantially update it.

In this regard, several new sections were added. First, a new "Buyer Entitlement for VA Loan Assumption" was added in which the buyer states that the "Buyer has sufficient VA entitlement for Loan being assumed and will replace Seller VA entitlement".

A new paragraph on the "Length of Financing Contingency Period" is also included for the first time. This is the number of days the buyer has to determine if the buyer has the ability to assume the loan. If the buyer does not terminate the contract prior to the end of the Financing Contingency Period (and provide a loan denial letter within seven (7) days from the termination date) then the buyer is presumed to have the ability to assume the loan.

A new paragraph was also added where the contract, depending on which checkbox is marked, either is or is not subject to the property appraising for at least the purchase price. If the purchase is subject to an appraisal and does not appraise, the buyer then has a defined period of time to ask for a price reduction. The appraiser must be a certified appraiser and only one appraisal can be performed. If the seller does not agree to the request for a price reduction to not less than the appraised price, then the buyer can terminate the contract. If the seller agrees to the request for a price reduction, then the buyer must proceed with the purchase.

9. LEASE FOR RESIDENTIAL PROPERTY (GAR FORM F913)

a. **Language Clarifying Administrative Fee (Section B.7.)**. Language was added explaining the purpose of the administrative fee referenced in section A.7 of the lease. The new language explains that the fee is to offset the holder's time and expense related to performing the move-in and move-out inspections required under Georgia law.

b. **When Early Termination Applies Clarified (Section A.13.)**. Language was added to the section stating that the requirement of landlord to give the tenant notice of early

termination and paying the tenant money for such a right does not apply if the lease is terminated due to a default by the tenant or the destruction of the premises. In those situations, the landlord can simply proceed to dispossess the tenant if the tenant does not timely move out.

c. **Holding Over Fee Explained (Section B.14.)**. Language was added to this section explaining that the holding over fee is intended to partially compensate the landlord for losses resulting from landlord's inability to secure a replacement tenant or sell the property due to tenant holding over. In addition, the landlord is entitled to seek damages resulting from either of the above.

d. **Subletting a Default (Section B.10.)**. Language was added to this section specifically providing that any advertising or online postings as well as actual rentals of the premises to vacation or short-term guests constitutes a material breach of the agreement for which the tenant shall not be given an opportunity to cure. Subletting remains a material breach of the agreement.

e. **New Property Damage Liability Exhibit (GAR Form F923)**. A new Property Damage Liability Exhibit was referenced in the lease and is discussed below.

10. NEW PROPERTY DAMAGE LIABILITY EXHIBIT (GAR FORM F923)

A new exhibit was added requiring the tenant to maintain an agreed upon amount of general liability insurance for the benefit of the landlord. The tenant can satisfy the requirement by purchasing a standard HO4 renter's insurance policy. Some tenants are participating in alternative programs offered by the property manager, and that option is offered in the exhibit.

CONCLUSION

The GAR Forms Committee largely makes changes to its forms based on requests from members to review particular provisions in the Forms. Hopefully, the Forms get a little better each year as these changes are made.