



ActionLine

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Brownfields in Florida

Florida Residential Purchase & Sale Contracts

Decanting — IRS Seeks Comments

All forms are not the same:

Comparison of FAR/FLA BAR 10 and FAR 9 Residential Contracts for Sale and Purchase

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This article provides an overview and comparison of the two 'standard' forms of residential real estate purchase and sale contracts that are most customarily used in Florida; the June 2010 Florida Realtors/Florida Bar 10 "As Is" Residential Contract for Sale and Purchase ("New Form"), and the Far 9 Residential Sale and Purchase Contract that was promulgated in 2007 ("FAR-9"). The New Form was prepared by a joint committee consisting of 10 attorneys and 10 realtors, and the FAR-9 Form was prepared by a committee of the Florida Realtors Association ("FAR").

The use of standard forms has an important role to facilitate residential real estate transactions, but it's important to understand that 'standard' does not mean that the forms are the same, and in fact, these two forms are markedly different from one another.

Analysis by Sections:

PROPERTY DESCRIPTION:

The New Form provides boxes to check for additional items that are included in the sale. The FAR-9 does not have this, though both forms provide for additional space to clarify what is included and excluded in the sale.

PURCHASE PRICE:

The New Form allows you to check a box indicating that the initial deposit can be due "upon acceptance;" lines were added for escrow agent's address and phone number, and more importantly checks are now subject to "collection" not "clearance." Collected means not susceptible to charge backs. This is a significant change from the prior forms and the FAR-9, which still permits the use of "cashier's checks."

TIME OF ACCEPTANCE OF OFFER AND COUNTER-OFFERS, EFFECTIVE DATE:

Both forms provide that offers are effective for two (2) days, and Effective Date is the date last signed and initialed. The New Form provides that **acceptance** only occurs when the offer has been accepted and delivered to the other party, while FAR-9 permits lesser standard of fact of execution to be communicated in writing to the other party.

EXTENSION OF CLOSING DATE:

The New Form provides that Closing may be extended by up to 7 days for TILA Notice requirements and Lender's failure (see financing section), but be careful as *lender's*

failure to fund on time does not fall within the definition of Force Majeure. The FAR-9 does not have any provision relating to TILA, but both forms permit extension of Closing Date for "force majeure".

OCCUPANCY AND POSSESSION:

If Property is subject to a lease, the New Form provides that Seller must comply with information disclosure and timing requirements set forth in Standard D of the form. The FAR-9 has similar provisions in its Rental Addendum. The New Form also provides that if pre-occupancy occurs, that Buyer assumes risk of loss, is responsible for maintenance and deemed to have accepted property in its *"as is" condition, and prorations will be made as of time of taking occupancy.* This provision should be looked at carefully, and consideration should be given to modification for a pre-occupancy or lease/purchase deal. The FAR-9 does not have this provision.

ASSIGNABILITY:

The New Form adds boxes for the parties to determine if the contract is assignable, and if so, to further designate whether assignment releases or does not release Buyer from liability under the Contract. The FAR-9 does not have these options, and provides that Buyer may not assign without Seller's written consent.

FINANCING:

The FAR-9 provides if Buyer remains silent and does not provide Seller with evidence of rejection within the Financing Period, that Buyer will be deemed to have waived the financing contingency for essentially all matters other than that the Property does not appraise. By contrast, the New Form does not have such strong consequences deriving from non-action. The New Form provides that *if Buyer is unable to obtain approval within the Financing Period, either party can terminate the Contract up to the day of Closing.*

CLOSING COSTS, TITLE INSURANCE, SURVEY, HOME WARRANTY, SPECIAL ASSESSMENTS:

The New Form provides that *if Seller is unable to meet its Maintenance Requirement as required by Paragraph 11, a sum equal to 125% of estimated cost shall be escrowed at Closing.* If actual costs exceed this amount, Seller shall pay the actual costs, and if not any unused portion of the

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escrow amount shall be returned to Seller. The FAR-9 does not have a similar provision. The New Form also requires delivery of a Title Commitment - at least _____ (if blank, then 5) days prior to the Closing Date (FAR-9 is 10 business days before Closing Date with copies of policy exceptions, with Buyer to respond within 5 business days from receipt thereof). The New Form requires Title Commitment to be delivered with legible copies of instruments listed as exceptions attached thereto. It also requires that **Seller deliver** (if it has these items) a copy of its Owner's Title Insurance Policy and its Survey to Buyer within 5 days from the Effective Date. Closing costs are similarly treated in New Form and FAR-9, except that New Form provides more specificity and requires that Seller pay for the municipal lien search if the Miami-Dade / Broward Regional Provision (Section 9(c)(iii)) is checked. Note that the *Miami-Dade / Broward Regional Provision codifies customary regional practices* for Seller to provide prior owner's title policy and pay a 'title update' fee, and the fee will be limited to \$200 if this provision is checked.

DISCLOSURES:

The New Form has a representation that is not in FAR-9 which states that unless disclosed otherwise "Seller does not know of any improvements made to the Property which were made without required permits or made pursuant to permits which have not been properly closed." This should be looked at with Section 12(c) – Property Inspection, Right to Cancel, Seller Assistance and Cooperation in Close Out of Open Permits – which imposes greater standards on Sellers than that provided in the FAR-9; however, as the Section may result in some ambiguity as to Seller's obligations, *Buyers are advised to add in both forms that Seller will close open permits, if any, prior to Closing.*

PROPERTY INSPECTION, RIGHT TO CANCEL:

The New Form has several minor variations from the FAR-

Millions in life insurance can be bought without ever paying a premium. World-class banks pay all costs for your high-worth clients with assets over \$5 million.

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9. The New Form *does not require Buyer to furnish Seller with a copy of the Inspection Report to terminate within the Inspection Period, nor to have repair items more than a specified amount as a pre-condition to terminate.* The New Form provides Buyer with a 15 calendar day Inspection Period (and no cancellation period thereafter), unless otherwise specified. *Buyer or Buyer's representative can specify date and time of walk-through for one day prior to the Closing Date or on the Closing Date.* If Buyer's inspection identifies open or needed building permits, Seller shall promptly deliver all plans and other documentation within Seller's possession and promptly cooperate in good faith, and execute necessary consents, but shall not be obligated to expend any money. By contrast, the FAR-9 provides for 10 business days for inspections with 5 business days to cancel thereafter, that the cost of treatment and repairs must be greater than \$250 (unless otherwise specified) and that Buyer must also deliver a copy of the inspection report to terminate.

ESCROW AGENT:

In the New Form Escrow Agents are authorized, and agree by acceptance, to deposit and hold funds subject to COLLECTION, and to disburse in accordance with the Contract. *Failure of funds to become COLLECTED shall not excuse Buyer's performance.* If Escrow Agent is a licensed real estate broker, the New Form states that Escrow Agent must also comply with Chapter 475 and FREC rules to timely resolve escrow disputes through mediation, arbitration, interpleader or an escrow disbursement order. See Florida Statute 475.25(1)(d)1 and DBPR Regulation 61J2-14.011. The FAR-9 does not have these provisions.

PROFESSIONAL ADVICE; BROKER LIABILITY:

The New Form contains a representation that Broker has no personal knowledge of the Property condition or square footage, but it's *important to delete this provision when the Seller is also acting as Broker.* The FAR-9 has similar, but much more extensive exculpatory provisions.

DEFAULT:

The New Form requires that in the event of a Buyer default, portion of the Deposit, IF ANY, paid to the Listing Broker, shall be split equally between Listing Broker and Cooperating Broker; provided, however, that Cooperating Broker's share shall not be greater than the commission amount Listing Broker had agreed to pay Cooperating Broker. A deposit dispute under this form requires the agreement of two parties (Buyer and Seller). The Brokers' rights to a deposit, if any, will derive from the listing agreement. *Contrast this to the FAR-9, which provides that the Broker will receive 50% of all deposits paid and agreed to be paid (to be split equally among Brokers) up to the full amount of the brokerage fee.* A deposit dispute under

this form requires the agreement of three parties (Buyer, Seller, and Broker).

DISPUTE RESOLUTION:

This is very different, and in the view of most real estate practitioners, is one of the most important changes from the FAR-9. The New Form requires that if there's a Dispute, Buyer and Seller will have a 10 day period to amicably resolve. *Unresolved disputes after 10 days are to be submitted to mediation. Disputes not resolved through pre-suit mediation may be litigated* (except that injunctive relief may be sought without seeking mediation). By contrast, the FAR-9 provides that parties have 30 business days to resolve deposit disputes through mediation and if that fails, the escrow agent decides the forum to resolve disputes – which may be one of three choices: arbitration, a Florida court, or the Florida Real Estate Commission (FREC).

ATTORNEYS FEES:

The New Form provides for attorney's fees to the prevailing party, whereas the FAR-9 does *not* provide for payment of attorney's fees, and thus, they are only available on FAR-9 for §57.105 frivolous claims or defenses.

Standards:

TITLE:

Both forms provide that *Buyer shall have 5 days after receipt of the Title Commitment to examine it and notify Seller in writing specifying defects, if any, that render title unmarketable.*

SURVEY:

Both forms provide that *Buyer shall deliver written notice of encroachments, easements, etc., within 5 days of Buyer's receipt of the Survey*, but no later than Closing. The New Form further provides that if Seller has delivered a prior survey, Seller shall, at Buyer's request, if applicable, execute an affidavit of "no change" to the Real Property since the preparation of the prior survey.

LEASES:

The New Form provides that *within 5 days after the Inspection Period Seller is required to furnish Buyer with copies of leases, estoppels and last 12 month's income and expense statement.* If Seller is unable to provide estoppels letters, Seller can furnish an affidavit and Buyer may thereafter contact Tenants to confirm this information. If terms of the Leases differ materially from what Seller represents, Buyer may deliver written notice to Seller within 5 days from receipt of the information but no later than 5 days prior to Closing terminating the Contract. At Closing, Seller shall deliver and assign all original leases to Buyer, who shall assume Seller's obligations thereunder. The

FAR-9 has similar provisions in its Addendum R.

LIENS:

The New Form requires that Seller shall provide Buyer with an affidavit at Closing attesting to the absence of any financing statement and that there have been no improvements or repairs within the past 90 days; or if so, Seller shall deliver releases for same. This is not in the FAR-9.

TIME:

The New Form provides for CALENDAR DAYS. By contrast the FAR-9 provides for BUSINESS DAYS. Any time periods which end on a Saturday, Sunday or legal holiday (see U.S.C. Section 6103) shall extend to 5:00 pm the next business day. Both forms provide that *time is of the essence.*

FORCE MAJEURE:

The New Form provides that Buyer and Seller shall not be required to perform in the event of *hurricanes, earthquakes, floods, fire, acts of God, unusual transportation delays, wars, insurrections, acts of terrorism, and any other cause not reasonably within the control of Buyer or Seller, and which, by the exercise of reasonable diligent effort, the non-performing party is unable in whole or part to prevent or overcome.* If such Force Majeure continues to prevent performance under the Contract more than 14 days beyond the Closing Date, then either party may terminate the Contract and the Deposit shall be refunded to Buyer. The FAR-9 has a similar provision, but provides for 30 rather than 14 days.

CLOSING LOCATION, DOCUMENTS AND PROCEDURE:

Both forms provide that Closing may be conducted by mail or electronic means.

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Correction: The article that appeared in the Fall 2011 issue of *ActionLine* entitled "Secret Trusts: (Some) Questions and (Fewer) Answers About Florida's New Designated Representative Statute" incorrectly included Thomas C. Lee, Jr., Esq. as an author instead of acknowledging Mr. Lee as a contributor. In fact, the only authors of that article were Robert J. Naberhaus III, Esq. and Mark R. Parthemer.

Comparison of FAR/FLA BAR 10 and FAR 9

ESCROW CLOSING PROCEDURE:

The New Form establishes a procedure if Closing takes place prior to receipt of COLLECTED funds, and thus, "gap" insurance is not available. This is not in the FAR-9.

PRORATIONS; CREDITS:

Both forms provide for *prorations as of the day prior to the Closing Date (ie, Closing Date is a Buyer's day)*. There are several subtle differences, however, in the provisions for proration for Real Estate taxes.

RISK OF LOSS:

The New Form requires Seller to expend up to 1.5% of the Purchase Price to restore or repair any damage occurring between the Effective Date and Closing Date. If repairs are not completed by Closing, 125% of cost of repairs shall be held in escrow at Closing. By contrast, the FAR-9 provides that if the Property is damaged by fire or other casualty and can be restored to its original condition that Seller shall restore the Property by the Closing Date or within 45 days thereafter.

Executive Summary

ITEM	FAR / FLABAR 10	FAR-9
Use of Funds	Checks/funds must be "collected" – ie, not susceptible to charge backs	Cashier's checks acceptable – though not recommended in practice
Preoccupancy	If preoccupancy, Buyer assumes risk of loss and responsibility for maintenance, and prorations as of date of occupancy	No similar provision
Financing	If financing not provided within financing period, either party may terminate from date of expiration of financing period to date of Closing . Termination requires affirmative action. New Form has more spaces to add financing conditions	If financing not provided within financing period Buyer, is thereupon deemed to have waived financing contingency except if property does not appraise
Closing Costs	Has optional Miami-Dade/ Broward regional provision that requires seller to pay for Municipal lien search and codifies customary regional practices, with \$200 limit for title update fee	No difference for Miami-Dade/ Broward and silent on payment for Municipal lien search. Otherwise similar.
Days	Calendar days	Business days
Inspection Period – Right to Terminate ("As-Is" Contract)	15 calendar days Not necessary to include inspection report	10 business days Necessary to include inspection report
Default	If any portions of deposits are paid to listing broker, shall be split between listing and cooperating broker. Effect is that brokers (unless escrow agent) are not a party to these disputes and rights to deposits, if any, derive exclusively from listing agreement	Broker will receive 50% of all deposits paid and agreed to be paid (to be split equally among brokers) up to full amount of brokerage fee
Dispute Resolution	Parties have 10 days to resolve, then required to mediate prior to filing a lawsuit (except that mediation is not required prior to filing for an injunction)	If unresolved after 30 days and mediation, escrow agent decides the forum to resolve disputes – with three options: FREC, arbitration or litigation
Attorney's Fees	Provides for attorney's fees to prevailing party	Does not provide for attorney's fees
Condominium Rider – Representations	Provides that Seller is not aware of an item on the agenda, or reported in the minutes within 12 months prior to the effective date	No similar provision. Note that both forms require 718 disclosures and delivery of declaration, bylaws, rules, most recent year end financials, and questions and answers