ARIZONA

FIRST QUARTER 2015

BROKER & MANAGER

QUARTERLY

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ARIZONA association of REALTORS®

REAL SOLUTIONS. REALTOR® SUCCESS.

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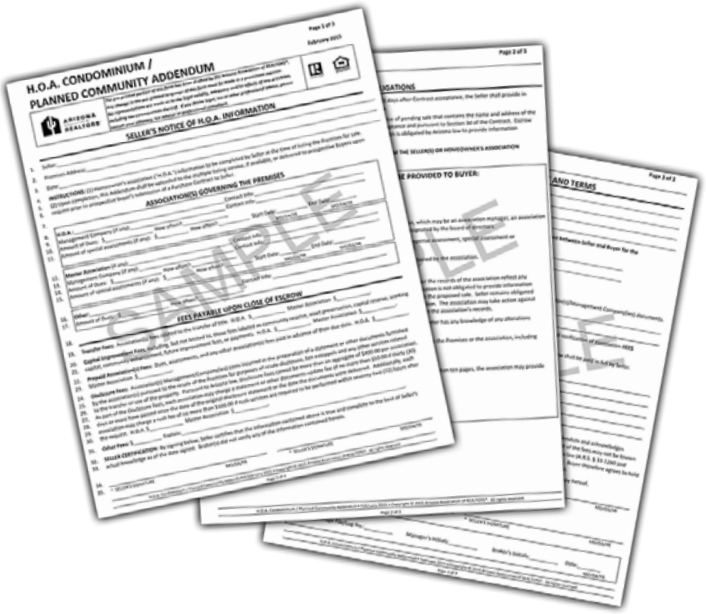
The Revised H.O.A. Condominium/ Planned Community Addendum

BY HOLLY ESLINGER, CHAIR - 2014 HOA ADDENDUM WORKGROUP

As the Chair of the HOA Addendum workgroup, I am excited to introduce to you a newly revised **H.O.A. Condominium/ Planned Community Addendum** (the "HOA Addendum"), that will take effect on February 2, 2015. [1] In the past, the HOA Addendum has been justifiably viewed as a buyer form in that it is completed entirely by the buyer and submitted by the buyer to the seller. As a result of its current structure, the buyer is often left to indicate which party pays for which HOA related fees without really knowing the amount of the fees. Consequently, buyers frequently submit their offer without knowledge of facts that would enable them to make an informed decision.

In an effort to remedy this issue, the workgroup created a revised HOA Addendum that is seller generated, much like the Seller's Property Disclosure Statement. Specifically, the form is now initiated by the seller who, when listing their home for sale, is asked to ascertain the HOA fees payable upon close of escrow and then disclose the fees on lines 19 through 33 of the revised form. Once this is done, the listing agent is instructed to upload all three pages of the HOA Addendum into the MLS, if available, or deliver the form to prospective buyers upon request.


H.O.A. CONDOMINIUM / PLANNED COMMUNITY ADDENDUM

SELLER'S NOTICE OF H.O.A. INFORMATION

ASSOCIATION(S) GOVERNING THE PREMISES

FEES PAYABLE UPON CLOSE OF ESCROW

SAMPLE

In completing the form, it is critical for sellers to provide information for all associations that may govern the property. In some cases, the property may be subject to a master association such as Dobson Ranch, Desert Ridge or McCormick Ranch, as well as an association for the individual subdivision that lies within the master association. On rare occasions, there may even be a third association. All will have to be contacted by the seller, and fees payable upon close of escrow disclosed for each.

The form itself is now set up in four parts. The first portion, found on page one, includes sections in which the seller discloses the association(s) that govern the property as well as the fees charged by the association(s) upon close of escrow. The second portion, found on page two, identifies legal obligations imposed upon the parties including information that must be provided to the buyer. Third is that portion of the form from lines 69 to 83, completed by the buyer, in which they submit their proposal as to which party pays for the HOA fees previously disclosed by the seller. Lastly, the fourth section consists of line 100, in which the seller can accept the buyer's proposal. Hopefully, this new structure will enable buyers and sellers to avoid last minute surprises regarding undisclosed HOA fees that can place the transaction in jeopardy.

Finally, because the form is significantly different than the previous version, it is important that agents be aware of the changes. Please therefore help us get the word out and discuss the new form at office meetings, on blogs and other appropriate venues.

For more information see our **Best Practices (pg. 3)** and our **HOA Addendum FAQs (pg. 5)**.

[1] Assisting me and making valuable contributions to the form were workgroup members Martha Appel, Pat Baldwin, Mike Garey, Ryan Halldorson, Jon Kitchen, Linda Lang, Trudy Moore, Wilma Purcell, June Shapiro, Patti Shaw, and Kay Wood. The workgroup was assisted by AAR staff members Scott Drucker, Nikki Salgat, Jan Steward, Cynthia Frey, and Nick Catanesi.

Questions or Comments: editor@aaronline.com | Excluding author photos (or if otherwise indicated), images are © iStockphoto LP.

ARIZONA association of REALTORS®

BROKER & MANAGER

FIRST QUARTER 2015 | ARIZONA BROKER/MANAGER QUARTERLY

IN THIS ISSUE

Best Practice Use of the HOA Addendum

BY SCOTT DRUCKER, ESQ. ARIZONA ASSOCIATION OF REALTORS® GENERAL COUNSEL

& NIKKI J. SALGAT, ESQ. ARIZONA ASSOCIATION OF REALTORS® ASSOCIATE COUNSEL

The newly revised H.O.A. Condominium/Planned Community Addendum (HOA Addendum) is scheduled for release on **Monday, February 2, 2015**. With the revision comes a change in the way the HOA Addendum is used. Accordingly, this article is intended to educate REALTORS® on best practices in using the revised HOA Addendum.

Before discussing the use of the revised form, it is important for members to understand the reason for the changes. In the eyes' of the Risk Management Committee, it was becoming increasingly common for parties to be surprised at close of escrow by previously undisclosed HOA fees that were due and payable upon close of escrow, and which neither the buyer nor seller had previously agreed to pay. In an effort to avoid this scenario, the Committee wanted to create a form that promotes a greater level of disclosure of the various fees that are payable upon close of escrow. This greater level of disclosure should allow for fewer surprises, happier clients and successful closings.

The HOA Addendum is now a three-page document that involves four parts.

PART ONE: THE SELLER

The Seller initiates the process by completing page one of the HOA Addendum. Page one involves identifying the Association(s) that govern the Premises, along with the amount of dues and/or special assessments. This section also asks the Seller to disclose the homeowner's association (HOA) fees payable upon close of escrow.

A. Identifying the HOA Information

Upon listing a property for sale, the Seller should identify all Association(s)/Management Company(ies) governing the Premises. The HOA Addendum includes three boxes for this information. The boxes are as follows: (1) the first box, starting at line 8, is for the HOA governing the Premises; (2) the second box, starting at line 12, is for properties that may be additionally subject to a master association; and (3) the third box, starting at line 16, is included for the rare occasion in which there is a third association governing the Premises.

The Seller should further include in each of the respective boxes the amount of dues owed to the Association(s)/ Management Company(ies) and how often those dues are paid (e.g. monthly, quarterly, or yearly). Additionally, if the Seller is aware of any current or pending special assessments, that amount should be included along with the start date and end date for the special assessment.

The Seller can find the above information by reviewing their association billing statement or contacting the Association(s)/Management Company(ies) that govern the Premises.

B. Identifying the Fees Payable Upon Close of Escrow

When listing a property for sale, the HOA Addendum further instructs the Seller to disclose the Fees Payable Upon Close of Escrow. The Fees Payable Upon Close of Escrow are located at lines 19 through 31 and are grouped into →

CONTINUED

categories which consist of the following: (1) Transfer Fees; (2) Capital Improvement Fees; (3) Prepaid Association(s) Fees; (4) Disclosure Fees; and (5) Other Fees. If there is a question as to what kind of fee falls under each of the categories, definitions of the fees conveniently follow each bolded category.

In completing this portion of the HOA Addendum, each association governing the property should be contacted, and the fees charged by each association at close of escrow should be disclosed. If there are fees charged by a third association, those fees should be included in one lump sum under "Other Fees" with an explanation provided.

C. Conveying the HOA Addendum

Once the HOA information and Fees Payable Upon Close of Escrow have been obtained, the Seller is to complete page one of the Addendum and place their signature on line 34. Thereafter, the entire three-page HOA Addendum is to be uploaded to the Multiple Listing Service, if available, or delivered to prospective buyers upon request.

The reason for uploading the HOA Addendum is so that prospective buyers will be able to easily access the HOA Addendum and take note of the Fees Payable Upon Close of Escrow. With this knowledge, the Buyer can make an informed decision as to which fees they are offering to pay as part of their purchase offer.

In the event that the local MLS does not permit the Addendum to be uploaded, or in the event that the listing agent fails to do so, the prospective buyer's agent should directly contact the listing agent and request that the HOA Addendum be promptly conveyed.

PART TWO: ADDITIONAL OBLIGATIONS

The second page of the HOA Addendum addresses the Seller's legal obligation to provide specific information (which is located in the box on page 2) to the Buyer if the HOA has less than 50 units. However, if the HOA has 50 units or more, lines 38 through 41 address the association's obligation to provide the information to the Buyer.

PART THREE: THE PROSPECTIVE BUYER

Prior to submitting their purchase offer, the Buyer should secure a copy of the Addendum in which page one has been completed by the Seller. The Buyer should review the fees disclosed on page one and should then contact the Association(s)/ Management Company(ies) to obtain verbal verification of the Fees Payable Upon Close of Escrow. Once the Buyer feels that they understand the Fees Payable Upon Close of Escrow, they are to complete page three of the HOA Addendum, thereby identifying which party pays for which fees. Finally, the Buyer signs the HOA Addendum at line 100 and conveys all three pages of the HOA Addendum to the Seller upon submission of their purchase offer.

PART FOUR: THE SELLER

Upon receipt of the HOA Addendum, the Seller decides whether to accept or counter the Fees Payable Upon Close of Escrow as proposed by the Buyer.

If the Seller is unwilling to accept the Buyer's proposal regarding the Fees Payable Upon Close of Escrow, the Seller has two primary options. First, the Seller can simply reject the Buyer's purchase offer. Alternatively, the Seller can submit a counteroffer to the Buyer that contains the Seller's proposal for who pays what fees.

For more information on the changes and use of the HOA Addendum, please see the **HOA Addendum FAQs (p. 5)**.

This article is of a general nature and reflects only the opinion of the author at the time it was drafted. It is not intended as definitive legal advice, and you should not act upon it without seeking independent legal counsel.

H.O.A. Condominium/Planned Community Addendum – Frequently Asked Questions

BY SCOTT DRUCKER, ESQ. ARIZONA ASSOCIATION OF REALTORS® GENERAL COUNSEL

As of February 2, 2015, the Risk Management Committee released an updated H.O.A. Condominium/Planned Community Addendum. For more information on the form see our introduction here or our best practices here.

Q: Why did the Risk Management Committee believe it necessary to revise the H.O.A. Condominium / Planned Community Addendum (the "HOA Addendum")?

A: In the eyes of the Risk Management Committee, it was becoming increasingly common for parties to be surprised at close of escrow by previously undisclosed HOA fees that were due and payable upon close of escrow and which neither the buyer nor seller had previously agreed to pay. In an effort to avoid this scenario, the Committee wanted to create a form that promotes a greater level of disclosure of the various fees that are payable upon close of escrow.

Q: Who takes the initial steps in completing this Addendum and what exactly are they supposed to do?

A: Upon listing a property for sale, the Seller is instructed to contact the Association(s)/Management Company(ies) that govern the Premises to obtain an understanding of the HOA fees payable upon close of escrow. Once that information has been obtained, the Seller is to complete page one of the Addendum and place their signature on line 34. Thereafter, the entire three-page Addendum is to be uploaded to the Multiple Listing Service, if available, or delivered to prospective buyers upon request.

Q: Why does page one of the Addendum not ask for the identity of the Buyer?

A: At the time page one is being completed by the Seller, the identity of the Buyer will not yet be known.

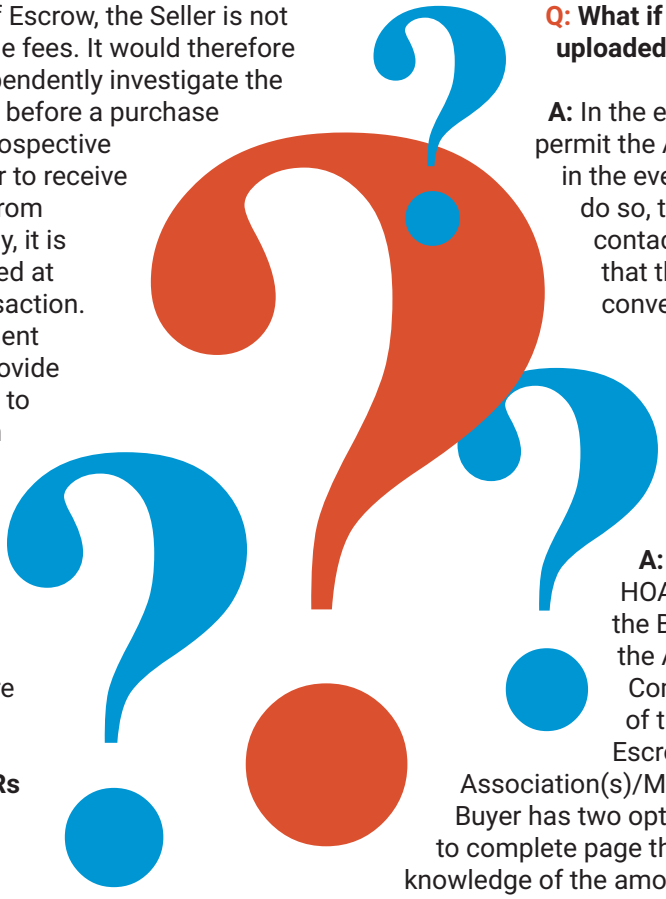
Q: What steps does the Buyer take in regard to this Addendum when submitting a purchase offer?

A: Prior to submitting their purchase offer, the Buyer should secure a copy of the Addendum in which page one has been completed by the Seller. The Buyer should review the fees disclosed on page one and should then contact the Association(s)/Management Company(ies) to obtain verbal verification of the Fees Payable Upon Close of Escrow. →

Once the Buyer feels that they understand the Fees Payable Upon Close of Escrow, they are to complete page three of the Addendum, thereby identifying which party pays for which fees. Finally, the Buyer signs the Addendum at line 100 and conveys all three pages of the Addendum to the Seller upon submission of their purchase offer.

Q: Why do lines 82-83 of the form request that the prospective Buyer contact the Association(s)/ Management Company(ies) to obtain verbal verification of the Fees Payable Upon Close of Escrow?

A: Although the Seller has used best efforts to identify the Fees Payable Upon Close of Escrow, the Seller is not guaranteeing the accuracy of the fees. It would therefore benefit a prudent buyer to independently investigate the amount of these fees, including before a purchase offer is submitted. And while prospective buyers would presumably prefer to receive written verification of the fees from the HOA/Management Company, it is unlikely that such will be provided at this very early stage of the transaction. Specifically, the HOA/Management Company will most likely not provide written confirmation of the fees to the Buyer unless a fee has been paid as permitted by A.R.S. § 33-1260 and A.R.S. § 33-1806. The workgroup was concerned that if the word "verbal" was omitted from line 82, buyers would insist upon receiving written documentation to which they are not yet entitled.



Q: In some instances, the CC&Rs that govern the property may dictate which party pays for a specific fee(s). How does this impact the Buyer and Seller?

A: Even if the CC&Rs designate the payor of a specific fee(s), the parties can, nonetheless, negotiate which party will pay that fee at close of escrow.

Q: If the Fees Payable Upon Close of Escrow as identified on page one of the Addendum are incorrect, is the Seller or the Seller's broker subject to liability?

A: No. Lines 94 through 98, titled Buyer Acknowledgement, explain that the parties may not know the exact amount of the fees until written disclosure documents are paid for, and furnished by, the Association(s)/Management Company(ies). As a result, the Buyer agrees to "hold Seller and Broker(s) harmless should the Fees Payable Upon Close of Escrow prove incorrect or incomplete."

Q: What is the purpose of uploading the HOA Addendum into the MLS?

A: Once page one of the Addendum is completed by the Seller, the entire three-page form is to be uploaded to the MLS, assuming that the local MLS permits such action. The reason for uploading the Addendum is so that prospective buyers will be able to easily access the Addendum and take note of the Fees Payable Upon Close of Escrow. With this knowledge, the Buyer can make an informed decision as to which fees they are offering to pay as part of their purchase offer.

Q: What if the HOA Addendum is not uploaded into the MLS?

A: In the event that the local MLS does not permit the Addendum to be uploaded, or in the event that the listing agent fails to do so, the Buyer's agent should directly contact the listing agent and request that the HOA Addendum be promptly conveyed.

Q: What if, despite all of their efforts, the listing agent is unable to obtain a copy of an HOA Addendum completed by the Seller?

A: If unable to obtain a completed HOA Addendum from the Seller, the Buyer should try to contact the Association(s)/Management Company(ies) for verbal verification of the Fees Payable Upon Close of Escrow. If the Buyer cannot reach the Association(s)/Management Company(ies), the Buyer has two options. First, the Buyer can elect to complete page three of the Addendum without knowledge of the amount of the fees, and then submit all three pages of the addendum with their purchase offer. (Note – Under this fact scenario, page one of the Addendum would be blank.) Alternatively, the Buyer can submit their purchase offer without submission of the HOA Addendum, noting on the Purchase Contract that their offer is contingent upon the parties' execution of the HOA Addendum once the Fees Payable Upon Close of Escrow have been successfully negotiated.

Q: If the property is governed by an HOA, does that mean that it is also governed by a Master Association?

A: No. While some communities may be governed by more than one association, most are governed by only a single association.

Q: Upon payment of the fee authorized under A.R.S. § 33-1260 and A.R.S. § 33-1806, the Association(s)/ Management Company(ies) will provide written resale disclosure documents that state with certainty the Fees Payable Upon Close of Escrow. If the Buyer does not approve of the fees, can the Buyer cancel the contract?

A: Yes. The Purchase Contract provides the Buyer five (5) days after receipt of exceptions to Buyer's policy of Title Insurance (which includes CC&Rs and other association documents) to provide written notice to the Seller of any items disapproved. Accordingly, if after receipt of the written resale disclosure documents, the Buyer disapproves of the Fees Payable Upon Close of Escrow, the Buyer can deliver to the Seller a signed notice of any items disapproved and elect to cancel the Contract. This fact is reiterated on lines 42 and 43 of the Addendum. Additionally, the Buyer is encouraged to investigate the Fees Payable Upon Close of Escrow during the Inspection Period provided for in the Purchase Contract. If during that time the Buyer does not approve of the Fees Payable Upon Close of Escrow, prior to expiration of the Inspection Period, Buyer can deliver to the Seller a signed notice of any items disapproved and elect to cancel the contract.

Q: Why does line 78 require the Seller to pay all Disclosure Fees?

A: This is a requirement imposed by Arizona law as A.R.S. § 33-1260(C) and A.R.S. § 33-1806(C) allow the HOA to charge **"the unit owner"/"member"** a fee of no more than an aggregate of four hundred dollars to compensate the association for the costs incurred in the preparation of a statement or other documents furnished by the association pursuant to the resale of the Premises for purposes of resale disclosure.

Q: What if the Seller is not willing to accept the Buyer's proposed terms set forth on lines 75 through 81 of the HOA Addendum?

A: If the Seller is not willing to accept the Buyer's proposal regarding the Fees Payable Upon Close of Escrow, the Seller has two primary options. First, the Seller can simply reject the Buyer's purchase offer. Alternatively, the Seller can submit a counteroffer to the Buyer that contains the Seller's proposal for who pays what fees.

Q: Why doesn't the HOA Addendum ask the Seller to identify a list of services provided by the HOA?

A: The HOA Addendum is intended solely to disclose the Fees Payable Upon Close of Escrow and determine which party will pay for which fees. Furthermore, it would likely prove very difficult for a seller to compile an exhaustive list of this nature.

Q: What if HOA dues are voluntary?

A: If HOA dues are voluntary, the HOA Addendum is not required. However, the Seller should still disclose the existence of a voluntary HOA to the prospective buyer.

This article is of a general nature and reflects only the opinion of the author at the time it was drafted. It is not intended as definitive legal advice, and you should not act upon it without seeking independent legal counsel.

Real Estate Advertising Rules & Guidance

BY COMMISSIONER JUDY LOWE, ARIZONA DEPARTMENT OF REAL ESTATE

& K. MICHELLE LIND, ESQ., ARIZONA ASSOCIATION OF REALTORS® CHIEF EXECUTIVE OFFICER

The Advertising of Real Property is Regulated by Law: Arizona real estate law defines "advertising" as:

- the attempt by publication, dissemination, exhibition, solicitation or circulation, oral or written, or for broadcast on radio or television
- to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in [real property] including the land sales contract to be used, and
- any photographs, drawings or artist's presentations of physical conditions or facilities existing or to exist on the property.

Generally, advertising does not include (a) press releases or other communications delivered to news media for general information or public relations purposes for no charge; or (b) communications to stockholders as specified in the statute. A.R.S. §32-2101(2).

The Arizona Department of Real Estate Commissioner's Rules, A.A.C. R4-28-502, set forth the rules for real estate advertising. Notably, these rules specify that the use of an electronic medium, such as the Internet or web site technology that targets Arizona residents with the offering of a property interest or real estate brokerage services pertaining to property located in Arizona also constitutes advertising. A.A.C. R4-28-502(L) (*See also*, A.R.S. §32-2163(D)). Thus, online advertising is subject to the same rules as print advertising.

Consider the following rules and guidelines when advertising real property, either as an entity, an individual or as a member of a real estate team.

Clear and Prominent Identification of the Employing Broker: A licensee must ensure that all advertising identifies, in a clear and prominent manner, the employing broker's legal name or the dba name contained on the employing broker's license certificate. A.A.C. R4-28-502(E). The employing broker is the corporation, limited liability company, partnership or sole proprietorship licensed as the broker. The employing broker designates a natural person to act as the designated broker. The rule requiring clear and prominent identification of the employing broker ensures that the public is made aware of the person or entity responsible for supervision. Although "clear and prominent" is a somewhat subjective term, it means "readily noticeable," which may relate to size or position. Consider the following rules and guidelines:

- The employing broker's name must be included in all advertisements, including classified ads, real estate advertising guides, and other magazine ads.
- In advertising flyers, the employing broker's name may be located on either the top or the bottom of the flyer however the employing broker's name must be clearly legible.
- On any other promotional material the employing broker's name must be on the front page or front of the object.
- The employing broker's name must be visible on the front page of the website and each subsequent page of the website, without the necessity of scrolling down, regardless of the screen size of the computer.
- When advertising real property on social media, such as Facebook, the name of the employing broker must be stated. When advertising real property in "thumbnails", text messages, "tweets", etc., where stating the name of the employing broker firm is not practical, the advertising information being linked to must include the name of the employing broker.
- With team advertising it must be clear that the team is a part of the employing brokerage. For example, placing *"The (Team Name) Team"* at the top of the page in large letters with a much smaller brokerage symbol somewhere below is not sufficient.
- The employing broker's name must be spelled out in its entirety. For example, if an employing broker's legal or dba name on a license includes "Southeast Valley," that is what must appear in the ad; simply saying "SE" is not sufficient.
- If the brokerage is an office of a franchise, the office must be identified; simply displaying the franchise name alone is not sufficient.

"Blind Ads": A licensee must not advertise property in a manner that implies that no salesperson or broker is taking part in the offer for sale, lease, or exchange. A.A.C. R4-28-502(A). In other words, "blind ads", including advertising a property for sale without the broker and agent's names, in newspapers, on Craigslist, or otherwise is prohibited.

"Owner/Agent": Any licensee advertising their own property for sale, lease, or exchange must disclose the licensee's status as a salesperson or broker and as the property owner by placing the words "owner/agent" in the advertisement. A.A.C. R4-28-502(B). When advertising your own property, include "owner/agent" in all advertising, including any "for sale" sign.

Accurate Claims: A licensee must ensure that all advertising contains accurate claims and representations, and fully states factual material relating to the information advertised. A salesperson or broker must not misrepresent the facts or create misleading impressions. A.A.C. R4-28-502(C).

Advertising another Licensee's Listing: A licensee advertising property that is the subject of another licensee's real estate employment agreement must display

the name of the listing broker in a clear and prominent manner. A.A.C. R4-28-502(F).

Permission for "For Sale" Signs: Before placing or erecting a sign giving notice that specific property is being offered for sale, lease, rent, or exchange, a salesperson or broker must secure the written authority of the property owner, and the sign must be promptly removed when authority expires, or upon request of the property owner. ARS§ 32-2153(12); A.A.C. R4-28-502(H).

Acre: A licensee must not use the term "acre," either alone or modified, unless referring to an area of land representing 43,560 square feet. A.A.C. R4-28-502(L).

Trade Names: Any broker using a trade name owned by another person on signs displayed at the place of business must place the broker's name, as licensed by the Department on the signs; and the broker must include the following legend, "Each (TRADE NAME or FRANCHISE) office is independently owned and operated," or a similar legend approved by the Commissioner, in a manner to attract the attention of the public. ARS §32-2126; A.A.C. R4-28-502(K).

Real Estate Schools: A school must include its name, address and telephone number in all advertising of Department-approved courses. The school owner, director, or administrator must supervise all advertising and the school owner must ensure that the school's advertising is accurate. A.A.C. R4-28-502(D).

Broker Supervision: The designated broker must supervise all advertising, for real estate, cemetery, or membership camping brokerage services. A.A.C. R4-28-502(G).

In conclusion, the Department of Real Estate receives numerous advertising complaints each month, primarily from other licensees, and will sanction those licensees in violation of the advertising rules. Therefore, if you have a question about your advertising practices, please contact your broker or the Department at www.azre.gov (message center) for guidance. And, if you notice a possible advertising violation by another licensee, consider contacting the person or the broker about the issue before filing a complaint.

The Use of Drones Is Still Up In The Air

BY NIKKI J. SALGAT, ESQ. ARIZONA ASSOCIATION OF REALTORS® ASSOCIATE COUNSEL

Stay Away From Drones – For Now

The use of drones is an innovative tool for marketing real estate. However, recently there has been a lot of controversy over whether real estate agents, amongst others, are allowed to use drones or unmanned aircraft systems (UAS) for that purpose. More specifically, the Federal Aviation Administration (FAA) maintains that drones or UASs may only be used for hobby or recreational use. Nonetheless, the FAA permits the commercial use of drones on a case-by-case basis, and an FAA certificate of airworthiness is required. Accordingly, if a drone is used for a commercial purpose, such as to market real estate, the FAA asserts that the user is in violation of FAA regulations and the user could be subjected to a $10,000 fine.

Although the FAA does not currently approve of the use of drones for marketing real estate, the FAA is developing a system for integrating commercial use of drones into the national airspace. To protect and promote real estate agents interests, the National Association of Realtors® (NAR) is working with the FAA to expedite the development of rules to allow real estate professionals to use drones to market properties. However, until clear-cut regulations are released, NAR "recommends against members use of drones for real estate marketing purposes and against hiring companies to do the same until such time as the FAA issues regulations providing for the commercial use of unmanned aircraft."

For more information regarding drones, go here and here.

Update: Droning On

While many have heard the recent news that Arizona REALTOR® Douglas Trudeau received permission from the FAA to fly a UAS, it does not mean any real estate agent can use a drone to market their listings. Rather, agents should not use a drone to market real estate unless they receive an exemption from the FAA, like Mr. Trudeau. Stated differently, the FAA prohibits the use of drones to market real estate unless the drone operator receives an exemption from the FAA. Notably, amongst additional extensive rules, Mr. Trudeau's exemption required either a temporary airman certificate or a private pilot certificate. Accordingly, unless the agent has received an exemption from the FAA, the agent should not fly a drone to market property. Similarly, if a company does not have a drone operator that has received the FAA exemption, agents should not hire that company to market a property for sale.

Click here for more information regarding the FAA's exemption

This article is of a general nature and reflects only the opinion of the author at the time it was drafted. It is not intended as definitive legal advice, and you should not act upon it without seeking independent legal counsel.

Planning to Practice Real Estate in 2015?

BY SCOTT DRUCKER, ESQ. ARIZONA ASSOCIATION OF REALTORS® GENERAL COUNSEL

Among the many issues that the 2015 AAR Risk Management Committee will address are changes to the closing process that the Consumer Financial Protection Bureau will implement on August 1, 2015. Under the guidance of 2015 Risk Management Committee Chair, Martha Appel, AAR will join with the National Association of REALTORS® and title companies across the state to educate REALTORS® on the new forms and closing procedures that will soon take effect.

As part of its continuing overhaul of the home mortgage market, the Consumer Financial Protection Bureau is eliminating the HUD-1 Settlement Statement and replacing it with a new Closing Disclosure. The new form, which will take effect on August 1, 2015, is designed to provide disclosures that will help consumers better understand all of the costs associated with the transaction. This document will be provided to consumers three business days before they close on their mortgage loan, and the bureau has published a version of this new form completed in the proper manner. The mock-up, which can be viewed at http://files.consumerfinance.gov/f/201311_cfpb_kbyo_closing-disclosure.pdf, is particularly helpful in understanding what the Closing Disclosure will look like upon completion.

Additionally on August 1, 2015, the current Good Faith Estimate and the current Truth in Lending Disclosure will be replaced by a new Loan Estimate. This form, which will be provided to consumers within three days after they submit a mortgage loan application, is designed to provide disclosures that will help borrowers understand the key features, costs and risks of the mortgage loan for which they are applying. A completed loan estimate form for a borrower in a purchase transaction can be found at http://files.consumerfinance.gov/f/201311_cfpb_kbyo_loan-estimate.pdf, and a completed loan estimate form for a borrower in a refinance transaction can be found at http://files.consumerfinance.gov/f/201311_cfpb_kbyo_loan-estimatefor-refinancing.pdf.

For a comparison of the existing forms and the forms that will take effect on August 1, 2015, go to http://www.consumerfinance.gov/knowbeforeyouowe/compare/.

An additional resource REALTORS® may wish to take advantage of are compliance guides that are intermittently published by the Consumer Financial Protection Bureau. While some of the guides are more helpful and concise than others, one that is easy to understand is titled Final Rule on Simplified and Improved Mortgage Disclosures, and can be found at http://files.consumerfinance.gov/f/201311_cfpb_tila-respa_detailed-summary.pdf. This guide, which was issued on November 20, 2013, is only seven pages in length and provides a broad overview of the upcoming changes. A more detailed guide is the bureau's TILA-RESPA Integrated Disclosure Rule Small Entity Compliance Guide found at http://files.consumerfinance.gov/f/201409_cfpb_tila-respa-integrated-disclosure-rule_compliance-guide.pdf. Although a more recent publication, having come out in September 2014, it is 91 pages in length and addresses relatively detailed and complex topics that may not prove applicable to a majority of REALTORS®.

Throughout 2015, AAR, by way of the Risk Management Committee, will continue to provide members with valuable information on these upcoming changes. The Risk Management Committee will additionally review and evaluate AAR's current forms to ensure that they align with the Consumer Financial Protection Bureau's new closing procedures. AAR members should therefore keep an eye out for articles, classes, webinars and blog posts designed to keep agents abreast of the changes that we will experience in the coming year.

This article is of a general nature and reflects only the opinion of the author at the time it was drafted. It is not intended as definitive legal advice, and you should not act upon it without seeking independent legal counsel.

Residential Seller's Property Disclosure Statement: Why It Matters

BY SCOTT DRUCKER, ESQ.
ARIZONA ASSOCIATION OF REALTORS® GENERAL COUNSEL

As General Counsel for the Arizona Association of REALTORS®, I am frequently contacted by members of the association regarding proper usage of AAR forms. Recently, I have received a number of inquiries regarding the Residential Seller's Property Disclosure Statement (SPDS). While the questions and comments about this popular form run the gamut, I am repeatedly asked about sellers electing not use the SPDS. I therefore want to share the three most common questions I receive on this topic, along with my thoughts on the proper answer.

QUESTION ONE: Who benefits the most from use of the Residential Seller's Property Disclosure Statement?

ANSWER ONE: Without question, use of the SPDS benefits the seller above all other parties to the transaction. Sellers are obligated by law to disclose all known material facts about the property to the buyer. The most effective way for sellers to comply with these legal obligations is to complete the SPDS to the best of their knowledge. Without using the SPDS, it is more likely that sellers will inadvertently fail to disclose a material fact, potentially subjecting them to liability. So while the SPDS is undoubtedly helpful to buyers in deciding whether to purchase the property, the form itself is of greatest benefit to sellers. For this reason, a seller may want to think twice before completing a transaction without using this document, even in instances in which the seller lacks knowledge of all aspects of the property.

QUESTION TWO: Aren't sellers best protected by having the buyer waive the SPDS?

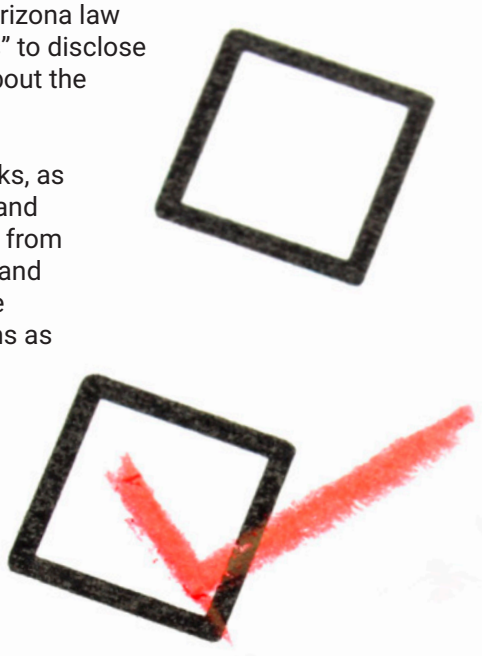
ANSWER TWO: Absolutely not. In fact, the opposite is likely true. This point is addressed at the top of the Residential Seller Disclosure Advisory, which is titled "When In Doubt – Disclose!". The pertinent language states:

> Arizona law requires the seller to disclose material (important) facts about the property, even if you are not asked by the buyer or a real estate agent. These disclosure obligations remain even if you and buyer agree that no Seller's Property Disclosure Statement ("SPDS") is provided.

As such, an agreement to waive the SPDS does not excuse the seller's disclosure obligations. Rather, it makes it: (1) harder for sellers to satisfy their disclosure obligations; and (2) more likely that sellers will inadvertently fail to disclose a material fact, potentially rendering the seller liable for undisclosed defects. Sellers should also keep in mind that even if the property is sold in as-is condition, they are still subject to the same legally imposed disclosure obligations.

Discussing this issue with one prominent agent, he explained a practice he employs on his client's behalf when the listing expressly states "Buyer to waive SPDS." In the Additional Terms and Conditions Section of the Residential Resale Real Estate Purchase Contract, the agent, when representing the buyer, writes: "Seller acknowledges that even though no SPDS will be conveyed, Seller's disclosure obligations under Arizona law remain." In several instances, this language has caused sellers to reconsider their position and ultimately convey a completed Disclosure Statement.

QUESTION THREE: Does Arizona law require banks and "flippers" to disclose all known material facts about the property to the buyer?



ANSWER THREE: Yes. Banks, as well as investors who buy and flip homes, are not exempt from the law. As a result, banks and "flippers" are subject to the same disclosure obligations as all other sellers.

And while banks and flippers often claim to know nothing about the property because they never resided there,

such representations are frequently false. Virtually all banks perform inspections of their REO (bank owned) properties. In many cases, these inspections cause the bank to authorize certain repairs before the home is sold. Similarly, many "flippers" repair and/or upgrade portions of the property before listing it for sale, leading to the term "fix and flip." So while it is true that banks and "flippers" do not reside in the property, in many instances, each has knowledge of the property's condition, as well as repairs that were made prior to sale. Banks and "flippers" who fail to disclose these material facts subject themselves to potential liability.

Despite the above, there are and will continue to be transactions in which no SPDS is provided to the buyer. Under those circumstances, it is recommended that the buyer's agent have documented communication with their client addressing the associated risks and emphasizing the importance of hiring professional inspectors to thoroughly investigate the property's condition. It's also a good practice to provide a blank SPDS to the buyer and obtain written acknowledgment that the buyer received the document, such as by initialing or signing a copy.

Ultimately, the SPDS is a tool designed to protect the seller. Sellers who choose not to complete the document do so at their own risk as this course of action increases their potential liability. It is therefore prudent for all sellers, including banks and investors who buy and flip homes, to utilize the SPDS in each and every transaction to better ensure compliance with their legally imposed disclosure obligations.

This article is of a general nature and reflects only the opinion of the author at the time it was drafted. It is not intended as definitive legal advice, and you should not act upon it without seeking independent legal counsel.

CHANGES IN 2014

2014 FORMS, ADVISORIES, ARTICLES AND TRANSLATIONS

Forms New/Revised:

- Seller Financing Addendum with Seller Attachment (Only 1 Residential Property) Released January 2014, Revised February 2014
- Seller Financing Addendum with Seller Attachment (3 or Fewer Residential Properties) Released January 2014, Revised February 2014
- Seller Financing Addendum (Non-Consumer Credit Transaction) Released January 2014, Revised February 2014
- Buyer Contingency Addendum (Revised, February 2014)
- Mutual Cancellation of Property Management Agreement (February 2014)
- Notice of Cancellation of Property Management Agreement (February 2014)
- Residential Lease Agreement (Revised, February 2014)
- Seller's Property Disclosure Statement (SPDS) (Revised, June 2014)
- Referral Fee Agreement (October 2014)
- Minor Changes to Contracts/Forms:
  - Residential Resale Purchase Contract, Vacant Land/Lot Purchase Contract, Commercial Contract, Purchase Contract for New Home—with Lot, (Statutory Change January 2014, Small Claims Ceiling Raised)
  - Residential Resale Purchase Contract & Vacant Land/Lot Purchase Contract (Addenda Incorporated—Removed Assumption/CarryBack, Added Loan Assumption and Seller Financing)
  - Additional Clause Addendum (Aligned Sections of Addendum with Residential Resale Purchase Contract & Vacant Land/Lot Purchase Contract (October 2014)

Most Recent Advisory Updates:

- Buyer Advisory (Reformatted and Most Recent Update December 2014)
- Lease Owner's Advisory (Most Recent Update December 2014)

AAR Spanish Translation Forms & Advisories:

- Tenant Advisory
- Move In/Move Out Checklist
- Agreement Notice Pursuant to the Short Sale Addendum
- Revised Residential Lease Agreement
- Revised Seller's Property Disclosure Statement

View AAR Sample Forms:
http://www.aaronline.com/manage-risk/sample-forms/

AAR Spanish Translation Forms, Advisories and Flyer:
http://www.aaronline.com/manage-risk/sample-forms/forms-spanish-translations/

ARIZONA ASSOCIATION OF REALTORS®

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* To answer legally related questions about the many diversified areas of today's real estate industry.

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For More Information

Please contact Cynthia Frey, AAR Risk Management Coordinator, at cynthiafrey@aaronline.com or 602-248-7787.

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LEGAL HOTLINE

DISCLOSURE

Significant Change in HOA Operations Should Be Disclosed

FACTS: The seller receives an email from an officer of the HOA stating that the HOA is going to make a change that would dramatically affect the way the HOA governs the community. The change has not yet been announced to the other homeowners in the subdivision.

ISSUE: Does the seller have to disclose the potential change in the HOA to the buyer prior to the closing?

ANSWER: Yes.

DISCUSSION: A seller must disclose known material facts. *See Hill v. Jones*, 151 Ariz. 81, 85, 725 P.2d 1115, 1119 (App. 1986). A fact is material if it is one to which a reasonable buyer would attach importance in making a decision as to the consideration to be paid for the property. *Id*. Since the seller is now on notice of a potential change that will "dramatically affect the way the HOA governs," the information should be disclosed.

DISCLOSURE

Where Full Disclosure Is Made, Agent Should Have No Liability for Leaky Roof

FACTS: Pending close of escrow, the home inspection report identified water stains on the ceiling and recommended that a roof inspection be performed. The buyer subsequently obtained a roof inspection which identified various repairs that should be made. The seller paid for the recommended repairs prior to the close and the repairs were made by a licensed contractor. After closing, the roof leaked during a substantial rain. The buyer has demanded that the buyer's agent pay to repair the roof.

ISSUE: Is the buyer's agent obligated to repair the roof?

ANSWER: No.

DISCUSSION: Based on the facts presented, the roof problems were discovered prior to the close of escrow. Additionally, certain repairs were undertaken by a licensed contractor prior to the close. Because the agent was not involved in those repairs, the agent should have no liability.

Note: Generally, agents do not have a responsibility to inspect for defective conditions. *See Aranki v. RKP Invs., Inc.*, 194 Ariz. 206, 979 P.2d 534 (App. 1999).

MISCELLANEOUS

HOA Must Provide Notice Of Known Violations Before Closing

FACTS: There are 142 units in the particular community. Following close of escrow, the homeowners association (HOA) sent the buyer a letter advising the buyer of violations based on alterations to the home that needed to be corrected. The HOA was aware of the violations prior to close of escrow but did not give notice to the buyer of the violations before escrow closed.

ISSUE: Is the HOA required to give notice to the buyer of known violations prior to close of escrow?

ANSWER: Pursuant to A.R.S. § 33-1806(A)(3)(e), within 10 days after receipt of written notice of a pending sale, an association with fifty or more units, shall mail or deliver to a purchaser or a purchaser's authorized agent a dated statement containing "whether the records of the association reflect any alterations or improvements to the unit that violate the declaration. . . Nothing in this community relieves the seller of a unit from the obligation to disclose alterations or improvements to the unit that violate the declaration, nor precludes the association from taking action against the purchaser of a unit for violations that are apparent at the time of purchase and that are not reflected in the association's records." Thus the HOA (and the seller) should have disclosed the alteration to the buyer before the close of escrow.

Q&A Legal Hotline

Have you signed up for the Legal Hotline?

The Legal Hotline provides all AAR broker members (designated REALTORS®) free access to a qualified attorney who can provide information on real estate law and related matters.

FIND OUT HOW BROKERS CAN ACCESS THE LEGAL HOTLINE
www.aaronline.com/wp-content/uploads/2013/08/3-Legal-Hotline-Access-Process-fillable.pdf

BROWSE MORE LEGAL HOTLINE TOPICS ONLINE
www.aaronline.com/manage-risk/legal-hotline

FINANCING

The Dodd-Frank Act Does Not Prohibit A Balloon Payment In A One-Time Seller Financing Transaction

FACTS: The buyer and seller entered into a purchase contract for the residential real property where the seller is going to finance the transaction. This is the only seller finance transaction the seller will originate in a 12-month span. The seller wants to include a seven year balloon payment in the loan documents.

ISSUE: Does the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) prohibit a balloon payment in this transaction?

ANSWER: No. If the seller is going to originate only one seller financed consumer credit transaction in a 12-month period, the loan documents may include a balloon payment without violating the Dodd-Frank Act. See 12 CFR § 1026.36(a)(5).

CONTRACTS

Listing Agreement Should Not Be Incorporated in the Residential Contracts

FACTS: A buyer has made an offer on the residential property listed by the agent. As part of the acceptance, the seller wants to attach the listing agreement to the contract and indicate that the listing agreement is incorporated by reference into the contract. The broker is concerned with the seller's request.

ISSUE: Should the listing agreement be attached to and incorporated into the residential purchase contract?

ANSWER: No.

DISCUSSION: The listing agreement is a contract between the broker and the seller. By contrast, the residential purchase contract is an agreement between the seller and a potential buyer. The rights and obligations of the parties under each contract are separate and distinct. There is therefore no need to incorporate the listing agreement into the purchase contract. In fact, such a practice would likely lead to confusion and diminish the certainty of the terms in the various contracts.

ADVERTISING

Advertising Must Identify the Brokerage Involved

FACTS: The brokerage contracts with a broker who works closely with a private investor. The private investor intends to purchase a billboard that reads as follows: "Will buy your home for cash call [800 number]." The investor intends to have the eight hundred number go directly to the broker's phone number.

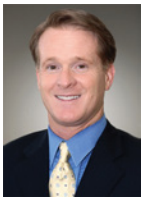
ISSUE: Is this a violation of the Arizona Department of Real Estate advertising requirement?

ANSWER: Yes

DISCUSSION: Advertising means "the attempt by publication, dissemination, exhibition, solicitation or circulation, oral or written, or for broadcast on radio or television to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in [property] . . . and any photographs, drawings or artist's presentations of physical conditions or facilities existing or to exist on the property." A.R.S. § 32-2101(2). The billboard is a solicitation for those interested in selling their property for cash.

The Commissioner's Rules, A.A.C. R4-28-502, sets forth the rules for all advertising. A salesperson or broker acting as an agent is prohibited from advertising property in a manner which implies that no salesperson or broker is taking part in the offer for sale or lease. Further, all advertising must identify in a "clear and prominent manner the employing broker's legal name or the dba name contained on the employing broker's license certificate." The billboard links potential sellers to a brokerage without (1) indicating that a salesperson is involved in the transaction; and (2) without clearly identifying the brokerage involved. Accordingly, this is a violation of the Commissioner's rules on advertising.

ABOUT THE AUTHOR



Richard V. Mack

Richard V. Mack is a shareholder at Mack, Watson & Stratman, which provides the AAR Legal Hotline service. He is a State Bar of Arizona Board Certified Real Estate Specialist and AV rated by Martindale Hubbell. He has also been designated as a Southwest Super Lawyer. Mr. Mack practices commercial litigation with an emphasis on real estate litigation. He is admitted to practice in the state and federal courts of Arizona and before the 9th Circuit Court of Appeals. Mr. Mack graduated Magna Cum Laude from Southwestern College in Winfield, Kansas with a Bachelor of Business Administration, with an emphasis in economics, and received his Juris Doctor from the University of Arizona.

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