

Post Possession Agreement Provisions

This document is for informational purposes only.

This is not a contract and should not be used as a contract or as an addendum to a contract.

USE THE BELOW INFORMATION ONLY AFTER HAVING CONSULTED INSURANCE, LEGAL, TAX, AND ACCOUNTING PROFESSIONALS.

Introduction: Keep in mind that Post Possession agreements are not recommended, carry inherent risks, and raise a variety of legal and practical issues. For that reason, Commissioner's Rule R4-28-1101(K) provides that "A salesperson or broker shall recommend to a client that the client seek appropriate counsel from insurance, legal, tax, and accounting professionals regarding the risks of pre-possession or post possession of a property." It may therefore be beneficial to include disclaimer language at the top of your Post Possession Agreement, such as:

This form is provided as a courtesy to the parties only. It is not required to be used in this transaction and may not fit the needs, goal, and purposes of the parties. Broker(s) makes no statement or warranty as to the legal validity of this form, its contents or use, and the parties, by their use of this form, acknowledge and agree that Broker(s) shall not be liable to any party or person for its contents or use. Post Possession agreements are not recommended and the parties are aware there are many risks associated with allowing the Seller to possess the Premises following close of escrow. The parties are advised to: (i) seek appropriate counsel from insurance, legal, tax and accounting professionals before entering into an agreement that provides Seller with possession following close of escrow; and (ii) consider the use of a lease agreement rather than a post possession addendum.

Parties: Any Agreement should identify the name of the Buyer, Seller and Premises address. For example:

This is an Addendum to the Residential Resale Real Estate Purchase Contract ("Contract") dated _____ between the following parties:
MO/DA/YR

SELLER: _____

BUYER: _____

PREMISES ADDRESS: _____

Purpose: Identify the intent of the agreement. This provision may choose to address whether the parties' relationship will create a landlord-tenant relationship and thereby be governed by the Arizona Residential Landlord Tenant Act. Arizona law does not directly address short term rentals, yet post possession agreements may be governed by Arizona's Residential Landlord and Tenant Act. The parties should confirm this with their independently selected counsel and investigate their rights and obligations under the Residential Landlord and Tenant Act. Independent counsel should additionally advise the parties as to the potential applicability of state regulations pertaining to transient housing and innkeeper liability. Once legal counsel provides guidance on these issues, this provision should be drafted accordingly. Moreover, if the property is governed by a homeowner's association, governing documents such as CC&Rs should be reviewed by the parties and/or their attorneys to determine the contractual legality of their contemplated post possession agreement. This provision should not be finalized until the parties have received legal guidance, but until such time, initial boilerplate language identifying the purpose of the agreement may include the following:

This Addendum is intended to grant continued exclusive possession of the Premises to Seller by Buyer following close of escrow on the Premises. The following additional terms and conditions are hereby included as part of the Contract. **This form is not recommended to be used for periods that exceed 30 days.**

Possession date and occupancy: Provide the length of the term for Seller's possession of the premises. If agreed to by the parties, include verbiage that the agreement is void if escrow fails to close. State the reason for the occupancy and who/how many occupants are allowed, including pets, if any. For example:

Buyer grants Seller permission to retain possession of the Premises beginning on close of escrow until _____, 20__ for the limited purpose checked below:

- ☐ Continue to physically occupy the Premises; OR
- ☐ Store personal property in the following areas, without physically occupying the Premises; OR

☐ Other: _____

Occupancy shall be limited to the following number of: _____ adults _____ children _____ pets. Type of pet(s): _____.

In the event close of escrow (COE) does not occur by _____, 20__, this Agreement is void.

Compensation: Consider whether Seller will compensate Buyer to possess the premises. If compensation will be charged, determine the amount (e.g., daily rate, flat rate, etc.), whether Seller will directly pay Buyer the compensation, and whether Seller will owe additional funds if Seller remains in possession of the premises following the agreed upon move-out date. Identify available legal remedies by which a holdover Seller can be removed, which will depend on the applicability of the Arizona Residential Landlord and Tenant Act. For example:

Seller agrees to pay Buyer for the privilege of ongoing possession of the Premises after close of escrow, certified funds in the amount of \$ _____ per day for _____ days from close of escrow up through the date specified herein for a total payment in the amount of \$ _____, to be paid in full on or before close of escrow. Any agreed extension of possession shall be at the same per day rate. The sums paid for compensation under this Addendum will NOT be applied toward the purchase price of the Premises.

If Seller fails to vacate the Premises by the agreed upon date, Seller agrees to pay Buyer \$ _____ per day for each day Seller remains in possession of the Premises. If necessary, Buyer may pursue legal remedies prescribed by law, including attorneys' fees, in order to recover damages and obtain possession of the Premises by way of a special detainer action.

Security deposit: Consider whether Buyer will charge a security deposit and how much, and whether Buyer will hold the security deposit. As with all terms, the amount of the security deposit should be determined exclusively by the parties and, depending on the advice of the parties' respective attorneys, Buyer and Seller may wish to address the manner in which unused portions of the deposit will be returned and whether such will be done in accordance with the Arizona Residential Landlord and Tenant Act (A.R.S. § 33-1321). If counsel advises that Buyer act in accordance with the Arizona Residential Landlord and Tenant Act, Buyer shall not demand security, including, but not limited to prepaid rent, in an amount in excess of one and one-half month's rent. A sample provision may include the following language:

On or before COE, Seller agrees to pay directly to Buyer the amount of \$ _____ as damage and security deposit. Seller agrees to surrender possession of the Premises to Buyer in substantially the same condition as at COE. Once Seller surrenders possession of the Premises, Buyer is entitled to use the security deposit to recover any unpaid compensation for use of the Premises, costs to clean or repair the Premises necessitated by Seller's possession, and any costs incurred for collection, including attorneys' fees. Buyer may further hold Seller liable for any additional charges and obligations incurred by Buyer or caused to be incurred by Buyer that arose out of Seller's use of the Premises under the terms of this Addendum. Buyer shall return any unused portion of the deposit to Seller, along with an itemization of the monies withheld, in accordance with A.R.S. § 33-1321. If escrow fails to close, the security deposit shall be returned to Seller within 48 hours following the cancelled transaction.

Use of premises: Identify how the premises is to be utilized (e.g., personal residence) and address Seller's compliance with any and all applicable laws, ordinances, regulations, CC&Rs, etc. Additionally, address who is responsible if any fines or assessments are incurred during the post possession. For example:

Seller shall use the Premises as a personal residence only. Seller agrees to comply with applicable laws, ordinances, regulations, Covenants, Conditions and Restrictions, and Homeowner's Association rules and regulations concerning the Premises. If Buyer incurs any fines or assessments due to Seller's actions or conduct, Seller shall be responsible to pay those fines or assessments.

Utilities/services: Determine who will pay the utility bills and other services for the premises during the post possession term. For example:

All utilities and services shall remain in Seller's name. Seller shall pay all charges incurred.

Insurance and risk of loss: The parties should contact their respective insurance carriers to determine what types of insurance should be secured by Buyer and Seller, the appropriate coverage limits, and who should be named as an insured. The parties should also identify who is responsible in the case of damage to the premises during the post possession. This provision should not be finalized until the parties have received guidance from insurance professionals, but until such time, initial boilerplate language addressing insurance and risk of loss may include the following:

Seller shall maintain insurance policies for personal property and liability protection. Buyer shall maintain adequate hazard insurance to cover the change in occupancy status of the Premises. Buyer is not legally responsible for any injury or damage to Seller or Seller's guests that occurs on the Premises.

Maintenance and repair: Determine who is responsible for any repairs or maintenance of the premises during the post possession term. The parties may additionally want to consider the amount Seller is responsible for paying for any maintenance or repair during Seller's post possession (e.g. Seller is responsible for home warranty deductible). For example:

Seller shall maintain the Premises, including heating, cooling, mechanical, plumbing and electrical systems, pool, spa, landscaping and grounds, and all personal property included in the sale, in substantially the same condition as on the date of COE.

Seller shall be responsible for the first \$ _____ of any repair, or any home warranty deductible, whichever is less. Buyer shall be responsible for any amount that exceeds \$ _____. If any damage is due in part or in whole to Seller's negligence, Seller will be fully responsible for the cost of the repair.

Improvements: State whether alterations, repairs, or improvements are allowed during the post possession term and what happens if any alterations, repairs, or improvements are made. For example:

Seller shall not perform any alterations, repairs or improvements to the Premises without first obtaining the prior written consent of Buyer. If Buyer consents, Seller shall when due pay all third parties for labor, services and materials performed or supplied in making the alterations, repairs or improvements. Seller shall furnish Buyer with proof that all labor, services and materials have been paid for in full and shall indemnify and hold harmless Buyer against, and from, any and all liens which may be asserted or filed against the Premises related to the making of the alterations, repairs or improvements.

Assignment: Consider whether the Seller is allowed to assign their post possession right to the premises. If it is agreed that Seller cannot assign their rights without the prior written consent of Buyer, language may include:

Seller shall not assign this Addendum nor sublet any portion of the Premises without the prior written consent of Buyer, and any attempted assignment or sublet shall be void and unenforceable.

Entry to premises: The parties should determine what type and how much notice Buyer should give Seller to enter the premises for completing repairs or conducting inspections. While this provision should not be finalized until the parties are advised by their respective attorneys whether their post possession agreement is governed by Arizona’s Residential Landlord and Tenant Act, initial boilerplate language may include:

During the post possession term, Seller shall not unreasonably withhold consent to Buyer or Buyer’s representative(s) to enter the Premises to inspect, make repairs, decorate, alter or improve, supply necessary or agreed services; or to exhibit the Premises to prospective or actual purchasers, mortgagees, tenants, workmen or contractors. Buyer may enter the Premises without Seller’s consent in case of emergency. Buyer shall not abuse the right to access or use it to harass Seller. Except in case of emergency or it is impracticable to do so, Buyer shall give Seller at least two days’ notice in writing of the intent to enter and enter only at reasonable times.

Indemnification: REALTORS® should ensure the Buyer and Seller will hold harmless and indemnify broker(s) in the transaction from any and all liability and responsibility related to the post possession. Designated Brokers should consult with their company’s legal counsel to obtain exact verbiage, but sample language may include:

Seller and Buyer hereby expressly release, hold harmless and indemnify all Brokers, their licensees, employees, and any of their officers or partners, and any other person, firm, or corporation who may be liable through them from all claims, lawsuits, and actions that arise from or relate to: (i) this Addendum; or (ii) the actions of Seller or anyone else entering the Premises while the Premises is occupied or used by Seller during the post possession term. The parties understand and agree that Broker(s) do not provide advice on property as an investment and are not qualified to provide financial, legal, or tax advice regarding the implications of entering into a post possession agreement.

Other terms and conditions: Include any other items of importance (e.g., no smoking in the property).

Signature: Place signature lines at the end of the agreement for Buyer and Seller. For example:

The undersigned agrees to the additional terms and conditions and acknowledge receipt of a copy hereof.

^ BUYER’S SIGNATURE	MO/DA/YR	^ BUYER’S SIGNATURE	MO/DA/YR
^ SELLER’S SIGNATURE	MO/DA/YR	^ SELLER’S SIGNATURE	MO/DA/YR