

# Memo

**To:** Teresa Lightbody, Forms Subcommittee Chairperson  
**From:** James A. Bowditch, Boone Karlberg P.C., Missoula, Montana  
**Date:** October 8, 2019  
**Subject:** Form Changes from 2018 Forms Subcommittee Meetings

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The form changes approved by the Forms Subcommittee of the Montana Association of REALTORS® in 2018 are finally complete and available for use by MAR members. A description of these approved changes are described below.

## I. Buy-Sell Agreements

- a. For **only** the Residential Buy-Sell Agreement, the Inspection Contingency section (lines 144-187) was modified to allow buyers more flexibility in deciding what due diligence buyers want to conduct as part of a residential real estate transaction. Specifically, the initial sentence of this section (lines 145-146) has been amended to state that if a buyer elects the inspection contingency, the closing of the transaction is contingent “upon Buyer’s acceptance of any Property conditions that Buyer deems appropriate.” Because this revised language allows a buyer to investigate any aspect of the property that the buyer desires, check boxes are no longer appropriate for a buyer to select which items a buyer want to include as part of the buyer’s inspections. Therefore, the check boxes that formerly preceded each of the inspection items set forth in the two columns at lines 156-173 have been removed and the “Other” check box followed by a blank line has been removed. At this time, the insertion of language allowing a buyer the ability to inspect anything and the removal of the check boxes has been made only to the residential buy-sell agreement.
- b. For the following buy-sell agreements, “Post-Closing Rental Obligations” was added as an inspection item at the locations set forth below.
  - i. Buy-Sell Agreement (Residential): Line 173
  - ii. Buy-Sell Agreement (Commercial): Line 128
- c. For **all** buy-sell agreements the “BUYER’S COMMITMENT” section setting forth buyer contact info and signature lines was restructured (no substantive changes were made). The areas revised are set forth below.
  - i. Buy-Sell Agreement (Residential): Lines 486-498
  - ii. Buy-Sell Agreement (Commercial): Lines 390-402
  - iii. Buy-Sell Agreement (Farm & Ranch): Lines 481-493
  - iv. Buy-Sell Agreement (Land): Lines 382-394
  - v. Buy-Sell Agreement (New Construction): Lines 542-554

- d. For **all** buy-sell agreements the “SELLER’S COMMITMENT” section was also restructured to (i) provide three check boxes based on the seller’s response to a buyer’s offer (e.g. accepted, modified per counter-offer or rejected) and (ii) restructure the seller contact info and signature lines. The areas revised are set forth below.
- i. Buy-Sell Agreement (Residential): Lines 499-524
  - ii. Buy-Sell Agreement (Commercial): Lines 403-429
  - iii. Buy-Sell Agreement (Farm & Ranch): Lines 495-522
  - iv. Buy-Sell Agreement (Land): Lines 396-422
  - v. Buy-Sell Agreement (New Construction): Lines 555-581
- e. For **all** buy-sell agreements, the “CLOSING AGENTS FEES” section was renamed to “CLOSING FEE” and the language of that section slightly modified in an attempt to clarify that it pertains only to the costs of closing charged by the closing agent (e.g. not loan fees or other costs payable at closing). The new language is found at the following areas of all buy-sell agreements:
- i. Buy-Sell Agreement (Residential): Lines 294-295
  - ii. Buy-Sell Agreement (Commercial): Lines 214-215
  - iii. Buy-Sell Agreement (Farm & Ranch): Lines 292-293
  - iv. Buy-Sell Agreement (Land): Lines 193-194
  - v. Buy-Sell Agreement (New Construction): Lines 311-312
- f. For **all** buy-sell agreements, language was added to the “MINERAL RIGHTS” section, at the areas set forth below, to notify parties that the definition of mineral rights in the MAR buy-sell agreements is different from the definition of mineral rights under Montana law – the definition on the MAR buy-sell agreements includes sand and gravel as a mineral.
- i. Buy-Sell Agreement (Residential): Lines 281-292
  - ii. Buy-Sell Agreement (Commercial): Lines 201-212
  - iii. Buy-Sell Agreement (Farm & Ranch): Lines 279-290
  - iv. Buy-Sell Agreement (Land): Lines 180-191
  - v. Buy-Sell Agreement (New Construction): Lines 298-309
- g. For **only** the Residential Buy-Sell Agreement language was added to the end of the “INSPECTION CONTINGENCY” section that (i) requires the seller to provide the buyer reasonable access to the property to allow the buyer to conduct the buyer’s inspections (lines 149-150) and (ii) requires the buyer to indemnify and hold the seller harmless from any damages or injuries relating to any inspection of the property conducted by or on behalf of the buyer (lines 150-154).

- h. For **only** the Farm & Ranch Buy-Sell Agreement:
  - i. The “BUYER’S INSPECTION CONTINGENCY” section was deleted because the buyer’s inspection rights are already covered by the section titled “PROFESSIONAL INSPECTION CONTINGENCY” which is now retitled as “BUYER’S INSPECTION CONTINGENCY” and that begins at line 214. Additionally, language was added to the end of this section that requires (i) the buyer to conduct any inspections in a manner that does not damage the property (lines 222-224); (ii) the seller to provide the buyer reasonable access to the property to allow the buyer to conduct the buyer’s inspections (lines 224-225); and (iii) the buyer to indemnify and hold the seller harmless from any damages or injuries relating to any inspection of the property conducted by or on behalf of the buyer (lines 225-229).
  - ii. The language in the “MEGAN’S LAW DISCLOSURE” section (lines 339-344) was revised so that it is identical to the Megan’s Law Disclosure sections in all other MAR buy-sell agreements.
- i. For all buy-sell agreements **except** the Residential Buy-Sell Agreement, in the “PAYMENT/RECEIPT OF EARNEST MONEY”, “DEPOSIT OF EARNEST MONEY” and “BUYER’S REMEDIES” sections, (i) “Earnest Money” was changed to “earnest money” (since it is not a defined term) and (ii) “earnest monies” was changed to “earnest money”.
- j. For **only** the Commercial and Farm & Ranch Buy-Sell Agreements, a non-substantive language change was made changing “insure” to “make sure” at lines 256 and 331, respectively.
- k. For **only** the Land Buy-Sell Agreement, a non-substantive change was made to move the indenting for the check boxes under the “POSSESSION” section (lines 45-47) to the left margin.

## II. Listing Agreements

- a. For **all** listing agreements, a new section titled “AUDIO RECORDING ACKNOWLEDGEMENT” was added whereby a seller acknowledges that it is a criminal offense to record a conversation without the knowledge of all parties to the conversation. The new language is found at the following areas of all listing agreements:
  - i. Listing Agreement – Residential: Lines 272-275
  - ii. Listing Agreement – Farm & Ranch: Lines 290-292
  - iii. Listing Agreement – Land: Lines 196-199
  - iv. Listing Agreement – Commercial (Exclusive Right to Lease): Lines 241-244
  - v. Listing Agreement – Commercial (Exclusive Right to Sell): Lines 252-255

- b. For **all** listing agreements, the capitalized language just above the signature lines was slightly modified for clarification (there were no substantive changes to the language).
- III. Inspection Notice (Results/Remedies) – The second page of this document (lines 53-103) was reformatted to separate language relating to the buyer’s election to negotiate from the buyer’s election to terminate. If the buyer desires to negotiate the buyer now checks the box on line 54, inserts the proposed resolution(s) into the blank lines at lines 55-77, inserts the deadline by which the seller must complete all of the agreed upon resolution(s) in the blank area on line 82, and signs the document at line 84. If the buyer instead desires to terminate the buyer only checks the box at line 99 and signs at line 102.
  - IV. Inspection Notice (Seller’s Response) – New language was added at lines 42-45 to (i) clarify that if all parties agree upon and execute this document it constitutes an amendment to the buy-sell agreement and (ii) provide a deadline by which the seller must complete all of the agreed upon resolution(s).
  - V. Relationships/Consents in Real Estate Transactions (Combined Explanation and Disclosure) – Language was added in right column at lines 102-107 allowing a buyer to withhold consent to allowing a buyer agent to represent multiple buyers in submitting offers on the same property.
  - VI. Authorization – Buyer (Consent for Communication) and Authorization – Seller (Consent for Communication) – Language was added at lines 3-7 of both of these forms to expressly state that consent for communication by telephone includes text messages and that communication for which consent is given includes communication by social media.
  - VII. Lead-Based Paint Disclosure – The Buyer Broker/Salesperson signature line in the right column at the end of the form was deleted and language was added under the Seller Broker/Salesperson signature line (line 51) stating that if there is no Seller Broker/Salesperson (e.g. in a for sale by owner transaction) then the Buyer Broker/Salesperson is to sign. The intent of this change is to clarify that a buyer agent is required to sign the Lead-based Paint Disclosure form acknowledging the obligation under federal law to inform a seller of the obligation to disclose lead-based paint **only** if the seller does not have an agent representing the seller.
  - VIII. All Property Disclosure Statements – Language was added to the section on leases to prompt an owner to provide information about any post-closing short-term rental obligations.
    - a. Owner’s Property Disclosure Statement: Line 197
    - b. Owner’s Property Disclosure Statement (Commercial): Line 196
    - c. Owner’s Property Disclosure Statement (Land): Line 122

- IX. Residential Lease-Rental Agreement – In response to a ruling from a 2018 district court case out of Missoula County, the following changes were made to this document:
- a. The section on late fees was revised to allow only a one-time fixed late fee of \_\_\_\_\_ dollars. Language that previously allowed a daily fixed late fee or a late fee (one-time or daily) that was based on a percentage of rent owing was deleted. This change is at lines 80-81.
  - b. Language and a check box was added whereby a property manager and tenant can agree to a reduction in rent if paid by a certain date (e.g. an early payment discount). This change is found at lines 82-83.
  - c. The “COLLECTION COSTS” section (lines 386-389) was modified to limit collection costs to those awarded in a court judgment (effectively eliminating the right to recover collection costs incurred in sending a tenant to collections before a court judgment is obtained).