

NWMLS Legal Bulletin 203

May 2014 Forms Revisions

May 6, 2014

1. Introduction

This bulletin reviews recent revisions to NWMLS forms, including the purchase and sale agreements (Form 20, 21, 23, 25, and 28), Financing Addendum (Form 22A), Optional Clauses Addendum (Form 22D), Identification of Utilities Addendum (Form 22K), King County Septic Addendum (Form 22S-King), Buyer's Pending Sale of Property Addendum (Form 22Q), Short Sale Addendum (Form 22SS), Inspection Addendum (Form 35), Pre-Inspection Addendum (Form 35P), Back-Up Addendum (Form 38A), Rescission Agreement (Form 51), and Feasibility Contingency Notice (Form 90P). The bulletin also introduces a new form - Assignment of Lease or Rental Agreement (Form 69). These forms will be available on May 14, 2014. Please carefully review this bulletin and the revised forms.

2. Purchase and Sale Agreements (Form 20, 21, 23, 25, and 28)

a. Included Items

Specific Term 5 has been revised to delete "operating equipment" from "satellite dishes and operating equipment." This is because in most situations, the property owner can include the satellite dish with the sale, but the owner is required to return the operating equipment (set top box, remote control, etc.) to the satellite television provider. In addition, the option to include a "microwave" with the property has been added to Specific Term 5.

b. E-mail Delivery of Documents

The "E-mail Transmission" of documents provision from the Optional Clauses Addendum (Form 22D) will be incorporated into General Term "m" of the purchase and sale agreements. This will make e-mail transmission of documents permissible if the appropriate e-mail addresses are included on the first page of the agreement.

The contact information for the listing firm and selling firm on page one of the purchase and sale agreements will include the firm's "document e-mail address," which will replace the section for the firm's "assumed name." General Term "m" will include the following provision:

E-mail transmission of any signed original document, and retransmission of any such transmission, shall be the same as delivery of an original, provided that the e-mail is sent to both Selling Broker and Selling Firm or both Listing Broker and Listing Firm at the e-mail addresses on page one of this Agreement. At the request of either party, or the Closing Agent, the parties will confirm e-mail transmitted signatures by signing an original document.

Please note that, just like in Form 22D, delivery is only effective if the document is sent to both the individual broker's e-mail address (listed on the first page of the purchase and sale agreement) and the firm's "document e-mail address" (also listed on the first page of the agreement). If either of these e-mail addresses is not filled-in, brokers may not use e-mail to deliver documents to the other party.

c. Earnest Money

General Term "b" will be revised to make clearer that the buyer has the option to deliver earnest money either to the selling broker or directly to the closing agent. Brokers are still required to "keep the party to whom they provided brokerage services informed of the earnest money deposit status and must retain and provide copies of receipts to the principals and participating firms." See WAC 308-124D-205(5).

d. Counteroffer

Revised General Term "s" clarifies that a counteroffer can be made by either party (not just the seller) and that the acceptance of a counteroffer must be properly delivered to the other party as permitted by other provisions of the agreement (e.g. facsimile, e-mail, etc.)

e. Property Insurance

General Term "x" will be revised to advise the buyer to investigate the cost of insurance for the property, including, but not limited to homeowners, flood, earthquake, landslide, and other available coverage.

f. Multi-Family Purchase and Sale Agreement (Form 20)

In Form 20, General Term "y" (Books, Records, Leases, Agreements) requires the seller to deliver certain documents to the buyer related to the property (e.g., leases, service agreements, etc.) The term will be revised to clarify that the buyer has ten

(10) days from the receipt of the documents or the date the documents are due, whichever is earlier, to give notice to terminate the agreement.

g. Manufactured Home Purchase and Sale Agreement (Form 23)

Form 23 (not Form 21) should be used for the sale of a manufactured home on leased land. Manufactured homes are subject to regulation by the Washington State Department of Labor and Industries (L&I). New General Term "v" provides the buyer with ten (10) days to inspect the manufactured home for the purposes of compliance with L&I regulations. This inspection is in addition to other inspection rights that the buyer may have in the Inspection Addendum (Form 35).

3. Financing Addendum (Form 22A)

a. Appraisal Less Than Sale Price

Paragraph 6 of Form 22A contains an appraisal contingency for the buyer and provides the parties with a process for notice, response, and reply if the appraisal is less than the purchase price. Form 22A currently provides that if the buyer waives the financing contingency, the buyer also waives the appraisal contingency contained within Paragraph 6.

New Paragraph 2(c) in the revised Form 22A allows the parties to negotiate whether the buyer's voluntary waiver of the financing contingency "will" or "will not" also waive the appraisal contingency in Paragraph 6. If the parties agree that the appraisal contingency will not be waived, that contingency will continue throughout the duration of the transaction even if the buyer decides to waive the financing contingency. Please note that the buyer's automatic waiver of the financing contingency in Paragraph 1(b) (e.g., for buyer's failure to timely apply for financing) will still waive the appraisal contingency in Paragraph 6.

4. Optional Clauses Addendum (Form 22D)

As mentioned above, Form 22D will be revised to remove the "E-mail Transmission" of documents paragraph, which will be incorporated into General Term "m" of the purchase and sale agreements.

Paragraph 3 of the form will be revised to clarify that the buyer's "reinspection" rights in that paragraph are limited to confirming that the seller has maintained the property in the same condition as when initially viewed by the buyer and repaired or replaced any appliance or system that has malfunctioned or become inoperative prior to transfer of possession.

In addition, Paragraph 8 will be revised to make clear that the homeowner's association documents are provided at the seller's expense. The association bylaws and covenants, conditions, and restrictions (CC&Rs) and the current operating budget will be added to the list of documents to be provided to the buyer.

5. Identification of Utilities Addendum (Form 22K)

The revised Form 22K includes space to insert facsimile numbers for all of the utility providers. Written requests for a final billing to a utility provider may be made via facsimile as provided for in RCW 60.80.020.

6. King County Septic Addendum (Form 22S-King)

Paragraph 5 (On-Site Sewage System Disclosure Form) will be deleted from Form 22S-King. King County no longer requires that the seller provide the On-Site Sewage System Disclosure Form (NWMLS Form 37) to the buyer. Form 37 has been removed from publication.

7. Buyer's Pending Sale of Property Contingency Addendum (Form 22Q)

Form 22Q will be revised to require that the buyer attach a copy of the purchase and sale agreement for the sale of the buyer's property to the form. In addition, the revisions will clarify that the term "Pending Sale" includes sales that are subject to an inspection, feasibility, or other contingency (e.g. financing, attorney review, etc.) Other non-substantive revisions were made to modernize and simplify the form.

8. Short Sale Addendum (Form 22SS)

The revised Form 22SS will give the parties the option to include the neighborhood review contingency (from either Form 35 or Form 35R) into Paragraph 5 (Computation of Time). As a reminder, Paragraph 5 provides that all timelines in the purchase and sale agreement begin on the date of notice of lender consent, unless the parties agree that a specific timeline (e.g. Deposit of Earnest Money) shall begin on mutual acceptance by checking the corresponding box.

9. Inspection Addendum (Form 35)

Form 35 will be revised to clarify that the inspection may only be conducted by the buyer, a licensed home inspector, or a person exempt from licensing (e.g. engineer, architect, licensed electrician, licensed plumber, licensed pest inspector, etc.) There is no exemption for general contractors in the inspector license law (RCW 18.280).

In addition, Paragraph 1 will include the option to allow a buyer to conduct an inspection of the sewer system, which may include a video inspection and require the inspector to remove toilets or other fixtures. Please note that Form 35 requires that the buyer restore the property to the same condition as it was in prior to the inspection and makes the buyer responsible for any damage to the property resulting from the inspection.

These same revisions will also be made to the Pre-Inspection Agreement (Form 35P).

10. Back-Up Addendum (Form 38A)

Form 38A will be revised to make clear that if a Short Sale Addendum (Form 22SS) is included with the agreement, all timelines begin upon delivery of notice that the first sale has failed (Form 38) or notice of lender consent (Form 22SS), whichever occurs later.

11. Rescission Agreement (Form 51)

Revisions to Form 51 provide that if the seller sells the property to the buyer within six months from the date of the rescission, the seller will pay the listing firm the commission set forth in the listing agreement (rather than allowing the parties to renegotiate the commission obligation in Form 51). Other non-substantive revisions were made to modernize and simplify the form.

12. Assignment of Lease or Rental Agreement (Form 69)

Several NWMLS Forms require the seller to transfer any lease or rental agreements to the buyer when those agreements will remain in effect after closing. However, NWMLS did not previously publish a lease assignment form. In new Form 69, the seller assigns its right, title and interest in a specific lease or rental agreement to the buyer. The buyer agrees to assume the lease or rental agreement and perform all of the obligations required by that agreement. The assignment is effective on the closing date of the sale to the buyer.

13. Feasibility Contingency Notice (Form 90P)

The Feasibility Contingency (Form 35F) gives the parties the option of requiring the buyer to (1) give notice of disapproval of the contingency (otherwise the contingency is automatically waived); or (2) give notice that the contingency is approved (otherwise the agreement is automatically terminated). Form 90P will be revised to include notice provisions for both of these options: (1) Notice of Termination (Feasibility Contingency Disapproval; and (2) Notice of Satisfaction (Feasibility Contingency Approval).

14. Availability of Revised Forms

The revised forms are currently available for order in hard-copy and will be available on Xpress Forms (and Transaction Desk) on May 14, 2014. NWMLS will remove the old version of the forms at the same time. You should recycle your old forms to prevent any inadvertent use.