

New Northeast Florida Multiple Listing Service, Inc. (realMLS)

Exclusive Right of Sale Listing Agreements and other documents

By Legal Counsel Jeff Marks

The realMLS suggested forms of Exclusive Right of Sale Listing Agreement and other realMLS forms have been recently revised. The new realMLS forms have a date of 06/01/2020. realMLS members should always use the latest version of the forms. The realMLS Forms Committee which met several times before the Covid-19 stay at home orders were issued. The Committee reviewed and revised the listing agreement. Thereafter, Ron Stephan, Lee Osborne and I reviewed the other realMLS forms and revised them with the approval of the members of the Forms Committee. Please join me in thanking the members of the Forms Committee: Dane Leslie, Michael Morris, Diane Cook, Ethan Gregory, Linda McMorrow, Jerry Smith, Clark LaBlond, Patricia Sherman, Mario Gonzalez, Lori Dreisbach, Thomas Love, Rick Filippone, Ben Bates, Sonny Downey, Kathy Karr Garcia, Greg Mosely, Kim Knapp, Karen Palmer, Lori Mieczkowski, Jennifer Tossavainen, Carol Zingone, Lee Osborne, Sam Stromberg, Kimberly Wiggins, Glenn East and Ron Stephan.

Here are the most important changes in the forms. There were several other smaller grammatical and other changes to clean up wording.

Exclusive Right of Sale Listing Agreement. The following words were moved from the end of the Agreement to the preamble paragraph: "SELLER represents that SELLER has legal authority and capacity to convey the Property and that no other person or entity has an ownership interest in the Property. If the Property is held in a trust or in a limited liability company ("LLC"), SELLER agrees to provide the closing attorney/settlement agent with a copy of the trust or operating agreement for an LLC upon requests."

In paragraph 1(Grant of Exclusive Right to Sell Property) the following words were added: "If the date of execution of this Agreement is other than the beginning of the listing term, all terms and conditions of this Agreement will be effective as of the date of the execution of this Agreement other than Broker's obligations under paragraph 5 of this Agreement." In the next sentence after the words "the closing" the following words were added: "(Consummation)..." The Consumer Financial Protection Bureau refers to a closing as a Consummation.

In paragraph 2F (Personal Property) the word "intercom" was deleted and the words "trash compactor, smart outlets, thermostats and keyless entry devices" were added. In that same paragraph, in the checkbox section, there is a new checkbox for "security cameras and a new checkbox for "other smart home devices (must specify): _____"

In paragraph 3A (Listing Price) the following words were added: "If SELLER changes the listing price review paragraph 4. ___ / ___ initial of SELLER." In paragraph 3C the word survey is now survey map as it is throughout this form. I hope this will help Sellers from confusing the words survey and appraisal. In paragraph 3C(4) the underlined words were added: "All mortgage payments, condominium and homeowners' association fees and assessments, costs to cure all association violations, reasonable cost to cure governmental regulations/permitting matters, taxes and Community Development District (CDD)

fees, and public body (government), special assessments due and payable, shall be paid current at SELLER'S expense at the time of closing."

In paragraph 3E (Possession) the underlined words were added: "If the Property is rented, the lease term expires on _____ [] with no tenant option to renew or extend; or [] with a tenant option to renew or extend..." in that same paragraph the following words are now in bold: **SELLER shall sweep the Property clean and remove all personal property not included in the sale by time of that buyer's possession or closing, as applicable.**"

Paragraph 4 (Financial Representation) was simplified to have only two boxes instead of four. The first box now reads as follows: "SELLER represents to Broker that the listing price will produce sufficient funds or that SELLER has readily available funds to satisfy all mortgages and liens encumbering the Property and pay all closing costs described in Paragraph 3 hereof." The other box that could be marked reads "SELLER does not have the readily available funds to satisfy all mortgages and liens encumbering the Property and pay all closing costs described in paragraph 3 hereof. A SHORT SALE/PRE-FORECLOSURE Addendum must be completed and attached to this Agreement."

The title of paragraph 5 now includes the underlined words: "BROKER OBLIGATIONS AND AUTHORITY AND SELLER'S REPRESENTATIONS."

In paragraph 5A, lines for initials were added to the following phrase "SELLER authorizes Broker to [] withhold all verbal offers and/or [] withhold all offers after SELLER accepts a purchase and sale agreement, unless it is a short sale. _____/_____ initial of SELLER." In paragraph 5C the underlined words were added: "SELLER authorizes and BROKER agrees to: (1) if Broker desires, cause the Property to be photographed (and videoed, including by drone/aerial, in compliance with all laws/regulations) and place the Property, the photographs and videos if any in NEFMLS;"

In paragraph 10 (Disputes and Waiver of Jury Trial) the underlined words were added. They are important "If SELLER fails to perform any of SELLER'S obligations, or if any of SELLER'S representations are untrue and, if litigation ensues involving BROKER, SELLER agrees to pay BROKER'S reasonable attorney's fees and costs, including in bankruptcy and on appeal." If there were any litigation under this Listing Agreement, it would more likely be the Broker suing the Seller for the commission than the SELLER suing the Broker for something. The prior version provided for each party to pay their own attorney's fees, which was an impediment for a Broker to bring suit for a commission. Please know however that if the Broker brought suit but if the SELLER prevailed or if the Seller sues the Broker and prevailed, the Seller would be entitled to attorney's fees from the Broker under Florida Statute 57.105(7).

In paragraph 11(Material Facts and Defects) the underlined words have been added: "SELLER has received no written or verbal notice from any governmental entity or owners' association as to uncorrected Property, environmental or safety code violations, and SELLER has no knowledge of any repairs or improvements made to the Property not in compliance with governmental/owners' associations, regulations/ permitting except..."

In paragraph 12(Complete Agreement and Miscellaneous Provisions) the underlined words were added: "this Agreement is not binding unless signed or initialed as appropriate and delivered by and to SELLER and BROKER. Any written communication or notice, including execution and delivery of this Agreement between Broker and SELLER may be transmitted by electronic media." The words "such as email and

facsimile” were deleted. It is the opinion of the attorneys on the Forms Committee that transmission of a text message would be a valid electronic transmission. I suggest that you print all text messages that modify or impact the listing agreement, the purchase and sale agreement, and any other of the important documents in a transaction. The following sentence was added: “For purposes of SELLER’S indemnifications, agreements to hold harmless and authorization in this Agreement, BROKER shall be deemed to include BROKER’S licensees.” For ease of reading that paragraph has now been divided into two different paragraphs.

At the end of the Listing Agreement, the wire fraud paragraph has been modified to add these words to the beginning of the wire fraud alert: “Every day criminals are trying to steal your money...” Also the following additional paragraph has been added within that paragraph: “After you receive a Federal Reference Number from your sending financial institution you may want to verify as soon as possible with the intended recipient of the wire that they received your money. If you cannot verify that the wire was received by the intended recipient, immediately contact the financial institution that sent the wire.” Additionally, there is a rectangle around this entire wire fraud alert paragraph to make it more prominent.

Other NEFMLS forms

Change Authorization. In the preamble we added the words “Exclusive Right of Sale” to the words NEFMLS Listing Agreement, so that it reads: “...NEFMLS Exclusive Right of Sale Listing Agreement...” There are also now four SELLER signature lines instead of two.

On the Tenant’s Consent to Photograph/videography, the words “or show the Property were added to the title.” In paragraph 1 the underlined words were added: “Tenant will be notified at least 24 hours in advance that Owner, Broker, or Broker’s photographer/videographers ...”

There are several changes to the SELLERS Waiver of Entry into the NEFMLS Addendum. The following sentence was added to the end of the first paragraph: “Within one business day of marketing a property to the public, the listing Broker must submit the listing to NEFMLS for cooperation with other NEFMLS Participants.” A new paragraph below that was added with the following words: “Public marketing includes, but is not limited to, flyers displayed in windows, yard signs, digital marketing on public facing websites, brokerage website displays (including IDX and VOW), digital communications marketing (email blasts), multi-brokerage listing sharing networks, and application available to the public.”

In the next paragraph the underlined words were added: “Can be displayed on the local realMLS.com realMLS homesforsale.com...”

In the Coming Soon Listing Addendum, there were several changes. In the second paragraph the underlined words were added: “a Coming Soon Listing is a Property that is not yet an Active Status in NEFMLS but has a fully executed Listing Agreement. SELLER understands and agrees that the Property CANNOT BE SHOWN and furthermore authorizes Broker to withhold all offers to purchase until the listing is placed in Active Status in NEFMLS. The Coming Soon Listing will be placed in Active Status in the NEFMLS system within 14 calendar days after all necessary signatures of SELLERS have been obtained with up to 17 - day extension.” In the next paragraph the underlined words have been added: “Notice to SELLER:” “coming soon” is an industry term for marketing a Property before it is placed in Active Status. Because marketing activities prior to the Property being placed in Active Status reach only a limited number of

potential buyers or tenants...a Property that goes under contract before it is listed in Active Status in NEFMLS does not have the benefit of being exposed to the entire potential market."

In the COVID-19 No Showings While Active Addendum the underlined words have been added to the title to "to Exclusive Right of Sale Listing Agreement. In the body of the form the underlined words have been added: "This Addendum is to be used when the SELLER does not want showings of their Active Property Listing or allows for showings under very restrictive circumstance due to COVID-19." The underlined words have been added to the following paragraph: "substantially the following language must be included in the first line of public remarks: "Due to the recommendations of social distancing to help prevent the spread of COVID-19, this Property will not be shown per the SELLER'S request at this time." There is also now a separate similar form for listing rental property.

In the Exclusive Buyer Representation Agreements (for Transaction Broker, Single Agent Broker, Single Agent Broker without consent to transition.") The following words were added to paragraph 10(Disputes and waiver of jury trial/costs and attorney's fees). "If Buyer fails to perform any of Buyer's obligations under this Agreement and, if litigation ensues, BUYER agrees to pay Broker's reasonable attorney's fees and costs." Please know however that if the Broker brought suit but the BUYER prevailed or if the BUYER sued the Broker and prevailed, the BUYER would be entitled to attorney's fees under Florida Statute 57.105(7). In the single agent version of this form, the following words were added near the end of the document: "BUYER agrees that it may be necessary or appropriate for Broker to act as a broker for a SELLER in a transaction." There is a new version of this form titled: "Exclusive Buyer Representation Agreement for Single Agent Broker without Consent to Transition."

The Vacant Land Exclusive Right of Sale Listing Agreement for Transaction Broker and for Single Agent have been changed to incorporate the changes that were made in the regular listing agreements.

NEFLMS forms can be accessed at NEF.FLEXMLS.COM. A video of me explain the listing agreement and some of the addenda will be available soon on realmls.com (in the eLearning section).