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THE FAR/BAR “AS IS” RESIDENTIAL CONTRACT:

A Comparison to the FAR Residential Contract With an “As Is With Right to Inspect” Addendum*

In the sale of REO properties by banks (“REO” means “Real Estate Owned” by the bank, typically as a result of a foreclosure), many banks are insisting that their REO properties be sold using the FAR/BAR “AS IS” Residential Contract (hereinafter referred to as the “FAR/BAR Contract”). On the other hand, Realtors® primarily use the FAR Residential Contract, and, if the real property is being sold “AS IS,” they simply add the FAR As Is With Right to Inspect Addendum.

The FAR/BAR Contract was drafted and promulgated by a joint committee of The Florida Bar, representing Florida attorneys, and the Florida Association of Realtors® (“FAR”), representing Florida Realtors®. The FAR Residential Contract with an As Is With Right to Inspect Addendum (the latter Contract with its Addendum being hereinafter referred to as the “FAR Contract”) was drafted and promulgated by the Florida Association of Realtors® only. This article will attempt to compare and cross-reference the provisions of the FAR/BAR Contract to those of the FAR Contract. Remember, throughout this article, references to the FAR/BAR Contract and the FAR Contract refer to “AS IS” contracts.

Both the FAR and FAR/BAR Contracts are derived from their respective organizations’ regular residential contracts. In revising its regular residential contract, FAR simply provides an addendum to convert that contract to an “AS IS” contract. The FAR/BAR Contract actually incorporates the revisions into its standard residential contract, bolding the revisions to indicate where they are located within the contract. Both the FAR Contract and the FAR/BAR Contract delete the regular contracts’ *limited* inspections for, and seller warranties against:¹ (1) termite

¹ The FAR Contract’s Paragraphs 6 & 8(a) are deleted, and the FAR/BAR Contract’s Standard N is deleted.

* This summary is based on the 2/08 revision of the FAR/BAR “AS IS” Contract and the 4/07 revision of the FAR Residential Contract and “As Is with Right to Inspect” Addendum. Please note that these forms and the provisions they contain may be modified or revised after the preparation of this summary.

and other wood-destroying organisms;² and (2) the property’s structures, appliances, a/c, electrical, and plumbing systems not being in “working condition,” as the latter term is defined in the Contracts,³ along with (3) deleting the seller’s monetary obligations to repair or remedy defects found by the inspections up to an agreed-upon maximum amount.⁴ Both the FAR and FAR/BAR Contracts replace these deleted rights with a *general* inspection right regarding any and every aspect of the subject property, although the FAR Contract has certain limitations on this right. In both Contracts, if the buyer is not satisfied with the results of the inspection, the buyer may cancel the Contracts and receive a return of the buyer’s deposit.

Following is Table 1, which is a table of key, deal-point provisions⁵ of both the FAR and FAR/BAR Contracts where the provisions differ from each other, with the table indicating how they differ. (Keep in mind that the parties can amend either Contract’s provisions to read as the other’s provisions do or in a completely different way). Table 2, also following, cross-references, between the two Contracts, where corresponding provisions are located in each Contract.

² The FAR Contract’s Paragraph 8(b) is deleted, and the FAR/BAR Contract’s Standard D is deleted.

³ The FAR Contract’s Paragraph 8(a)(1) is deleted, and the FAR/BAR Contract’s Standard N is deleted.

⁴ The FAR Contract’s Lines 68-72 are deleted, and the FAR/BAR Contract’s Paragraph XII is deleted.

⁵ Minor differences or differences in legal “boiler-plate” provisions are not addressed here.

TABLE 1

	DIFFERENCES BETWEEN:	
	THE FAR/BAR CONTRACT	THE FAR CONTRACT
PROVISION	LOCATION & SUMMARY OF DIFFERENCES	LOCATION & SUMMARY OF DIFFERENCES
Assignability of the Contract	<i>Paragraph X:</i> The parties must choose one of these three options: (1) allowing the buyer to assign and be released from the Contract; (2) allowing the buyer to assign and not be released from the Contract; and (3) not allowing the buyer to assign.	<i>Paragraph 14:</i> The buyer may not assign without the seller’s written consent.
Attorneys’ Fees	<i>Standard R:</i> In case of a dispute, the losing party has to pay the winning party’s legal fees &	<i>No reference:</i> No such provision is included or resulting deterrence provided. All

	costs. This helps ensure that parties abide by the Contract and do not initiate lawsuits without merit.	parties pay their own legal fees & costs.
Building Permit Representation	<p><i>Standard W(4):</i></p> <p>Seller represents that seller has no knowledge of any repairs or improvements made to the property without compliance with governmental regulations, or building code violation notices that have not been already disclosed to the buyer. If the representation proves to be untrue, buyer can sue seller.</p>	<p><i>No reference:</i></p> <p>Unfortunately, the FAR AS IS Addendum, by replacing Paragraph 8, deletes both: (1) seller's requirement to prove that all building permits have been closed and all improvements permitted, and (2) the obligation to close out any permits found to be open or obtain permitting for any non-permitted improvements. The buyer, if the buyer discovers these problems, has only a right to cancel.</p>
Coastal Construction Control Line (CCCL) Requirements	<p><i>No reference:</i></p> <p>A separate Addendum provision must be added regarding these requirements.</p>	<p><i>Paragraph 7(g):</i></p> <p>The Contract contains a provision dealing with these requirements.</p>
Delay of Closing for Acts of God <i>(See also Force Majeure & Risk of Loss Provisions)</i>	<p><i>Paragraph VI:</i></p> <p>In the event of extreme weather or other "force majeure" events, closing can be delayed until: (1) utilities are restored, and (2) building insurance is available, with (3) a time limit inserted by the parties, which, if left blank, is 14 days by default.</p>	<p><i>Paragraph 4 & 11(c):</i></p> <ol style="list-style-type: none"> 1. If insurance underwriting is suspended at closing, the closing can be delayed until 5 days after the suspension is lifted. 2. Otherwise, all time periods, including closing, can be delayed up to 30 days for acts of God.
Dispute Mediation, Arbitration, & Forums	<p><i>Standard S:</i></p> <p>State or federal court for all disputes. Note, however, that most court systems require the parties to attempt mediation of their claims before trial.</p>	<p><i>Paragraph 16:</i></p> <ol style="list-style-type: none"> 1. For deposit disputes, mediation first, then, as determined by the escrow agent, arbitration, a Florida court, or The Florida Real Estate Commission. 2. For all other disputes, mediation first, then arbitration in the county where the property is located.
Financing Contingency	<p><i>Paragraph IV:</i></p> <ol style="list-style-type: none"> 1. The contingency specifically defines whether the interest rate will adjust, the interest rate %, and the loan 	<p><i>Paragraph 3:</i></p> <ol style="list-style-type: none"> 1. The contingency does not specifically define in advance what loan will be acceptable to buyer, so

	<p>term, which then makes clear in advance whether the loan that is approved will be acceptable to the buyer and satisfy and eliminate this contingency.</p> <p>2. If buyer receives loan approval, <u>buyer must deliver written notice of loan approval</u> to seller within loan approval period. If buyer fails to do so, seller can give buyer notice of 3 days to waive the contingency or the contract will be cancelled. Regardless of notice, if the loan is not approved, either party can cancel the contract. If the contract is cancelled as a result of buyer failing to obtain loan approval, <u>buyer</u> will receive the deposit, provided that buyer used due diligence in seeking the loan.</p>	<p>buyer has the right to reject any offered loan, no matter how attractive, and thereby cancel the Contract and receive a return of the deposit.</p> <p>2. If buyer does <u>not</u> receive loan approval, <u>buyer must deliver written notice of failure to obtain an acceptable loan</u> to seller within the loan approval period. If buyer fails to do so, and the sale does not close, <u>seller</u> will receive the deposit.</p>
Flood Zone Advisory	<p><i>No reference:</i></p> <p>No such optional advice is provided to the buyer.</p>	<p><i>Paragraph 7(c):</i></p> <p>The Contract contains this optional advice to the buyer.</p>
Force Majeure <i>(See also Delay of Closing & Risk of Loss Provisions)</i>	<p><i>Paragraph VI:</i></p> <p>If force majeure conditions continue beyond time limit set by the parties, either party may cancel the contract. Who receives the deposit is not mentioned, but it is <i>presumably</i> returned to buyer.</p>	<p><i>Paragraph 11(c):</i></p> <p>If force majeure conditions continue beyond 30 days, both parties are excused from having to perform and either party can cancel. Buyer will receive a return of its deposit.</p>
Inspection	<p><i>Paragraph XIV:</i></p> <p>This is a <i>general</i> inspection right of every aspect of the real property with no limits or restrictions.</p>	<p><i>AS IS Addendum:</i></p> <p>This inspection right is limited as follows: (1) the inspections <u>must</u> be conducted by licensed professionals; (2) the buyer may not cancel unless the cost of repairs for discovered defects exceeds a certain monetary limit (\$250 if left blank), and (3) written inspection reports and repair estimates must accompany any cancellation.</p>
Prorations & Credits	<p><i>Standard L:</i></p> <ol style="list-style-type: none"> 1. Taxes must be prorated based upon the discount for early payment. 2. Any advance rent and security 	<p><i>Paragraph 5(d):</i></p> <ol style="list-style-type: none"> 1. No such requirement for consideration of the early payment discount.

	deposits must be credited to buyer and charged to seller. Other items listed are also subject to proration.	2. No such contract requirement, but landlord/tenant law requires a credit. Other proratable items are the same.
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<p>Realtor® Protections</p>	<p><i>Standard Z:</i></p> <p>Buyer and buyer's successors & assigns waive all claims against the Realtor® for defects or damages that may exist at closing but are subsequently discovered. This is a somewhat limited protection.</p>	<p><i>Paragraphs 15, 16(b), 18, & 19:</i></p> <ol style="list-style-type: none"> 1. The Realtors® are expressly entitled to receive 50% of the deposit if buyer defaults and the full commission if seller defaults. 2. If the Realtors® are a part of a dispute, the Realtors® must consent to arbitration. 3. Both parties expressly agree that the Realtors® have advised them to verify all representations and to seek legal and other professional advice. 4. Buyer agrees that the Realtors'® representations are based upon seller representations or the public records and agrees to rely upon other parties for verification of the property's condition, square footage, and value. 5. Both parties agree to indemnify the Realtors® against and release them from: (a) all expenses and costs, including those of attorneys, resulting from the parties' Contract breaches or misrepresentations; (b) the Realtors'® performance of tasks beyond their scope of services; and (c) other vendor services, products, or payment. 6. The parties expressly direct the escrow agent to disburse the commissions at closing.
<p>Rented Property Provision</p>	<p><i>Paragraph VIII & Standard F:</i></p> <p>The Contract covers: (1) the required disclosure of the terms of any existing lease, tenant estoppel letters, and other relevant lease matters, and (2) any occupancy of the property by the buyer in advance of closing.</p>	<p><i>No reference:</i></p> <p>A separate, but more comprehensive, FAR Rental Addendum must be attached, which covers these issues and more.</p>
<p>Risk of Loss (See also Delay of Closing & Force Majeure Provisions)</p>	<p><i>Standard O:</i></p> <p>If the property is damaged by casualty and repair costs do not exceed 1.5% of</p>	<p><i>Paragraph 9:</i></p> <p>If the property is damaged by casualty and the repair time does not exceed 45</p>

	<p>the price, seller must repair and buyer must buy. Otherwise, buyer may: (1) cancel and have its deposit returned, or (2) take the property AS IS with a credit for the 1.5%.</p> <p><i>Note: The language of this paragraph, together with the language in Paragraph VI regarding delay of closing and force majeure, may create certain conflicts within the contract regarding the parties' rights in the event that acts of God delay closing or damage the property.</i></p>	<p>days, seller must repair and buyer must buy. Otherwise, buyer may: (1) cancel and have its deposit returned, or (2) take the property AS IS, and seller must credit the deductible to buyer and assign any unexpended insurance proceeds to buyer.</p> <p><i>Note: The language of this paragraph, together with the language in Paragraphs 4 & 11(c) regarding delay of closing and force majeure, may create certain conflicts within the contract regarding the parties' rights in the event that acts of God delay closing or damage the property.</i></p>
Seller Financing Provision	<p><i>Standard B:</i></p> <p>The Contract provides provisions for seller financing.</p>	<p><i>No reference:</i></p> <p>A separate Seller Financing Addendum must be added.</p>
Seller Protections	<p><i>Standards W(2) & Z:</i></p> <ol style="list-style-type: none"> 1. Seller makes no warranty or representation regarding the physical condition or history of the property. 2. Buyer and buyer's successors & assigns waive all claims against the seller for defects or damages that may exist at closing but are subsequently discovered. 	<p><i>AS IS Addendum:</i></p> <p>Seller makes no warranties, except marketability of title.</p>
Special Tax Assessments	<p><i>Paragraph XI(a):</i></p> <p>Regardless of whether the assessment is certified, confirmed, ratified, pending, or payable in installments at the time of closing, the parties simply agree on whether seller or buyer will pay.</p>	<p><i>Paragraph 5(e):</i></p> <p>If the assessment is certified, confirmed, and ratified, seller will pay. Otherwise, the buyer will pay.</p>
Survey Deadline	<p><i>Standard C:</i></p> <p>The survey must be obtained and reviewed within 5 days after the time allowed for the delivery and examination of the Title Commitment.</p>	<p><i>Paragraph 10(c):</i></p> <p>The survey must be obtained and reviewed prior to closing.</p>

Time Calculations	<p><i>Standard I:</i></p> <p>Time periods of less than 6 days do not include Saturdays, Sundays, or holidays.</p>	<p><i>Paragraph 11(b):</i></p> <p><i>All time periods are computed in business days.</i></p>
Title Defect Curative Period	<p><i>Standard A:</i></p> <p>Seller has 30 days to cure, but buyer has the ability to extend the Curative Period for another 120 days or less, within which time seller must continue to attempt to cure.</p>	<p><i>Paragraph 10(b):</i></p> <p>Seller has 30 days to cure.</p>
Title Insurance Commitment Deadline	<p><i>Paragraph V & Standard A:</i></p> <p>The parties insert how many days (but not less than 5 days) prior to closing the Commitment must be delivered.</p>	<p><i>Line 250:</i></p> <p>The Commitment must be delivered 10 days prior to closing.</p>
Title Insurance Payment & Selection of Title Agent	<p><i>Paragraph V:</i></p> <p>If seller pays the premium, seller selects the title agent. Conversely, if buyer pays the premium, buyer selects the title agent. The parties must agree on the option of who pays.</p>	<p><i>Paragraph 5(c):</i></p> <p>The provision is the same, except there is a third option whereby buyer selects the title agent, but seller pays the premium.</p>
Title Matters to which Buyer Takes Subject	<p><i>Paragraph VII:</i></p> <p>In addition to other matters, the buyer is required to take title to the property subject to “unplatted public utility easements of record (located contiguous to real property lines and not more than 10 feet in width as to the rear and front lines and 7½ feet in width as to the side lines).”</p>	<p><i>Paragraph 10(a):</i></p> <p>No such requirement, but the other matters to which the buyer takes subject are the same.</p>
1031 Exchange Required Provision	<p><i>Standard Y:</i></p> <p>The Contract contains a provision dealing with this requirement.</p>	<p><i>No reference:</i></p> <p>A separate 1031 Exchange Addendum must be added regarding this Internal Revenue Code requirement.</p>

TABLE 2

	CROSS-REFERENCES* FOR CORRESPONDING PROVISIONS OF:	
	THE FAR/BAR CONTRACT	THE FAR CONTRACT
PROVISION OR TOPIC	CONTRACT LOCATION	CONTRACT LOCATION
Acceptance Deadline (Initial Offer)	Paragraph III(a)	Lines 403 - 407
Acceptance Deadline (Counteroffers)	Paragraph III(a)	Lines 408 - 411
Alternative Dispute Resolution	None	Paragraph 16
Assignability of Contract	Paragraph X	Paragraph 14
Attorneys' Fees	Standard R	None
Building Permit Representation	Standard W(4)	None
Closing Costs Payment (Except Title Insurance)	Standard K covers both sellers' and buyers' costs.	Paragraph 5(a) for sellers' costs. Paragraph 5(b) for buyers' costs.
Closing Date	Paragraph VI	Paragraph 4
Closing Place	Standard H	Paragraph 5
Coastal Construction Control Line (CCCL) Requirements	None	Paragraph 7(g)
Deed Documentary Stamp Tax Paid by Seller	Standard K, Line 207	Paragraph 5(a), Line 65
Deed Type	Standard U	Paragraph 10
Default by Either Party	Standard S	Paragraph 15
Delay of Closing (Acts of God)	Paragraph VI	Paragraphs 4 & 11(c)
Disclosures: a. Radon Gas b. Mold c. Lead-Based Paint d. Energy-Efficiency e. Property Tax f. HOA	Paragraph XI(b) Paragraph XI(c) Paragraph XI(e) (add lead-based paint rider for pre-1978 homes) Paragraph XI(d) Paragraph XI(h) Paragraph XI(g)	Paragraph 7(b) Paragraph 7(f) Add separate FAR Lead-Based Paint Addendum Paragraph 7(a) Paragraph 7(e) Paragraph 7(d)

g. Non-Observable Facts	Standard W(1)	Paragraph 7
Dispute Mediation, Arbitration & Forums	Standard S	Paragraph 16
Effective Date Definition	Paragraph III(b)	Paragraph 11(a) & Line 424
Escrow	Standard Q	Paragraph 17
Financing Contingency	Paragraph IV	Paragraph 3
Flood Zone Advisory	None	Paragraph 7(c)
Force Majeure	Paragraph VI	Paragraph 11(c)
Foreign Investment in Real Property Tax Act (FIRPTA)	Paragraph XI(f)	Paragraph 5(f)
Home Warranty & Payment	Paragraph XIII	Paragraph 5(g)
Inspection Period	Paragraph XIV	AS IS Addendum
Maintenance of Property	Standard X	AS IS Addendum
Miscellaneous & General Provisions	Standards T & V	Paragraph 13
Notices	Standard T	Paragraph 12
Occupancy Delivered at Closing	Paragraph VIII	Paragraph 4, Line 55
Prorations	Standard L	Paragraph 5(d)
Realtor® Names & Commission %	Lines 148 - 151	Paragraph 19, Lines 362 & 363
Realtor® Protections	Standard Z	Paragraphs 15, 16(b), 18, & 19
Rented Property Provision	Paragraph VIII & Standard F	None
Risk of Loss	Standard O	Paragraph 9
Seller Financing Provision	Standard B	None
Seller Protections	Standards W(2) & Z	AS IS Addendum
Special Tax Assessments	Paragraph XI(a)	Paragraph 5(e)

Survey Procedure & Payment	Standard C	Paragraph 10(c)
Time Calculations	Standard I	Paragraph 11(b)
Time of Essence	Standard I	Paragraph 11(a)
Title Insurance Procedures	Paragraph V & Standard A	Paragraph 10(a) & (b)
Title Insurance – Who Pays?	Paragraph V	Paragraph 5(c)
Title Matters to which Buyer Takes Subject	Paragraph VII	Paragraph 10(a)
Walk-through	Standard X	AS IS Addendum
1031 Exchange Provision	Standard Y	None

* Corresponding provisions whose locations are similar or obvious, or that address legal “boiler-plate” issues, are not included in this table.

If you have any questions, please do not hesitate to contact us at 741-8224.

Sincerely,

Garret T. Barnes

Adron H. Walker