

Guidelines for the Preparation & Use of the Pennsylvania Association of Realtors®

Pre-Settlement Possession Addendum to Agreement of Sale (Form PRE)

General Notes on Usage of PAR Standard Forms

The Pennsylvania Association of Realtors® Standard Forms are developed by the PAR Standard Forms Committee for use in a wide variety of transactions and market areas. To provide maximum flexibility to the parties, many provisions contain blank spaces that can be filled in as appropriate. Further, it is helpful to remember that where pre-printed language is not agreeable to the parties it can be crossed out and/or modified, with the parties dating and initialing the change in the margins. As a general rule, text added by the parties that changes pre-printed text, or pre-printed text altered by the parties, will prevail over pre-printed language should a dispute arise.

As stated in the title, these are only *guidelines* for the proper use of this form. The Guidelines presented here should be used in conjunction with, and as a supplement to, your professional education, and are in no way meant to substitute for a proper professional education. Seek guidance from your Broker and/or your legal counsel if you have any questions about the proper use of this or any PAR form in a transaction.

To make these Guidelines more useful there may be helpful “extras” added to the main text. Many of the “Note” or “Practice Tip” items you will see are based, in part, on the experiences of PAR members and legal counsel, and are designed to point out some of the more practical items involved in filling out this form.

Paragraph 1: Purpose

The Pre-Settlement Possession Addendum is used when Buyer and Seller agree that Buyer is permitted to occupy or access the Property before the Settlement Date for a particular purpose. Select the purpose for which Buyer will be entering the Property, which in most cases will be a defined reason. For example, Buyer may ask to store personal property while waiting for the Settlement Date.

Note: Although there is no specific limitation on the period of pre-possession occupancy or access this form could cover, it is generally used for shorter terms of a few weeks to a few months. If the parties wish to do a longer term arrangement, they should be advised to involve counsel.

Note: This Addendum does NOT create a formal lease from Seller to Buyer. Creating a lease for the Property would bring the parties within the scope of the Pennsylvania Landlord and Tenant Act, which would add substantial complexity to the transaction.

Paragraph 2: Possession Date

Enter the date by which Seller must provide Buyer access to the Property. Buyer’s pre-settlement possession will obviously end upon settlement.

Practice Tip: In the event settlement does not occur, Buyer’s right of access ends at 5:00 pm two days after the Settlement Date specified in the Agreement of Sale. For this

reason, make sure a date is listed in the Agreement and not a general description such as “when determined by the mortgage lender.”

Paragraph 3: Occupancy Fee

As noted above, this Addendum is NOT intended to be a formal lease between Buyer and Seller. Instead of paying “rent” for the purpose of staying in the home, Buyer is obligated to pay a daily “occupancy fee” to Seller. Enter the amount of the occupancy fee in the line provided. Though the occupancy fee is a **daily** fee, it is paid in monthly installments.

Note: This paragraph states that the occupancy fee is to be calculated “from Possession Date until settlement.” This means that both the settlement date and the vacating date are counted when calculating the occupancy fee. For example, if the parties sign an Agreement that permits possession on June 30, with settlement to occur on August 31, for an occupancy fee of \$20 per day, then the occupancy period would be 63 days with the first month’s total occupancy fee of \$640 for 32 days. The second month’s fee would be \$620 for the remaining 31 days.

Unlike the deposits in most transactions, the occupancy fees are not paid to a broker and they are not escrowed. The occupancy fees are paid directly to Seller unless Seller directs otherwise. Because they are paid directly to Seller, any occupancy fees are not subject to the same laws and regulations that cover escrowed funds held by licensees, but may be subject to federal, state and local income tax laws.

Paragraph 4: Deposits

Use this paragraph to establish an additional damage deposit to be paid by Buyer. As with the occupancy fees, this deposit would be paid directly to Seller unless another agreement is reached between the parties. This deposit would be returned to Buyer unless there is damage to the Property (see Paragraph 12(B) for information relating to Buyer default).

Note: Since any deposit would be held directly by the seller and not by a licensee, it would not be subject to the same laws and regulations relating to deposits held by licensees. Specifically, if there is a dispute as to how the money should be distributed, Seller is not legally or ethically obligated to put or keep the money in an escrow account until the dispute is settled.

Paragraph 5: Property Inspection

Buyer will inspect the Property within 2 days of when Seller vacates. The purpose of this inspection is to determine whether there is any damage that would cause Seller to be in default of the Agreement or to ensure that the condition of the Property is as expected according to the terms of the Agreement. See Paragraphs 7 & 8 for additional information regarding the physical condition of the Property.

Practice Tip: During a normal pre-settlement walkthrough Buyer may simply be focused on confirming that any agreed upon repairs have been completed and making sure that the Property has not significantly deteriorated during the transaction. Because the house will likely be vacant or close to it, Buyer can do a fairly thorough job of assessing the Property without significant effort. A pre-settlement walkthrough in a transaction where Buyer will be occupying the Property may require some additional effort by both parties.

Buyers should spend extra time to do a more thorough *assessment* of the condition of the Property. Buyer may want to move furniture to get an idea as to the condition of walls and carpet and may want to take a closer look at the operation of appliances to see what is in working order. Similarly, Buyer should make Seller aware of any issues they see that wouldn't have risen to the level of a disclosable "material defect." For example, if Buyer is aware of holes in the carpets or walls that aren't visible because of how the house is furnished, they would want to inform Seller of these items so Seller won't try to claim that they were caused by Buyer's activities after taking possession.

Paragraph 6: Utilities

Use this section to identify what utilities and costs, if any, will be paid by Buyer. Although the list identifies many of the most common utility and operation costs, there may be others that will be relevant to a particular property. The parties should go through this list carefully and add any items to be paid for by Buyer. Additional items might include heating oil, condominium or homeowner's association fees, cable or satellite TV, parking fees and pest control. If there are any leased items identified in the Agreement of Sale, the parties should also spell out how these lease fees are to be paid.

Practice Tip: In this paragraph, days are counted the same way as they are for the occupancy fees – including the day of possession and the day of settlement. If Buyer is responsible for payment of certain utilities, payment can only be made after Seller receives a final bill, which may take several weeks. Buyers should be sure to get Seller's forwarding address to provide this pro-rated billing information. The parties might also consider pre-agreeing to a method of payment involving deductions from Buyer's damage deposit.

Paragraph 7: Pets

The Pets paragraph establishes whether and how Buyer is permitted to keep pets on the Property. All special provisions relating to pets should either be inserted here, or this section should refer to an addendum with specific terms and conditions related to pets.

Paragraph 8: Maintenance

Buyer is required to use care when on the Property and keep the Property in the same general condition, aside from normal wear and tear. If Seller has any rules or conditions of occupancy, they should be attached to the Addendum.

Practice Tip: The longer the buyer is going to remain in the property, the more likely it is that the parties may have to deal with some sort of substantial repair issue. If the buyer will be in the property for several weeks before settlement, the parties should consider adding language that explicitly addresses the question of responsibility for more substantial maintenance issues such as broken appliances or major repairs.

Paragraph 9: Changes to the Property

In this paragraph, Buyer agrees not to make any substantial changes to the Property unless they are agreed to by Seller. These alterations or improvements might take two forms. One would be

alterations that are required by the Agreement of Sale but have not yet been completed. For example, if Seller agreed to have a section of the sidewalk repaired but the repair wasn't completed by the time of settlement, that repair can still be done. The other type of change that is permitted would be one agreed upon by the parties after settlement.

Paragraph 10: Property Insurance

Insurance issues can be some of the most confusing aspects of this sort of arrangement. Where Seller owns the Property but Buyer is living there, both need to be sure that they have properly insured their interests. As noted in the first line of the paragraph, both parties are urged to contact an insurance professional to be sure that they are able to obtain the proper insurance coverage.

If Buyer is physically occupying the Property or storing personal items on the Property, insurance for this personal property is strictly the responsibility of Buyer; any policy maintained by Seller will not cover Buyer's personal property. Subparagraph (B) requires Buyer to obtain coverage on that personal property. Buyer's amount of personal liability and personal property coverage should be disclosed by inserting the policy amount into the blank. Buyer should seek advice from an insurance professional before deciding on a policy amount to be sure that the amount is sufficient to cover the value of Buyer's personal property and potential liability that may be attributed to Buyer's negligence while occupying Seller's property.

Practice Tip: Because the seller may not be occupying the property, it is likely that a standard homeowner's policy would not be applicable at the time of settlement. Make sure that the seller fully explains the scenario to the insurance agent, as failure to obtain the correct type of policy may mean that the coverage is void.

Paragraph 11: Entry

Buyer and Seller are agreeing that Seller is permitted to enter the Property at any time with no notice for an emergency, and once a week with at least 24 hours' notice to Buyer. This provision helps protect Seller's interest in the Property without a substantial disruption to Buyer's occupancy. In the event an emergency repair is necessary, or some other emergency presents itself, this provision allows Seller to make entry immediately to take care of the problem. The portion allowing weekly entry lets Seller have reasonable access to the Property, while also allowing for Seller to check the Property for any damage or violations of the rules that were agreed upon.

In order to permit Buyer to gain access to the Property, Seller must provide Buyer with a set of keys or combinations the Buyer will need to accomplish the stated purpose for pre-settlement possession.

Paragraph 12: Seller's Default

Like in the main body of the Agreement, all dates and times are considered to be "of the essence" in this addendum. This means that if a party fails to meet a stated deadline in either the body of the Agreement or the addendum, they may be considered to be in default of the Agreement. In discussing this addendum, it means that Buyer's failure to make a payment of the occupancy fee by the stated date is a default, as is the failure to vacate the Property if settlement does not occur. This paragraph provides for several non-exclusive options for Seller in the event of a Buyer default.

POSSESSION

In the event of a Buyer default, Buyer agrees to immediately vacate the Property and Seller is entitled to immediate possession. If Buyer refuses to leave, Seller is authorized to bring appropriate legal action without any advance notice to Buyer.

Note: In a traditional landlord-tenant relationship there are several steps the landlord must take before attempting to evict a tenant and secure possession of the property. Because this is not a rental situation the protections of the Landlord and Tenant Act do not apply.

DEPOSIT

If Buyer has paid a security/damage deposit as stated in Paragraph 4, Seller is entitled to retain some or all of that deposit to cover the costs of unpaid fees or damages. For example, if Buyer defaults by refusing to pay the occupancy fee and is then forced to vacate the Property, Seller could retain an amount equal to the amount of the unpaid fee for the days that Buyer actually occupied the Property. Similarly, if there was physical damage done to the Property then Seller may be able to retain enough of the deposit to pay for those damages.

Note: As with all other transactions involving a default, there may be damages far beyond any physical damage to the property. For example, if the buyer had been counting on receiving the occupancy fee in order to pay the mortgage for several months until he could move into the property, the buyer might claim damages in the total amount of the anticipated fees. If there is any claim to damages beyond obvious, be sure to suggest that your client seek legal counsel.

LEGAL FEES

Where Seller is forced to bring legal action to enforce the terms of the addendum, Buyer agrees to pay all legal costs including attorneys' fees and court costs.

Paragraph 13: Assignment

Buyer is not permitted to allow any other person or entity to access or occupy the Property during this time by assigning the addendum to another party or by leasing the occupancy rights to the Property. If the intent is to have some other entity occupying the Property after the sale, this is best done as a direct lease from Buyer to that entity.

Paragraph 14: Indemnification

This language is similar in scope and effect to the release language contained in the Agreement of Sale. In this context, the indemnification is from Buyer to Seller and to all involved brokers. Buyer agrees to indemnify Seller and all brokers against any issues that may arise from Buyer's occupancy of the Property before settlement, and agrees to pay for all related costs of Seller should Seller become involved in legal action resulting from something done by Buyer while Buyer was occupying the Property.

Paragraph 15: Survival

Once the parties have settled on a property most of the obligations of the Agreement of Sale are no longer enforceable if they haven't yet been carried out. One substantial exception to this general rule is

that any provisions stating that they “survive” settlement continue to be valid and enforceable. For example, the mediation paragraph in the Agreement of Sale specifically states that it survives settlement, meaning that if one party wishes to mediate a dispute the other can be forced to mediate according to the terms of the Agreement. Similarly, this language states that the entire addendum is to survive settlement. This way the parties can enforce the terms of the addendum.