



## 2016 AREA Purchase Contract Revisions

### Backgrounder: Purchase Contract Section 7 – Dower

#### Form:

- All residential purchase contract forms

#### What are dower rights?

Dower rights come from the *Dower Act*. With regard to the sale of a property, dower rights protect the spouse of an owner of property by preventing the “disposition” of property without the knowledge and consent of the non-owner spouse. A “disposition” includes the sale of the property.

#### When do dower rights exist?

Dower rights may exist when the following circumstances apply:

- the property title is in one name;
- the owner on title is legally married; and
- either spouse has lived on the property at any time during their marriage.

This means that if a couple is separated but not divorced, and the spouse on title lived in the property even for a short time, dower consent is necessary even if the non-owner spouse never stepped foot on the property.

#### What does the REALTOR® do if dower rights exist?

If dower rights exist, dower consent must be obtained at each step in the process – listing, offer and property transfer. REALTORS® are involved at the listing and offer stages and AREA’s Dower Consent and Acknowledgment form is available to AREA members for this purpose. Lawyers typically handle obtaining consent at the time of transfer. The consent obtained for one of these stages cannot be re-used at another stage. Each stage requires a new consent.

**AREA’s Exclusive Seller Representation Agreement (ESRA):** When listing a property with only one registered owner indicated on the property title, the ESRA includes these questions:

- (a) Are you legally married? (includes a separated couple not yet legally divorced but does not include a couple in a common law relationship)
- (b) Have you or your spouse resided on the property at any time since your marriage?

If the owner answers yes to both questions, then dower rights may exist. Now, the REALTOR® should recommend the owner obtain legal advice, especially if there is a Dower Release registered on title. When it is established that dower rights exist, the non-owner spouse will sign the ESRA and the Dower Consent and Acknowledgement form.



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#### AREA's Residential Purchase Contract: Section 7 – Dower:

#### **7. DOWER**

**7.1** The seller represents and warrants to the buyer that no spouse has dower rights in the Property. Otherwise, if dower rights do apply, the seller will:

- (a) have the non-owner spouse sign this contract; and
- (b) provide a completed Dower Consent and Acknowledgment form to be attached to and form part of this contract on or before \_\_\_\_\_, 20\_\_\_\_\_. (seller to enter an appropriate date).

If the seller fails to provide the completed Dower Consent and Acknowledgment form by the agreed date, the buyer may void this contract at the buyer's option by giving the seller written notice. The buyer's option expires when the seller delivers the Dower Consent and Acknowledgment form, even if delivered late.

This section addresses dower rights in a way that is consistent with the *Dower Act*. Whether dower rights exist should already be known to the seller because it is first addressed in the Exclusive Seller Representation Agreement (ESRA). Now, the Purchase Contract clause provides a step-by-step process of what is to be done if dower rights exist:

7.1 – indicates that dower rights do not exist (and no further action is required). Otherwise, if dower rights do exist, then the seller commits to have the non-owner spouse sign the contract [7.1(a)]. Note: there is a specific place in the contract for the non-owner spouse's signature in section 18:

**Non-owner spouse signature (when dower rights apply):**

Signed and dated at \_\_\_\_\_, Alberta at \_\_\_\_\_ .m. on \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Non-Owner Spouse Signature

\_\_\_\_\_  
Non-Owner Spouse Name (print)

\_\_\_\_\_  
Witness Signature

\_\_\_\_\_  
Witness Name (print)

The seller also commits to providing a completed Dower Consent and Acknowledgement form by an agreed date [7.1(b)]. Note: the clause indicates the seller is to select an appropriate date. This is because only the seller will know if dower rights apply and the availability of the non-owner spouse.

If the seller cannot provide proof of the non-owner spouse's consent through the completed Dower Consent and Acknowledgment form by the agreed date, the buyer has an option to void the contract. The buyer's option ends when the form is delivered, even if delivered later than agreed. This is similar to the seller's option to void the contract if the buyer fails to pay a deposit (Section 4 – Deposit). Legal advice is recommended and can aid the buyer's decision. Some possible options are:

1. the buyer will exercise the option and void the contract;
2. the parties agree to extend the date while the seller continues efforts to have the form completed; or,

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3. the parties agree to delete the term and insert a seller's condition that the seller apply for an application to dispense with consent.

In summary, Section 7 – Dower achieves the following:

1. it informs the buyer of the status of dower rights by giving a seller statement that no dower rights exist OR, if they do, it is indicated by the non-owner spouse's signature and the negotiated date for when the consent is to be obtained;
2. it serves to indicate that the consent is part of the contract as required by the *Dower Act*; and,
3. it gives the buyer an option to void the contract, if needed.

#### **Process for having the Dower Consent and Acknowledgment signed:**

At each stage in the listing and selling process, a dedicated Dower Consent and Acknowledgment form is required to be completed and signed before a lawyer, Commissioner for Oaths or Notary Public. At each stage, the signed consent must be attached to the relevant document, which the non-owner spouse must also sign – Exclusive Seller Representation Agreement, Residential Purchase Contract and the transfer of land.

This process ensures that the non-owner spouse understands the rights being given up and prevents the registered owner spouse from exerting pressure on the non-owner spouse to sign. If the non-owner spouse wishes to waive dower rights completely, a Release of Dower Rights may be executed before a lawyer, who does not already act for the owning spouse.

#### **Common Questions:**

##### **Q) There is only one name on title. Does this mean dower rights exist?**

A) Not necessarily. For dower rights to exist, the owner of the property must be married and either one of the married couple must have resided in the property. A buyer's agent will not know this information. If the buyer's agent completes clause 7 when it is not needed, a sign-back situation is created unnecessarily. Therefore, buyer's agents should not fill in the clause unless the seller's agent has advised that dower rights do exist. Another option is for the seller's agent to provide the information in the listing's private remarks that 1) dower rights exist, and 2) the seller requires "x" days to obtain the Dower Consent and Acknowledgement form. By doing so, the buyer's agent can fill in the clause with the required time and a seller sign-back can be avoided.

##### **Q) Why is dower consent required at each stage of the transaction?**

A) This requirement comes from the *Dower Act*, which states consent must be given for each "disposition" (sec 2). A disposition is defined in the Act [sec. 1(b)(i)(ii)] as a transfer, agreement



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for sale, lease (in excess of 3 years), or other instrument that conveys an interest in land, a mortgage or encumbrance, a devise or other disposition made by will. So, each time one of these things happens, consent must be obtained.

**Q My client's lawyer says not to worry about dower consent and that it will be handled by the law office at the transfer.**

A) The transfer is just one of the “dispositions” in the Dower Act. If the non-owner spouse refuses to sign the transfer, the transaction is at risk (including your commission!). However, if consent has already been given at both the listing and purchase stage, a court may consider the interests of the innocent buyer who will be disadvantaged if the transfer is not made. This may result in the sale being ordered and the owner and non-owner spouse required to settle their differences in another way. AREA does not recommend REALTORS® go against the advice of a client's lawyer. However, AREA is concerned about REALTOR liability. If your client's lawyer's advice is to proceed this way, ask the lawyer for a letter stating their advice and that you will not be held liable for that advice.

#### **Compliance is key:**

Failure to obtain proper Dower Consent and Acknowledgment could result in the loss of the right to encumber the title in the event of a commission dispute. Non-compliance with the *Dower Act* at any step of the process (listing or offer stage) could result in a sale that is vetoed by the non-owner spouse at the last minute. This could result in the registered owner being liable for damages to the buyer, which would likely result in a liability claim against the REALTOR®.

Dower situations can be complicated. When dower rights exist, REALTORS® should always recommend clients – both sellers and buyers – get legal advice.

**Also see:** Backgrounder: What to do when there is a dower release registered on title?

Note: REIX will not provide coverage for claims arising out of or in respect to members' activities as Commissioners of Oaths; therefore, brokerages should evaluate their own level of risk tolerance associated with commissioning Dower Consents in house. AREA advises members to seek legal advice when reviewing brokerage policies.