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DAVIS, MALM & D'AGOSTINE
Buying and Selling Real Estate in Massachusetts

ILN REAL ESTATE GROUP



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KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER MASSACHUSETTS LAW

I. STANDARD FORMS OF AGREEMENTS

- A. Offer to Purchase sets forth buyer's offer of price, date for closing, contingencies for inspections, financing etc. and date for signing a formal purchase and sale agreement. Seller may accept or reject.
- B. Purchase and Sale Agreement sets forth the complete terms of the purchase and sale.
- C. **Note:** In Massachusetts an Offer to Purchase may be enforced as a binding contract even if it contemplates the execution of a Purchase and Sale Agreement.

II. BROKERS

- A. All brokers in Massachusetts whether they are working with the buyer or the seller represent the seller unless the buyer enters into a separate Buyer's Broker or Dual Agency Agreement.
- B. Seller usually pays the brokers commission unless negotiated otherwise.

III. BUYER'S INSPECTIONS

- A. **Residential:** Prior to Closing, the buyer performs property inspections including inspection for structural issues, radon, asbestos, pest infestation or damage, title, and in certain rare circumstances, lead paint and underground storage tanks (for oil or propane). Buyers should also check the town/city building file on the property to make sure all alterations and renovations have been completed in compliance with permits and all permits are properly closed out. Buyer or its lender will also obtain a plot plan of the premises.
- B. **Private Septic.** If the property is on a private septic system (rather than municipal sewer), then seller has to provide buyer

with a Title V inspection (with passing results) from the town in which the home is located.

- C. **Commercial:** In addition to the inspections performed by residential buyers, commercial buyers also usually obtain a survey, an environmental review, and a use and zoning/permitting analysis.

IV. FORMS OF OWNERSHIP

- A. Residential Property is usually held in a nominee trust, an estate planning trust, or an individual's own name. Joint owners may take title as:
 - 1. Tenants in Common (each own 50%);
 - 2. Joint Tenants with rights of survivorship (they own the property jointly and the survivor ends up with 100%); or
 - 3. Tenants by the Entirety if the owners are a married couple (they each own the undivided whole of the property).
- B. Commercial Property may be held as follows:
 - 1. As the Owners pursuant to the forms set forth in A above, (highly unusual for liability purposes)
 - 2. General Partnership/Joint Venture
 - 3. Limited Partnership
 - 4. LLPs
 - 5. LLCs (most common)
 - 6. Business Trusts
 - 7. Business Corporations
 - i. C corporation
 - ii. S corporation



V. THE “CHECK-THE-BOX” REGULATIONS

- A. Treas. Reg. §1.7701-1 *et seq.* provides that domestic business corporations are *always* classified as corporations for Federal income tax purposes; GPs, LPs, LLCs, LLPs and business trusts are automatically classified as partnerships (with pass-through treatment) *unless* they “check-the-box” on Form 8832 electing to be taxed as corporations.
- B. C corporations are subject to a “double tax,” once on the corporate level, and again on dividends or distributions to shareholders. S corporations are taxed only at the shareholder level, with a few exceptions. Partnerships “pass-through” income or loss to the partners. Single-owner LLCs and business trusts are “disregarded entities.”

VI. DISTINGUISHING FEATURES

A. Nominee Trust

1. Fiduciary relationship between “trustee” and beneficiaries listed on an unrecorded schedule.
2. Trustee has no power to deal with the trust property except as specifically directed by beneficiaries – legally an “agent” for beneficiaries.
3. Third parties are entitled to rely on certificates signed by trustees of record.
4. Beneficiaries may terminate or amend trust at any time.
5. On termination, the trust property is conveyed to beneficiaries.
6. Advantages
 1. Beneficiaries are undisclosed (privacy).

2. Trust property can be effectively conveyed by assignment of beneficial interests. Useful for intra-family gifts.
 3. No income taxation on trust level; “pass-through” to beneficiaries.
7. Disadvantages
1. No limited liability for beneficiaries.
 2. Sole trustee and sole beneficiary may not be identical – merger will result.
 3. Poor draftsmanship can result in trust being treated as a “true trust,” which may result in the trust being subject to tax on capital gains and undistributed income and inability to pass through losses.
 4. Ancillary probate for deceased non-Massachusetts beneficiaries (who are deemed to own Massachusetts real estate).
 5. Potential for fraud by beneficiaries.
 6. Creation of a partnership if two or more beneficiaries.
 7. Deeds excise tax on transfer of beneficial interest (DD 95-2).

B. General Partnership/Joint Venture

1. GP is an agreement (oral or written) among two or more people to engage in business.
2. A joint venture is a GP which is limited to a specific project or business.
3. Governed by Massachusetts Uniform Partnership Act, G.L. c. 108A.
4. In absence of written agreement, a numerical majority of partners control decision-making.



5. Limited transferability of interests.
 6. Limited life. Withdrawal of partner dissolves partnership, but partnership can be reconstituted.
 7. Advantages
 1. Simplicity, informality.
 2. Pass-through treatment.
 8. Disadvantages
 1. No limited liability. Partners are jointly and severally liable for partnership liabilities. New partners liable only for future obligations; retired partners for past obligations.
 2. Limited transferability of interests.
 3. Conveyancing issues:
 - (i) If title to real estate is in the name of the partnership, any partner may convey title in the name of the partnership. A BFP may rely on the deed, notwithstanding any limitations on the partner's authority (G.L. c. 108A, §10(1)).
 - (ii) If title in the name of less than all partners (and the record does not disclose the partnership's rights), the named partners may convey title to a BFP, notwithstanding the existence of an undisclosed partner (G.L. c. 108A, §10 (3)).
 - (iii) If title in the name of all the partners, all must sign the deed. (G.L. c. 108A, §10 (5)).
 - (iv) Attachments against partners individually can affect the partnership's title if the claim relates to a partnership liability.
 4. Fiduciary duties – self-dealing, corporate opportunities. Can be modified by contract.
- C. Limited Partnerships
1. A statutory entity governed by G.L. c. 109. Creation requires filing of a brief certificate of limited partnership.
 2. Limited partnership is managed and controlled by general partners (GPs). Limited partners (LPs) are passive investors.
 3. Certain extraordinary actions can require approval of LPs.
 4. Written limited partnership agreement not required but highly advisable.
 5. Advantages
 1. Limited liability for LPs.
 2. "Pass-through" tax treatment. No entity-level tax.
 3. Names of LPs not publicly disclosed.
 6. Disadvantages
 1. Unlimited liability for GPs, but a limited liability entity, such as an LLC or a corporation, can be a GP.
 2. Unlimited liability for LP who takes part in control of business or knowingly permits his name to be used in the name of the limited partnership.
 3. Limited transferability of interests requires consent of all partners to admit a new LP; unadmitted transferees are entitled to distributions but have no other rights as LP.
 4. Fiduciary duties.



D. LLP

1. A general partnership that files a registration form with the Secretary of State under G.L. c. 108A, §§45-47.
2. Same advantages and disadvantages as a general partnership, but partners have limited liability.
3. Must renew LP status by annual filing with Secretary of State.

E. LLCs

1. Governed by G.L. c. 156C. Requires filing of certificate of organization naming manager (of if no manager, at least one person authorized to sign filings with the Secretary of State).
2. Very flexible, can be member-managed or manager-managed.
3. "Pass-through" tax treatment, unless it elects to be taxed as a corporation.
4. Single-member LLCs can be treated as "disregarded entities" for tax purposes.
5. Written operating agreement unnecessary, but highly desirable in most cases.
6. Advantages

1. Limited liability and pass-through tax treatment.
2. Less formality than a corporation. No minute book, stock ledger, etc. Query: Is that an advantage or disadvantage?
3. Flexibility. Operating Agreement can create (i) a "corporate model" LLC, with officers and a board of managers elected by members (like a corporation); (ii) a "partnership model" LLC, with management by the members (like a general

partnership); (iii) an "autocratic model" LLC, with one or more managers having sole control of the LLC (like a limited partnership); or (iv) any combination of the above.

4. Can limit or eliminate fiduciary duties.

7. Disadvantages

1. Limited transferability. Effectively disqualifies LLCs from being public companies.
2. Operating agreements can be complex and expensive to create.
3. Uncertainty as to "corporate veil" doctrine.
4. Uncertainty re legal status in other states.

F. Business Trust

1. An unincorporated organization governed by the common law, but subject to regulation under G.L. c. 182.
2. Written declaration or agreement of trust and all amendments must be filed with the Secretary of State and the clerk of every municipality in which trust has a usual place of business and recorded in the registry of deeds if it owns real property.
3. Trustees are the managing body of the trust and may delegate duties to officers. Shareholders may elect trustees, but this may give rise to personal liability. See Paragraph 4 below.
4. Trustees have personal liability for contracts, but typically limit liability to the trust assets. Shareholders who participate in excessive control or



management may be personally liable, as partners, for the debts of the trust.

5. Shares are represented by certificates, which are freely transferable subject to applicable securities laws.
6. The existence of a business trust may be subject to the Rule against Perpetuities. Many trusts have specified dates of termination.

7. Advantages

1. Free transferability of interests.
2. Limited life.
3. May elect “pass-through” treatment.
4. Once popular, now uncommon outside the utility, mutual fund and REIT industries.

8. Disadvantages

1. Potential unlimited liability.
2. Fiduciary duties.

G. Business Corporations

1. Statutory entity – G.L. c. 156D.
2. C corporation taxable as an entity (max. Federal tax, 35%; Mass., 8%).
3. S corporation gives pass-through of income and loss (Federal and Mass.) *pro rata* based on shareholdings.
 1. Requires election by all shareholders.
 2. One class of stock.
 3. 100 shareholder maximum.
 4. Shareholders must be individuals (no non-resident aliens), certain trust and estates, certain tax-exempt entities.

4. Advantages

1. Limited liability of shareholders by statute.
2. Free transferability of stock.
3. No deeds excise tax on sale of stock.
4. Pass-through treatment for S corporations.
5. S corporation dividends are tax free to extent of basis.

5. Disadvantages

1. Double-taxation for C corporation.
2. No pass-through of C corporation loss. S corporation losses limited to shareholder’s basis (*plus* loans to corporation and corporate liabilities assumed by S corporation shareholders). Guaranties not considered as debts.
3. Unlike partnership, S corporation allocation of income and loss is inflexible.
4. Mass. “sting tax” to “big” S corporations with over \$6 million in income (1.87%) or \$9 million (2.8%). (G. L. c. 63, §32(b)).
5. Corporation excise tax lien (G.L. c. 62C, §51).
 - i. (NOTE: excise tax lien now also applies to *unincorporated entities* electing corporate tax status).
6. Two-thirds shareholder vote required to approve sale of all or substantially all assets. (G.L. c. 156D, §12.02).



7. Dissolution by Secretary of State – but reinstatement possible. (G.L. c. 156D, §108). Note that assets can be sold after dissolution as part of “winding up.”
8. Corporate signatories: President or Vice President *and* Treasurer or Asst. Treasurer, who may be the same person. (G.L. c. 156D, §8.46). Corporate vote authorizing other officers may be recorded.

VII. FORM OF DEED

- A. The common deed in Massachusetts is the Quitclaim Deed whereby the Seller gives covenants as to Seller’s period of ownership only.

VIII. CLOSING COSTS/ADJUSTMENTS

- A. Seller usually pays the transfer taxes due at the time of the conveyance to the Commonwealth of Massachusetts. The tax is \$4.56 per \$1,000 of sale proceeds.
- B. **Note:** In a few jurisdictions in Massachusetts the tax is higher.
- C. **Note:** In Nantucket and Martha’s Vineyard, there is an additional land bank tax that is paid at the time of conveyance.
- D. Buyer and Seller adjust for water, sewer, gas/oil, electricity and taxes. In addition to the foregoing, if the property is commercial property, adjustments are also made for rents, third party operating expenses and common area maintenance expenses.
- E. Land that has been subjected to agricultural purposes may be subject to certain taxes and payments if it the agricultural purposes are terminated.
- F. Withholding Tax – Foreign Seller
 - 10% of amount realized (subject to reduction in certain situations (i.e.

maximum tax liability on disposition is less than amount required to be w/held; installment sales rule exception, I/c or bond is posted etc.)

- Buyer becomes withholding agent and must remit by the 20th day of the date of transfer; file Form 8288

IX. OTHER CLOSING DOCUMENTS

- A. Residential Properties: Seller has to have a smoke/carbon monoxide inspection performed by the town/city fire department and provide a certification at Closing.
- B. Title V Inspection Certificate – if the property is on a private septic system.
- C. Buyer has to obtain a municipal lien certificate from the Town/City where the premises are located stating the current status of real property taxes payments and balances due. This certificate also advises if water and sewer charges are due.
- D. Residential Property – If the property is to be used as a principal place of residence, the buyer may want to consider filing a Homestead Exemption.
- E. Sales by a Corporation are subject to the seller’s procurement of a Tax Lien Waiver. The Commonwealth of Massachusetts has an inchoate lien on the real and personal property of a seller if the sale of the property constitutes a sale of all or substantially all of the seller’s assets in the Commonwealth and the waiver advises the buyer that the lien has been waived and all taxes have been paid.

X. RECORDING REAL ESTATE DOCUMENTS

- A. Title Documents are recorded on a county basis in Massachusetts. In other states, title documents are recorded in the towns and city records.



- B. Unlike most other states in the United States, Massachusetts has two recording systems.
 - 1. Registered Land. Some property is registered land whereby real estate documents are filed with the Registry District of the Land Court within each county in which the premises are located. Registered Land means that the land has been certified, all documents affecting registered land are confirmed at the time of filing, and the Commonwealth of Massachusetts guarantees the title to the property. The Land Court issues a certificate of title certifying title to the owner of each registered property.
 - 2. Recorded Land. Unless the property is registered, it is recorded land and is recorded with the Registry of Deeds in the County where the premises are located.

XI. ANNUAL COSTS FOR PROPERTY OWNERSHIP

- A. Property Insurance
- B. Real Estate Taxes
 - A. Ad Valorem/Town & City Assessments
 - B. Rental Properties (Florida – tax on rental income)
 - C. Personal Property Taxes (Cars, Boats, etc.)

NOTE: The tax implications of Foreign Purchases and ownership of US-based real estate are outside the scope of this outline.