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SHUTTS & BOWEN LLP
Buying and Selling Real Estate in Florida



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KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER FLORIDIAN LAW

I. STANDARD FORMS OF AGREEMENTS

A. Purchase and Sale Agreement sets forth the complete terms of the purchase and sale including, among other things, price, security deposit, allocation of costs of the transaction, date for closing, inspection period, financing, title contingencies, escrow information, representations, warranties, covenants, and default provisions.

1. Either party's attorney can prepare the initial draft of the Purchase and Sale Agreement.
2. FARBAR Form – this is the pre-printed form of Purchase and Sale Agreement typically used in Florida for residential real estate transactions; parties can freely negotiate the terms and provisions contained in the FARBAR.
3. The assignment of a Purchase and Sale Agreement can be prohibited or restricted if expressly stated in the document (for example, seller can restrict buyer to only being able to assign contract to an entity related to buyer).

B. Letter of Intent, like a term sheet, is sometimes utilized in commercial transactions to outline the basic terms of a transaction before drafting and negotiating a Purchase and Sale Agreement.

1. Beneficial because allows parties to put to paper key terms to deal, which helps facilitate agreement on the remaining terms.

2. Signing letter of intent adds level of formality and gravitas to negotiations.

3. Letters of Intent may or may not be binding depending on the language utilized; they are usually non-binding.

C. While utilized in other states, an Offer to Purchase is not commonly used in Florida.

II. BROKERS

A. There are four general types of brokers:

1. Residential Brokers

- a. Sell homes, condos, vacant lots

2. Commercial Brokers

- a. Office buildings, vacant land, shopping centers, apartment buildings, raw land, warehouses, industrial facilities. Multi-family Apartments: include Retail, Office, and Industrial subcategories.

3. Leasing Brokers

- a. Specialize in leased properties (tend to focus on commercial properties, which includes retail, office, and industrial).

4. Mortgage Brokers

- a. Facilitate mortgage lending in both residential and commercial transactions
- b. They typically receive commission based on a percentage of the loan amount or a flat fee



- B. Must be licensed in Florida and they are regulated by state law
- C. Real estate brokers usually enter into listing agreements with sellers, and they typically receive a commission based upon a percentage of the sales price (generally 6%, but commonly negotiated); if there is a co-broker, the listing broker will usually share the commission with the co-broker.
- D. Real estate brokers are paid by the seller, and they owe fiduciary duties to the party that they represent.

III. BUYER'S INSPECTIONS

- A. Residential: Prior to Closing, the Buyer will typically perform property inspections including inspection for structural issues, radon, asbestos, pest infestation or damage, title searches, survey, and in certain rare circumstances, lead paint and underground storage tanks (for oil or propane). Buyers should also order municipal lien/open permit searches to confirm there are no outstanding governmental violations, liens, or fines and to confirm that all alterations and renovations have been completed in compliance with permits and all permits are properly closed out.
- B. Commercial: In addition to the inspections described above for residential buyers, commercial buyers also usually obtain an environmental inspection (Phase I, and if necessary, Phase II), and a land use and zoning/permitting analysis.
- C. The Purchase and Sale Agreement typically designates an inspection period (also known as due diligence period), during which buyer has a

specified amount of time (usually 30-45 days) to conduct the above referenced inspections as well as investigate any title issues or zoning and land use concerns; buyer generally may terminate the contract during this inspection period for any or no reason and receive a return its initial deposit.

IV. SURVEYS

- A. As-Built Surveys – depict the improvements over a given parcel of land and can be utilized both prior to construction and post-construction.
- B. ALTA/ACSM – standards by which surveyors are held; many lenders require that the surveyors meet these standards and requirements (these are national requirements, not just Florida).
- C. Benefits of Surveys
 1. Ensure property actually exists
 2. Determine relationship of property to other properties
 3. Ensure the record boundary lines are actually the ones being occupied/ used
 4. Determine physical location of improvements and easements
 5. Determine whether there are any encroachments on the property

V. FORMS OF OWNERSHIP

- A. Residential Property is usually held in a nominee trust, an estate planning trust, or an individual's own name (especially if the property is the owner's homestead so that the owner is afforded certain homestead rights and protections provided under



Florida law). 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 upon the death of one of the joint tenants, the property automatically passes to the surviving joint tenant(s)); or
3. Tenants by the Entirety if the owners are married (they each own the undivided whole of the property and if one spouse dies, the property automatically passes to the other spouse).

B. Commercial Property may be held as follows:

1. As the Owners pursuant to the forms set forth in A above, (highly unusual for commercial properties to be held in an individual's personal name for liability purposes)
2. General Partnership/Joint Venture
3. Limited Partnership
4. LLPs
5. LLCs (has become the most common form of ownership)
6. Business Trusts
7. Business Corporations
 - (i) C corporation
 - (ii) S corporation

VI. FORM OF DEED

A. General warranty deed – most protection for buyer

1. Grantor warrants title for all times that the property has existed, including before grantor took title to the property
2. Most likely to see this form of deed in the residential context

B. Special warranty deed – middle-level protection for buyer

1. Grantor warrants title for the period that grantor has owned the property
2. Most likely to see this form of deed in the commercial context

C. Quitclaim deed – least protection for buyer

1. Contains no warranties of title
2. Typically used for gifting property or for situations where necessary to correct title defects or issues
3. Title companies do not like to insure quitclaim deeds

VII. CLOSING COSTS/ADJUSTMENTS

A. Documentary Stamp Taxes (Doc Stamps) – levied on documents that transfer interest in Florida Real Property (i.e. deeds)

1. In most counties in Florida, the documentary stamp taxes are calculated at the rate of \$0.70 per \$100 of purchase price; in Miami-Dade County the rate is \$0.60 per \$100 of purchase price plus an additional \$0.45 surtax per \$100 of purchase price on documents transferring property other than a single-family residence
2. The documentary stamp tax and, if applicable, the surtax, is paid to



the Clerk of Court when the deed is recorded; the Clerk then sends the money to the Department of Revenue.

B. Title Insurance Commitment, Title Policy, and Municipal Lien Searches

1. The cost of the title insurance commitment is usually paid by Seller, even if ordered by the Buyer or Buyer's attorney.
2. The premium for the title insurance policy is a promulgated rate based upon the purchase price for the property being purchased. The attorney for the party that is responsible for paying for the title insurance premium generally is the agent that issues the title insurance policy. Whether the Buyer or the Seller pays for the title insurance premium is negotiable, but in most counties in the Florida, the custom is for the Seller to pay for the title insurance premium. The main exceptions are Miami-Dade County and Broward County, where the custom is that the Buyer is responsible for paying the title insurance premium.
3. The cost of the municipal lien searches (also known as lien letters) is usually paid by the Seller.

C. Inspections, Survey, Due Diligence, and Financing Costs are usually the responsibility of the Buyer.

D. Real property taxes, association maintenance fees, special assessments, rents, and operating expenses are usually prorated as of the closing date, with the Seller

responsible for those costs/revenues incurred prior to the closing date and the Seller responsible for those costs/revenues incurred from and after the closing date.

VIII. OTHER CLOSING DOCUMENTS

A. Bill of Sale – conveys personal property (i.e. refrigerator, washing machine, appliances, equipment, etc.); usually does not get recorded.

B. Seller's Affidavit – also can be referred to as title affidavit, lien affidavit, gap affidavit, or some combination of these terms i.e. title, lien, and gap affidavit.

1. Title Company will typically require on Title Commitment as a requirement for Title Policy to be issued.
2. Purpose of the Affidavit is for Seller to provide assurance to the Title Company and the agent for the Title Company that no liens or other encumbrances have been placed on the property in the past 90 days and that no work has been performed the cost of which is remains unpaid; this is important because there is a gap period between when the Title Commitment is issued by the Title Company and when the Title Policy is issued.

C. FIRPTA Affidavit – IRS requires

1. Proof that grantor is a US entity paying US taxes
2. If Seller is a foreign entity not paying US taxes, the transferee/settlement agent must withhold 15% of the purchase



price and remit it to the IRS to ensure that taxes will be paid on the income if any taxes are owed.

3. One important exception to FIRPTA withholding is a transferee/settlement agent is not required to withhold when the Buyer is purchasing a home and the purchase price is not more than \$300,000.

D. Assignments

1. Can include Assignment of Leases, Assignment of Contracts, Assignment of Bulk Buyer Rights, etc.
 - (i) Would typically see these in the context of buying and selling a commercial building
 - (ii) Both buyer and seller usually sign these assignments.

E. Closing Statement – also typically called Settlement Statement

1. Sets forth the purchase price, closing costs and prorations of the transaction as debits and credits to Buyer and Seller.
2. Will usually include the financing costs for the Buyer's loan; provided, sometimes in a commercial transaction, the Buyer's lender will have its own, separate loan closing statement.

IX. RECORDING REAL ESTATE DOCUMENTS

- A. Deeds need to be witnessed by two witnesses and notarized
 1. Only the Grantor signs the deed (not the grantee)

2. Regarding recording, Florida is a Notice state, i.e. last bona fide purchaser without notice who pays value has priority

3. Must record the original of the deed (cannot record copies, except with e-recording but must have original in possession)

- B. Other than the Deed, most other conveyance documents are not recorded; sometimes a limited liability company affidavit is recorded to evidence authority for execution of the Deed

- C. If the conveyance is a condominium unit which requires the approval of the condominium association, then the condominium association approval is usually recorded with the Deed