

## 12.1: REAL ESTATE TRANSFERS

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### INTRODUCTION

For most people, the purchase of their home is the largest investment they will make in their lifetime. This chapter will discuss, in general terms, the usual steps in purchasing a home. The process of purchasing residential real estate can be very local in nature. How attorneys, real estate agents, title companies, and lenders work together can vary across the state and from city to city. However, while the process may be slightly different in NYC versus Buffalo, the legal concerns and requirements are the same.

### DEFINITIONS AND TERMS:

It is helpful to understand the language and terminology used in real estate transfers. The following are common terms and language, in alphabetical order, used in real estate transfers.

#### Abstract of Title

The Abstract of Title is a summary of all the previous and current owners of a property. It may go back as far as the original owner to the present owner. It is a history of the development and subdivision of your property from the deeds, mortgages, and other documents filed in the County Clerk's Office where the property is located. An up-to-date abstract is almost always provided by a seller to a buyer at the seller's expense. Abstracts are updated by abstract companies that certify the accuracy of the information contained in the abstract. A buyer will use the abstract to help them determine whether the seller has good and clean title to their property. Most attorneys and lenders require abstracts to go back between forty to fifty years of a property's title history.

#### Condominium

A condominium or condo is a building, or group of buildings, where units are individually owned rather than by a landlord. The individual owners of the units will share certain parts of the property and expenses of maintenance. These individual owners will pay a fee to an association that all owners participate in to manage and pay for agreed upon maintenance and management of the condominiums. Condos often resemble an apartment building.

#### Contingency

Most purchase offers will have contingencies associated with the contract. For example, a buyer may have a contingency that they will purchase the property, but only if they can borrow the necessary funds for a certain interest rate. A seller may have a contingency that the closing date for their sale aligns with the purchase of the new home they are purchasing.

#### Counter-Offer

When a seller receives a purchase offer, they may want to accept the offer but under different terms like a higher purchase price. They will then make a counter-offer to the buyer. This process of counter-offers may go back and forth between a buyer and seller several times before a final agreement is reached.

#### Deed

A deed is the legal document that transfers legal title of real estate from one person or entity to another.

#### Deposit

When a buyer and seller agree to a purchase offer, the seller will usually require the buyer to place a deposit with the real estate broker listing the property to show good faith in the purchase. The deposit is usually non-refundable if the buyer breaches the purchase offer contract. This deposit will be used toward the down payment on the property.

#### Down Payment

A down payment is the amount of funds the buyer is paying in conjunction with his/her loan. The amount of down payment a buyer must make is determined by the lender, which is usually determined by the credit of the buyer. Better credit usually means a lower down payment.

#### Easements

An easement gives a property right to someone who does not own the property. Examples are with utility companies and their right to enter a property they do not own to repair and maintain the utility services. Another example is when a property is landlocked, so

the owners cannot reach the street or sidewalks without crossing another property. An easement would give them the right to do so.

### Escrow

Typically, a lender will require a buyer/mortgagor to set up an escrow through the lender. The escrow will have funds paid by a mortgagor in advance and placed in the escrow account to pay the real estate taxes and homeowner's property insurance associated with the property.

### Fixtures

Fixtures are personal property items that are attached to a property. Fixtures can become part of the real estate. For example, a chandelier attached to the ceiling of a home is a fixture and upon sale and purchase is expected to remain with the property. However, a room air conditioner that is placed in and out of a window is not a fixture.

### Foreclosure

A foreclosure is a legal action by the mortgagee to take legal possession and title of real estate owned by a mortgagor when the mortgagor breaches the note and mortgage.

### House Inspection

A buyer often will hire a third party to inspect the property as a contingency of the purchase. The property inspector will look for defects or damage to property. Radon, mold, pests, water damage, and leaking roofs are often things that inspectors will look and test for.

### Homeowner's Property Insurance

Homeowner's property insurance is a type of insurance that the owner of real estate purchases to protect them in the event the property is damaged by fire or other unforeseen events. It often protects them from theft of their personal property and from lawsuits from third parties against them based on their property ownership. Lenders almost always will require mortgagors to purchase property insurance and have the lender listed on the insurance, so the lender's collateral is protected. This is an expense of the buyer/owner of the property and has nothing to do with title insurance.

### Instrument Survey

An instrument survey is a map drafted by a licensed surveyor showing lot lines, sewer easements, fences, and the location of any structures such as houses, garages, sheds, and swimming pools located on a particular piece of property. A survey is almost always provided by a seller to a buyer at the seller's expense. It is used by a buyer to help determine if the seller has good and clean title of their property.

### Listing a Home

A real estate broker "lists" your house when you put your house up for sale and you sign a written sales agreement with that broker agreeing to have them represent you in said sale.

### Mortgagee

A mortgagee is the lender that loans the money to a mortgagor.

### Mortgagor

A mortgagor is the buyer who borrows the money and signs a mortgage with a lender.

### Multiple Family

A multiple family is a home built for two or more people or families to live in. A two-family home is often called a double.

### Multiple Listing Service or MLS

The MLS is an internet tool of the National Association of REALTORS® that assists listing brokers find cooperative brokers working with buyers to help sell their clients' homes.

### Note and Mortgage

Typically, because of the amount of money required to purchase real estate, a buyer will borrow the necessary funds to do so from a lender. The lender can be a bank, credit union, or individual who lends the money to a buyer. The note sets out the terms of the

contract between the lender and the buyer. It will state how much interest the buyer will pay for the loan, along with the timeframe and method of repayment. The mortgage is the contract between the lender and the buyer that uses the real estate as collateral for the loan. It sets out the responsibilities of the buyer regarding insurance coverage, paying of taxes, and of the note. It also sets out what will happen if the buyer breaches the terms of the note and mortgage, which will lead to foreclosure.

## Real Estate

Real estate is land that includes any buildings or structures on said land. It is often called real property.

## Real Estate Commission

Almost all real estate brokers and agents work on commission. The commission for the sale and purchase of real residential real estate is most typically paid by the seller. The typical commission for residential real estate is in the range of four to six percent of the sale price. The commission is paid to the listing broker, who then shares the commission with the other brokers and agents involved in the transaction.

## REALTOR®, Broker, Agent, Salesperson

A real estate agent is anyone who earns a real estate license. There is a test that real estate agents must pass to get licensed. A real estate agent helps clients rent, buy, or sell real estate. A real estate agent is an independent contractor who must work under the umbrella of a real estate broker. A real estate broker is an agent who has a higher license than an agent by passing an additional test. Brokers can work alone or hire agents to work for them. Real estate brokers can start their own companies or own a franchise with a real estate company like Century 21 or Coldwell Banker. There are a number of different local and national real estate companies. A REALTOR® is a real estate broker or agent who is a member of the National Association of REALTORS®. A real estate salesperson is another name for a real estate agent.

## Purchase Offer

All contracts for the sale and purchase of real estate must be in writing. A purchase offer is a written contract between a buyer and seller for the purchase of real estate. Putting real estate up for sale is not an offer. It is an invitation to accept offers for purchase. A seller is not under any obligation to accept an offer for purchase. The buyer is the one making the offer that a seller must accept for a valid real estate purchase offer.

## Purchaser

A purchaser and buyer are one in the same.

## Property Description

A deed will set out the property description. It is a written version of the lot lines of the property. The property description in a deed and what an instrument survey shows as lot lines should match exactly.

## Property Lots

Real estate is divided into various lots that people or entities own. Lot lines are also referred to as property lines.

## Title

If you have title to real estate, it means you own it. When a buyer purchases property, their attorney should make sure they are receiving good and clean title. There should be no unknown problems with the title. These title problems are sometimes referred to as a cloud on title. An example of a cloud on title would be an unresolved foreclosure action or a judgment filed against an owner of real property.

## Title Insurance

Title insurance is purchased by a buyer to protect them against future title problems that are missed at a closing. A title company is guaranteeing the title to your land is good and clean and will reimburse you if there is a future title problem. Title insurance is typically an expense of a buyer. Lenders almost always require a buyer to purchase title insurance in an amount to cover the note and mortgage. This protects the lender's collateral and interest in the property. Buyers can also purchase their own title insurance. This is not the same as property insurance.

## Real Estate Attorneys

Most sellers, buyers, and lenders in NYS real estate transfers have their own attorneys representing them. The buyer and seller are typically responsible for the cost of their own attorneys. The buyer typically pays for the cost of the lender's attorney. In most instances, the buyer's and seller's attorneys will review and approve the purchase offer between the parties.

The seller's attorney is responsible for providing to the buyer's attorney all the legal documents that show the seller has good and clean title. The buyer's attorney is responsible for reviewing these documents. If the buyer finds problems with the title, the buyer's attorney will notify the seller's attorney, who is then responsible for trying to resolve the title issues. The lender's attorney is responsible for providing the legal documents required by the lender to protect their interest, like the note and mortgage. They will also be concerned with the title of the property and review all the title documents provided by the seller's attorney to determine whether they are satisfied that the title is good and clean.

## Real Estate Closing

A real estate closing is the final step in a real estate transaction. This is where signed deeds, notes, mortgages, and other legal documents, along with the funds for purchase are exchanged between the parties.

## Real Estate Taxes

Real estate taxes are a type of tax used to fund schools and essential services provided by your local governments.

## Recording Fees

Most legal documents in a real estate transfer are recorded in the local county clerk's office. The county clerks charge various fees for recording these documents. Some recording fees are paid by the seller, and some by the buyer, as determined by the purchase offer contract.

## Restrictive Covenants

Properties sometimes have restrictive covenants placed on them that do not allow current and future owners from doing certain things with the property. Restrictive covenants are enforceable as long as they do not violate the law.

General Obligations Law (GOB) § 5-331 states, "Any promise, covenant or restriction in a contract, mortgage, lease, deed or conveyance or in any other agreement affecting real property, heretofore or hereafter made or entered into, which limits, restrains, prohibits or otherwise provides against the sale, grant, gift, transfer, assignment, conveyance, ownership, lease, rental, use or occupancy of real property to or by any person because of race, creed, color, national origin, or ancestry, is hereby declared to be void as against public policy, wholly unenforceable, and shall not constitute a defense in any action, suit or proceeding."

However, a restrictive covenant that would prohibit a property from having a clothes line outside or from being painted a certain color would be enforceable.

## Single Family

A single family is a home built for one person or family to live in.

## Townhouse

Townhouses are very much like condominiums, except they are individual houses attached to each other.

## Zoning

Zoning is the government's way of controlling how a property can be used by the owner. The government has an interest in making certain neighborhoods residential while having other parts of its territory zoned for commercial and industrial use.

## MUST I USE A REAL ESTATE AGENT TO SELL OR PURCHASE A HOME?

There is no requirement to use a real estate agent in the sale or purchase of real estate. Many sellers will put their real estate on the market for sale without the help of a real estate broker or agent. However, most people do use the services of real estate brokers and agents.

## THE TYPICAL STEPS IN SELLING A HOME USING A REAL ESTATE BROKER

- Sign a written contract with your broker to list the property on the MLS for an agreed upon price.
- Place a sign on the property indicating it is for sale with the broker's contact information.

- Hold open houses so potential buyers can walk through and see the property.
- Hire an attorney to represent you and prepare the closing documents.
- Review, counter, and accept a purchase offer.
- Through their attorney, provide all the title documents like an updated abstract and instrument survey to the buyer's attorney, along with a proposed deed.
- Make arrangements with their current lender, if there is one, to pay off their loan and get a mortgage release on the property.
- Make arrangements to move out of the property pursuant to the date set in the purchase contract. Sometimes, sellers remain in the home after the closing and pay rent to the buyer until they can move out.
- Sign all the legal documents including the deed to the property.

## THE TYPICAL STEPS IN BUYING A HOME WITH A REAL ESTATE BROKER

- Work with a broker who will represent you in the purchase of your home.
- Decide what type home, where you wish to live in, and how much you want to spend in purchasing your home.
- Get pre-qualified for a mortgage.
- Review prospective homes on the internet and in person with your broker.
- Make a purchase offer with the help of your real estate broker.
- Hire an attorney to represent you in the purchase and review all the title and closing documents.
- Hire an inspector to inspect the property.
- After the purchase offer is signed and approved by your attorney, work with your lender to obtain your mortgage.
- Purchase homeowners insurance.
- Make arrangements to move into the property pursuant to the purchase offer.
- Attend the closing and sign all legal and closing documents.

## TYPICAL SELLER'S CLOSING COSTS

- Updating the Abstract of Title
- Broker's commission
- Instrument Survey
- Transfer Taxes
- Seller's mortgage payoff
- Attorney Fees

## TYPICAL BUYER'S CLOSING COSTS

- Bank Fees
- Down Payment
- Personal Attorney Fees
- Lender's Attorney Fees
- Escrow
- Mortgage Tax
- Recording Fees

## QUALIFYING FOR MORTGAGE

As with all loans, lenders for the purchase of real estate are looking for borrowers that they believe are good risks. Most lenders look for the following in making this determination:

- The borrower's credit history
- The borrower's income
- The borrower's length of employment
- The value of the property

## CLOSING DOCUMENTS FILED WITH AT THE COUNTY CLERKS OFFICE

Real estate transfer documents are part of the public record. All real estate transfer documents can be found at the county clerk's office where the property is located. Deeds, mortgages, and other documents are recorded so the public has notice as to ownership and liens that are placed on real estate.

Deeds, mortgages, and other documents relating to real property are recorded (filed) in the county clerk's office in the county where the real estate is located. This is done so potential buyers can research the title and make sure the seller really owns the property and that all mortgages have been paid off or otherwise provided for prior to closing. Attorneys and title companies generally assist you with this task. This is why an abstract of title is prepared.

## DIFFERENT WAYS TO RECEIVE TITLE ON A DEED

**Sole Ownership:** If a buyer is taking sole ownership of a property, all they need is the signature on a deed from the seller(s). If they die while in ownership of the property, it will become part of their estate and be passed on pursuant to their will or by law if they have no will.

**Tenants by the Entirety:** Spouses can take title as tenants by the entirety. This means that if one of the spouses dies while they are in ownership of the property, the living spouse has the right of survivorship. The deceased spouse's property rights in said property automatically pass to the surviving spouse regardless of what the deceased spouse's will dictates. If, during their lifetimes, both spouses wish to sell the property, both of them must sign the deed to convey title to a third party. This is because each spouse owns 100% of the property. NY EPTL § 6-2.2(b) provides that, "a disposition of real property to a husband and wife creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or a tenancy in common". This means that if spouses purchase property while they are married, they automatically do so as tenants by the entirety, even if the deed does not state so.

**Joint Tenants with Right of Survivorship:** This form of title is exactly the same as tenants by the entirety except the two owners are not married. Both owners have equal rights and ownership of the property while alive. Upon the death of one of the joint tenants, all the property rights and title of the property will vest in the surviving joint tenant. If, during their lifetimes, both owners wish to sell the property, both of them must sign the deed to convey title to a third party. This is because each owner owns 100% of the property.

**Tenants in Common:** When two or more owners take ownership of a property, they can do so as tenants in common and set forth in the deed. The ownership of the property is divided by percentages as agreed upon by the owners. There is no right of survivorship. Upon an owner's death, that owner's share in the property will pass on as dictated by the owner's estate, with or without a will. Each owner can sell their share of the property without the permission or signing of a deed by other owner(s). If the deed is silent as to form of ownership and just lists the names of the owners, then it is presumed that the parties own the property as tenants in common.

**Life Estate:** A person can transfer property to another while retaining right of possession of the said property while they are still alive. This is called a life estate. Life estates are common between family members where elderly parents wish to convey their real property to their children while still retaining the right to live in the home until they die.

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