

5. REAL ESTATE TRANSACTIONS

Fundamentals of a Real Estate Sale or Purchase Transaction©

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**Bridging the Gap 2 Making a Smooth Transition
October 1, 2013**

OUTLINE SUMMARY

Introduction

1. How Do The Buyer and Seller Find One Another?
2. How Does The Buyer Know What He or She is Buying? (Due Diligence)
3. How Do The Parties Confirm the Deal Terms?
4. How Does the Buyer Pay for the Transaction?
5. How Does the Buyer Confirm that He or She is Getting What Was Bargained For?
6. Closing Preparations and Attendance – Who Does What?

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Introduction

The goal of this presentation is to provide newly admitted attorneys with an overview of the “anatomy” of a basic real estate sale or purchase transaction. The specifics will vary significantly depending upon the type of property being bought or sold, the parties involved, the goals sought to be accomplished by the parties, the deal structure, whether the buyer is financing a portion of the purchase price, and the issues encountered before or after the contract is signed, or at the closing. However, there are certain fundamentals common to every real estate transaction. They are discussed below through a series of questions and answers, designed to help you assist your clients who will look to you for guidance when they retain you as their attorney in connection with such transactions.

1. How Do The Buyer and Seller Find One Another?
 - A. Real Estate Broker
 - i. Listing Agreement
 - a. Exclusive Agency vs Exclusive Right to Sell vs Non-Exclusive Open Multiple Listing
 - ii. No Written Agreement Required
 - iii. Dual Agency Considerations
 - B. Internet
 - C. Print Media
 - D. Personal Referral
2. How Does The Buyer Know What He or She is Buying?
 - A. Due Diligence
 - i. Caveat Emptor
 - ii. Usually Performed Pre-Contract Signing
 - Custom
 - Market Conditions

- Circumstances of Individual Transactions Affect
Negotiability of Contingency Clauses for Inspections
- iii. Laws Affecting Residential Transactions – Federal Residential Lead Based Paint Hazard Reduction Act (1992)(not applicable to property built after 1978), New York State Property Condition Disclosure Act (2002)(applicable to houses only, not cooperatives or condominiums), New York City Local Law 38 of 1999 requiring owners to correct peeling paint conditions upon vacancy.
- iv. Type of Property and Buyer’s Goals for Post Acquisition Use Affect
Scope of Due Diligence
 - Valuation
 - Other Financial Issues Affecting Acquisition and Post-Closing Maintenance, Operation of Property
 - Document Review – varies depending upon nature of transaction (e.g., if cooperative or condominium unit, offering plan, governing documents, minutes of board and unit owner or shareholder meetings, financial statements; if commercial tenanted property, maintenance and operation service agreements and other documents, lease records)
 - Physical Condition (Engineering)
 - Termites
 - Environmental
 - Architectural
 - Zoning
 - Litigation
 - Title, Judgments, Liens
 - Survey Issues
 - Municipal Code Violations
 - Special Use Considerations
 - Issues Raised by Third Party Occupants
- v. Sources of Information
 - Owner
 - Property Manager
 - Internet – e.g., New York City Department of Buildings for Certificate of Occupancy and Violations), ACRIS System in NYC Department of Finance website for current ownership and encumbrances, Property Shark for zoning, pricing, litigation, anecdotal neighborhood information, NYC Department of Finance for real estate tax information
 - Public Records for Recorded Documents, Real Property Taxes, Zoning and Municipal Code Issues, Litigation Against Owner or Property

3. How Do The Parties Confirm the Deal Terms?

A. Purpose of Contract of Sale

- i. Statute of Frauds
- ii. Memorialize Basic Business Terms – Manage Expectations, Eliminate Surprises
 - a. Name, Address of Each Party
 - b. Property Description
 - c. Price
 - d. Down Payment
 - e. Acceptable Funds for Balance Due at Closing
 - f. Personal Property Included in Sale
 - g. Occupants
 - h. Closing Date
 - i. Identity of Broker(s)
 - j. Buyer Contingencies for Inspections, Financing, Approvals for Zoning or Certificate of Occupancy Amendments
 - k. Title to Be Delivered at Closing (Permitted Exceptions, “Subject To’s”)
 - l. Representations and Warranties – Identify Which, if Any, Survive Closing
 - m. Adjustments for Taxes, Rents, Utilities, Insurance
 - n. Commit Seller to Cooperate for Assignment of Existing Mortgage to Save New York Mortgage Tax, if Possible
 - o. New York State and Local Transfer Taxes
 - p. Foreign Investment in Real Property Tax Act (“FIRPTA”) Compliance
 - q. Closing Fees and Expenses Payable by Each Party
 - r. Risk of Loss Provisions
 - s. Remedies for Breach of Contract
 - t. Miscellaneous
(Notice Provisions, Assignability of Contract, Governing Law, Merger Clause)
- iii. Prevent Seller from Selling to Another Party while Parties Prepare for Closing
- iv. Obligate Buyer to Close Provided Contract Contingencies Met
- v. Representations, Warranties – Some May Survive Closing
- vi. Identify Seller’s Obligations to be Fulfilled Before Closing:
 - a. Clear Title, Satisfy Judgments, Liens
 - b. Remove Occupants if Contract Requires Vacant Possession

- c. Perform Any Repairs or Complete Construction if New Building, Cure Any Violations Required by Contract
 - d. Notify Buyer of Issues that Surface as Contract Requires
 - e. Maintain “Status Quo” as Contract Requires
 - vii. Identify Buyer’s Obligations to be Fulfilled Before Closing
 - a. Fulfill Financing Contingencies if Permitted by Contract
 - b. Obtain Title and Municipal Searches, New Survey or Update Existing One by Visual Inspection, Notify Seller of Items Contract Requires to be Cleared at or Before Closing
 - c. Final Inspections
4. How Does the Buyer Pay for the Transaction?
- A. Cash (Check(s) or Wire Transfer drawn from Existing Funds)
 - B. Bank Loan
 - i. Commitment Letter – Does it Conform to any Contract Financing Contingency Requirements?
 - ii. Identify Loan Fees and Expenses Payable Before or at Closing – What is Refundable, What is Forfeited if Loan Not Funded
 - iii. Identify Escrows Required After Funding
 - iv. Clear Commitment Conditions for Closing to Obtain Funding
5. How Does the Buyer Confirm that He or She is Getting What Was Bargained For?
- A. Title Insurance
 - B. Judgment, Lien and Municipal Violation Searches
 - C. Final Inspections
 - D. Review of All Seller Representations – Confirm Still True at Closing
6. Closing Preparations and Attendance – Who Does What?
- A. Seller
 - i. Prepare Closing Checklist Using Contract as Roadmap
 - ii. Prepare Closing Documents for transfer of title, transfer tax returns, other closing documents required by Contract to be Signed and/or Delivered by the Parties
 - iii. Arrange for Satisfaction or Assignment of Existing Mortgages
 - iv. Notify All Parties Required to Attend of Date, Time, Place (or Coordinate Escrow Arrangements if Not a “Sit Down” Closing)
 - v. Clear Title
 - vi. Meter Readings as Required
 - vii. Compute Adjustments

- viii. Remove Occupants if Contract Requires Vacant Possession
 - ix. Perform Any Repairs or Complete Construction if New Building, Cure Any Violations Required by Contract
 - x. Instructions to Buyer for Payment of Balance of Purchase Price and Adjustments Due Seller
- B. Buyer
- i. Prepare Closing Checklist Using Contract as Roadmap
 - ii. Clear all Loan Commitment Conditions, Arrange Funding
 - iii. Review All Closing Documents
 - iv. Confirm Any Title, Survey, Certificate of Occupancy, Zoning Issues Resolved
 - v. Confirm any Municipal Code Violations Resolved
 - vi. Determine Amounts Owed at Closing, Arrange Checks, Wire Transfers
 - vii. Secure Casualty, Property Insurance
 - viii. Open Utility Accounts as Needed
 - ix. Notices to Existing Tenants of Transfer
 - x. Final Inspection

