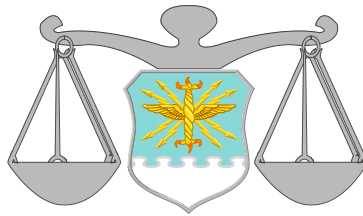


BUYING AND SELLING **A HOME**



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Buying a house will be one of the biggest investments one will ever make. It's important to educate yourself on home buying before you meet with real-estate agents, bankers, etc. The material in this handout represents general legal advice. The law is continually changing; although the information in the handout was current as of the date it was drafted, some provisions in this pamphlet may have changed. It is always best to consult an attorney about your legal rights and responsibilities regarding your particular case.

TYPES OF HOMES

There are a number of choices when it comes to home buying; including:

- A single-family home, a house designed to be lived in by one family.
- A condominium, a number of dwellings that the condominium owners own individually and common areas that they own jointly. If you bought a condominium, you would own the apartment, and you and the other apartment owners would own common hallways, entrances, recreation areas, etc. A condominium association would manage the property; either the condominium owners would do this collectively or they would hire a professional to do it.
- A cooperative apartment complex, a complex that is owned and managed by a corporation in which you, as a tenant, would be a shareholder and would lease your apartment from the corporation and pay your share of the costs of operating the corporation. Thus, the residents in a cooperative are both tenants of the cooperative (by virtue of their occupancy leases) and owners of the cooperative (by virtue of their stock interests).

THE CONTRACT TO PURCHASE

Transfers of land must be preceded by written contracts of sale, which are usually negotiated by real estate brokers. These contracts normally contemplate escrows (delivery of deed to a third person to be held until purchase price paid) before closing (exchange of purchase price and deed).

Real estate law requires contracts for the sale of real estate to include all “essential terms” of the contract to be in writing and requires all buyers and sellers to sign the contract. Essential terms usually include the following:

- A legal description of the property (the description of the property on the seller's deed normally is sufficient to properly identify the piece of real estate)
- The purchase price; the contract should break down the purchase price into its components, i.e., down payment, assumption of existing mortgages, and balance of the purchase price, and state when the buyer is to pay the purchase price (usually at closing)

- Names of the parties to the contract.

The contract should also clearly state the date and time of closing. This clause should also state when you get possession of the property. You normally get possession at closing, although you could get possession before or after closing. If you get possession before closing, the contract should state the amount of rent, if any, you would pay to the seller. Another good idea is ensure the contract contains an attorney's approval clause. This clause gives the buyer a specified amount of time, such as 3 days, to have an attorney review the contract and either negotiate any necessary changes or allow the buyer to get out of the contract. You should always ask about hidden or not visible problems with the house. In many states, if the buyer doesn't ask, he is stuck with them if he subsequently discovers them. In others, the seller is liable for any defects he knows about and fails to disclose.

Additional Terms

There are many terms that could be included in a contract to purchase real estate. One possibility is a "Subject to" clause. This clause is a part of the contract that specifies any conditions that the property has, such as zoning restrictions or easements. It is of the utmost importance to read your contract thoroughly and to understand exactly what conditions are placed on the transfer of the property in question.

There are several additional clauses you may want to consider including in your contract to purchase real estate as well. For example, if you are to get any personal property from the seller, i.e., a washer or dryer, as a part of the transaction, include it in the contract. If this is the case, you should make certain the contract states that this personal property must be in working condition at the time of closing. You should do a thorough inspection of the house before signing any agreement to purchase.

The contract must list any repairs the seller must make. You should have the house inspected before signing the contract and reserve, in the contract, the right to inspect any repairs the seller has made to see that they are suitable before closing. Also, see to it that the K provides for a termite inspection. Make sure that the contract apportions various costs, such as electrical, property taxes, and insurance, between the seller and buyer as of the date of closing.

Contingencies

Your contract could also be subject to one or more contingencies. A contingency is a condition of the real estate contract. For example, a contingency clause of the contract may make your obligation to go through with the purchase conditional on your getting a mortgage or some other event. If your contract has such a contingency clause and you cannot get a mortgage, you can cancel the purchase. Without such a clause, the seller could sue you for breach of contract if you didn't get a mortgage and couldn't buy the home. As a service member, you should consider

making your obligation to buy the property contingent on the military's not reassigning you before closing.

Because of these potential problems, make certain that a contract for deed contains these provisions:

- Seller will put the property title in trust until you complete the payments or default on them;
- Seller will write out a deed to the property in your name and give it to the trustee with instructions to give it to you when you complete your payments;
- Payments will go to the trustee, who will pay all taxes and other liens on the land and send the rest to the seller. This provision would help keep the land from foreclosure by someone who holds a mortgage on the property or by a tax official;
- Seller will record the contract with the Recorder of Deeds office;
- Seller cannot transfer the property to anyone else during the life of the contract.
- The contract has no prepayment penalty; and,
- Seller will provide you marketable title by warranty deed when you have completed payment.

MORTGAGING

There are many ways to acquire real estate; however, most people will use a mortgage to acquire a home. It is important to understand mortgages because few people can pay cash for a home. A mortgage is security for the repayment of money you borrow to pay for a house; it is similar to a lien on a car you buy with borrowed money. The bank, saving and loan company, or mortgage company that lends the money is called the mortgagee. The borrower, usually you, is called the mortgagor. In some states, a mortgage is called a deed of trust. A mortgage or deed or trust must be in writing. The mortgagee [lender] extinguishes the mortgage you signed when you pay the debt in full. If you don't make your mortgage payments on time, or if you otherwise default on the mortgage, the mortgagee [lender] may sue to foreclose the mortgage. A foreclosure is the sale of your mortgaged property to pay off the debt. When you take out a mortgage, make certain it has a prepayment clause. Such a clause allows you to pay the mortgage off early without penalty and to refinance your loan if finance rates go down without paying for the privilege of paying the old mortgage off early.

Also when you take out a mortgage, find out the type and rate of interest. Mortgage rates can be either fixed, meaning they stay the same throughout the life of the mortgage, or variable, meaning they vary with the prevailing interest rate. Mortgage lenders often use the rates on 3

month to 5 year Treasury Bills as the index to determine whether, and how much, a variable mortgage rate will change. If you are considering a variable-interest loan, make certain that the mortgage has a limit on how much the interest rate may go up and that you understand how it affects your payment.

Typically, variable interest rate mortgages fall into 2 categories, a fixed payment, variable maturity loan where if the interest rates go up, you would still make the same payments, but the extra interest would be added to the loan so that it would take longer to pay off, or a variable payment, fixed maturity loan in which if the interest rates go up, your payments would increase, but you would still pay off the loan according to the original schedule.

SECOND MORTGAGES

Another financing tool is a second mortgage. If the buyer does not have enough cash to pay you your equity, you can consent to getting your money in installments by agreeing to a second mortgage, which you would hold yourself as security for repayment of the loan. However, if you wanted your money immediately, you could try to sell the second mortgage to a mortgage institution. It is important to remember, however, that any buyer of a second mortgage will pay you only a fraction of its value because second mortgages are riskier than first ones.

If the buyer defaults, the court will order that the proceeds of a foreclosure sale pay off the first mortgage before the remaining proceeds, if any, are applied to the second mortgage. You must be certain that the buyer is financially able to pay you the money secured by the second mortgage. Again, you must immediately record the second mortgage at the Recorder of Deed's office. Sometimes neither taking over your mortgage nor getting a second mortgage is attractive to the buyer. With high interest rates, realtors and others have come up with many different ways of financing home ownership. You must read such arrangements carefully. Many states now have laws that require home sellers to notify prospective buyers of any defects in the property. Failure to do so may constitute fraud or at least make the seller liable for any damages resulting from the failure to notify the buyer of the defects.

OTHER FORMS OF FINANCING

Another method, although less often used, of buying real property is by a contract for deed, which is also known as a conditioned sales contract or an installment sales contract. Members will probably not buy their residences this way; nevertheless, it's useful to know of another option to acquire real estate.

In such a contract, you may give the seller a down payment, but regardless of whether you give the seller a down payment, you pay off the balance of the contract in installments. The seller will not transfer the title for the property to you until you have made all of the payments. Companies often sell retirement or vacation homes this way. A contract for deed can be dangerous because if you cannot make your payments, you could lose all of the money you've

paid and have nothing to show for it. Also, if the seller does not own the property outright, he could lose it, so you would be out the property and your money unless you sued to get your payments back.

Service members may also want to finance their home with a Department of Veterans' Affairs guaranteed home loan or a Federal Housing Administration insured loan. Under the VA loan program, a veteran can borrow as much as he wants, so long as qualifies under the lender's terms. The VA will guarantee up to a set amount, which lenders accept for a certain down payment. VA loans may be used to buy a house or condominium, refinance or improve an existing home, or to buy a lot for a manufactured home the veteran already owns. VA loans often have lower interest rates than do conventional loans. If you want to apply for a VA loan, please call your local VA office for more information. The VA appraises the property to make certain the veteran buyer is paying a fair amount for it. The VA charges the veteran a small fee for its expenses in doing so. If you don't qualify for a VA loan, you should ask your realtor or lender about a FHA insured loan with a veterans' preference. This program is similar to a DVA loan, but requires the buyer to put down a down payment. However, the required down payment is much smaller than would be required with a conventional loan.

TYPES OF DEEDS

The deed/title that the seller will transfers to you will usually be one of two major types of deeds: warranty deeds and quit-claim deeds. A warranty deed not only transfers the property but also guarantees that the seller owns the property and that his title is free from liens or conditions other than those listed on the deed. A quit-claim deed is usually worse for the buyer because it transfers only whatever rights of ownership that the seller has in the property. With a quitclaim deed, if another party, such as the seller's spouse or creditor, has a greater right to ownership than the seller does, you could lose the property and have difficulty recovering your purchase price from the seller.

There is an implied warranty in every land sale contract that at closing the seller will provide the buyer with a title that is "marketable." A marketable title is free from limitations on the property, such as any encumbrances, liens, or another party's claim to it. Again, aside from ensuring there are no liens against the property that you may be purchasing, you may also ensure that the Title has been checked against any easements, or possible zoning restrictions that may affect your property. Therefore, you should always make certain that your contract to buy a home requires the seller to transfer a marketable title by warranty deed.

CLOSING

You finalize your home purchase at closing. Closing is a meeting in which the buyer gives the seller the purchase money and the seller delivers the deed to the buyer. If the buyer is going to get a mortgage to finance buying the property, the mortgage lender will have an attorney attend the closing to make certain that you properly execute the mortgage documents. The purchaser

usually pays the closing costs, although you could negotiate for a different arrangement in which these costs are shared or the seller covers them. Closing costs are the fees for initiating a mortgage, the transfer taxes, the cost of a title search or title insurance, attorney's fees, and the cost of a credit report.

Federal law requires that if you get a mortgage that is federally insured, such as a Department of Veterans' Affairs or Federal Housing Administration loan, the lender must inform you in advance of the closing costs. After closing, make certain that you properly record the new deed at the county recorder's office. The county recorder will normally stamp the deed showing when he recorded it. If you do not record your deed, someone with a recorded deed to the property could claim the property dependent upon the laws of the respective state.

As mentioned above, closing costs are usually provided for by the purchaser; however, in most cases closing costs are negotiable to meet the needs of the buyer and the seller. The following is a list of costs that the buyer or seller is typically, not always, responsible for.

TYPICAL CLOSING COSTS

NOTE: Be sure to come to the closing prepared with funds that have either been wired to the closing agent...or with a cashier's check. Personal checks are generally not allowed. Bring along a photo ID, typically a drivers license.

Buyer Expenses. Typically, the buyer is responsible for closing costs relating to the acquisition of the property and lender costs. Government loans are an exception; they require the seller to pay certain costs not allowed to be charged to the buyer. The following are costs that a buyer with a conventional loan can expect to pay: document stamps, origination/discount fees, appraisal, credit report, PMI/funding fee, application fee, flood certification, document preparation/underwriting fees, state intangible tax, lender's title

insurance, endorsements, recording of mortgage or deed, survey, termite inspection, attorney fees, and home inspection fees.

Seller Expenses. Typical seller expenses include the following: Document stamps on deed, marketing or realtor fees, processing fees, home warranty, recording fees and title insurance.

SELLING

In terms of selling your home, many of the concerns addressed above still apply. However, there are some issues that are unique to the seller that you should bear in mind. As such, one of the first decisions you must make is whether to use a real estate agent. This decision is not so much a legal one as it is a financial or practical one. But you need to know the rules on how to list your home with a broker. If you decide to use a broker, you can list your home in one of 3 ways: a multiple listing, an open listing or an exclusive right-to-sale listing. A multiple listing lists the home with one broker, who then offers it through other brokers. The listing broker and the

broker who actually sells the home then split the commission. An open listing can be with several brokers, each of whom may try to sell your home. The broker who sells the home then gets the commission. In this type of listing, if you sell the home yourself, you don't have to pay anyone a commission. Finally, an exclusive right-to-sale listing is a listing with one broker who has the exclusive right to sell your home. Ensure that you read the brokerage agreement closely for many exclusive right-to-sell contracts require you to pay the broker his commission even if you sell the house yourself.

You may also have to decide whether you should help the buyer with the financing. With the high prices of homes in many areas and high interest rates, sellers sometimes have to help buyers in financing the purchase of the home. If you need to help your buyer, several ways are available to you, including letting the buyer assume the existing mortgage, giving him a second mortgage, and other financing devices, all of which have potential legal risks you should know of in advance. One way to help the buyer is to allow him to take over your mortgage and then pay you the difference between the amount due on the mortgage and the selling price, also known as equity. Allowing the buyer to take over your mortgage instead of taking out a new one can be a good selling tool if your mortgage rate is lower than current interest rates.

The risk is that you may still be liable for the mortgage debt if you are not careful. If the buyer assumes the mortgage, he becomes liable to pay it off, which releases you from liability. If, however, he only "takes subject" to the mortgage, you and the buyer are both liable, and the mortgage company may seek to collect from you if he does not pay. If you have a DVA insured mortgage, you should include a provision in the contract requiring the buyer to substitute his liability for yours with the VA if he is eligible for VA insurance. If he does not substitute his VA liability, your VA mortgage insurance benefits remain tied up with that mortgage, and you cannot use your VA guaranteed financing to buy another home.

OTHER RESOURCES

Despite the various aforementioned legal issues to consider, this document is not all inclusive in regards to buying or selling a home. For instance, one may want to inquire about Housing and Urban Development (HUD) homes, or fair housing, or even types of grants that may be out there to help one get a home of their dreams. Additional information such as this can be inquired about at <http://portal.hud.gov/portal/page/portal/HUD>. Furthermore, one can inquire about lending information with the Department of Veterans Affairs at www.homeloans.va.gov. These are very useful websites for one that may be in the market for buying or selling a home.

Homeownership is often referred to as one of the aspects of the American Dream. It is certainly one of the most rewarding experiences you can have if the time is right for you.