Global Corporate Real Estate Guide - United States of America

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*This chapter was last reviewed in September 2023.*

# Authors

# Real Estate Law

## What is included in the term “real estate”?

The term “real estate” includes the following:

Land

Any buildings or structures on it

## What laws govern real estate transactions?

Primary responsibility for property law rests with the states and not the federal government. Property law has developed through the English common law process in all states, except in Louisiana where property law has developed through French law.

## What is the land registration system?

All states maintain a system of public land title recordation where ownership can be verified and through which interests in land are recorded. The systems differ by state and are established by statute. The registration is a necessary step in real estate transactions.

The traditional recordation system is a “recordation of deeds” system, which provides only for the public recording of instruments affecting land and does not itself make any qualitative statement concerning the status of title. A person wishing to record an interest in real property simply leaves a document setting forth a claim of interest to the real property with the local recorder of deeds. This is known as “filed for record” and such claim of interest is thereupon deemed to be recorded. Such recording gives constructive notice to the whole world that the person filing the document is claiming an interest in the property in question. Thereafter, courts of law resolve claims and actually determine the interests of competing claimants.

## Which authority manages the registration of titles?

Title recordation is maintained by the recorder of deeds, located in all counties within each of the 50 states and is commonly referred to as the Recorder’s Office.

## What rights over real property are required to be registered?

Rights are generally not required to be registered. However, third parties who do not have notice (constructive or actual) are not bound by unregistered interests over property. Thus, owners or others claiming an interest usually register any document creating or evidencing an interest in real estate. This includes the following:

Deed

Transfers

Mortgages

Easements

Restrictive covenants

Leases

Co-ownership agreements

Options to purchase

Judgment lien holders

Mechanic liens

Tax liens

Other instruments affecting the title to real estate

## What documents can landowners use to prove ownership over real property?

Deeds prove ownership, though an updated title search is necessary to confirm that no deeds or other encumbrances have been recorded against the property since the date of the deed. A valid title insurance policy is often used as customary evidence of title interests.

## Can a title search be conducted online?

Most land title jurisdictions allow electronic searches of land-related documents. If a title search is unavailable online, it can be conducted at the office of the county or municipal clerk where the property is located.

## Can foreigners own real property? Are there nationality restrictions on land ownership?

Foreigners generally have the same rights to buy real property as US citizens, subject to restrictions. Substantially, any and all restrictions on the ownership of real property by non-US persons are found on the state rather than the federal level. Restrictions usually center around interests in agricultural property, natural resources, use of corporate ownership vehicles with a large number of shareholders and limitation on acreage to be owned. States are gradually eliminating or limiting these restrictions. Attention must be given to federal regulations set forth in the Foreign Investment in Real Property Tax Act (FIRPTA). There are special tax rules and reporting requirements for non-US ownership found in FIRPTA. Specifically, FIRPTA imposes special tax obligations when the seller of a property is foreign.

State legislators continue to introduce restrictions on nonresident and nonnational buyers. For instance, in the 2023 legislative sessions, most states have proposed at least one piece of legislation that seeks to prohibit foreign investments and landholdings to some degree. For example, California and Washington have active bills that, if passed, would limit foreign nationals and foreign governments from acquiring agricultural land in the respective states. No states have imposed an absolute prohibition on foreign ownership.

## Can the government expropriate real property?

Property can be expropriated by government and quasi-governmental authorities for public use, such as to build highways, airports or other infrastructure projects. Under those circumstances, the Fifth and 14th Amendments under US Constitution require the property owner to be fairly compensated as a result of the taking.

## How can real estate be held?

Generally, an interest is held by the following:

Fee simple

Leasehold

Condominium or strata title ownership

## What are the usual structures used in investing in real estate?

The usual structures used in investing in real state are the following:

Individual ownership

Business corporations

Co-ownership or co-tenancy

Partnerships

Limited partnerships

Trusts, including bare trusts or nominee arrangements

Limited liability corporations

## How are real estate transactions usually funded?

Most real estate financings are arranged through institutional lenders such as banks, trust companies, pension funds, credit unions and insurance companies. Interest rates are generally fixed for a specified period or are variable, based on the Secured Overnight Financing Rate (SOFR) Prior to 2022 when SOFR was adopted, LIBOR was the default rate in loan transactions; due to the newness of SOFR, LIBOR provisions can still be seen in certain contracts established before 2022. Typically, it will be the borrower’s responsibility to pay for all of the lender’s legal and other costs, such as commitment and processing fees, in arranging property financing. Interest rates generally must be expressed as an annual or semiannual rate and a higher rate upon default is not permitted when the loan is secured by real property.

Buyers should be aware of the lenders’ requirements and be prepared to meet those requirements. For commercial transactions, the lending requirements can be quite detailed, and the terms upon which the loan will be granted are often heavily negotiated. Lending institutions typically take both primary and collateral security in real property and related assets. Typical primary security includes a mortgage, deed of trust or charge, a debenture containing a fixed charge on real property or, in some cases where more than one lender is involved, a trust deed securing mortgage bonds or debentures and including a specific charge over real property.

Collateral security often includes assignments of leases and rents, general security agreements for personal property and personal guarantees.

Banks and trust companies are regulated under state and federal laws.

In recent years, alternative financing arrangements, including real estate investment trusts (REITs), funding and sale-leaseback arrangements have become more appealing to owners due to tighter banking regulations and corresponding higher costs.

## Who usually produces the documentation in real estate transactions?

Generally, the buyer’s lawyer will prepare the initial draft of the purchase agreement, though it is not uncommon for the seller’s lawyer to prepare initial drafts, as the party preparing the initial draft of a purchase agreement generally receives some benefits in negotiations by preparing the first draft. It is customary for the seller’s lawyer to prepare closing documents, which the buyer’s lawyer will review and comment upon as well.

## Can an owner or occupier inherit liability for matters relating to the real estate even if they occurred before the real estate was bought or occupied?

Under US federal environmental law, the current owner or occupier of real property can be held liable for contamination of the property regardless of whether they caused it. Some US states adopt the federal environmental liability scheme, while others only hold property owners and operators liable for contamination that they cause.

## Does a seller or occupier retain any liabilities relating to the real estate after they have disposed of it?

A seller can retain liabilities relating to the real estate even after it has disposed of it. The seller is liable for any indebtedness secured by a mortgage placed by it on the real estate (unless it is assigned to the new property owner). Similarly, other liabilities “run with the land” and can also be transferred to the purchaser, such as real estate taxes or obligations with respect to an easement.

For properties held in a leasehold, a former tenant or operator may also be held liable for its actions at the property.

Indemnifications are usually sought from sellers and landlords by buyers and tenants.

Under US federal environmental law, a prior owner or operator of property can be held liable for contamination that they caused, even if they no longer own or occupy the property. Most US states adopt the same liability scheme. Indemnification can shift that liability to a new owner or tenant. However, the prior owner or operator will remain liable in the eyes of the government.

# Acquisition of Real Property

## What are the usual documents involved in such transactions?

The usual documents are the following:

Sale and purchase agreement

The first document in any real estate acquisition is normally the sale and purchase agreement between the buyer and the seller. This agreement should contain all the necessary business terms for the transaction, including the description of the land, purchase price, deposit (if any), the closing date and any other special terms. These agreements also typically contain conditions for the benefit of the buyer and representations and warranties by the seller. These agreements outline what documents will be required to complete the transaction. Such documents may include deeds, bills of sale, transfer tax declarations, title clearance documents, 1099s, FIRPTA statements, etc.

Due diligence report

Once the sale and purchase agreement is signed, it is generally the responsibility of the buyer, usually through the buyer’s lawyer, to conduct due diligence with respect to the property being acquired. The due diligence period provides the buyer with the ability to investigate the property and determine if it wishes to proceed with the transaction. This includes title and zoning searches and a review of any leases and surveys of the property. An independent environmental assessment is recommended and an independent engineering review of the property, particularly in the case of property with older buildings, is common. The buyer’s lawyer will also provide a title opinion to the buyer or obtain title insurance for the buyer. A title policy is the universal insurance obtained by a buyer, lender or tenant.

## What are the warranties given by a seller to a buyer?

The trend is for sellers to give limited representations and warranties and the buyer often takes a property in its “as-is” and “where-is” condition. This is the concept of caveat emptor (i.e., buyer beware). Thus, a buyer is generally responsible for conducting extensive due diligence with respect to the property to be acquired.

## When is the sale legally binding?

Generally, parties are legally bound as soon as they execute the sale and purchase agreement; however, the trend is for a buyer to have the ability to terminate the deal following a due diligence period if it is not satisfied with the condition of the property.

## When is title transferred?

The signing of a deed or other instrument purporting to convey an interest in real property is typically seen as the act that marks the transfer of title from the seller to the buyer. Usually, the parties agree to a transfer of title on a particular date (closing date) with the deed to be recorded in the public records promptly following such closing.

## What are the costs usually shouldered by the parties?

The buyer usually pays for the following:

Buyer’s agent’s fees

Buyer’s own legal costs

Due diligence costs for consultants who have prepared building condition reports, environmental assessments, valuation appraisals and real estate surveys

Due diligence inquiries made to statutory and government bodies

Registration fees

Lender title policies

The seller usually pays for the following:

Listing agent’s fees

Seller’s own legal costs

Income tax on any profit made on the sale of the real estate

Allocation of certain costs is driven by the customs of each state, including survey costs, title insurance premiums and transfer taxes.

# Leases

## What are the usual forms of leases?

The usual forms of leases are the following:

Ground leases

One form of leasing arrangement is a long-term ground lease, in which the tenant leases vacant land and develops it. Once development is completed, the ground tenant will sublet space to retail, office or industrial tenants, depending on the type of development or may occupy the space itself. Ground leasehold interests may be bought and sold in a manner similar to fee simple property interests. Such use of ground leases for development projects has become increasingly popular over the past 30 years.

Commercial leases

Most commercial office and retail space, and much of the standard industrial space in the US, is available only through a commercial lease. Most commercial lease transactions commence with an offer to lease (sometimes called letter of intent), which contains the business terms agreed upon by the parties, including the space, term, rent and any tenant inducements. Commercial leases are typically on a net rental basis, which requires a tenant to pay basic rent plus additional rent comprising a proportionate share of real estate taxes, insurance, utility, and common area maintenance charges, or on a gross net basis, which requires a tenant to pay a fixed rent inclusive of all additional costs and expenses. In a retail lease (particularly shopping centers), a tenant may also be required to pay rent based on a percentage of its annual sales.

Residential leases

Residential leases are often regulated by state or local city legislation; in some cases, the applicable legislation will override the terms of the lease contract, regardless of the intention of the parties. In some cities (New York and San Francisco being prime examples), the ability of the landlord to increase residential rent is limited by regulation. Some cities establish certain rights and obligations of residential property owners and operators above a certain size and commercial landlords and tenants. These rules override the terms of lease agreements, which are otherwise freely negotiated.

## Are lease provisions regulated or freely negotiable?

Leases are freely negotiable, subject to state laws. In smaller transactions, standard forms that favor the landlord are often used.

## Is there a maximum term for leases? Can these be extended?

The term of a lease is subject to negotiation as are extension rights.

## What are the usual lease terms?

Leases for residential property are usually for one year. Options are possible. For all other asset classes, terms are more long-term, usually set at five, 10 or 15 years with additional options of the tenant extending the term. The market conditions at the time of the lease usually influence the outcome of negotiations. Both parties always want a lease long enough to achieve a return on any investment made to or for the property.

There is no maximum limit on the term set by legislation, but certain entities may lack legal authority to enter into a lease beyond a certain number of years.

## Are there instances where tenants may demand an extension of the lease?

Where a tenant plans to make substantial improvements to the premises, it has greater leverage to request extension rights but, like other terms, this is negotiable.

## On what grounds may a lease be terminated?

A landlord can generally terminate the lease when the tenant breaches the terms of the lease (with the timely payment of rent and upkeep of the property being the most important terms), which usually includes insolvency (subject to statutory restrictions) and assigning or subletting the property without the consent of the landlord. Negotiated termination rights following a full or partial condemnation or casualty of the property are common as well.

## Must rents be paid in local currency?

The parties are free to set the rent in other currencies. But arrangements for payment of rent in foreign currency are not at all typical.

## Is rent paid on a monthly basis? Is it required to be paid in advance?

This will depend on the agreement of the parties. Rent is usually paid monthly, at the beginning of the month. If there is a lender, they will typically prohibit the borrower/landlord from accepting rent more than one month in advance.

## How is rent reviewed? Are there limits to the increase in rent?

Rent is usually fixed for the initial term. Rent upon renewal or extension may also be fixed or may be adjusted to reflect the fair market value at the time of renewal or extension. The parties may also agree to periodic adjustments when there is a longer-term lease.

In some cities (New York and San Francisco being prime examples), the ability of the landlord to increase residential rent is limited by regulation.

## What are the basic obligations of landlords and tenants?

The following is usually required of landlords:

Repair and maintain the structure of the property, except when the tenant leases all of the property and makes improvements to it

Insure the property

Provide tenants with a valid notice of termination (in writing) if terminating the tenancy

Provide a non-defaulting tenant with quiet enjoyment of the property

The following is usually required of tenants:

Pay rent on time, including taxes and a share of the operating expenses for certain asset classes

Keep the property in good order

Inform the landlord if repairs are needed that are the landlord’s obligation and give the landlord access to the property to carry out repairs

Give the landlord access (often by appointment) for inspections and the landlord’s work

Seek the landlord’s prior consent before making alterations to the property

## What provisions or restrictions typically apply to the transfer of the lease by the tenant? May a tenant sublet the leased premises?

Tenants are generally allowed to assign the lease or sublet the premises if they obtain the consent of the landlord. The landlord is usually required to be commercially reasonable when considering the tenant’s request. Tenant subletting rights are often regulated by state and local laws for residential leases. In some cities (Chicago, for example), the laws are more renter-friendly and provide renters the explicit right to sublet notwithstanding the landlord’s refusal.

## What happens in the event of destruction of the leased premises?

If the premises are substantially damaged or destroyed by an act of God, the lease is often terminated. Rent generally abates according to the extent of the damage or destruction. Where there is partial damage, the lease is usually not terminated, and the landlord is obligated to restore the premises. Under state laws, a party involved is generally excused from the performance of its obligations when such circumstances arise beyond the party’s control.

If the premises are damaged or destroyed due to causes attributed to the tenant, then the tenant may be liable for repairs or replacement.

To the extent a lease is silent on this issue, local laws may apply.

## Who is usually responsible for insuring the leased premises?

The landlord is usually responsible for insuring the leased premises with respect to property insurance and recovers the cost from the tenant in a net lease. Tenants are typically responsible for their own general liability insurance.

## Will the lease survive if the owner sells the leased premises?

Lease agreements typically survive and are binding upon the new owner.

## Will the lease survive if the leased premises are foreclosed?

In the absence of a non-disturbance agreement, if a foreclosure is the result of a prior mortgage over the property, the lease will not survive at the option of the lender. Therefore, it is typical for a lender to request that the tenant sign a subordination and non-disturbance agreement so that the lender can keep a lease in place at its option.

# Planning and Environmental Issues

## Who has authority over land development and environmental regulation?

Property development is regulated, primarily at the municipal level. Municipalities typically control land use and the density of the development through official plans and zoning bylaws. The ability of an owner to subdivide property is also restricted and regulated. Development charges are also imposed by many municipalities on new developments within their jurisdiction.

The construction of new projects is also subject to municipal legislation. Building codes set specific standards for the construction of buildings, and most municipalities require building permits before the commencement of construction. Building codes also regulate the maintenance of existing structures.

Environmental regulation occurs mainly at the federal and state levels. Many federal environmental programs have been delegated to state environmental regulatory authorities to implement and enforce. Certain municipalities also have limited environmental regulations, often related to construction and municipal services (e.g., sewer and wastewater).

## What environmental laws affect the use and occupation of real estate?

The US Environmental Protection Agency regulates environmental matters at the federal level, including those related to air, water, hazardous substances, waste and protected species. Many federal environmental programs have been delegated to state environmental regulatory authorities to implement and enforce. Certain states have promulgated environmental laws and regulations that are more stringent than the federal ones.

## What main permits or licenses are required for building or occupying real estate?

Generally, a site plan agreement or a building permit are required for the construction or renovation of real properties. Occupancy permits must be obtained prior to occupying newly constructed or renovated real estate.

Depending on how the property may be used, environmental permits or licenses may be required, including those related to air emissions and stormwater and wastewater discharges.

## Can an environmental cleanup be required?

Federal and state regulators have authority under environmental laws and regulations to require investigation and remediation of environmental contamination.

## Are there minimum energy performance requirements for buildings?

Energy codes are developed at the national level through model code and standards processes. The codes are adopted by the states and enforced locally. The Environmental Protection Agency’s (EPA) Energy and Environment Guide to Action includes chapters providing recommendations on establishing, implementing and evaluating state-building energy codes. Local building codes provide minimum energy-efficiency requirements for new buildings. Old buildings are usually not covered by these requirements.

There are a number of voluntary standards for environmentally sustainable buildings. The building owners and manager associations in various cities have a voluntary environmental certification program for commercial buildings. The US promotes the Leadership in Energy and Environmental Design (LEED) rating system, a third-party certification program and an internationally accepted benchmark for the design, construction and operation of high-performance green buildings. Aside from LEED, the EPA also promotes other green building standards, including the Green Globes and the 2012 National Green Building Standard (ICC 700).

## Are there other regulatory measures that aim to improve the sustainability of newly constructed and existing buildings?

Green codes aimed to improve building sustainability and performance continue to be developed and adopted in the US. Existing mandatory model codes contain minimum requirements for increasing the environmental and health performance of buildings, sites, and structures (for example, the International Green Construction Code). States are also developing separate codes for similar purposes; the California Green Building Standards Code was the first statewide green building code in the US.

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