Global Corporate Real Estate Guide - United States of America

Real Estate Law

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# 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.

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