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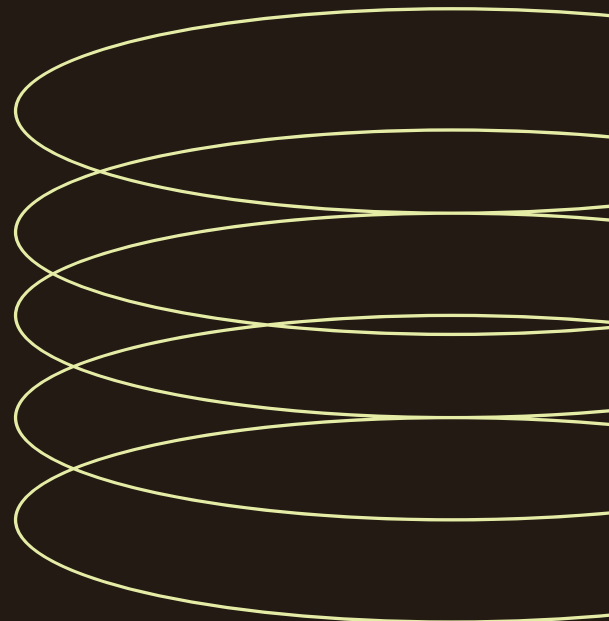
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Agreements of Sale

A Real Estate Lawyer's Guide to
Agreements of Sale Philadelphia



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What makes a strong offer?

More than just the price. As any good real estate lawyer will tell you, any buying or selling of property begins with an agreement of sale – just a name for a written version of this agreement between buyer and seller. Here in Philadelphia, Pennsylvania, where our law firm, Nochumson P.C., is located, any conveyancing of real estate from one party to another actually legally requires an agreement of sale, whether you are buying a condominium unit or a warehouse. So, why do many states make agreements of sale the law?

The main reason is that agreements of sale catalyze a meeting of the minds that is in the best interest of everyone involved in the deal, a group which may comprise many more individuals than just buyer and seller. Communication between all these individuals is key to the success of any deal. Given the sums of money involved, being unclear about the details of a real estate transaction may carry life-changing consequences. This guide will break down what a good agreement of sale should contain. It should be useful for anyone buying or selling real estate: whether you are in Pennsylvania or elsewhere in the country.



Introduction:

Agreements of Sale Basics

The ultimate purpose of an agreement of sale is that both buyer and seller in any real estate transaction need to know what they are getting into. That means they need to know how they are committing themselves to each other and how they plan to get to the closing table. Agreements of sale should function like a road map, and their natural end point is the closing of a deal on a specific closing date and for a specific purchase price.

A real estate lawyer or attorney writing an agreement of sale has to chart the rest of the journey to that end point. There can be many other obstacles to be surmounted before money changes hands. A property inspection is often the first step. A buyer may need a property inspector's advice as to whether they can afford to fix whatever is going on behind the walls of their prospective property. There can be other issues of mortgage financing, property appraisal, as well as condition of title, such as liens, encumbrances, and easements to consider as well.

It is worth noting that adding conditions for a property purchase can actually influence whether it takes place: a buyer may wish to do as much due diligence as possible, but adding too many conditions may be unsettling to the seller. It is in determining the right number of conditions for a specific agreement of sale that an attorney can truly be valuable. What lawyers that focus in conveyancing of real estate or related matters can do is help find a happy medium between buyer and seller, where the interests of both sides are protected.

As a first step to that end, Nochumson P.C. has compiled this complete starter list of what you should be looking for in a complete agreement of sale, whether you are a buyer, seller, or third party. Any offer will depend heavily upon how the following items are addressed in its terms and conditions: they add up to far, far more than just a figure on a bottom line.

Sale Price

With limited exceptions, the seller will not accept an offer if the amount owed on the property exceeds the purchase price being offered by the buyer. A prudent buyer, therefore, should find out prior to make an offer:

- How much the property was sold for previously
- The amount of the mortgage and other monetary liens currently encumbering the property
- The sale price of comparable properties in the neighborhood.

In a weak real estate market, a buyer can take advantage of a desperate seller whose property has been on the market for a long period of time, or a seller who has used what we might call “creative” financing and is too overextended to keep the property for much longer.

By contrast, in a strong real estate market, when a buyer is competing against other interested buyers for the next hot property, that buyer may be willing to overpay for a given property believing that the property will simply appreciate due to market conditions.

Earnest Monies

In order to convince the seller to take the property off the market, the buyer generally must agree to pay earnest monies toward the agreement of sale. Most, if not all, earnest monies are refundable and held in escrow by a third party.

The more money that the buyer places in escrow prior to settlement, the more that buyer has “invested” in the real estate transaction. Although the earnest monies is being held in escrow, most escrow agreements specifically prohibit the escrow agent from releasing the earnest monies to either the seller or buyer without mutual consent. As a result, when a buyer places that the earnest monies into escrow, the buyer is taking a calculated risk that if they should decide to cancel the real estate transaction, they may face the wrath of a jilted seller who will refuse to agree to release the 4 5 earnest monies simply out of spite. Under that scenario, the buyer will be forced to file an action for specific performance with a lawyer under the agreement of sale to reclaim the earnest monies from the real estate transaction. In the meantime, the buyer will be paying for the cost of litigation, and will not have the use of the earnest monies to purchase another property until the conclusion of that litigation.

Another factor determining a potential payment of earnest monies towards the agreement of sale is its due date. In many situations, the earnest monies is paid in installments. The first installment is typically due upon execution of the agreement of sale; the next installment, if any, is due after certain contingencies under the agreement of sale are either met or waived by the buyer. The more money paid before these contingencies – often processes like inspections – take place, the more commitment is demonstrated by the buyer to get to subsequent mortgage and financing stages. And, in general, an earlier payment date favors the seller.

Settlement Date

Executing an agreement of sale is the beginning of the road, not the end. The seller does not transfer their ownership interest in the property to the buyer until the seller receives the net sale proceeds from the buyer on the settlement date. Any seller wants settlement to occur as quickly as possible in order to reap the financial benefit of the real estate transaction and to lessen the time frame during which the real estate transaction could simply “blow up.” A buyer wants as much time as is necessary to verify the condition of the property, without risking the deal.

Unless the real estate transaction is a “cash” transaction and the buyer is taking the property in “as is” condition, the buyer will need at least a month to close on a residential property and approximately 2 or more months on a commercial property. These time frames reflect how long it typically takes the buyer to obtain financing to purchase the property, and to perform a property inspection.



Realty Transfer Taxes

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Advanced Payments

Most local governments require property owners (in this case the seller) to pay in advance for taxes and utilities due on account of the property on either a quarterly or yearly basis. Moreover, if the property is located in a planned community or condominium structure, the property owner may be obligated to make advance payments for assessments due.

Any agreement of sale should thus contain a provision addressing whether the buyer will reimburse, on a pro rata basis, the seller for any of these advanced payments.

Personal Property

As a precautionary matter, the buyer should list any personal property which will be included as part of the real estate transaction and not presume that the affixed personal property is a “fixture.” Again, a real estate lawyer should know the local legal definitions of “fixture” where they practice.

Fixtures become especially important at scale. If a buyer is purchasing a residential property for personal use or as an investment, that buyer may want the refrigerator, washer, and dryer located on the property. Failing to include these appliances as part of the agreement of sale will probably not lead to the buyer’s financial ruin. However, if a buyer is purchasing a multi-family dwelling or an entire apartment building, the failure to include such appliances in the agreement of sale could prove financially devastating.

Mortgage Financing

Unless the property is purchased for “cash” outright or is being financed by the seller, the buyer will need to obtain a loan from a financial institution to purchase the property.

To be more buyer-friendly, an agreement of sale should include a “mortgage financing contingency” provision making closing of the real estate transaction contingent upon the buyer obtaining mortgage loan financing. That is, the provision should state that if the buyer fails to obtain the requisite mortgage financing, the agreement of sale will automatically terminate, and the earnest monies deposited by the buyer on account of the agreement of sale will be returned to the buyer. If that provision is not included in the agreement of sale and the buyer fails to obtain such mortgage financing, the buyer will be in breach of the agreement of sale if the buyer fails to pay the purchase price at settlement. Under most agreements of sale, the buyer will forfeit the earnest monies as a result.

The seller should only agree to include this “mortgage financing contingency” provision in the agreement of sale if it is strictly defined. This provision should include the details of the mortgage financing: the amount to be financed, the interest rate of the mortgage loan, the type of the loan, a date certain that the buyer must apply for the loan, and a date certain that the buyer must obtain the mortgage commitment from the lender.

Seller's Assist

Most mortgage lenders will allow the buyer to accept a “seller's assist” of up to 3% of the sale price. A seller's assist helps a buyer who, absent the seller's assist, either cannot afford the costs associated with settlement or must make immediate improvements to the property.

For example, if a buyer obtains a 3% seller's assist on a property with a purchase price of \$100,000, the buyer will receive \$3,000 from the seller at settlement from the net sales proceeds. One may question why a seller would agree to give money back to the buyer. In actuality, the “real” purchase price is less than the “actual” purchase price agreed to by the parties. However, due to the reasons set forth above, the seller may be willing to inflate the purchase price to entice the buyer to purchase the property.

The seller must be mindful of 4 recurring issues when they agree to a seller's assist:

- First, not all mortgage lenders allow seller's assist. The provision should, thus, include language in the agreement of sale stating that, if the mortgage lender does not allow the buyer to accept the seller's assist, then settlement should otherwise proceed.
- Second, the realty transfer taxes due on the property are based upon the purchase price. The seller should, thus, require the buyer to pay for the realty transfer taxes on the inflated amount of the purchase price plus seller's assist.
- Third, in the same vein, the real estate agent's commission is also based upon the purchase price. As a result, the seller should make sure that the real estate agent waives their right to a commission on the inflated amount.
- Fourth, if the property is being financed, the mortgage lender will obtain an appraisal of the property. If the appraised value of the property is less than the purchase price, the mortgage lender will not finance the real estate transaction. Therefore, if the property appraises for the “actual” rather than the “inflated” purchase price that incorporates the seller's assist, the agreement of sale should contain an appraisal contingency provision for the sake of the buyer requiring the purchase price to be accordingly reduced to the appraised value.

Property Inspection

The right to inspect the property after the agreement of sale is executed by the parties is one of the most important aspects of the agreement for the buyer.

In a commercial real estate context, especially in a major city like Philadelphia, many agreements of sale are conditioned upon environmental testing and approval of the property. Additionally, similar to a residential property, many commercial real estate buyers elect to inspect the physical structure of the building located on the property as well as to inspect for evidence of radon or termites.

After the agreement of sale is executed, the buyer is usually given a small window of opportunity to inspect the property by a licensed professional. During that window of opportunity, the buyer then must present the property inspector's written findings about the property and ultimately decide between:

- Accepting the property in “as is” condition,
- Entering into a mutually agreeable written agreement with the seller to either remedy the defects with the property or accept a credit therefor or,
- Terminating the agreement of sale.

Zoning

The zoning classification of a property is of minimal concern when the buyer is purchasing a single-family home, simply because the buyer will likely continue that use during their ownership. However, when the buyer is purchasing a multi-family residential dwelling or a commercial building and intends to change the use of the property after settlement, the buyer may want a window of opportunity by the date of change of ownership to actually obtain such zoning approval prior to proceeding forward with settlement. In Philadelphia, Nochumson P.C. can assist buyers and developers in navigating zoning regulations. We have an introduction to the zoning approval process in Philadelphia [here](#).



Title Insurance

You should never buy a property without title insurance. Nochumson P.C. offers an entire article on all the reasons why. Title insurance provides for good conveyance of a property to you while ensuring the property has no monetary liens and no outstanding debts. If the buyer is financing the purchase of the property, the mortgage lender will require the buyer to obtain title insurance. By doing so, the buyer and its “silent” investor, the mortgage lender, are assured by the title insurance company that there are no liens or other interests detrimentally encumbering the property. Even if the buyer is purchasing^{10 11} the property with cash proceeds, that buyer should really purchase a title insurance buyer’s policy to protect their financial interest in the property: as well as their ability to resell it in the future.

In fact, most agreements of sale are conditioned upon the seller establishing they have good and marketable title to the property they want to convey by insuring it with a reputable title insurance company at regular rates.

Condominium/Planned Community Structures

A buyer usually has the right to review the governing documents of a condominium or planned community he or she plans to join. Check your local laws with a real estate lawyer, but, in Pennsylvania, a buyer who is purchasing a property in a condominium building or planned community must receive the corresponding association’s governing documents prior to settlement. The buyer is given the right to declare the agreement of sale null and void at any time before the buyer receives these documents. Given the leverage that the buyer has under such circumstances, the seller should ensure the buyer receives these documents as soon as possible. Due to the extreme length of these documents, the buyer should request that he receive the documents well in advance of settlement in order to give them the opportunity to review the documents either on their own or with a lawyer, and thereafter make an informed decision as to whether they wish to proceed with settlement.

Maintenance & Risk

A buyer should always include a provision in the agreement of sale requiring the seller to maintain the property in its present condition and to bear risk from fire or other casualties until settlement.

The reason why is that as a general rule in Pennsylvania the buyer of real estate bears the risk of loss for injury occurring to the property after execution of the agreement of sale but before the settlement, unless this risk is shifted by the parties in their agreement.



Assignment and Resale of Property

Most agreements of sale require the buyer to obtain the seller's permission to transfer the buyer's interest to purchase the property to a third party.

With many investment properties and commercial real estate transactions, the buyer is typically purchasing the property through a corporate entity which may not have been duly formed by the time the agreement of sale was executed. Under those circumstances, the buyer should insist upon a provision in the agreement allowing him to assign his interest in the agreement to this soon-to-be-formed entity. Otherwise, the buyer may be forced to purchase the property individually rather than through that corporate entity, and then transfer it afterwards, incurring twice the transfer taxes.

Moreover, most buyers who purchase in a newly developed condominium building or a planned community are prohibited from selling the property for a short period after settlement; a buyer should inquire about how long this period lasts. This prohibition exists because sellers who are marketing the other properties within that condominium building or planned community do not want any additional competition for prospective buyers.

Remedies

The money damages to which a seller is entitled if the buyer breaches the agreement of sale are typically de minimus ("immaterial") because the seller could always secure another buyer to purchase the property for approximately the same purchase price. A seller, therefore, usually requests for a provision in the agreement of sale allowing the seller to keep the earnest monies made by the buyer in the event the buyer breaches the agreement of sale.

By the same token, most agreements of sale either prohibit or severely limit the buyer's ability to collect damages against the seller, assuming an equivalent property could be found, so be aware.

Property Disclosures

In Pennsylvania, under the Real Estate Seller Disclosure Law, 68 Pa. C.S. § 7301 et seq., with limited exceptions, a seller of a residential property must disclose to the buyer any material defects with the property by completing all applicable items in a property disclosure statement and must deliver a copy of the statement to the buyer prior to the signing of the agreement of sale. Ask a lawyer who specializes in real estate about the equivalent statute in your state.

Among other things, a seller in Pennsylvania is required to make disclosures with respect to the following subjects:

- The seller's expertise in contracting, engineering, architecture, or other areas related to the construction and conditions of the property and its improvements.
- When the property was last occupied by the seller.
- The condition of the property's roof.
- The condition of the property's basement and crawl space.
- The existence of termites/wood destroying insects, dry rot and pests on the property.
- The existence of any structural problems with the property.
- Any additions, remodeling and structural changes to the property.
- The condition of the property's water and sewage systems or service.
- The condition of the property's plumbing system.
- The condition of the property's heating and air conditioning.
- The condition of the property's electrical system.
- Whether other equipment and appliances is included in the sale of the property.
- The property's soils, drainage, and boundaries.
- The presence of any hazardous substances on the property.
- The existence of condominium and/or other homeowners' associations.
- The existence of any legal issues affecting title or that would interfere with use and enjoyment of the property.
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- The property's soils, drainage, and boundaries.
- The presence of any hazardous substances on the property.
- The existence of condominium and/or other homeowners' associations.
- The existence of any legal issues affecting title or that would interfere with use and enjoyment of the property.

If at the time the disclosures are made, an item of information required to be disclosed is unknown or not available to the seller, the seller may make a disclosure based on the best information available to the seller.

Conclusion

Buying and selling real estate is one of the most stressful processes in our lives. It happens so infrequently, often only a few times in a lifetime, and involves six-figure, or even greater sums of money. The ramifications of a poor decision extend widely, and the more research you do the better. The above conditions are the ones we see as the most important to any agreement of sale. But there are others that are more deal-specific and which could pertain to your situation or potential transaction.

Always Have a Lawyer Read Your Real Estate Agreements of Sale.

If you have any questions or concerns after reading our guide in applying for and obtaining real estate tax abatements in Philadelphia, please feel free to call Alan Nochumson at (215) 600-2851 or email him at alan.nochumson@nochumson.com.



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