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Purchase-offer contracts need to define the seller and what the seller owns

By Curtis Seltzer

BLUE GRASS, VA—Buying country property raises a number of issues for buyers that differ from those commonly faced when pursuing a house in or near a city. These issues take on legal importance when they are threaded into the language of a purchase-offer contract.

In the next few weeks, I'll discuss the contract snags that can catch buyers unawares.

Who is the seller and what does he own? In the first or second paragraph of the standard purchase contract, the names of the seller and the buyer are filled in. If the seller is represented by a broker or agent, that individual will insert the seller's name.

This seems simple enough, but, occasionally, it gets complicated.

The buyer wants the exact name (s) of the seller (s) who owns the property. The buyer does not want a name of an individual included as a seller who is not a legal owner, nor does the buyer want the name of a legal owner left out.

Country property often involves one or more generations of heirs. As the family farm was passed down in equal ownership shares to children and then their children, each ownership share became a smaller percentage of the whole. A dozen heirs is common; two or three times that number is not uncommon in rural communities. I've seen one property conveyed by 256 owners.

Sometimes, informality reigns. The seller may be identified in the listing agreement and in the purchase contract as John Doe when the actual legal owner is something like JD LLC, or the Doe Family Limited Partnership. If the seller is named incorrectly, a buyer may find himself trying to enforce an unenforceable contract, or one that takes a lot of legal time to enforce. Keep things simple: Get the seller right.

Sometimes courthouse research is needed to nail down the legal owner before an offer can be submitted. Heirs have to be followed through wills and other records. Divorce and remarriage further complicate ownership.

Brokers are not lawyers or title searchers as a rule. They will make a good-faith effort to get all lawful owners signed onto their listing agreement, but this may not be good enough.

A buyer can protect himself by including language in the purchase offer that places the burden of ownership on the seller, which is exactly where it belongs. The purchase-offer contract should include language whereby the parties agree that the seller guarantees the following:

1. No other party (individual, business entity, trust, estate, etc.) holds an ownership interest in the property the buyer proposes to purchase other than those parties named as sellers in the buyer's purchase contract;

2. The seller warrants (promises) that he legally owns the property in full, subject only to limitations on ownership of record. Commonly found

limitations of record are items such as a utility easement, right-of-way easement that allows another party to use a road on the seller's land, life estate, hunting lease or mineral lease.

"Of record" means the limitation must be on file and recorded in the county clerk's office. I'm using "county" in a generic sense to represent whichever local jurisdiction -- city, town, parish -- manages property transactions. Recordation provides public notice of claims of ownership and claims of rights on property. The clerk may also be called the "registrar."

In some situations, a careful buyer may want a seller to promise that no unrecorded limitations on ownership exist. Rural property seems to have more than its share of unrecorded encumbrances, that is, a right or interest in land that affects its value. The buyer may need to state further that both buyer and seller agree as part of their purchase contract that the buyer will be bound only by limitations of record.
3. The seller promises that he will deliver or convey the property with marketable title. This phrase means that the seller's title is so free of defect that a court will enforce its acquisition by the buyer.

A property title that's marketable is one that:

A. contains no serious defects or flaws;

B. does not depend on a doubtful question of law or fact to establish its validity;

C. does not expose the buyer to litigation over title or threaten the buyer's quiet possession and enjoyment of the property; and

D. would convince a reasonable buyer, acting reasonably and in accord with accepted business principles and in knowledge of the facts and their legal significance, that he could, by virtue of the title he holds, sell or mortgage the purchased property.

A deed by itself is not sufficient proof of ownership. A deed, even a general warranty deed, does not legally establish the condition of the seller's title at the time that the purchase-offer contract is signed or the sale consummated. A buyer needs something more than a deed.

The buyer's purchase-offer contract should specify that he is purchasing and acquiring both ownership and marketable title. This is often done by having a lawyer, title company or licensed abstractor issue a certificate of title (an opinion) that says, after an examination of public records, the seller's title appears to be good and marketable.

A certificate does not look for or cover unrecorded liens, limitations or rights of other parties, and therefore, it is not a perfect guarantee of ownership. Buyers can buttress a certificate by insisting in a purchase-offer contract that the seller disclose all unrecorded limitations on title that he knows of. But a certificate is still not perfect.

Title insurance is the best protection a buyer can get to defend against problems in ownership and title. But it, too, is not comprehensive. A standard-coverage policy insures the title based on an examination of public records and against some hidden defects, such as a forged document, among others. An extended-coverage policy also protects against things that can be discovered by inspecting the property, such as some unrecorded liens, adverse possession and inspection of a survey. Both types of policies include exclusions that are not covered, such as a claim against the property involving a zoning ordinance, restrictive covenant, some easements, some water rights, among others.
Lenders often require a buyer to purchase title insurance that protects them. Insurance that protects the buyer is usually worth the money.

The Torrens system verifies and guarantees ownership. It guarantees title by registration in the system, and provides evidence of title without additional searching. Iowa is the only state that has all its land under this system, while nine others have implemented it in part.

My opinion is that a buyer should always have a local real-estate lawyer by his side when he is filling in a standard purchase-offer contract. The lawyer should include language to make sure that all lawful sellers are party to the buyer's contract and that these sellers own what is being sold and will convey that ownership through marketable title.

Next: How should property to be sold be described in a purchase-offer contract?