

THE BUYER'S VIEW IN SHORT SALE REAL ESTATE TRANSACTIONS

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By now, most property owners in Florida are familiar with the concept of a “short sale.” Simply put, a short sale is a sale of property by the current owner for a sales price that is less than the total of the closing costs to complete the sale (real estate commissions, recording fees, real estate taxes, and closing fees) and the unpaid balance of all mortgages against the property.

The simplest form of short sale is where the owner owes more than the sales price to only one lender. In this situation, the owner enters into a short sale contract and then contacts the lender and requests the lender to accept less than the full payoff amount due to the lender to satisfy the note, unpaid interest, and costs incurred by the lender.

For example: Unpaid note and mortgage amount including interest, default interest, lender costs \$1,600,000 Short sale price \$1,400,000 Closing costs

Broker's commission \$70,000

Documentary stamps \$9,800

Title insurance premium \$6,075

Miscellaneous costs \$300

Proration of real estate taxes \$24,000 \$110,175 (\$110,175) Short sale payoff if accepted by the lender \$1,289,825

The request by the owner for the lender to accept a payoff less than the total amount due will most likely result in the lender requesting full current financial disclosure by the current owner, a copy of the short sale contract, and a draft settlement statement for the proposed short sale. Once current financial information and the draft settlement statement are submitted by the owner to the lender, the lender may (a) reject the short sale payoff, (b) approve the short sale payoff, or (c) require the owner to contribute funds to reduce the amount of loss the lender incurs by accepting a short sale payoff. After submission to the lender, no changes or modifications should be made to the short sale contract without obtaining the

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lender's prior written approval. Additionally, the buyer should not participate in any arrangement (whether written or oral) that provides for the seller to receive any form of compensation from the buyer (or a third party) in connection with the short sale contract and closing. To do so could jeopardize the approval for the sale or even expose the buyer to a direct claim by the lender.

Since a short sale is contingent upon a negotiated agreement with the lender in order for the seller to perform the contract, the short sale contract is not a firm sales agreement. The short sale contract is usually an "as is" contract, with the buyer having a right of inspection and a right to cancel the short sale contract within an agreed upon number of days.

The Florida Association of Realtors has a standard form short sale addendum (SSA), which is commonly used by the Florida real estate brokerage community. While the SSA is a starting point, it does not adequately protect a buyer and should be edited to make it deal specific. If an SSA is used, the following specific concerns should be addressed to protect the buyer:

1. Pay careful attention to the time period the seller has to get lender approval. This time period should be specified in the SSA. If no time period is specified, the default time period is 45 days. Since the FAR residential contract defines "days" as business days, it would allow the seller nine weeks to obtain lender approval, which may be too long. The approval deadline is important to the buyer so that the buyer will know that the lender has either accepted the short sale and knows the deal is firm or has rejected the contract so that the buyer can move on to another property.
2. Another important issue is how lender approval is confirmed. Under the SSA, the seller notifies the buyer that the lender has agreed to proceed. The SSA should be modified to require the lender (and all other lienholders) to issue written confirmation to the closing agent that the purchase price has been approved, that the lender acknowledges this is less than the payoff price, and that the mortgage and other liens will be satisfied with the receipt of the discounted payoff amount. The lender's written approval should contain all of the lender's conditions to proceed with the short sale closing. This lender's written approval will allow the buyer to move forward to the closing and settlement knowing there are no remaining unresolved issues between the lender and the seller.
3. The buyer should be sure to indicate that all time periods under the contract commence from the date that a copy of the lender's written approval is delivered to the buyer. The buyer should not be required to spend money on due diligence inquiries or to undertake any action required of the buyer under the terms of the short sale contract until the buyer receives a copy of the lender's written approval issued to the closing agent.
4. The SSA should adequately address the closing date. Many short sale contracts are written with a closing date earlier than the lender's approval deadline. The SSA should be edited to allow adequate time for inspections, survey, title review, and mortgage approval by the buyer's lender (if applicable) following the date the buyer receives a copy of the lender's written approval. Typically, this would be a minimum of 15 business days.

A short sale is not a standard real estate contract or closing, and the buyer should obtain legal counsel to review and edit as necessary the contract prior to the buyer signing the contract and paying a deposit to the escrow agent. Additionally, the buyer should work with a real estate broker (not the listing broker) selected by the buyer who will assist the buyer in evaluating an appropriate purchase price and who will provide the buyer with current comparable sales information and advice on other market conditions applicable to the purchase.