REAL ESTATE IN MINNESOTA: Issues to Consider

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Real estate as an investment is no longer a local matter. Sellers, buyers, and lenders may be from other states, or even other countries. Investment real estate is now a global industry. For those selling, buying, or financing real estate in Minnesota, residents and non-residents alike, here are nine issues for consideration:

1. **Cancellation of Purchase Agreements:** In Minnesota, purchase agreements do not automatically terminate when a party fails to perform as agreed. In almost all cases, the purchase agreement remains in effect after a default, until it is cancelled. There are three ways to cancel a purchase agreement. First, a buyer and seller may voluntarily cancel the purchase agreement by written agreement. Second, a relatively expeditious statutory cancellation process is available, in which the buyer generally has 30 days to cure after service of a notice of cancellation. If the statutory procedure is strictly followed, this is an effective and relatively inexpensive process. Third, a party wishing to cancel a purchase agreement may seek judicial cancellation, but that is time-consuming and expensive.

2. **Deed Tax:** Minnesota imposes a tax on deeds and some other instruments that convey title to Minnesota real estate. Deed tax is an obligation of the grantor and must be paid as a condition to recording. The tax rate where the consideration exceeds $500 is .0033 of the purchase price (.0034 in Hennepin and Ramsey Counties). Some deeds (*e.g.*, deeds making a qualifying designated transfer under Minn. Stat. § 287.20, deeds transferring real property to complete a merger/consolidation, and deeds gifting real property) qualify for the minimum deed tax.

3. **Dual Recording Systems:** Minnesota has two real estate recording systems. The first is the "abstract" system in which documents are recorded with the County Recorder's office. The second is the registered land system, commonly referred to as the Torrens system. Documents affecting Torrens property are recorded with the office of the Registrar of Titles. If the property is part abstract and part Torrens, documents must be recorded in both offices. Recording in one office is ineffective to serve as notice if the recording should have occurred in the other office.

4. **Marketable Title State:** Minnesota is a marketable title state as compared to an insurable title state. Marketable title is title that is free from reasonable doubt or title that a prudent person, with full knowledge of the facts, would be willing to accept. Insurable title is merely title that a reasonably prudent title insurance company would be willing to insure. Most purchase agreements in Minnesota will require the seller to provide marketable title to the buyer at the time of closing. A buyer may be able to cancel a purchase agreement if there is an alleged or apparent defect in title that is not resolved or cured prior to closing, even if a title insurance company is willing to "insure over" the defect.

5. **Skyways:** Minnesota winters can be long and cold. Many buildings in downtown Minneapolis and St. Paul, and some in other cities, are connected by climate-controlled skyways. In Minneapolis, skyways are privately owned and are governed by agreements between the respective building owners. In St. Paul, the City owns and regulates the skyways. Skyways add value to a building, but there may be governmental and contractual obligations that come with owning a building that has a skyway connection.

6. **Mortgage Registry Tax:** Minnesota imposes a tax on the recording of a mortgage ("MRT"). MRT must be paid (typically by the borrower) before the mortgage may be recorded, and payment of MRT is required to enforce a mortgage. The tax rate is .0023 (.0024 in Hennepin and Ramsey Counties) of a debt or portion of the debt that is secured by the mortgage on Minnesota real property. If the mortgage secures a revolving line of credit, MRT is payable on the maximum amount of the line of credit, even though the full amount may never be advanced. No MRT is payable for a mere mortgage amendment or extension that alters a mortgage without securing a new debt, or increasing the amount of the existing debt. If the amount of the existing debt is increased, additional MRT is payable only on the amount that exceeds the existing principal balance. Purchasing and then amending and restating existing mortgage loan documents may result in a substantial reduction in MRT.

7. **Key Mortgage Terms:** A mortgage should state the maturity date of the debt it secures. If the mortgage does not specify the maturity date, the 15-year statute of limitations for enforcement of the mortgage will run from the date

of the mortgage, rather than from the maturity date. If a mortgage secures a revolving line of credit, that fact, and the maximum principal amount that may be secured at any one time, should be stated in the mortgage.

8. **Assignment of Rents/Receivership:** Minnesota is a lien theory state, meaning the lender is considered the holder of only a security interest, and the mortgagor is the owner of the land and is entitled to possession, unless and until foreclosure of the mortgage is completed. An assignment of leases and rents is generally enforceable in Minnesota when recorded and after default by the mortgagor. However, a well-drafted assignment of leases and rents will provide for enforcement of the assignment either by the lender or through appointment of a receiver. The assignment remains effective during foreclosure of the mortgage and throughout the redemption period from a foreclosure sale.

9. **Foreclosure:** Minnesota allows both foreclosure by advertisement and foreclosure by action. To foreclose by advertisement: (i) the mortgage must contain a power of sale; (ii) a default must have occurred under the mortgage by which the power of sale has become operative; (iii) no other action or proceeding to collect the debt may be pending; and (iv) the mortgage and all assignments must have been recorded. Under either foreclosure procedure, the borrower has the absolute right to "reinstate" the mortgage (and thereby undo any acceleration of the debt) prior to foreclosure sale by curing the existing curable defaults and paying certain expenses. After a foreclosure sale, the borrower has the statutory right to redeem the mortgaged property, and if the borrower fails to redeem, junior lien creditors also may redeem, in the order of priority of their liens. Usually the mortgagor's redemption period is six months after the foreclosure sale.

For further information about selling, buying, or financing real estate in Minnesota – or for any other real estate questions – contact your attorney at Moss & Barnett.

Caroline A. Bussey is a member of our real estate team. She represents landlords, tenants, and lenders on a wide range of leasing and financing transactions.

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