

“BUYING PROPERTY SOUTH OF THE BORDER”

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Purchasing real estate in Mexico has changed dramatically over the past five (5) years for foreign, non-Mexican nationals. Beginning in 1994, the federal government of Mexico liberalized ownership provisions of all property within the constitutionally protected area known as the “prohibited zone.” Prospective buyers outside of Mexico’s borders seeking to buy tourist (housing developments, condominiums and time share projects), rustic, industrial or urban property can now enjoy greater legal freedom and ownership rights as mandated and protected under Mexico’s new foreign investment law. In Mexico, as in the U.S., the transfer of real estate property rights are administered by federal, state and local laws. Foreign nationals wishing to acquire property are subject to permission and registration with Mexico’s Department of Foreign Affairs. This federal level agency is responsible for awarding the lawfully required permits and authorizations to purchase land in the Mexican Republic, as well as to acquire real estate properties or rights thereto.

However, buying south of the border is not like buying property in the U.S. and purchasers must always remember that they are not in the United States. The Mexican legal system is not the same as its American equivalent. That is not to say that real estate transactions (*operaciones*) in Mexico are totally different or more complicated than in the US, but common sense should always be exercised. The worst a purchaser can do is to remain ignorant of the law and procedures involved in the conveyance of real estate in a foreign country. Mexico is **not** the “wild west” as some may perceive where anything goes and the prevailing Mexican attitude is “trust me, no problema.” It is inherently important for non-Mexican buyers to understand that Mexico has formality of law with authorized regulation of real estate development procedures at all levels and this formality is coupled with a statutory government framework for the legal conveyance of real property.

Foreign purchasers should be aware of the same basic issues that any prudent buyer would utilize acquiring real estate. Additionally, they should not depend on the seller for information or advice about the property because they have no way of knowing whether it is correct. They should obtain the status of the title to the property requiring an in-depth title search. They should be knowledgeable of the type of contracts to be utilized for a purchase-sale agreement (*compraventa*) and preparation of the deed (*escritura publica*) by the notary public (*notario publico*) in Mexico. They should be aware of earnest money deposit and escrow considerations, and ultimately, a buyer should have an understanding of the actual conveyance method in Mexico and how legal title or beneficiary interest (*fideicomiso*) is vested and recorded for foreign purchasers.

The first thing a buyer must consider is whether the seller of the property has legal title to the property, and if so, whether the property can be legally transferred. Although this seems to be a logical and foregone precaution, there have been many documented transactions in which foreigners thought they had acquired real estate only to find out later that the seller was unable to transfer legal title. Very simply, the seller didn’t own the property or he had not completed the required development procedures for the conveyance of the real estate. A good example would be agrarian land (“*ejido*”) not properly regularized, or the conveyance of a condominium unit that does not have a recorded condominium regime (*regime de condominio*) or even the sale of a lot or house in a residential subdivision (*fraccionamiento*) that does not

have the required and published state/municipal development approvals. In any of these cases, the result is that the purchaser has paid money for the acquisition of the property but can not receive legally recorded title or beneficiary interest in a Mexican bank trust. An adequate title search of the property should be performed that addresses these various issues. A buyer should always ask the seller for a copy of the escritura vesting title to the real estate. The buyer should request a copy of the lien certificate (*certificado de libertad de gravamen*) on the property that should indicate the owner of record, surface area and classification of property type, the legal description and whether there are any liens or encumbrances filed of record against the property. The buyer can also request a certificate of no tax liability (*certificado de no aduado*) from the local taxing authority. The notario publico is responsible for the title search in Mexican transactions. However, the notary typically only examines the current deed and a current lien certificate resulting in the possibility of a short or incomplete title history of the property. Today, there are US title companies, as well as Mexican companies, that facilitate the title examination process on a more in-depth basis and issue either a Commitment for Title Insurance on Mexico Land or a title report from the Mexican company. A foreign purchaser always has the option of hiring Mexican counsel to provide a legal opinion on the status of title as well.

Most real estate transactions in Mexico will have at least two (2) contracts: (i) an offer and acceptance (*oferta*) and/or a promissory agreement (*contrato de promesa*): and, (ii) a purchase- sales agreement (*contrato de compraventa*). The first two are preliminary agreements containing the basic transactional information. They are not the instruments by which title to the property is transferred to the buyer. The second contractual document is the agreement to be protocolized by the notario which will transfer title to the buyer. It may have several different forms: a real estate trust agreement (*contrato de fideicomiso*), a reserve title agreement (*contrato de compraventa con reserva de dominio*) or an assignment of real estate trust rights (*contrato de cesion de derechos fideicomisarios*). The Civil Code defines an agreement (*convenio*) as an accord (*acuerdo*) between two or more persons to create, transfer, modify or extinguish obligations. Specifically, the Civil Code defines contracts as agreement that produce or transfer obligations and rights. In general, real estate contracts in Mexico must be recorded before a notary public and, to be binding on third parties, they must be filed with the public registry of property. Once there is a written acceptance to the offer, it is recommended that the buyer's attorney draw up the sales contract or promissory agreement. Since this agreement is the single most important document the buyer will execute with the seller, and the agreement's contents will determine the terms and conditions of the transaction, the buyer should insist that his attorney assume this responsibility.

There are many aspects of Mexican real estate deals that are very similar to transactions closed in the United States. It is easy to presume that the basic terms and principals with which a purchaser is familiar in the US also hold true in Mexico. However, a foreign buyer is much better off to assume nothing. Two such terms are escrow (*plica*) and earnest money deposit. In the United States, an escrow or title company, or a person legally empowered to act as an escrow agent, will serve in the capacity of handling escrow functions and earnest monies. In either case, the company or individual whom carries out the escrow procedure is licensed and empowered by law to do so. They are legally responsible to see that the agreed upon conditions of an escrow agreement are met before any funds are released. This is **not** the norm in Mexico. Historically, foreign purchasers have given earnest money as contractual consideration to the seller. And in many cases, the real estate agent or "broker" involved in the transaction has served as an escrow agent. Real estate brokers are not licensed in Mexico and typically do not set-up separate accounts for earnest money deposits. The caveat here is expressly made in bold letters. **If a foreign buyer is willing to give earnest money to the seller or the real estate agent in the transaction, be prepared not to get it back!!** Only until very recently have a couple of Mexican escrow companies come into existence utilizing US bank accounts for earnest money deposits. The same can be said for a few brokerage companies. A foreign buyer should always exercise caution and use common sense when it

comes to their money and whom they're giving it to. As is often said, "don't leave your brains at the border!"

Ultimately, foreign buyers get to the point where they are ready to have the transaction consummated and take title to the property. In Mexico, all real estate transactions and the legal conveyance of any type of property involve the participation of the notario publico. Although their title translates to "public notary", the notario publico's responsibilities greatly exceed the formalization of signatures. Appointed by the Governor of the State and the Executive Branch of the federal government for a particular state district, notarios are attorneys that must pass two extensive examinations in order to receive their lifetime appointments. In a typical transaction, they will prepare the deed of conveyance subject to the "protocolized" purchase-sale agreement. The notario brings buyer and seller together for the formalization of the property transfer and they authorize the appropriate signatures upon execution of the escritura. And lastly, after the property transfer has been formalized, the notario will record the escritura with the public registry of property where the property is located. Prior to the closing, the notario's additional duties include: (i) to examine the documents of the selling party to ensure their accuracy and legitimacy; (ii) to verify title; and (iii) to search the public records to determine the status of the seller's title to the property and the existence of liens against the property. The notario is also responsible for the collection of all applicable property taxes and government transfer taxes. As a representative of the State, however, the notario does not insure title to the real estate nor do they have any legal responsibility for title defects. In short, a purchaser can not seek restitution against a notario in the event the purchaser suffers a monetary loss due to a title defect unless fraud, misrepresentation or gross negligence could be proven in a Mexican court of law.

And finally, title to all real estate in the "prohibited zone" being acquired by foreign purchasers can only be legally vested and recorded one of two ways: (i) in a Mexican bank trust (*fideicomiso*) for all residentially declared property; or (ii) in a Mexican corporation for all non-residential real estate. There is no in-between choice or "gray area" concerning foreign acquisition in the restricted zone (100 km. along all borders, 50 km. along all coastlines, all of Baja California) of Mexico. Foreign nationals can be the sole and exclusive stockholders of a Mexican corporation that holds fee simple title to non-residential property in the prohibited zone. In any type of real estate acquisition in Mexico, non-Mexican purchasers must always register their ownership interest with the Secretary of Foreign Affairs and must waive their rights to foreign government intervention in the event of a property dispute. This is known as the Calvo Clause, which is constitutionally mandated, and is contained in all bank trust agreements. It should be noted that Mexican banks, acting as trustee for a foreign buyer in a *fideicomiso*, make no warranty or guarantee of the title to the property in the trust nor do they provide any restitution in the event of a title defect. Foreign buyers should always be advised to consult US or Mexican counsel regarding real estate transactions. They also can contact US title companies to assist them in answering questions about conveyance issues, title searches and title policies for a prospective property as well as escrow account considerations. And one last caveat buying public: if you are told by a seller or agent that this beautiful piece of land on the border or this lovely house on the beach does not need to be in a corporation or in a trust, or it does not need to be closed by a notario, walk away immediately....., and very quickly!!

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