

DEEDS IN LIEU & SHORT SALES

NAVIGATING UNIQUE TRANSACTIONS IN A CHANGING ECONOMY

Presented by:

Charlie Cookson, Commercial Underwriter for Fidelity National Title Group

Tara Thompson, Escrow Operations Manager for Western Title & Escrow Company

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Nothing in this presentation shall constitute legal advice or a binding offer to insure under certain conditions.

DEEDS IN LIEU



- A Deed in Lieu of Foreclosure is when a lender and the borrower have agreed that the borrower will surrender the secured property to the lender in exchange for cancellation of the debt.
 - Lender avoids the time and expense of a foreclosure.
 - Borrower may experience less of a credit hit than a completed foreclosure.
 - No court case.
 - Borrower has some control over the timing.

It will **NOT** clear/remove any Junior Liens from the record.

RISKS FOR INSURING A DEED IN LIEU

Absolute Conveyance?

Given as Security?

Deed held by lender or in escrow.

Lender will record if payments are not made.

What is the date the deed was signed?

Do you have independent instruction from the borrower?



RISKS FOR INSURING A DEED IN LIEU

- Conditional Conveyance with re-purchase options?
 - Is there a buy-back option?
 - Who has possession?
- Is the Deed in Lieu Agreement available to review?

RISKS FOR INSURING A DEED IN LIEU

Judicial Attack

- Value of property greatly exceeds debt?
- Duress, coercion, undue influence.
- Hinders any Right of Redemption.



INSURING AFTER A DEED IN LIEU

- Preferential or fraudulent conveyance?
- Related parties?
- Bankruptcy?
- Conditional Conveyance? Notary Concern? Competence?
- All of the above?

LIMITING THE RISK

- Estoppel Affidavit.
- Borrower represented by an attorney.
- Review Deed in Lieu agreement.
- Review circumstances of transaction. Does it make sense?

ESTOPPEL CERTIFICATE OR AFFIDAVIT

- Written, signed stipulation of previously established facts preventing subsequent contradiction or recant of these facts
(thelawdictionary.org featuring Black's Law Dictionary, 2nd Ed)
- Recital of facts may address specific concerns.
 - Absolute Conveyance and not intended to be a security instrument
 - Waives Right of Redemption
 - Possession
 - Coercion or duress, etc.
- Often incorporated into the deed.
 - Can we rely on the language in the deed?



Estoppel Certificate and Affidavit Example



I, John Borrower, being first duly sworn, depose and say that:

1. I am the grantor (herein "Grantor") that made, executed, and delivered that certain Deed-in-Lieu of Foreclosure (herein "the Deed") to Lender, (herein "the Grantee") dated October 10, 2021, recorded 2021-001234, in the official records of the below referenced county in Oregon, conveying the following described property (herein "the Property"), to wit:

Lot 6, Block 6, DOE ADDITION, Deschutes County, Oregon.

2. I make this Affidavit for and on behalf of Grantor pursuant to appropriate resolution that duly authorized the Deed.
3. The Deed is intended to be and is an absolute conveyance of the title to the Property to the Grantee and was not and is not now intended as a mortgage, trust deed, or security instrument of any kind. It was the intention of Grantor in said deed to convey to the Grantee all of Grantor's right, title and interest absolutely in and to the Property. Grantor relinquished to the Grantee any equity of redemption and any statutory right of redemption concerning the Property. Possession of the Property has been surrendered to the Grantee. In the execution and delivery of the Deed, Grantor was not acting under any misapprehension as to the effect thereof and Grantor acted freely and voluntarily and was not acting under coercion or duress. The consideration for the Deed was and is forbearance of foreclosure against Grantor and forbearance of an action on the debt against Grantor or of a deficiency judgment against Grantor, with respect to the debt secured by that certain trust deed (herein "the Trust Deed") dated January 1, 2004, recorded on 2004-12345, records of above referenced county in Oregon. At the time of making the Deed, Grantor was in default of the terms and provisions of the Trust Deed. At the time of making the Deed, Grantor believed, and its duly empowered officers, directors and representatives believed, and now believe, that the aforesaid consideration represents fair value for the Property.
4. This Affidavit and Estoppel Certificate is made for the protection and benefit of the Grantee, its successors and assigns, and all other parties hereafter dealing with, or who may acquire an interest in, the Property, and particularly for the benefit of any title insurer that insures the title to the Property directly or indirectly in reliance on the facts and representations contained in this Affidavit and Estoppel Certificate.
5. The undersigned affiant will testify, declare, depose or certify before any competent tribunal, officer or person, in any case now pending or that may hereafter be instituted, to the truth of the facts and representations contained in this Affidavit and Estoppel Certificate.
6. The undersigned affiant has executed this Affidavit and Estoppel Certificate as an individual, and also for and on behalf of the Grantor.

DEED IN LIEU - TITLE REVIEW

- Does it identify the Trust Deed or loan it is being given for?
- Does the consideration state that it is in forbearance of foreclosure and deficiency judgment?
 - Satisfaction of debt? ****
- May include Estoppel recitals?
- Does the Deed address the merger question?

MERGER AND A DEED IN LIEU REVIEW

- When the Fee Title interest in real property and a lesser interest in real property become vested in the same party, the lesser interest is eliminated.
 - In layman's terms, “You can’t enforce a lien against yourself.”
- A Deed in Lieu will often specify that it is “Non-Merger” so that the lender can retain the right to foreclose any Junior Liens.
- The Trust Deed will need to remain as an exception on any title policy until reconveyed.

WHAT IF THE DEED DOES NOT SPECIFY NON-MERGER

- Depending on the specifics, the Trust Deed may have Merged and no longer be a lien against the property.
 - Lien priority over junior interests may have been lost
- ****Title Insurance Best Practice****
 - Continue to reflect the Trust Deed as an exception until there is a reconveyance recorded.
- Any insurance issued regarding a foreclosure action should be discussed with underwriting.

DEED IN LIEU OF FORECLOSURE (NON-MERGER)

DEED IN LIEU OF FORECLOSURE (Nonmerger)

THIS DEED IN LIEU OF FORECLOSURE, made this [REDACTED], by and between [REDACTED], whose address is [REDACTED] (“Grantor”) and [REDACTED], its successors and assigns (“Grantee”), whose address is [REDACTED]

WITNESSETH:

WHEREAS, Grantor acquired certain real property by deed recorded [REDACTED], as Instrument No. [REDACTED] in the Official Records of Multnomah County, Oregon, and more particularly described herein below and in the attached Exhibit A (the “Property”);

WHEREAS, Grantor granted a beneficial interest in the Property to Grantee, or its predecessors in interest, as collateral under the Line of Credit Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing dated [REDACTED] and recorded [REDACTED] as Instrument No. [REDACTED] in the Official Records of Multnomah County, Oregon (as subsequently modified, amended, or assigned, the “Deed of Trust”);

WHEREAS, the said Deed of Trust secures the obligations of Grantor under that certain Promissory Note dated [REDACTED], in the principal amount of \$ [REDACTED] held by Grantee (the “Note”) and that certain Loan Agreement between Grantor, as Borrower, and Grantee, or its predecessors in interest, as Lender, also dated [REDACTED] (the “Loan Agreement”), and



WHEREAS, a default occurred under the Note, Loan Agreement, and Deed of Trust, and the Deed of Trust is subject to foreclosure.

NOW, THEREFORE, Grantor conveys to Grantee, in fee simple, all of Grantor's right, title, and interest in the following Property:

See Legal Description attached hereto as Exhibit A

Together with all of Grantor's right, title, and interest in any contracts or lease agreements involving the Property, and any and all after-acquired interest in the Property.

Together with all the ways, easements, rights, improvements, privileges and appurtenances to the same belonging or in any wise appertaining, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise of the said Grantor, of, in, to, or out of the land and premises.

Grantor is the owner of the Property, free and clear of all encumbrances except for the Deed of Trust and those exceptions listed on the attached Exhibit B. Grantor hereby surrenders possession of the Property to Grantee.

In consideration of Grantee's acceptance of this deed in lieu of foreclosure (this "Deed"), Grantee may retain all payments previously made on the Note and Loan Agreement, with no duty to account for them.

The consideration for this transfer is \$0.00. However, the true consideration for this conveyance is Grantee's forbearance of an action on the full debt against Grantor and of a deficiency judgment against Grantor; provided, however, that Grantee will not be deemed to have accepted this Deed unless and until this Deed is recorded at the request of Grantee or Grantee's attorneys.

This Deed is intended as a conveyance of the fee simple interest absolute in legal effect, as well as in form, of the title to the Property to Grantee, and this Deed is not intended as a mortgage, trust, or security of any kind. Grantor waives, surrenders, and relinquishes any equity of redemption and statutory rights of redemption that Grantor may have in connection with the Property and the Deed of Trust. Grantor and Grantor's heirs, successors, and assigns will be forever estopped from asserting that Grantor had, on the date of the Deed of Trust, an estate or interest in the Property less than a fee-simple interest in the whole of the Property, and this Deed will pass any and all after-acquired title.

This Deed does not effect a merger of the fee ownership and the lien of the Deed of Trust described above. The fee and the lien will hereafter remain separate and distinct. Grantee reserves its right to foreclose its Deed of Trust at any time as to any party with any claim, interest, or lien on the Property. The debt secured by the Deed of Trust will not be deemed satisfied by this Deed.

Grantor has read and fully understands the above terms and is not acting under misapprehensions as to the effect of this Deed, nor under any duress, undue influence, or misrepresentations of Grantee, Grantee's agents or attorneys, or any other person.

Grantee does not expressly or impliedly agree to assume or pay any contract balances, debts, liens, charges, or obligations that relate or attach to the Property.

DEED IN LIEU - TITLE REVIEW

- Does the Grantee of the Deed in Lieu also own the beneficial interest in the Trust Deed?
- If not, how does that affect the agreement to forgive the debt?
- When was the Deed in Lieu signed? Was it executed as part of your current transaction?

DEED IN LIEU - OWNERS POLICY

- Lender may request the policy be issued for the loan amount.
- The Owners Title Insurance Policy must be issued for the value of the property.

ESCROW SALES TRANSACTION

- Escrow is opened as a sale transaction from the borrower to the private party lender.
- Escrow is expected to prepare the Deed in Lieu and Estoppel. Should escrow be doing this?
- What kind of tax implications are there for borrower and lender? Does Escrow prepare the 1099?

FORBEARANCE AGREEMENT ESCROW

- Lender & Borrower have entered into a Forbearance agreement.
- Borrower agrees to payment plan and Lender agrees not to foreclose.
- Lender requires Borrower to sign Deed in Lieu of Foreclosure to be held in escrow.
- If payments are not made, Lender requires the Deed in Lieu be released to them for recording.

****DISCUSS WITH YOUR UNDERWRITING DEPARTMENT !!!**

SHORT SALES



SHORT SALES

- An agreement from the Lender(s) to accept less than what is owed on the loan. Lender agrees to reconvey their loan even though they haven't been paid in full.
- Usually happens when Lender recognizes that property will not sell for enough to satisfy their loan.
- The expense of foreclosure and the length of time required outweighs the dollar amount the lender is forgiving.



SHORT SALE

- A Short Sale Agreement is often arranged by a Short Sale Negotiator.
- The Negotiator acts as an intermediary between the lender, other creditors and the borrower.
- Any changes to the agreed upon terms of the sale or payment amounts must be re-approved with the Lender or Junior Creditor in writing.

THE DEBT

- Lender usually agrees to “write off” and forgive a portion of their loan.
- There may be tax consequences involved in the forgiveness of debt.
 - Refer clients to their tax accountant!
- Occasionally, the existing lender may require that the borrower sign an unsecured note for the unpaid amounts.

Sample letter from Payoff Lender approving the Short Sale

██ has approved your request for a Short Sale on the above-referenced property in the amount of \$ **██████████**

██████████████████ agrees to release the lien on your property securing the balance of your loan conditional upon the following terms and instructions on the enclosed Pre-Foreclosure Sale Agreement and Closing Instructions.

Upon completion of the Pre-Foreclosure Sale, **██████████████████** will report "Settled in Full for Less than Amount Owed" to applicable credit reporting agencies. We will also file IRS Form 1099-C for the amount forgiven in accordance with federal law. You should consult your tax advisor regarding any possible tax consequences prior to agreeing with the terms outlined in this document.




LENDER DEMAND/PAYOFF INSTRUCTION

- Lender will have very specific requirements!
- Their instructions must be reviewed carefully.
- If not followed, the lender is not obligated to accept the payoff funds or reconvey their trust deed.

LENDER DEMAND/PAYOFF INSTRUCTION

- No payments may be made to other parties unless specifically authorized by the existing Lender.
- The reduced payoff instructions often contain restrictions on re-sale.

As a condition to this approval, please provide the following documents prior to settlement and no later than January 11, 2024: 

- Clear Title At Time of Closing
- Fully Executed Arm's Length Transaction Affidavit
- Purchase Addendum Extending Expiration To Date Of Closing

Approval is subject to the following terms and the closing costs are limited to the amounts shown below:

Contract Sale Price	\$350,000.00
1. Commission (6%)	\$21,000.00
2. Lien Payoff	\$321,065.34
3. Settlement or Closing Fee	\$1,000.00
4. Owner's Title Insurance	\$1,050.00
5. County Taxes	\$3,694.84
6. Lien Search	\$5.00
7. Release Tracking Fee	\$200.00
8. Lien Release	\$87.00
9. MH Tax Account	\$1,897.82

Short Sale Affidavit signed by Seller, Buyer and Real Estate agents.

AFFIDAVIT OF "ARM'S LENGTH TRANSACTION"

Pursuant to a residential purchase agreement ("Agreement"), the parties identified below as "Seller(s)" and "Buyer(s)," respectively, are involved in a real estate transaction whereby the real property commonly known as [REDACTED] ("Property") will be sold by Seller(s) to Buyer(s).

[REDACTED] Lender") holds a Deed of Trust or Mortgage against the Property. In order to complete the sale of the Property, Seller(s) and Buyer(s) have jointly asked Lender to discount the total amount owed on the loan which is secured by the Deed of Trust or Mortgage. Lender, in consideration for the representations made below by Seller(s), Buyer(s), and their respective agents, agrees to a short sale on the express condition that Seller(s), Buyers, and their respective agents (including, without limitation, real estate agents, escrow agents, and title agents) each truthfully represents, affirms, and states as follows:

1. The purchase and sale transaction reflected in the Agreement is an "Arm's Length Transaction," meaning that the transaction has been negotiated by unrelated parties, each of whom is acting in his or her own self-interest, and that the sale price is based on fair market value of the Property. With respect to those persons signing this affidavit as an agent for either Seller(s), Buyer(s), or both, those agents are acting in the best interests of their respective principal(s).
2. No Buyer or agent of Buyer(s) agent is a family member or business associate of the Seller(s) or the borrower(s) or the mortgagee(s).
3. No Buyer or agent of Buyer(s) shares a business interest with the Seller(s) or the borrower(s) or the mortgagee(s).


Short Sale Affidavit signed by Seller, Buyer and Real Estate agents (continued)

4. There are no hidden terms or hidden agreements or special understandings between the Seller(s) and the Buyer(s) or among their respective agents which are not reflected in the Agreement or the escrow instructions associated with this transaction.
5. There is no agreement, whether oral, written, or implied, between the Seller(s) and the Buyers and/or their respective agents which allows the Seller(s) to remain in the property as tenants or to regain ownership of the Property at any time after the consummation of this sale transaction.
6. The Seller(s) shall not receive any proceeds from the sale of the Property reflected in the Agreement.
7. No agent of either the Seller(s) or the Buyer(s) shall receive any proceeds from this transaction except as is reflected in the final estimated closing statement which shall be provided to Lender for approval prior to the close of escrow.
8. Each signatory to this Affidavit expressly acknowledges that Lender is relying upon the representations made herein as consideration for discounting the payoff on the loan(s) which is/are secured by a Deed of Trust or Mortgage encumbering the Property.
9. Each signatory to this Affidavit expressly acknowledges that any misrepresentation made by him or her may subject him or her to civil liability. I declare under penalty of perjury under the laws of the State of **(OR)** that all statements made in this Affidavit are true and correct.

Additionally, I/We fully understand that it is a Federal crime punishable by fine or imprisonment, or both, to knowingly and willfully make any false statements concerning any of the above facts as applicable under the provisions of Title 18, United States Code, Section 1001, et seq.

All Parties to the contract to purchase aforementioned property dated: 11/20/2017

This affidavit is to be executed before or at the time of closing of the sale of the Mortgaged Premises by all Borrower(s), purchaser(s), real estate brokers representing any of the parties, the escrow/closing agent performing the closing of the sale, and the transaction facilitator facilitating the sale (if any) certifying under penalty of perjury that to the best of each signatory's knowledge and belief:

- (a) The sale of the Mortgaged Premises is an "arm's length" transaction, between parties who are unrelated and unaffiliated by family, marriage, or commercial enterprise;
- (b) Neither the Borrower(s) nor the purchaser(s) will receive any funds or commissions from the sale of the Mortgaged Premises. The Borrower may receive a payment if it is offered by the Servicer, approved by the Investor and reflected on the Settlement / Closing Disclosure;
- (c) There are no agreements, understandings or contracts relating to the current sale or subsequent sale of the Mortgaged Premises that have not been disclosed to the Servicer;
-  (d) All amounts to be paid to any party, including holders of other liens on the Mortgaged Premises, in connection with the short payoff transaction have been disclosed to and approved by the Servicer and will be reflected on the Settlement / Closing Disclosure;

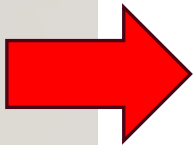
#16 A Deed of Trust to secure an indebtedness in the amount shown below,
Amount: \$490,800.00
Dated: January 25, 2006
Trustor/Grantor: John Borrower
Trustee: Fidelity National Title Company
Beneficiary: 1st Loan Company
Recording Date: January 31, 2006
Recording No.: 2006-1234


Notice of Pendency of an action, including the terms and provisions thereof,
Recording Date: July 21, 2017
Recording No: 2017-035680

#17 A state tax lien for the amount shown and any other amounts due,
State Identification No. 123456
Filed by: State of Oregon, Department of Revenue
Taxpayer: John Borrower
Amount: \$14,979.39
Recording Date: April 4, 2017
Recording No: 2017-12345

18. County Tax Warrant for the amount herein stated, plus interest and statutory charges:
Warrant No.: 420548
Amount: \$977.85
Debtor: John Borrower
Recording Date: June 29, 2017
Recording No.: 2017-56758

#19 Memorandum of Option of Purchase, including the terms and provisions thereof,
Dated: December 5, 2023
Recording Date: December 11, 2023
Recording No.: 2023-060687
Between: John Borrower
And: Distressed Investor LLC



As a condition to this approval, please provide the following documents prior to settlement and no later than January 11, 2024: 

- Clear Title At Time of Closing
- Fully Executed Arm's Length Transaction Affidavit
- Purchase Addendum Extending Expiration To Date Of Closing

Approval is subject to the following terms and the closing costs are limited to the amounts shown below:

Contract Sale Price	\$350,000.00
1. Commission (6%)	\$21,000.00
2. Lien Payoff	\$321,065.34
3. Settlement or Closing Fee	\$1,000.00
4. Owner's Title Insurance	\$1,050.00
5. County Taxes	\$3,694.84
6. Lien Search	\$5.00
7. Release Tracking Fee	\$200.00
8. Lien Release	\$87.00
9. MH Tax Account	\$1,897.82

You cannot list the property with or sell the property to anyone that you are related to or with whom you have a close personal or business relationship. In legal language, it must be an **"arm's length transaction"**. If you have a real estate license, you cannot earn a commission by listing your own property. You may not have any agreements to receive a portion of the commission or the sale price after closing. The purchaser of a property subject to a short sale must agree not to resell the property within 30 calendar days of closing and further prohibit any resale of the property for 31 to 90 calendar days after closing for a gross sales price greater than 120 percent of the gross sales price of the short sale transaction. Any knowing violation of the arm's length transaction prohibition may be a violation of federal law.



QUESTIONS??