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PACIFIC NORTHWEST ESCROW, LLC

**THE BASIC DIFFERENCES BETWEEN  
REAL ESTATE CONTRACT AND DEED OF TRUST**

This material has been prepared as a brief overview of the basic differences between a Real Estate Contract / Deed of Trust.

There are many legal issues and complexities that need to be addressed in selecting the method of purchase and financing that is appropriate for each situation. This material is not intended to replace the counsel of attorneys and professional tax advisors when making these decisions.

The comparisons in this material are based on the Washington State Bar Association Form LPB 22 Deed of Trust and the Washington State Bar Association Form LPB-44 Real Estate Contract. Revisions to these forms or the use of other versions of these instruments may alter the comparisons.



**DEFINITIONS:**

***DEED OF TRUST***

A Deed of Trust is an instrument used by a lender to secure real estate as collateral for a Note. The Note states the "terms of the loan". The borrower is in title to the property, (is the owner of the property). A third party is named as the Trustee to release the lender's interest in the property once the loan is paid and is also given the power to sell the property in case of non-payment.

***REAL ESTATE CONTRACT***

A Real Estate Contract is an instrument used when an owner of real estate agrees to sell the property and accept periodic payments from the purchaser. The seller remains in title to the property, (is the legal owner of the property), while the purchaser is entitled to possession of the property and the right to acquire title to the property in accordance with the terms of the contract.

**RELEASE OF LENDER'S INTERST AT FINAL PAYMENT:**

***DEED OF TRUST***

The lender surrenders the original note and Deed of Trust to the Trustee. The Trustee executes and records a Reconveyance which releases the Deed of Trust from public records.

*TIP:*

To avoid possible loss of misplacement of original Note and Deed of Trust by a private party lender, a True Estate can be set up. The True Escrow company holds the documents in safekeeping, collects payments and releases the documents upon final payment

***REAL ESTATE CONTRACT***

The Real Estate Contract seller executes and records a Warranty Fulfillment Deed, which releases the debt and places the purchaser in title to the property.

*TIP:*

The Warranty Fulfillment Deed can be prepared by a Limited Practice Officer or attorney and signed by the contract seller at the time of preparing the Real Estate Contract. The original document can be held in a True Escrow. The True Escrow company holds the document for safekeeping, collects the payments and releases the document upon final payment.

## **FAILURE OF SELLER TO MAKE PAYMENTS ON UNDERLYING LOANS:**

### ***DEED OF TRUST***

If the seller fails to make a payment on underlying loan(s) that the seller agreed to continuing paying, the buyer/owner has no remedy until the property goes into foreclosure by the underlying lender. The buyer/ owner may “cure” the default, which could be the entire loan balance plus costs, interest and attorney’s fees. Or, the buyer/owner may purchase the property at the Sherriff’s Sale or Trustee’s Sale. There is no provision for the buyer/owner to “take over” payments, should the seller default.

### ***REAL ESTATE CONTRACT***

If the Real Estate Contract seller fails to make payment on underlying loan(s) that the seller agreed to continue paying, the Real Estate Contract purchaser can make the delinquent payment(s) , after 1 days written notice to seller. The amount paid can be deducted from the payment(s) to the seller. After three such payments have been made by the purchaser, the purchaser can make all future payments directly to the underling lender and deduct that amount from payments to the seller.

## **REMEDIES FOR NON-PAYMENT BY BORROWER:**

### ***DEED OF TRUST***

***Judicial Foreclosure:*** The foreclosure is processed through the civil courts. Length of the foreclosure depends on availability of court dates which can range from three months to two years, depending on the volume in the courts in that county. The process can also be quite costly due to court costs, attorney fees and the length of time

The entire loan balance becomes due, plus costs and reasonable attorney’s fees can be recovered. The property is sold at a Sheriff’s sale to the highest bidder. The lender can obtain a Deficiency Judgment for the balance of the amount due after the proceeds of the Sheriff’s sale are applied. The Borrower continues to owe the lender the balance of the Deficiency Judgment after the property has been foreclosed.

The borrower has a twelve-month redemption period to pay the entire amount of the loan balance plus costs, if a Deficiency Judgment is obtained and eight months without a Deficiency Judgment. The borrower has the right to remain in the property during the redemption period if it is the borrower’s homestead (Primary Residence). The title to the property is conveyed in the form of a Sheriff’s Deed to the successful bidder after the redemption period.

***Non-Judicial Foreclosure:*** The foreclosure process is handled by a Trustee, (usually an attorney), without court supervision. The foreclosure cannot be completed in less than 120 days from commencement and the Trustee’s Sale cannot be held less than 190 days after default.

The borrower may stop the foreclosure by bringing payments current plus interest and costs on or before the eleventh day prior to the Trustee's sale.

There is no right of redemption period or right to remain in the property for the borrower after the Trustee's Sale. The borrower has no further obligation to the lender (as in a Deficiency Judgment). The successful purchaser at the Trustee's Sale has immediate and clear title to the property and has the right to possession on the twelfth day after the sale.

***Suit for specific performance:*** To recover unpaid installments on the Note, a law suit for Specific Performance can be exercised. The law suit results in a judgment against the borrower/owner and it can be enforced against any other property owned by them. Costs and attorney's fees can be included in the judgment. The lender does not foreclose on the property and the borrower/owner continues to make the remaining payments under the terms of the Note. This could result in multiple suits and judgments for the chronic delinquent borrower. However, it allows the lender to collect payments by "attaching" other property.

## ***REAL ESTATE CONTRACT***

***Judicial foreclosure:*** (same as Deed of Trust Judicial foreclosure).

***Forfeiture of real estate contract:*** The forfeiture process is handled outside of the courts. However, severe penalties can be imposed upon Real Estate Contract sellers who fail to follow strict compliance with the forfeiture procedures and the forfeiture can be voided. It is therefore recommended that legal counsel be used to forfeit a Real Estate Contract. The process can take as little as 90 days, once notices are served in accordance with the law.

The purchaser may stop the forfeiture by making delinquent payments, plus costs as allowed in the contract, within 90 days prior to the forfeiture.

Upon forfeiture, all rights of the Real Estate Contract purchaser are terminated. All sums previously paid by the purchaser and improvements made to the property are retained by the seller. The purchaser has no further obligation to the seller (as in a Deficiency Judgment). The seller is entitled to possession of the property ten days after the forfeiture.

***Suit for specific performance:*** (same as Suite for Specific Performance on a Deed of Trust-the purchaser continues to make the remaining payments under the terms of the Real Estate Contract.