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# 5 Traps To Avoid When Selling CRE In Las Vegas Area

By **Chris Walther** (December 14, 2023, 5:50 PM EST)

Sellers of commercial real estate in Clark County, Nevada — which includes the Las Vegas metro area — are often confronted with myriad issues when entering into a new sale transaction. This article discusses five traps that can ensnare even the most sophisticated sellers.



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## 1. Nevada's Real Property Transfer Tax: Allocation Between Seller and Buyer

With some exceptions, Nevada imposes a transfer tax on each deed conveying real property with a value of more than \$100. The transfer tax rate in Clark County is currently \$2.55 for each \$500 in property value or fraction thereof.

The transfer tax is paid concurrently with the deed being submitted to the Clark County Recorder for public recording. Which party pays the transfer tax is entirely negotiable between a seller and a buyer, and while the historic custom in Nevada was for the seller to pay this tax in full, this tax is now frequently split equally between the buyer and seller.

Accordingly, a seller will want to consider the allocation of transfer taxes between the seller and the buyer as part of the broader purchase price negotiations given that the transfer taxes will often constitute a significant line item on the final escrow closing statement.

## 2. Nevada's Real Property Transfer Tax: Avoidance by Seller and Buyer

Nevada statutorily exempts certain transfers of commercial real property from Nevada's real property transfer tax, including a transfer between an entity and its wholly owned subsidiary.

In an effort to avoid the transfer tax, a seller and buyer will sometimes try to structure their sale transaction so that the transaction falls under one of the transfer tax exemptions.

One commonly used structure in Clark County was for the seller to first transfer the real property to a newly formed, wholly owned subsidiary whose ownership interests — for instance, the membership interests of an LLC — would then be purchased by the buyer at the closing.

This structure would result in the buyer indirectly purchasing the real property through the purchase of the ownership interests of the seller's subsidiary, rather than the buyer directly purchasing the real property from the seller, and would avoid the transfer tax because no deed needed to be recorded in connection with the purchase of the ownership interests.

However, this type of indirect transfer structure might no longer avoid the transfer tax in light of a recent amendment to Nevada law that confirms that the transfer tax will apply if real property is transferred to an entity that was formed for the purpose of avoiding the transfer tax.

## 3. Discriminatory Restrictive Covenants

A common aspect of a commercial real property sale transaction in Clark County is a due diligence period during which the buyer may examine, and object to, any written instrument that encumbers the real property.

If the buyer timely objects to an encumbrance, the purchase and sale agreement usually permits the

seller to elect whether the seller will be obligated under the agreement to cause the encumbrance to be removed on or before the closing date of the sale transaction.

Sellers can face numerous difficulties if they elect to remove encumbrances against real property as a closing condition, especially when those encumbrances were created long before the seller owned the real property.

However, if a buyer objects to an encumbrance that contains a provision that purports to forbid or restrict the conveyance, encumbrance, leasing or mortgaging of the applicable real property to any person of a specified race, color, religion, ancestry, national origin, disability, familial status, sex, sexual orientation or gender identity or expression — any such provision being void and unenforceable under Nevada law — the seller is now able to remove such provision from the encumbrance pursuant to a recently enacted restrictive covenant modification procedure even if the seller has no relationship to the party that initially created such encumbrance.

#### **4. Arbitration**

Some sellers in Clark County prefer to exclusively arbitrate disputes arising from commercial real estate transactions rather than litigating those disputes in Nevada's state and federal courts.

Nevada has a statute that generally provides that an agreement containing a provision requiring any party to that agreement to exclusively arbitrate any dispute arising from that agreement must include language specifically authorizing, and by which the party affirmatively agrees to, that exclusive arbitration provision.

In *MMAWC LLC v. Zion Wood Obi Wan Trust*, the Nevada Supreme Court concluded in 2019 that this Nevada statute is preempted by the Federal Arbitration Act with respect to — and is therefore inapplicable to — transactions involving interstate commerce.

However, a cautious seller still might want to ensure that an exclusive arbitration provision in the seller's purchase and sale agreement contains the aforementioned statutory language in light of the inherent uncertainty in trying to determine whether a particular transaction involves interstate commerce.

#### **5. Liquidated Damages**

A purchase and sale agreement will often contain a liquidated damages provision entitling the seller to receive a specified amount from the buyer — usually some or all of the funds deposited into escrow by the buyer in advance of the closing of the sale transaction — in the event that the closing does not occur due to the buyer's failure to perform in accordance with the agreement.

Liquidated damages provisions in favor of sellers are common in Clark County and presumed to be valid under Nevada law absent a challenge by the buyer.

However, a seller will nevertheless want to consider whether the liquidated damages that the seller is entitled to receive from the buyer under their purchase and sale agreement are disproportionate to the actual damages that the seller would sustain in the event that the buyer fails to perform under their agreement, such that the liquidated damages could potentially constitute an unenforceable penalty under Nevada law.

*Correction: A previous version of the article referenced an incorrect Nevada Supreme Court case. The error has been corrected.*

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