

## CONTRACTS FOR DEED

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#### I. Characteristics

##### A. Seller Finance Transaction/transfer.

- It's a transfer of an interest in real property. Not just an agreement.

##### B. Executory Contract.

1. Can't just ignore it if it's not working.
2. Cancellation must meet statutory requirements.

##### C. Equitable Interest plus right of occupancy.

1. The equitable interest is the "ownership" right. Similar to purchase agreement. Converse of lease, which is right of occupancy without equitable interest, per se.
2. The right of occupancy, similar to leasehold. Converse of purchase agreement, which is equitable right without occupancy.

##### D. Seller's mortgage may be violated.

- Due-on-sale clause prevents transfer of any interest – including equitable.

##### E. Tax ramifications.

1. Payments are sale proceeds, which may be taxable gain for seller – but divided over payment period rather than up front.
2. Interest is deductible for buyer.

##### F. Title – vendee's policy/owner's policy.

1. Buyer needs to know status of title BEFORE they commit big funds to acquisition. Final payment is not the time to learn seller can't convey title.
2. Title commitment. Vendee's policy can convert to owner's policy on pay-off.

G. Parties – identification.

- Correct buyer/vendee; correct seller/vendor. Both will be bound, liable. Need to bind everyone necessary to deliver title.

H. Legal description/recording.

- No room for error. Use seller's deed or title commitment, not tax assessor's description.

I. Execution/acknowledgement.

1. Needs to be recordable.
2. Notarized.
3. Recording standards met.

J. Merger

- Contemporaneous or prior agreements, including purchase terms, lease terms, will merge into the deed. If they aren't restated, or if merger doctrine isn't addressed, those prior agreements, understandings become meaningless.

K. Subsequent modifications, extensions to CD/Equitable mortgage.

1. CD can be amended, extended as necessary.
2. Must be supported by consideration, otherwise the amendment becomes a "loan" secured by the CD – an equitable mortgage. Violation then requires foreclosure by action, statutory cancellation won't work.

L. Drafting incident to real estate transaction – legal for non-attorney?

- MSA 481.02 Unauthorized Practice of Law. Subd. 3(8) – exception applies for drafting conveyance documents. Subd. 3a, closing services, documents incident to transfer.

M. Covered by O&E insurance?

II. Provisions

- A. Forms – freely available from Commerce Department.

B. Title and exceptions.

1. At time of drafting.
2. Obligation upon final pay-off.

C. Payment/price

1. Down Payments. Not a security deposit, but it has that practical function. In the event of default, retaking property and keeping payments is generally the only remedy. Down payment should be large enough to soften that blow. Promissory note down payments can survive cancellation IF parties so intend and its evident in the agreement. Distinguish “down payment” in deferred installments (to induce seller to sell) from mere promise of future payment installments of purchase price. Former may survive cancellation, latter may not. “Down payment” is not presumed – vendor must prove. Contract language and facts determine intent.
2. Wrap around (“subject to” provisions). CD is “wrap around” if it “wraps around” existing financing/mortgage. Buyer’s payment covers the seller’s existing financing, plus extra. Buyer vigilance needed.
3. Payment calculations, interest, balloons, periodic payments
4. Amortization Schedule. Not required, but recommended.

D. Insurance – Should address obligations, and indicate whether an escrow will apply, or reimbursement. Either event, seller should not lose control of this, especially if it’s a wrap CD.

E. Taxes – Same as insurance.

F. Waste

G. Alterations – If buyer plans to improve, better address mechanic liens. Liens won’t attach to vendor’s interest *unless* there is actual notice of improvements – prelien

notice. Seller may post notice, which trumps even actual notice; may not ignore notice from liening contractors.

- H. Default – generally remedy for seller is to cancel, keep payments, then evict if the tenant doesn't leave. Can sue on the contract to enforce if terms permit it, or seek damages, but its rare, costly.

### III. Additional Terms.

- A. Late fee
- B. Acceleration of payment – Ok to keep in, but law disfavors a forfeiture, so a late payment that purports to trigger 100% acceleration is not likely to be enforced.
- C. Insurance/tax escrow
- D. Attorney fees – Especially where vendee is effectively a high-profile tenant (i.e., treating it like a leasehold.)

### III. Recording

- A. Seller – No benefit to seller, usually. But see buyer's rights.
- B. Buyer entitled to recordable copy. 507.235.
- C. Statute can compel – 507.235, failure to record may result in civil/criminal penalties. Never seen this statute enforced.
- D. Buyer – record/priority. 507.235 requires buyer to record within 4 mos. Entitled to recordable copy/original.
- E. Same applies to assignments of CD interests.

### IV. Transfers of Interests

- A. Like any other
- B. Assignment/Quit Claim Deed
- C. Mortgage-able, lienable
- D. Homestead protection

### V. Problems

- A. Interpreting payment terms
- B. Prior breach
- C. Title – now and upon payment
- D. Alterations/damage
- E. Liens

## VI. Default/Cancellation

- A. Process – statutory (559.21 – 60 days) or by litigation/enforcement
  - a. Quit claim deed in lieu/re-assignment not a good alternative; junior liens will attach.
  - b. Lawsuit – optional, still likely to implicate statutory procedure.
- B. O&E – be sure to serve anyone with an interest in the property, first to cancel their interest, second, in case its worth it to them to pay off the contract.
- C. State/tax liens – Notice to Commissioner of Revenue. When in doubt.
- D. Service – must be proper. Rules apply.
- E. Resisting Cancellation - Litigation to disprove default, challenge procedures. Often involves equitable claims in case cancellation can't be stopped. Litigation can survive the cancellation, but usually claims are weak.
- F. Cure
- G. Effect – cancels vendee's interest and all encumbrances that attached to it, if cancelled properly.
- H. Post-cancellation process/eviction
  - Torrens property – proceeding subsequent to strike the interest.
  - Abstract - Recording Cancellation and affidavit.
- J. Claims surviving after cancellation
  - For seller - none

For buyer – equitable only. Rare; generally only in truly egregious situations.

E.g, misconduct by seller, disproportional forfeiture, impaired or vulnerable buyer.

#### Conclusion

Inevitable response to volatile, repugnant real estate economy. If banks won't lend, or if conventional terms are oppressive, sellers will finance. Contract for deed is a good alternative to conventional transaction, but the industry doesn't have the safeguards in place, and it's not designed to self-propel. The law is complicated, and the potential damages to buyer or seller are huge.