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Insights

How Florida Borrowers Can Reduce Mortgage Taxes

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Florida continues to attract many new residents and companies to the state, in part due to its lack of a state income tax, except on certain types of business entities.

According to the state's Office of Economic and Demographic Research, almost 330,000 new residents settled in Florida between April 2020 and April 2021. The website move.org reported that Florida was the primary destination for Americans relocating in 2020. These trends are expected to continue through 2025.

The influx of new residents and companies has resulted in a significant increase in development activity involving residential subdivisions, apartments, retail centers, office buildings and other projects needed to serve the growing population.

While sales taxes are the largest revenue source for the state, transaction taxes imposed on deeds, promissory notes and mortgages generate a lot of revenue.

These taxes are based on the dollar amount of the transaction, so are assessed on the sale price of the land being conveyed by a deed, and the principal amount of the debt evidenced by a note and secured by a mortgage. As land values continue to escalate in Florida due to increased demand, these transaction taxes rise commensurately.

While these taxes apply to both residential and commercial transactions, the higher value of commercial projects — like apartment communities, shopping centers and office buildings — being sold and financed is responsible for generating a large portion of these transaction taxes.

Florida imposes mortgage taxes of two types on notes secured by Florida mortgages: (1) documentary stamp tax at the rate of 35 cents per $100, or portion thereof, of the principal amount of the promise to pay that is contained in the note secured by the mortgage, and (2) intangibles tax of 2 mills (i.e., the principal amount of the note multiplied by 0.002) on the grant

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of the mortgage.

These taxes are paid to the clerk of court of the county in which the mortgaged property is located, upon the recording of the mortgage in the public records.

While these mortgage taxes may not seem very high at first glance, they can be significant in large mortgage loan transactions. For example, a $1 million loan will trigger $5,500 in taxes, a $10 million loan will trigger $55,000 in taxes, and a $25 million loan will trigger $137,500 in taxes. As such, borrowers involved in large mortgage loan transactions can achieve significant savings if these taxes can be reduced or eliminated by structuring the transaction accordingly.

Many borrowers who refinance mortgage loans encumbering Florida property request that the new lender accept an assignment of the existing loan documents from the prior lender instead of having the prior lender satisfy them upon receipt of its payoff.

This is common in commercial transactions and is done in order to minimize Florida mortgage taxes on the new loan. In these instances, so long as the borrower remains the same, Florida mortgage taxes are payable only on the principal amount of the new loan that is in excess of the outstanding principal balance of the old loan at the time it is assigned to the new lender.

This is not common in residential transactions involving single family homes because (1) the loan amounts are not high enough to justify the cost and effort to restructure the transaction, and (2) residential lenders do not want to stray from the structure and forms they use for all their loans.

When negotiating the terms of a commercial loan that may later be refinanced, it is important to get the initial lender to agree in advance, at the borrower's option, to assign the loan to a new lender instead of canceling the note and satisfying the mortgage. The initial lender may wish to impose conditions to such an assignment, but in many cases, they will consent to it in advance as long as the borrower agrees to reimburse them for any expenses they incur.

The assignment of the loan documents from the initial lender to the new lender does not require the payment of Florida mortgage taxes. The new lender will then amend and restate the existing loan documents in their entirety in order to conform to the new loan terms and secure the new loan.

It is important in these instances that the amended and restated mortgage reference both the principal amount of the loan when it is assigned, and the principal amount of the new loan, so that the recording office knows how the mortgage taxes on the new loan were calculated. This is often done by including a "note to recorder" legend on the face of the amended and restated mortgage.

Some lenders who assign their loan documents are concerned that they may lose the benefit of indemnities provided by the borrower and guarantors in their loan documents once they are assigned, so they include a statement in the assignment that the assigning lender retains the benefit of any such indemnities with respect to the period prior the assignment, without thereby diminishing the benefit of such indemnities in favor of the new lender with respect to the period after the assignment.

Somewhat related to the foregoing is the concept under Florida law that if the borrower and lender expressly reserve the right to modify a mortgage in any respect whatsoever, then a creditor claiming a lien subsequent to the recording of a mortgage will not have priority over a later modification of that mortgage, so it is recommended that the initial mortgage includes a statement that the borrower and lender may modify the mortgage by mutual written agreement.

It is even possible for a buyer of mortgaged property to save some mortgage taxes on a new loan being used to finance the acquisition of the property if the seller has a mortgage.

Documentary stamp taxes will be payable in full on the new loan amount — thus, no savings — because that component of mortgage taxes is levied on the note. They will be payable in full on the new loan since the buyer is a new obligor under its lender's note.

This issue is not present in a refinance, since the borrower in that scenario stays the same.

However, if the seller of the property arranges for its lender to assign their note and mortgage to the buyer's new lender, the buyer can achieve intangibles tax savings because intangibles tax is levied on the mortgage, which survives the sale even though it is being amended and restated to conform to the new lender's loan document forms and to change the name of the mortgagor to the new borrower.

While the mortgage tax savings are not as substantial under this scenario, if the loans involved have high balances, it can still result in significant savings.

When buying property from a seller who has a mortgage, it is sometimes possible for the buyer to include in the purchase and sale agreement a clause by which the seller agrees to use reasonable efforts —at no cost to the seller, of course — to try and get its lender to assign their note and mortgage to the buyer's new lender, with the buyer agreeing to bear any expenses associated with such an assignment.

Of course, in either a refinance or a sale scenario, both the outgoing lender and the incoming lender are going to incur expenses associated with documenting the assignment of the loan and amending and restating the applicable loan documents for the new lender. This consists primarily of both lenders' attorney fees.

Any such expenses will eat into the mortgage tax savings, so should be taken into account when considering the feasibility of assigning loan documents from one lender to another.

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