

DEALER IN OPTIONS

The Idaho Real Estate License Law requires that a person acting as a “dealer in options” must hold an active Idaho real estate license. A “dealer in options” is defined by statute to include any person who obtains or uses options to purchase real property “for another or others,” whether or not the options are in his name or title passes through him.

This Guideline addresses the License Law’s distinction between being a “dealer in options,” which is defined as brokering activity and requires a license; and using an option to purchase property for a person’s own account, which does not require licensure. The Guideline also addresses the implications of having a licensed person involved in the option holder’s activities.

Purpose and Scope of the License Law

The License Law does not attempt to regulate the real estate market itself. Instead, it defines and regulates the activities of persons who “broker” real estate deals “for another or others.” However, the Law recognizes and exempts from regulation the option, purchase or sale of real estate “for a person’s own account,” and similarly exempts the sale of an interest in real property “by its owner.”

An Option Holder is Not an Owner of the Property, and Must be Licensed to Broker that Property

It is important to note that an Option to purchase does not give the option holder equitable title to the property. A person who obtains an option to purchase property has not obtained any ownership interest in that property, and accordingly, the License Law’s “owner exemption” does not apply. Because an option holder is not an owner of the property, he may not list, sell, negotiate, procure buyers for, or otherwise broker that property unless he has a license.

The Commission often sees documents called “option agreements” or “reservation agreements” which are not legally-enforceable options to purchase. To have an enforceable right, or option, to purchase real property, the option contract must contain all terms material to the contract, including price, expiration date and an exact description of the property. An option contract is binding upon the seller and entitles the option holder/buyer the right - but not the obligation - to purchase the property on the terms and conditions set forth in the option agreement. An “agreement” granting the holder merely the ability to make an offer which the seller is not bound to accept is not a binding option agreement.

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Dealer in Options vs. Option for Person's Own Account

As noted earlier, if a person uses an option to purchase property for his own account or use, no license is required. However, a person is acting as a Dealer in Options and must be licensed if the person uses options to purchase property "for another or others."

Example #1 - Use of Option to Purchase Property "for Person's Own Account."

Developer locates an agricultural property and obtains from Seller an Option to purchase the property for a sales price of \$500,000. Developer then exercises his Option and purchases the property from Seller for \$500,000. Subsequently, Developer decides he does not want to develop the property, and he then offers and sells the property to another person and earns a profit.

Because Developer exercised his Option and purchased the property before it offered the property for sale to any other buyer, it would appear that Developer used the Option to purchase the property "for his own account or use." As such, Developer's transactions are exempt from the licensing requirement.

However, if Developer had an agreement to sell the property to another at the time he exercised the Option to purchase the property, he did not purchase the property "for his own account or use," but instead used the Option to purchase the property for another. His transactions therefore would *not* be exempt from licensure.

Example #2 - Use of Options "to Purchase Property for Another or Others."

Speculator identifies agricultural properties in an area where significant growth is occurring. Speculator obtains Options to purchase on various properties in that area. Before exercising the Options, Speculator approaches a Developer and offers to sell Developer the properties for a higher price.

Speculator's option rights do not give him equitable title in the properties, and he is not the owner. By offering to sell the properties to Developer in anticipation of compensation, he is engaging in the activities of real estate broker, and he must be licensed.

Example #3 - Using Reservation Agreements to Sell Subdivision Lots.

Developer submits an application to the county for a preliminary subdivision plat. Developer begins taking "reservations" for the lots he hopes will be approved (and decides to call his

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contracts “lot options”). Speculator fills out multiple lot reservation agreements and then markets the lots for sale at a higher price, in order to make a profit on the lots in a competitive market.

Speculator is engaging in the practice of real estate brokerage and must be licensed and comply with the Real Estate License Law. In this example, Speculator owns nothing and may never own anything, and he cannot even force the Developer to sell the parcels to him. Regardless of whether the reservation agreements are valid and enforceable contracts, however, they do not convey any ownership interest in or equitable title to a property.

While an Option to purchase grants the right to purchase the property, reservations are usually not true option contracts (even if that is the name of the document), and they typically provide buyers with few rights. The final plat may never be approved, or it may be approved with fewer lots than originally contemplated, and Developer may never be able to sell the parcels he took reservations on.

Other Brokering Activities for Which Investor Must be Licensed.

Whether an Investor has an option to purchase or not, he may be engaged in Unlicensed Practice if he lists, sells, or negotiates the sale of property he does not own, or if he procures buyers for property that he does not own. For example, where an Investor locates a distressed property and obtains Seller’s agreement to allow Investor to procure an ultimate Buyer for that property, the Investor is engaging in brokering and must have a license.

Question 1: If an Investor is acting as a Dealer in Options, or is otherwise procuring buyers for properties that he does not own, is the Investor engaged in Unlicensed Practice if he hires a licensee to list and otherwise broker the transactions?

Yes. If an Investor is using Options to put together sales between property owners and Other Buyers, he is acting as a dealer in options (brokering) and must be licensed, even if he hires a licensee to assist him by listing the property. NOTE: In these schemes, the listing typically names the Investor, not the Owner, as seller.

Question 2: Does a Licensee Violate the License Law by participating in an Investor’s Dealer in Options scheme?

Potentially, yes. A licensee who knows, or reasonably should know, that the Investor is not the property owner may be in violation of the License Law for misrepresenting the identity of the Seller, and also for assisting the Investor in the Unlicensed Practice of Real Estate.