

How to Buy Real Estate in Mexico

By Susan Fogel

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Almost no other subject generates such heated conversation and opinion among Foreigners as real estate in Mexico. Ask any acquaintance and see for yourself. Then there is the reality check, which includes reading the Mexican constitution, taking classes in Mexican real estate law, and consulting with attorneys, notarios, and accountants.

Some friends visiting from the East Coast attended church here in La Paz. The minister approached them and introduced himself. He made this comment: "...in years past I would ask newcomers their origin. The frequent answers were that the newcomers were in port as part of their travels on their yacht. Others were on vacation. Now, most of the newcomers are here looking for property..."

You may be one of the people coming down to look at property. Be prudent and become informed. Any private person from outside Mexico that wants to own or already owns property in Southern Baja needs to listen up! There is only one legal way to own their primary residence in all of Baja—through the fideicomiso (fee day co me so). No land lease, no corporation, no presta nombre (Mexican citizen owning for you) is legal. I should stop right here. In Baja, there is no negotiation or variance on this issue for foreigners purchasing property as their primary residence. However there is a legal and customary process for buying real estate in Southern Baja.

One real estate agent I know said:

"I wish the Gringos coming down would be a little better informed, or at least stop taking the advice from their "expert" friends. Buying and selling real estate in Mexico is safe, as long as you do it right and follow the rules, and hire professionals to represent you..."

And, a little history lesson can help. Article 27.1 of the Mexican Constitution of 1917 states that foreign nationals may be granted the right to own property in Mexico if they agree before the Minister of Foreign Relations to consider themselves Mexican nationals in relation to the property and will not invoke the protection of their governments in relation to this property. Failure to comply can result in forfeiture of the property. This is called the "Calvo Clause." It further states that under no circumstances will foreigners acquire direct ownership of lands or waters within a zone of 66 miles from a foreign frontier or 33 miles from a coast. This is known as the "restricted zone." The entire Baja peninsula, BOTH SIDES, is in the restricted zone. And there lies the cause of the idea of "land leases" and other funny business surrounding foreigners buying beachfront property. Since most property hunters want beachfront property this applies to all of the coastal areas of Mexico.

To bolster foreign investment in Mexico and to protect the foreign buyer, Mexico enacted the Foreign Investment Law (FIL) in 1993. This allows foreigners to own residential property within the restricted zone exclusively through the vehicle of the fideicomiso.

You love it— the house, the view, the sultry air! You can taste the garlic shrimp and Margaritas. You're ready for the new life, free from the shackles of living in the old country. As we have all learned, freedom, true freedom, has its price. If you would like a life of tranquility and peace and freedom in Mexico, FOLLOW THE RULES. And what is our refrain? I'll remind you. "Pay a little now, save big time later." Oh, and get a professional to help you.

The fideicomiso is like a living trust, in that you are the beneficiary and can and should name secondary beneficiaries. The property will pass to them on your death. While you don't directly own the property, you do own the beneficial rights of full enjoyment of the property: you can bequeath it, sell it, improve it and mortgage it. You also have the responsibility to maintain the property and to pay the annual fees. But it is not really a trust; it is a contract. And those words "trust" or "foreign trust" can be a sticky wicket with the I.R.S. Real estate people use the word "trust" because the word is understandable to other North Americans. This kind of legal document, the fideicomiso, is used in many other areas of Mexican life and was adapted to residential real estate purchases by foreigners in the restricted zone.

A new fideicomiso is good for 50 years at a time and can be renewed in 50 year increments ad infinitum. A bank administers it; you pay an annual fee somewhere around US\$350-450. To set up a new trust costs about \$4,000. To assume an existing trust is about \$1,000. If you are buying a property with an existing fideicomiso, it is perfectly safe to assume it. You will become the new beneficiary and you will name new secondary beneficiaries. And you or your beneficiaries can continue to renew it.

Once you have agreed on the purchase price in writing in Spanish and English, with a deposit (usually 5-10% of the purchase price), the check or money wire should be deposited into an attorney or closing agent's trust account. It should not go directly to the seller. Would you hand over 10% of the cost of a home to the seller in your home country?

Repeat this mantra: "No money goes to the seller until you have signed in front of the Notario Publico." Or; if you wouldn't do it in the old country, don't do it here!

The purchase price in the contract is also the only price that can legally be shown in the fideicomiso. Some agents have allowed a lower price to be reflected in the fideicomiso to save on the acquisition tax. Here is the refrain again. Pay the blasted 2% acquisition tax now, so you don't get hit with BIG capital gains when you sell. The gains will be calculated on the sale price or the gain over the price in the fideicomiso. Consider paying 2% now to avoid a tax of 25% of the total price when you sell or 34% of the gain whichever is less.

Some sellers object to this because they don't want to give up their profits to capital gains because they did it wrong when they purchased or say, "It's the way we do it here." It is not legal and can come back and hurt you BIG TIME when you sell. Protect yourself and your future of peace and freedom. Do it right from the start. If the seller won't cooperate, don't buy the property.

Once you buy the property, save receipts, and get the real thing (a factura) with the supplier's RFC (Mexican IRS Tax ID number). These can be used later to show expenses that can be deducted from any capital gain. Your architect and other major suppliers will have these. Your handyman won't. So have the big jobs done by the guys that can provide tax deductible proof. This goes for commissions and notario fees, as well. These can all help in decreasing your capital gains hit. This law is liquid and open to interpretation, and the interpretation has recently changed. We'll get to that in a minute.

A survey will be ordered. Insist that the surveyor accompany your agent (and, if you are here at the time, you should go to the property while it is being measured). Many fences and even buildings are in the wrong place, an issue in most localities. As long as you know that you fence or the neighbor's fence may be off by a foot or two, you can deal with it. This falls under "no surprises" in our book on "Peace in Paradise."

There will also be an appraisal/survey for tax purposes. This is not a commercial appraisal to support market value. It will usually be lower than the purchase price, but it must be done. This value will not be reflected in your fideicomiso as the price for determining capital gains later. But both the appraisal and survey will become part of the final document. Buying property here is always buyer beware. Do your homework; look at the house in detail. Ask to see the existing fideicomiso and the original plans.

Title insurance is available, and is worth the cost. It runs about US\$7.00 per 1000. On a \$200,000 home, it would cost about US\$1,400. It is a one-time charge for lifetime coverage. Call it "Rest Easy in Paradise Insurance." This is your choice, and does not involve nor need the approval of your agent or the seller. All prices quoted are approximate.

Here is how the purchase process proceeds. We assume you have a good real estate agent or are using an attorney in the case of "for sale by owner."

1. Locate the property; make offer in writing in Spanish and English accompanied by "good funds" (check or wire). No post-dated checks, no sending the money later. It's not a contract without the dough.

The following items will be handled by your closing agent/attorney with your input where necessary.

2. Obtain a Cession of Rights (transfer of rights) letter signed by the seller and delivered to the trustee bank.
3. Apply for a Foreign Relations Permit.
4. Request a Certificate of No Liens
5. Have a Survey and an Appraisal done.
6. Apply for Title Insurance.
7. Provide secondary beneficiary names.
8. Buyer signs in front of the Notario Publico.
9. Money changes hands
10. You get the keys.

Now that loans are available here in Mexico, the process will change a little. Please see our "THE PROCESS" page for the ConfiCasa's current loan process.

You will usually be asked to deposit half the closing costs at the time the offer is accepted. Then just before signing you will be asked to deposit the remaining half of the closing costs and the balance of the purchase price into the trust account of your agent or attorney. Not into the seller's account. The closing agent/attorney will ensure that all is correct before they wire the money to the seller.

Now you have had the home for a while and your plans have changed. It's time to trade up or down; or simply it's time to sell and get out.

Remember those pesky words: "Capital Gains?" Now it's your turn! And the law is clear on this and it is strict. There are recent reinterpretations of the capital gains for foreigners. You must APPLY for a capital gains tax exemption. It's not automatic. Simply living in the home does not exempt you. Here's what you need to provide and questions to answer:

1. You must have an FM2 or FM3 (these are your residency cards, much like a green card for foreign residents in the USA).
2. You must have lived in the country for at least 183 days. The Notario Publico will ask to see your passport and FM3.
3. Have six months utility bills in your name.
4. Prove the house is your primary residence.
5. If you are Mexican taxpayer, you will have to show your RFC number*
6. Copies of all proper receipts for repairs, upgrades, taxes, fees, and commissions.

*Please note, the law is clear, there is no capital gains on a dwelling that is a primary residence for a taxpayer. Remember the other part of the mantra: "...Seek legal counsel..."

So even if the living is more relaxed, relatively inexpensive, and the climate is mostly wonderful, this is Mexico, not Panama. It is not a tax haven. There are strict laws on capital gains, and the only way to legally avoid paying them is to meet the criteria for the exemption.

There are other agents and sellers that say they have lived in Mexico for a long time, and they know a "different" way or a "better" way to buy property. They will also tell you that title insurance is not necessary. They will ask for the deposit to be given to the agent or the seller. RUN the other way.

If there is financing involved, the deposit money and all disbursements are required to be held by an escrow company, a bonded, legal, neutral third party. This is protection for all parties.