

Off Title Options in Parking Transactions

All parking transactions end with the Exchange Accommodation Titleholder (EAT) transferring the parked property to the Exchanger. This “off title” transfer is accomplished by one of two methods: (1) a deed from the limited liability company (“LLC”) or (2) a transfer of the LLC membership interest. The method used will depend on a number of factors, so it is very important that the Exchanger discuss the options with its tax advisor.

Deed Transfer:

When concluding a parking transaction by deed transfer, the LLC holding title will sign a deed transferring the parked property to the Exchanger (or to the third-party buyer in an “Exchange First” Reverse Exchange). Some items to consider when considering a transfer by deed:

- **Transfer Taxes** – In jurisdictions that assess transfer taxes, the deed from the LLC to the Exchanger may trigger a tax. Some states/counties/cities have exemptions under which the transfer may qualify (i.e. transfers between agents and principals), but that is not always the case. It is advisable for the Exchanger to determine the application of any transfer tax laws before entering into the exchange.
- **Title Insurance** – Because the deed transfer method results in a change in the legal titleholder, the title insurance issued for the benefit of the LLC will not offer protection to the Exchanger. There may be ways to mitigate the title insurance costs (i.e. binders, hold-opens, co-insurance, short-term reissue rates), but these options need to be arranged in advance of wrapping up the exchange. If prior arrangements were not made, the Exchanger may be faced with paying a second title insurance premium.
- **Loan Assumptions** – Since the legal titleholder is changing from the LLC to the Exchanger, a third-party lender will generally require a formal loan assumption, often at an additional cost.
- **Tenant Issues** – For some parked assets, for example shopping centers and apartment complexes, a second change in the legal title holder may necessitate coordination and cooperation from the tenants (i.e. estoppel letters). While such items are generally obtainable, many investors would prefer to avoid the administrative inconvenience and not go to their tenants for such matters.
- **Timing** – IPX1031 will rely on the Exchanger’s attorney or the settlement agent who handled the initial purchase of the parked property to prepare the deed and coordinate the recording. Because of the involvement of third-party settlement agents, title insurance and loan assumption issues, to transfer by deed will often require significantly more lead time than a transfer by limited liability company interest. IPX1031 suggests a minimum of 10 business days.

LLC Membership Interest Transfer:

Because of the speed and relative ease of concluding a parking transaction by the EAT’s assignment of the sole membership interest in the LLC holding title, this transfer method is generally preferred. Although it has significant benefits, there are also some issues with transfers of membership interest that an Exchanger needs to fully explore before selecting this option:

- **Transfer Taxes** – Although legal title does not change, some states and municipalities will view the assignment of membership interest as a change in ownership of the assets of the LLC, and will impose a real estate transfer tax. Some jurisdictions will assess an entity transfer tax in addition to, or instead of, a real estate transfer tax. An Exchanger should be sure to evaluate potential taxes with its CPA or tax advisor.

Off Title Options in Parking Transactions (CONT.)

- **Franchise Taxes** – Ownership of an LLC will frequently carry with it a responsibility to pay annual franchise taxes or entity registration fees to the state of formation and any state in which it is authorized to do business. In some states this amount is nominal, but in others (California for example), the taxes on the limited liability company can be hundreds of dollars.
- **Same Taxpayer Requirement** –Some Exchangers like to keep things simple and have all their real estate held in the same entity. However, Section 1031 requires that the same Taxpayer that held title to the Relinquished Property must take title to the Replacement Property. For that reason, at the end of the parking transaction the Exchanger should acquire the LLC membership, rather than having the membership assigned to their existing entity. However, concluding an exchange via an assignment of LLC interest does not mandate that the Exchanger permanently hold the asset in that entity. The Exchanger should consult with its tax advisors about transferring the property at a later date.
- **More Than One Taxpayer** – The IRS treats the acquisition of the sole membership interest in a limited liability company as the equivalent of acquiring the underlying asset (PLR200118023). Challenges arise when more than one Taxpayer holds title to the Relinquished Property. Separate Taxpayers acquiring an interest in the same LLC creates a partnership, and partnership interests are not eligible for like-kind exchange treatment under Section 1031. If an exchange involves multiple Taxpayers, and the Taxpayers want to acquire the parked property via membership assignment, the EAT must hold title in multiple LLCs, each as a tenant in common.

In the end, the decision to conclude the parking transaction by deed or assignment of LLC interest comes down to the Exchanger and its tax advisors reviewing all factors, including discussing the options with any third-party lender, then deciding on the best course of action.