

Purchase and Sale of Commercial Real Property (VA)

A Practical Guidance® Practice Note by Faisal Moghul and Terry Fox, Fox & Moghul



Faisal Moghul
Fox & Moghul



Terry Fox
Fox & Moghul

This practice note provides a framework for attorneys representing purchasers and sellers in a commercial real estate purchase and sale transaction in Virginia. While there are numerous factors to consider in such complex transactions, this note explains several key issues that attorneys should consider while structuring a commercial real estate purchase and sale transaction in Virginia.

Commercial property purchase and sale contracts are generally structured as option contracts that allow the purchaser to either exercise the right to purchase and proceed to settlement, or alternatively, terminate the contract, depending on the outcome of the purchaser's due diligence. In a caveat emptor jurisdiction such as the Commonwealth of Virginia, the due diligence period allows the purchaser to ensure that:

- There are no environmental liabilities attached to the property
- That the zoning in the area is compatible with the intended use for the property

- That there are no expected changes in the zoning of the property confirmed by an engineering feasibility study
- That there are no encumbrances identified in the title or ALTA survey
- That in the case of tenant occupied structures, there are no legal issues with the tenants or leases -and-
- That the structures and utilities on the property have been thoroughly examined by professionals in their respective trades (HVAC consultants, structural engineers, electricians, plumbers, roofing companies)

For additional resources sales of commercial real property in Virginia, see [Commercial Real Estate Ownership \(VA\)](#), [Commercial Purchase and Sale Agreement \(Long Form\) \(VA\)](#), and [General Warranty Deed \(Commercial Transaction\) \(VA\)](#). For further information on commercial purchase and sales, see [Purchasing and Selling Commercial Real Estate Resource Kit](#).

Letter of Intent

While not always required, the typical first step in the purchase of commercial real property in Virginia is the execution of a letter of intent (LOI) summarizing the parties' understanding of the basic terms and conditions of the transaction. The negotiated terms of the actual purchase and sale contract will be presumed to meet the fundamental principles stated in the LOI. This preliminary document should at the very least cover the following basic terms:

- Clearly identify the property being conveyed, preferably by tax parcel identification number(s)

- Purchase price, including any earnest money deposit (EMD) amount
- Purchaser and seller representation (brokers and attorneys)
- Feasibility study periods, approval period, extensions, and deposits required
- Closing details, including timing, identification of the settlement, or escrow agent
- Any exclusivity provision during the negotiations period
- Any confidentiality restrictions related to disclosure of the information exchanged during the deal (which should be drafted to survive the expiration or termination of the LOI)
- Authority designations of the respective parties if signing on behalf of any entity

The exact contours of the LOI must be given careful consideration. However, at a minimum, the parties need to ensure that the LOI remains a nonbinding document until the purchase and sale contract is signed. As stated above, any confidentiality provisions must be drafted carefully to ensure that they survive the expiration of the LOI to protect from any unwanted disclosure of the information gained by the purchaser during the due diligence period.

Purchase and Sale Contract

The following terms should be included in the purchase and sale contract.

Identification of the Parties

If the purchaser is a business entity such as a corporation or limited liability company, then the entity should be described using the information registered with the [Virginia State Corporation Commission](#), including the specific SCC identification number or the secretary of state's office for the respective state of incorporation. Since the title company managing the transaction is required to verify the corporate status and authorized signatories of the respective parties prior to closing, this requirement can be satisfied by providing copies of the most recent and updated corporate documentation, including the certificate of good standing, the bylaws, operating agreement, or other governance document, and any accompanying resolutions.

When representing large multinational corporations, attorneys should look for board resolutions indicating titles of employees authorized to bind the company with respect to third-party contracts, and the corporate secretary's certificate of incumbency identifying such individuals.

Description of the Property

The contract should contain a detailed description of the property, including the tax identification number and the legal description, which can typically be obtained from the vesting deed. The contract should also provide the approximate area in square feet or acres and reserve the right to revise the legal description upon receipt of the survey and title abstract.

Particular care should be given to define "property" in the contract. The definition should include not only the real property being conveyed, but also any other improvements, fixtures, easements, lease rights, tangible and intangible personal property, licenses, permits, and service agreements that convey with the property. A list of all personal property that is being conveyed should be attached as an exhibit to the contract.

Purchase Price and Earnest Money Deposit

The contract should specify the purchase price and any earnest money deposit(s) that is/are required, including the method of payment, and any specific instructions for the settlement or title company handling the transaction regarding how to disburse the deposit or apply it to the closing funds.

In the event that there are optional extensions of the feasibility or approval study periods, or allowable extensions of the closing after the option is exercised, deposits may be required at each of these extensions.

The initial deposit is generally refundable in the event a purchaser declines to exercise the option to proceed to closing prior to the expiration of the due diligence deadline. Industry parlance sometimes refers to this as "soft deposit." A hard money deposit, on the other hand, is often required for extensions of the feasibility or approval periods, or extensions of the closing date, so that the seller is compensated for the delays.

Consider the purchase of a large office building where the price may be several million dollars. Here, the initial deposit could be \$500,000, with an additional \$50,000 required to extend any feasibility period. This second deposit is generally called a nonrefundable or "Hard Deposit."

Type of Deed

While a residential property can be transferred by general warranty, special warranty, or quitclaim deeds, commercial properties are generally taken by a legal entity under a special warranty deed. This form provides sufficient quality of title such that a purchaser can receive owner's

title insurance and protects the selling corporation from problems with title that may have occurred prior to taking ownership. Therefore, the contract will most likely state that property will be transferred by special warranty deed.

For a form of general warranty deed in Virginia, see [General Warranty Deed \(Commercial Transaction\) \(VA\)](#).

Title and Survey Examination

Examination of title and costs of the survey in Virginia are generally paid by the purchaser. However, this is negotiable, and the contract should discuss which party obtains and pays for the title commitment and survey, what the procedure is for objecting to and curing any title defects, and the consequences of failure to cure such defects.

Furthermore, the seller should also list any known “permitted exceptions” to title at the outset of the deal. Sellers of commercial property in Virginia customarily deliver other affidavits or documents necessary to the settlement company to allow for the purchaser to be able to obtain title insurance free and clear of matters other than the permitted exceptions to title.

As part of the purchaser’s due diligence, a title abstract and American Land Title Association (ALTA) survey should be produced showing all easements, restrictions, rights-of-way, reservations of record, and any defects or exceptions to issuance of an owner’s title policy. The title defects or exceptions from coverage objectionable to the purchaser must be objected to by the seller within a specific time period, and if not, become permitted exceptions.

Contingencies

This clause should detail any contingencies that have been negotiated by the parties, including any financing or due diligence related issues, that must occur before closing. This provision should include specific deadlines and explain what happens if the contingency has not been satisfied before the expiry of such a deadline.

Due Diligence

Feasibility Study Period

This provision should explain the scope and time frame for the purchaser to complete its feasibility studies related to the property. These may include a study conducted by an engineering firm to research the local zoning and regulatory laws to ensure that the purchaser may use the property as desired.

The calculation of this period should factor in the time it would take for the seller to deliver all required documents to the purchaser as well as the time for the various studies to be performed. For example, it will take 30 to 45 days to complete the ALTA survey (which should be certified to purchaser, seller, and any lenders involved) and during that period, if a phase I is performed and there is reason to conduct a phase II environmental study, there may be a need to extend the study period.

Other aspects of this investigative period would include structural engineering studies of any buildings, examination of rent rolls, leases and estoppel certificates from tenants, management costs, existing maintenance contracts, taxes, and the right to contact tenants and management for further documentation. Consequently, it is not unusual in Virginia for the first 90-day study period to be extendable at the option of the purchaser for a fee, which is likely to be nonrefundable if the option is not ultimately exercised.

There may also be an additional period allowed for the purchaser to ensure that all local, state, and federal approvals for permits can be acquired. The purchaser will likely have to pay the escrow agent nonrefundable deposits for these extensions.

Representations and Warranties

It is customary in commercial property contracts for the parties to represent and warrant certain issues, including but not limited to, the valid existence and authority of the purchaser and the seller to enter into the contract, the accuracy of the information provided by the seller such as the rent roll and other contracts, the lack of any pending lawsuits or other violations, and lack of seller knowledge related to material latent defects or condemnation proceedings pending against the property.

Risk of Loss

The contract should address which party bears the risk of loss or damage by fire or other casualty, or a condemnation proceeding, between the time of execution of the contract until closing (in Virginia, this is usually the seller). The language of this provision should explain the parties’ respective rights and obligations in the event of a government taking or other property damage. Some contracts require sellers to provide the purchaser with notice regarding such events along with any applicable insurance coverage, with the purchaser retaining the option of either terminating the contract or proceeding to closing but having the seller assign any insurance proceeds received by the purchaser.

Events of Default and Remedies

This is one of the most important sections of the contract that should address the circumstances under which the parties are considered to have defaulted, or materially breached, the agreement. Moreover, the consequences stemming from such default should also be given careful consideration. The process of determining a default should be specifically outlined, including any notice provisions, and whether the defaulting party has the opportunity to cure. In the event that a default triggers the release of any deposit(s) made under the contract to the non-defaulting party, then instructions for the settlement company should be clearly enumerated. In the event of a seller's default, it is common in Virginia for the purchaser to be given the option to terminate the contract and have any deposits returned as liquidated damages. In the event of a purchaser's default, any funds deposited will normally be forfeited to the seller as liquidated damages.

Closing

The contract should state where the closing will be held, whether it will be remote or in person, the date for such closing, and the deadline for the funds to be transferred to the settlement company. The parties may also wish to negotiate any options for either side to extend closing, in which case the party seeking the extension may be required to deposit an additional nonrefundable fee that could apply toward the purchase price.

The contract should also state which party is responsible for the closing costs, which in Virginia, typically consist of the following: deed stamps, title commitment costs, title premiums for owner's title policy and lender's title policy, survey costs, and brokerage commissions.

In Virginia, the seller generally pays the cost of preparation of the deed, for release of any liens on the property, and the Virginia grantor's tax (state and county). The purchaser generally pays all other costs and fees that may be required relating to the transfer of title, due diligence, and any financing obtained by the purchaser, including but not limited to, the cost of recording the deed. Taxes, rents, and other apportionable items, if any, are to be prorated as of the date of closing.

Notices

This provision specifies what type of notice is sufficient, and the manner of delivery of such notice, that is, electronic or hand delivery etc. This section should always require the delivery of notices to be in writing and should state the parties addresses to which the notice is to be delivered.

Brokers

The contract should state any real estate brokers who are assisting the parties in the transaction, the brokerage commission being paid, who pays the fees, and any contingencies that may apply to payment of such commissions.

Miscellaneous Provisions

These provisions typically consist of boilerplate clauses that address issues like survival of remedies, choice of law and forum, modification standards, and attorney's fees.

Purchaser Specific Considerations

It is important to recognize that Virginia is a caveat emptor jurisdiction where the onus of any due diligence regarding the property is on the purchaser. In transactions where the sale is "as is," the purchaser should not only negotiate a broad inspection clause that provides sufficient time to investigate the condition of the property, but also ensure that the remedies provided therein protect the purchaser in the event that the purchaser wishes to terminate the contract during the due diligence time frame.

Here are some key considerations to incorporate into the contract from the purchaser's perspective.

Due Diligence

Generally, in commercial property transactions, the purchaser has a certain period from the execution of the contract until expiration of the delineated deadline to conduct all necessary due diligence. In such circumstances, the purchaser would want to ensure that the due diligence clause provides for inspections that are broad in scope and provide sufficient time for conducting the necessary investigation. Typically, the due diligence conducted by the purchaser includes, but is not limited to, the following:

- **Environmental phases I and II.** The purchaser must obtain a Phase I Environmental Report for any property, improved or non-improved. Even rural acreage may have had farm equipment stored on the land or fuel tanks, which could have had a negative environmental impact on the property. If the phase I report recommends additional testing, then the purchaser may need to extend the settlement date to conduct phase II testing when test wells will examine the soil for contamination. Additionally, soil and geotechnical tests may be necessary if the purchaser plans on doing any construction at the site after purchase.

- **Physical, structural, and mechanical inspections.** The purchaser should also have a licensed Class A contractor inspect the premises for any physical, structural, and mechanical issues.
- **Title abstract and ALTA survey.** As noted above, it is essential that the purchaser obtain an ALTA in conjunction with a title abstract so that all encumbrances can be shown on the property. The title abstract will be evaluated to confirm that the seller can convey marketable title that does not require any additional risk premiums. The title company issuing the owner's policy will also ensure that the chain of title is clear and that there are no outstanding judgments or unreleased deeds of trust that require resolution. Any ALTA surveys that have been produced in the past should be provided soon after contract execution, however, as these will **not be certified** to the purchaser, the purchaser must obtain a full ALTA survey that is certified to the purchaser, title company, and the purchaser's lender.
- **Financial documents.** At a minimum, the purchaser should examine documents that include the buildings rent roll, leases, estoppel certificates, income and operating statements, and maintenance ledger for the past three to five years.
- **Third-party contracts.** The purchaser should obtain and review all material third-party contracts, including any service and maintenance contracts, that currently exist to determine if any will need to be assigned. This should include identification of the company and individuals who act as property managers for the property.
- **Insurance documents.** The purchaser should examine the seller's insurance documentation related to the property, including title and commercial general liability insurance (if any) more specifically to learn if any prior claims had been processed and how the issues were resolved.
- **Engineering feasibility study.** Engineering firms can provide a detailed study of the local and state records, such as permits issued but not cleared, zoning analyses that may apply to the intended use, and also research any pending changes in these regulations.
- **Demographic and economic studies.** Demographic and economic studies should be obtained to evaluate the probability that suitable traffic will be available to support the expected profits from any contemplated operations.
- **Capitalization rate requirements.** The purchaser must determine if the site will generate sufficient profits to justify the investment.
- **Appraisal and broker's opinion of value.** Appraisals should be done as soon as possible in the diligence process to assess the relative value of the site is as expected.
- **Beware of ground leases.** While not a frequent problem in Virginia, some properties in Arlington County containing large cooperatives are subject to ground leases. Va. Code Ann. § 55.1-1916(E) requires recordation of the lease in the land records along with statements regarding the rights of the tenants at expiration of the lease. While subject to the contents of the lease, all improvements are subject to reversion to the fee simple owner at the end of the lease term. If a homeowner fails to pay ground rent, the ground rent holder has the right to eject the homeowner from the property and take possession of both the land and the improvements thereon

Contract Considerations

From the purchaser's perspective, the following considerations should be negotiated into the contract:

- **Earnest money deposit.** As mentioned above, in the event that the purchaser wishes to terminate the contract during the due diligence period, then a provision should be negotiated to allow the purchaser to have the earnest money deposit fully refunded. As such, clear instructions to the settlement company regarding the disposition of the deposit in the event of purchaser termination of the contract are important.
- **General warranty deed.** In the time before owner's title insurance, a general warranty deed was important to protect a purchaser from unknown claims to title. However, with the advent of owner's title insurance, a purchaser is insured for any defects in title occurring prior to the final transfer of ownership. The purchaser always wants the conveyance to be in the form of a general warranty deed but should not shy away from a transaction where a special warranty deed is requested.
- **Limitation of remedies against the purchaser.** The purchaser should limit any seller remedies against the purchaser for a breach of the contract to only liquidated damages in the amount of the earnest money deposit. Such clauses are enforceable under Virginia law. See *O'Brian v. Langley Sch.*, 256 Va. 547, 507 S.E.2d 363 (1998).
- **Purchaser remedies for seller breach.** Conversely, the purchaser should negotiate broad remedies against the seller in the event of a seller breach of the contract. These remedies should include all "legal and equitable" remedies, including damages and specific performance, and provide the purchaser with the right to terminate the contract, and recover the deposit along with any costs incurred during the due diligence period.
- **Seller representations and warranties.** The purchaser should have the seller make representations and warranties regarding the following issues:

- o There are no latent material defects or environmental issues known to the seller that seller has failed to disclose.
- o The seller has the appropriate authority to enter into the contract, particularly if the seller is an entity like a limited liability company.
- o There are no pending legal or other violations (zoning etc.) that currently affect the property.
- o There is no pending bankruptcy action.
- o That the financial and other documentation provided to the purchaser are accurate and current.
- o Warranties that between the date of execution of the contract and the closing date, limiting the seller's ability to take any drastic actions affecting the property (including limiting the seller from (1) undertaking any additional capital improvement not already in progress with respect to the property, (2) not allowing the seller to enter into any new service contracts related to the property, (3) not allowing any new leases or lease modifications without the purchaser's approval, and (4) not allowing for the adoption of unusual or extraordinary contracts for the performance of services or the delivery of supplies or materials to or for the benefit of the property).

Seller Specific Considerations

From the seller's perspective, the following considerations should be negotiated into the contract:

- **Time frame for delivery of required documents.** The contract often specifies the documents the seller must deliver to the purchaser. The seller will want to ensure that there is adequate time for the seller to deliver such documents. In the event that the seller is unable to timely deliver such documents, some contracts allow the purchaser to extend the due diligence period.
- **As is purchase.** The seller should ensure that the contract clearly specifies that the sale is "as is," the seller is making no warranties, except those stated in the contract, with respect to the condition of the property, and that it is the purchaser's responsibility to conduct any necessary due diligence.
- **Limitation of due diligence period.** The seller's primary aim is to limit or reduce the due diligence time frame to as short a period as possible. In the event of any property damage caused by the purchaser, or his or her agents, during the investigation period, the seller should also obtain an indemnity from the purchaser for any such damage or injury. Further, as discussed above, it is

not uncommon in commercial property transactions for the purchaser to negotiate an option for an extension of the due diligence period. In such cases, the seller should require the purchaser to pay an additional sum toward the deposit.

- **Personal property.** Sellers should make sure that any personal property being conveyed with the property is separately listed in the contract in a bill of sale.
- **Type of deed.** Sellers typically want to convey property by a special warranty deed, rather than a general warranty deed, for the reasons specified above. The argument being that there is no need for a seller to warrant title back to the beginning of time as a purchaser will have title insurance for such problems.
- **Seller remedies for purchaser breach.** The seller's goal here is to limit the purchaser's remedies for any potential material breach of the contract by the seller and ensure that the seller has broad remedies to pursue in the event that the purchaser breaches the contract. If the seller agrees to a liquidated damages provision, then it may be a good strategy to require the purchaser to post a higher earnest money deposit that is retained by the seller in the event of a purchaser default.

Closing

The closing date is the culmination of this complex transaction. By the time that the purchaser has exercised the option to purchase, the title company has already examined the title and issued a title commitment. They will have also vetted the parties' corporate status and the individuals that will be executing the closing documents. The title company works with the purchaser and the lender to prepare the final settlement statement that identifies all of the funds involved and distributes the settlement statement to the parties prior to closing for their approval.

Additional documents that may be required and distributed at closing include:

- **Bill of sale.** A bill of sale conveying all right, title, and interest in any equipment or personal property planned to be conveyed with the property to the purchaser.
- **An assignment and assumption of leases.** This document conveys all of the seller's interest as landlord in the lease(s) of the property, including estoppel and attornment certificates executed by all tenants in a form acceptable to the purchaser and assigns any security deposits, to the purchaser.
- **Notice to tenants.** The seller should provide copies of the notice to tenants informing of the transfer of ownership and new landlord rent payment information.

- **Copies of leases and list of security deposits.** The seller should deliver originals, or if unavailable, certified copies of all leases in full force and effect as well as a list of security deposits of all tenants being transferred to the purchaser at closing.
- **FIRPTA.** This document is a non-foreign certification affidavit and associated tax documents for use in reporting to the IRS any income and allocation to sellers.
- **Contracts.** The seller should provide copies of all third-party contracts to be assumed by or assigned to the purchaser.
- **Seller's affidavit.** The title company usually requires a seller's affidavit in a form suitable to the title company and the purchaser confirming the status of title to the property.
- **Settlement statement.** The title company usually prepares the settlements statement listing all the funds received and disbursed which should be reviewed by the parties prior to closing.
- **Transfer tax forms.** In Virginia, the primary tax document required to be executed by the seller is the IRS Form 1099. In the event the seller is nonresident of Virginia, then Form R-5 "[Virginia Department of Taxation Nonresident Real Property Owner Registration](#)" must be executed by the seller. If statutory exceptions apply, Form R-5E is completed "[Nonresident Real Property Owner Exemption Certificate](#)."
 - o **Form R-5E.** This form allows exemptions for 1031 exchanges, involuntary conversions, transfers pursuant to tax-free corporate reorganizations, and other exemptions.
- **Transfer taxes.** Virginia imposes various types of transfer taxes, including state and county taxes, grantor's and grantees taxes, recordation taxes, clerk's fee, and deed processing fee. For certain counties, there are certain

special taxes that include a regional congestion relief fee (Va. Code § 58.1-802.4), Regional WMATA Capital Fee (Va. Code § 58.1-802.3), and Open Space Preservation Fee (Va. Code § 58.1-817). These taxes are based on the sale price except for the clerk's fee, which is based on the number of pages, or the type of document recorded (plats are more expensive). These taxes are reflected on the closing statement.

At closing, the purchaser delivers the purchase price to the seller along with a signed settlement statement and other documents reasonably required by the title company.

Typically, prior to the day of closing, all parties submit the executed documents to the settlement company and have verified that all conditions required under the contract have been fulfilled. Once all funds and documents are received, the deed will be recorded only after the settlement company has performed a check of the land records to ensure no encumbrances have been recorded since the original abstract was created at the time of execution of the contract. This is referred to as a rundown. If there are no intervening recordations, then the deed and mortgage will be recorded in the land records. Finally, the funds are disbursed pursuant to the settlement statement.

After the county has recorded the instruments and the various county departments have modified their records to reflect the new ownership of the property, the original deed is returned to the settlement company. At this point, the title policies are created using the recordation information on the instruments and delivered to the new owner and the lender.

For additional resources sales of commercial real property in Virginia, see [Commercial Real Estate Ownership \(VA\)](#), [Commercial Purchase and Sale Agreement \(Long Form\) \(VA\)](#), and [General Warranty Deed \(Commercial Transaction\) \(VA\)](#).

Faisal Moghul, Managing Partner, Fox & Moghul

Faisal Moghul is a seasoned trial attorney whose practice is devoted to high-stakes business and commercial litigation. He has been selected to the prestigious Super Lawyers *Rising Stars* shortlist for five (5) years in a row (2016-2020), and his prior successes have been profiled in the Virginia Lawyers Weekly. He has successfully represented numerous small-medium sized businesses (SMBs) and individuals in state and federal courts on a variety of business and real estate matters. Mr. Moghul has also authored several publications in the areas of real estate and business law, including his latest co-publication with the American Law Institute titled *Caveat Emptor vs Seller Disclosure in Residential Real Property Conveyances* (April, 2021).

Terry Fox, Partner, Fox & Moghul

Mr. Fox has over two decades of experience representing developers, real estate brokers, community association boards, title companies, and commercial landlords as well as tenants on a full range of complex real estate matters, including commercial property acquisition, disposition, development and leasing, complex lien and title disputes, land use and zoning, mortgage fraud, residential and commercial purchase and sale contract disputes, construction/contractor (Classes A,B and C) disputes, easement/boundary line and adverse possession issues, partition and allotment actions, plat modifications and HOA related disputes.

As a licensed settlement agent, Mr. Fox has a noted expertise in title disputes, and his Continuing Legal Education Seminars (CLEs) on [curing complex title defects with real estate](#) have received national recognition. Mr. Fox's sophistication in this subject matter is reflected in the fact that he has handled more than 3,000 commercial real estate transactions for multi-national entities like Exxon Mobil Corporation. Additionally, Mr. Fox has been practicing trademark law since 1993 and has intellectual property clients from Hawaii to Connecticut, and has successfully prevailed before the United States Patent & Trademark Appeals Board. In addition to his trademark experience, he also has extensive experience in intellectual property transfer and licensing joint ventures.

This document from Practical Guidance®, a comprehensive resource providing insight from leading practitioners, is reproduced with the permission of LexisNexis®. Practical Guidance includes coverage of the topics critical to practicing attorneys. For more information or to sign up for a free trial, visit [lexisnexis.com/practical-guidance](https://www.lexisnexis.com/practical-guidance). Reproduction of this material, in any form, is specifically prohibited without written consent from LexisNexis.
