

Purchase and Sale Agreements Managing Risks

Presented by:
Christopher J. Vaughn
Carruthers & Roth, P.A.
235 North Edgeworth Street
Greensboro, NC 27401
CJV@CRLAW.com
336-478-1143

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Overview

- Legal Concepts
- Framework for Review and Analysis of Purchase and Sale Agreements
- Risk Management

Law Applicable to Purchase and Sale Agreements

- Statute of Frauds
- Priority Statutes
- Contract Law

Statute of Frauds

Deals with the relationship between the parties who are entering into an agreement.

Statute of Frauds

NCGS 22-2

“All contracts to sell or convey any lands...and all leases...for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and other contracts for leasing lands exceeding in duration three years from the making thereof, shall be *void unless* said contract, or some memorandum or note thereof, be put **in writing and signed by the party to be charged therewith...”**

Statute of Frauds

- 3 Important Elements
 - Contract
 - for sale of land
 - Must be In writing

Statute of Frauds

This statute deals with the relationship between the parties who are entering into an agreement with each other.

Priority

*Priority is a concept that focuses on the relationship of the parties to a transaction, such as a buyer and seller, or landlord and tenant, relative to the interests of **third parties***

Priority Statutes

- NCGS 47-18
 - Purchase and sale transactions
 - Leases
- NCGS 47-119
 - Authorizes recording of memo of option to purchase
- NCGS 47-119.1
 - Authorizes recording of memo of contract

Priority Statute

NCGS Section 47-18(a)

“No (i) conveyance of land, or (ii) contract to convey, or (iii) option to convey...shall be ***valid*** to pass any property interest as ***against lien creditors or purchasers*** for a valuable consideration from the donor, bargainer or lesser but from the **time of registration** thereof...”

Priority Statutes

NCGS Section 47-18(a)

3 Important Elements

Conveyance, contract, or option

Validity against Third Parties

Time of Registration

Priority Statute

NCGS Section 47-119

Option Agreements

authorizes recording of memo of option

Priority Statutes

NCGS Section 47-119.1

Purchase Agreements

Authorizes recording memo of purchase agreement

Priority Statutes

Protects a party's rights in real estate relative to
third parties

Contract Law

Some statutes, but Common Law primarily regulates commercial purchase agreements

Remainder of this presentation will focus on practical contract concepts rather than specific laws.

Framework for Purchase and Sale Agreements

- Parties
- Property
- Purchase Price
- Mechanics for Closing
 - What is delivered
 - Prorations
- Timeline for Purchase
 - Deliveries
 - Due Diligence
 - Rezoning

Framework for Purchase and Sale Agreements

- Time Line (continued)
 - Design and Permitting
 - Closing
- Representations
- Warranties
- Covenants
- Conditions
- Remedies
- Casualty/Condemnation

Framework for Purchase and Sale Agreement

- Miscellaneous Provisions
- Exhibits including form transfer documents

Framework for Purchase and Sale Agreement

- Representation
- Warranty
- Covenant
- Condition

Framework for Purchase and Sale Agreement

- Representation
 - statement of fact as of a given time

Example:

Seller is a limited liability company in existence under the laws of the State of North Carolina.

Framework for Purchase and Sale Agreement

- Warranty
 - An agreement that a factual circumstance will remain the same for some period of time

Example:

- Seller shall remain a limited liability company in existence at all times through closing.

Framework for Purchase and Sale Agreement

- Covenant
 - An agreement to take some action or not take some action

Example:

Seller shall not enter into any new agreements affecting the property prior to closing.

Framework for Purchase and Sale Agreement

- Condition
 - An event the occurrence of which is a requirement for something else
 - Example:
 - Tenants occupying a minimum of 95% of the space in the shopping center must have delivered estoppel letters prior to closing.

Framework for Purchase and Sale Agreements

- Covenants v. Conditions

Something I can do

v.

Something that someone who is not a party to the transaction has to do

Framework for Purchase and Sale Agreements

Use Covenants and Conditions to separate

- That which I control

v.

- That which I don't control

Framework for Purchase and Sale Agreements

Covenants v. Conditions--Examples

Agreement not to enter to a lease

v.

Agreement to obtain an estoppel letter from a
tenant

Framework for Purchase and Sale Agreements

Covenants v. Conditions--Examples

Agreement to demolish my building

v.

Agreement to obtain an access easement from a
neighbor

Framework for Purchase and Sale Agreements

Covenants v. Conditions—Examples

Agreement to restrict your own land

v.

Agreement to obtain release of use restriction a third party holds on your land

Framework for Purchase and Sale Agreements

Why does it matter?

– Consequences of each

Breach

v.

Failure of a Condition

Framework for Purchase and Sale Agreements

Control the Consequences

- Failure of a condition—Status Quo
- Breach -- Default -- Remedies
 - Limit downside exposure by capping damages
 - Limit downside exposure before and *after* closing

Risk Management

- Understand the business *of the* deal
- Analyze the business deal for additional issues
- Manage the risks of the business deal with the purchase agreement

Risk Management

Understand the Business *of the* Deal

Understand the Business Deal

LOI is half of the story

Risk Management

Understand the Business *of the* Deal

Understand the Client's Business Model

Example:

Shovel Ready Client

Risk Management

Understand the Business *of the* Deal

Understand the Client's Risk Tolerance

Example:

The novice developer

Risk Management

Analyze the Deal

- Missing details
- Missed issues
- Economic Motivation

Risk Management

Analyze the Deal

- Missing details

example, 1031 deadlines

Risk Management

Analyze the Deal

– Missed issues

- Real Estate—Access and Use
- Development – Infrastructure and Entitlements
- Third Party Agreements—Due diligence and Existence

Risk Management

Analyze the Deal

- Economic Motivation
 - Timing of performance
 - Escrow Agreements

Risk Management

Two Examples:

- Development Transactions
- Existing Income Property

Risk Management

Development Transactions

- Entitlements
- Infrastructure
- Third Party Agreements

Risk Management

Development Transactions—Entitlements

- Zoning
- Design and Plan Approval
- Permits

Risk Management:

All should be conditions to closing.

Risk Management

Development Transactions—Infrastructure

- Roads
- Utilities
- Storm water
- Parking

Risk Management:

Requirements for closing **or** post closing performance secured with escrow funds—may be conditions or covenants.

Risk Management

Development Transactions—Third Party Agreements

- Access rights
- Use Restrictions or Rights
- Storm water
- Utility Easements
- Appearance
- Signage
- Cost Sharing

Risk Management:

Pre-closing written agreements recorded at or before closing—may be conditions or covenants.

Risk Management

Existing Income Property

- Lease Analysis
- Third Party Agreements

Risk Management

Existing Income Property—Lease Analysis

- Review Leases
- Verify Lease with Tenant
- Verify Franchise Agreements with Franchisor
- Verify financial performance of Tenant

Risk Management:

Review and verify with estoppels, which should be conditions to closing.

Risk Management

Existing Income Property—Third Party Agreements

- Verify that important rights for use of property have been memorialized and recorded
- Verify
 - All approvals obtained
 - All sums paid under third party agreements
 - No defaults

Risk Management:

Review and verify with estoppels, which should be conditions to closing.

Risk Management

Manage risks with the Purchase Agreement, but understand the risks being managed and the tools available for management.