

Commercial Foreclosure Flowchart (Nonjudicial) (VA)

A Practical Guidance® Checklist by Terry L. Fox and Faisal Moghul, Fox & Moghul



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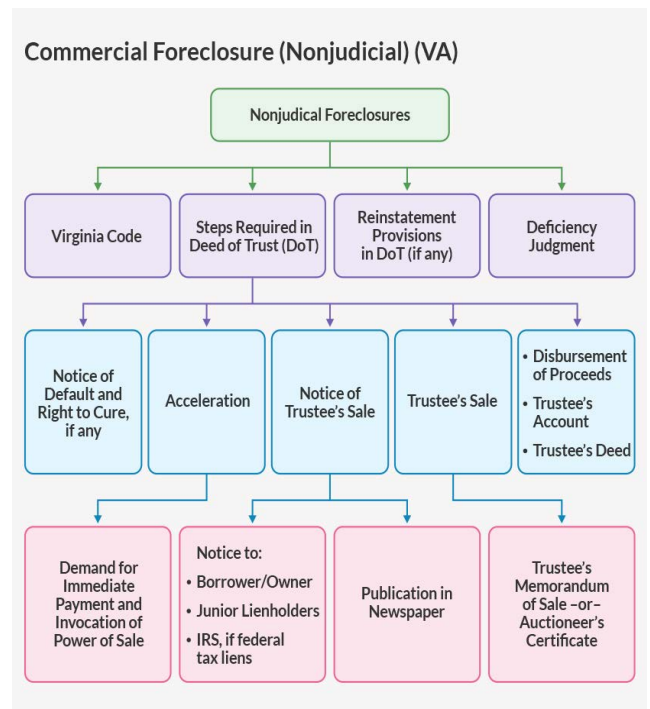
This flowchart describes the process for nonjudicial foreclosures of commercial property in the Commonwealth of Virginia. Virginia law authorizes both judicial and nonjudicial foreclosures of real property. However, most foreclosures in Virginia are undertaken through the nonjudicial foreclosure process pursuant to a power-of-sale clause contained in a deed of trust.

For additional guidance regarding foreclosures in Virginia, see [Foreclosure Resource Kit \(VA\)](#).

For further guidance on commercial foreclosures in Virginia, see [Commercial Foreclosure \(VA\)](#), [Commercial Foreclosure Alternatives \(VA\)](#), and [Commercial Real Estate Financing \(VA\)](#). For a commercial nonjudicial foreclosure checklist to use in Virginia, see [Commercial Nonjudicial Foreclosure Checklist \(VA\)](#). For a template of a memorandum of sale, see [Memorandum of Trustee's Foreclosure Sale \(VA\)](#).

For guidance on residential foreclosures in Virginia, see [Residential Foreclosure \(VA\)](#) and [Residential Nonjudicial Foreclosure Checklist \(VA\)](#). For related templates, see [Loan Agreement \(Acquisition Financing\)](#) and [\[Leasehold\] Deed of Trust, Assignment of Leases and Rents, Security Agreement, and Fixture Filing\(Acquisition Loan\)](#).

Commercial Foreclosure (Nonjudicial) (VA)



Nonjudicial Foreclosure vs. Judicial Foreclosure

The process for a nonjudicial foreclosure in the Commonwealth of Virginia is different from a judicial foreclosure. A judicial foreclosure is comparable to a breach of contract suit where the lender sues the borrower or mortgagor in a civil suit for breach of the promissory note and recovery of possession of the property. In contrast, a nonjudicial foreclosure is accomplished by following the procedures detailed in the deed of trust where a lender can recover possession of the property without the need to file a civil action in court.

In a nonjudicial foreclosure, when a borrower/mortgagor defaults on the terms of the deed of trust and accompanying promissory note, a lender typically sends letters and calls the borrower to discuss foreclosure alternatives. The requirements for foreclosures in Virginia are contained in Va. Code Ann. § 55.1-320 through Va. Code Ann. § 55.1-345. Unless the deed of trust provides otherwise, it is deemed to impose upon the parties (i.e., the lender, trustee, and borrower the rights, duties, and obligations under the statute). Va. Code Ann. § 55.1-320.

Preliminary Considerations

The lender must take some preliminary steps prior to engaging in a nonjudicial foreclosure. The lender should obtain and review a title search or report to identify any and all liens and encumbrances on the title to the property. The lender should also obtain a bankruptcy search to ensure that the borrower has not filed for bankruptcy which would prohibit foreclosure activities during an automatic stay period. For further guidance regarding bankruptcy stays, see [Automatic Stay](#). The lender must also confirm that it has physical possession of the original note or notes evidencing the indebtedness secured by the deed of trust to be foreclosed. See Va. Code Ann. § 55.1-321. The lender may need to appoint a substitute trustee under the deed of trust. The original trustee named in the deed of trust may be unfamiliar with the current lender, particularly if it did not originate the loan. For a template of an appointment of substitute trustee, see [Appointment of Substitute Trustee \(Foreclosure\) \(VA\)](#).

Virginia Law

As noted above, Virginia's statutes contain requirements for foreclosures contained in Va. Code Ann. § 55.1-320 through Va. Code Ann. § 55.1-345. Unless the deed of trust contains other provisions governing the power of sale by the trustee, the Virginia statutes govern the foreclosure process.

Steps Required for Nonjudicial Foreclosure in the Standard Deed of Trust

Most Virginia deeds of trust include the following steps for the lender to use the nonjudicial foreclosure process:

- **Notice of default and any right to cure.** The notice typically contains a description of the default (such as delinquency from a certain date), the actions required of the borrower and due date to cure the default (if a right to cure is included in the deed of trust), a warning that failure to cure may result in acceleration of the sums due under deed of trust and a sale of the property, and notice of the right to reinstate after acceleration (if applicable).
- **Acceleration of full amount.** The lender demands payment in full, including accelerated amounts due under the note, reasonable attorney's fees and costs, property inspection and valuation fees, and other fees incurred to protect the lender's interest in the property or rights under the deed of trust. The lender also invokes the power of sale contained in the deed of trust.
- **Notice of trustee's sale.** The lender must cause notice of the trustee's sale in accordance with Va. Code Ann. § 55.1-321. The notice of trustee's sale is published in a local newspaper meeting the statutory requirements. The lender must also provide notice to the borrower and any junior lienholders, as well as the Internal Revenue Service if there are any federal tax liens affecting the property. The notice must include: the time and date of the auction, the deed of trust instrument number or deed book and page where recorded, a copy of the appointment of substitute trustee if the trustee has been changed, the legal description of the property, and the approximate amount of principal, interest, and estimated expenses chargeable against sales proceeds.

- **Trustee's sale.** The lender prepares an "upset bid" that includes its principal, interest, escrow shortages, late charges, costs, protective advances, and all costs and expenses of the trustee's sale, including attorney's and/or trustee's fees. The trustee may sell the property on the eighth day after the first advertisement, or any day thereafter, but not later than 30 days after the last advertisement. The foreclosure sale typically occurs on the steps of the local courthouse, though it is also common to hold these auctions online. Whether online or in person, the auction is handled by an auctioneer who registers the participants and obtains competitive bids. A property can be removed from the bidding process, and the auction date changed to a future date. However, if the auction goes forward, the winning bidder conveys the certified checks, receives a receipt, and closes on the property in a memorandum of sale specifying when settlement will occur. Typically, this is within a short period of time such as 15 days. The auctioneer will present a memorandum of sale to the winning bidder, executed on the day of the auction that specifies the rights and obligations of the parties prior to final settlement. For a template of a memorandum of sale, see [Memorandum of Trustee's Foreclosure Sale \(VA\)](#).
- **Trustee's deed.** The property will be conveyed to the buyer at the trustee's sale with a trustee's deed.
- **Disbursement of proceeds.** The trustee applies the proceeds of the sale in the following order: (1) to expenses of executing the trust including a reasonable commission to the trustee; (2) to payment of all taxes, levies, and assessments with costs and interest if they have priority over the lien of the deed of trust, including the pro rata amount thereof due for the current year; (3) to payment of the remaining debts by their priority and any liens of record inferior to the deed of trust; and (4) the residue of the proceeds to be paid to the borrower.
- **Trustee's account.** A trustee's report of the sale is thereafter filed with the Commissioner of Accounts for the Circuit Court where the property is located. The trustee's deed is delivered to the Commissioner and the trustee must account for the distribution of the proceeds within six months of the sale. The report must have all the receipts for expenses of the sale such as publication costs, recording fees, taxes. It must include the original promissory note or affidavit of lost note, the recorded substitution of trustee if used, affidavit from the lender itemizing all of its costs related to the debt. The report is filed in the circuit court with other fiduciary reports.

Reinstatement Provisions in a Deed of Trust

Virginia does not provide a statutory right of reinstatement or redemption in connection with commercial real estate foreclosures. While uncommon in commercial deeds of trust, the deed of trust may contain a right of reinstatement by the borrower upon certain conditions that would be set forth in the deed of trust. If the deed of trust includes a right of reinstatement, conditions typically include payment of all sums due (e.g., principal, interest, expenses, attorneys' fees and costs, due diligence costs, protective advances, etc.) and the method of such payment in full (e.g., cash, money order, certified or cashier's check, electronic fund transfer). The right of reinstatement, if granted in the deed of trust, would have a time limit or expiration, such as a certain number of days prior to the scheduled sale.

Deficiency Judgment

Under Virginia law, a lender is permitted to file a lawsuit against the borrower following a nonjudicial foreclosure to seek a deficiency judgment. The Commissioner of Accounts reviews the trustee's account filed after the sale and determines the amount of any deficiency.

Terry Lee Fox, Partner, Fox & Moghul

As the recipient of the prestigious honor of 2022 Virginia Real Estate Attorney of the Year award, 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.

Faisal Moghul, Managing Partner, Fox & Moghul

Mr. Moghul's accomplishments in the areas of real estate and business litigation are varied and many, including his selection into the elite group of America's Top 100 Civil Defense Litigators (2021), the Virginia Lawyers Weekly "Go-To" Business Litigation Lawyers (2023), Lawyers of Distinction (2023), and the prestigious Super Lawyers Rising Stars shortlist every year since 2016.

Mr. Moghul is a widely published author whose works have received critical acclaim in both state and national media. As a regular contributor to premier legal publications like Lexis Nexis and the American Law Institute, Mr. Moghul frequently publishes practical guidance notes to educate other lawyers on cutting-edge legal issues in real estate and business law. In 2023, Mr. Moghul was also selected as the speaker for a VACLE seminar on examining a real estate broker's liability under Virginia law.

Mr. Moghul is hyper-focused on providing the best legal representation to his clients. As a seasoned trial attorney, he has obtained successful outcomes in high-stake disputes for numerous clients in state and federal courts throughout Virginia and D.C. In 2017, Mr. Moghul's representation of a client in a real estate fraud case received favorable coverage in the Virginia Lawyer's Weekly Settlements and Verdicts section. In 2019, Mr. Moghul was part of a legal team that spearheaded the dismissal of a \$7 million-dollar business partnership dispute for claims involving breach of fiduciary duty, fraud, conversion, and civil conspiracy. That same year, Mr. Moghul also obtained a high six-figure settlement in a deed fraud case in Loudoun County Circuit Court. In 2020, Mr. Moghul became one of the very few lawyers in Virginia to obtain a rare pre-filing injunction against a serial filer pro se litigant. He has also successfully defended many landlords in toxic mold poisoning lawsuits.

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