



POSSESSION OF THE PROPERTY CONSUMER VERSION

When is the seller required to deliver possession of the property to the buyer?

According to paragraph 13 of Form 2-T, **possession of the property, including all means of access to the property** (i.e., keys, security codes, etc.), **must be delivered to the buyer upon Closing**, as that term is defined in paragraph 1(m) of the contract, unless (a) the parties have agreed otherwise, or (b) possession is subject to the rights of one or more tenants.

A buyer who requires possession by a specific date should note that **Closing will not occur until after Settlement**, and that paragraph 12 of Form 2-T allows **Settlement to be delayed by up to 14 days**. Such a buyer should consider entering into a **Buyer Possession Before Closing Agreement (Form 2A7-T)** as that form sets forth a specific date on which the buyer may take possession of the property.

Settlement can be delayed by up to 14 days

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Closing/Possession will not occur until after Settlement

Possession Before Closing Agreement (Form 2A7-T)
allows possession of the property on specific date.

Can a seller wait until Settlement to remove their personal property?

Not unless the seller has negotiated a Seller Possession After Closing Agreement. Absent such an agreement, it is unlikely that there will be sufficient time between Settlement and Closing for the seller to complete a move between those two events.

A seller who is concerned that Settlement will be delayed, or not take place at all, should consider entering into a **Seller Possession After Closing Agreement (Form 2A8-T)**. That agreement allows the seller to retain possession for a specified number of days after Closing and will enable the seller to delay moving until there is certainty about whether the transaction will close.

Are there risks associated with using the standard possession before and after closing agreements?

Yes. Unlike standard residential leases, the possession **before and after closing agreements are designed for short-term occupancies only**. They do not include all of the protections for landlords and tenants that are found in ordinary leases. Parties are encouraged to limit the duration of any pre- or post-closing occupancy agreed to, and to consult with an attorney before signing such an agreement to discuss the potential issues that could arise.

How is possession handled when there are one or more tenants in the property?

Under North Carolina law, **buyers of real property take that property subject to any existing leases.** There is a limited exception: a lease with a term greater than three years is not valid against a purchaser for value unless the lease, or a memorandum of the lease, has been registered with the County Register of Deeds.

Therefore, if the property has one or more tenants in place, an interested buyer has a choice:

If the buyer is willing to proceed with the purchase with one or more tenants in possession, the applicable box in paragraph 13 should be checked before the offer is submitted. Also, the buyer should consider adding the **Rental/Income/Investment Property provision in the Additional Provisions Addendum (Form 2A11-T) or the Vacation Rental Addendum (Form 2A13-T) to the offer.** Both of those forms obligate the seller to provide information to the buyer regarding all existing rental agreements.

If the buyer insists on the property being vacant by the time of Settlement, the **buyer should ask a licensed attorney to draft an addendum stating that if the property is not vacant by the Settlement Date, the seller will be in breach of contract and buyer shall be entitled to any and all damages resulting from that breach.**

A seller concerned that an existing tenant may not vacate the property before Closing should ask a licensed attorney to draft an addendum that treats the seller's inability to deliver possession due to

the occupancy of a tenant as a failure of condition, rather than a breach of contract, and limits the buyer's remedy to the return of the buyer's Earnest Money Deposit.

If the buyer is willing to proceed with the purchase despite the right to possession of one or more existing tenants, the **buyer is advised to carefully review all existing leases during the due diligence period.** Form 2A11-T requires the seller to deliver those documents to the buyer on or before an agreed-upon date.

If the buyer asks for the keys at Settlement, should the seller turn them over?

No. Paragraph 13 of Form 2-T is clear. Possession (which includes keys) **"shall be delivered upon Closing." Closing is not complete until the deed is recorded.** Sellers should be reminded that, as stated in paragraph 11 of Form 2-T, the risk of loss or damage to the property remains on the seller until Closing. Unless the buyer has signed a Buyer Possession Before Closing Agreement, the buyer has the right to terminate the contract if a casualty loss occurs prior to Closing. Under the circumstances, the seller is advised to withhold possession and delivery of the keys until after the deed to the property has been recorded and the closing proceeds have been distributed.



Possession (which includes keys) shall be delivered upon Closing.

Closing/Possession will not occur until after Settlement

If the parties have agreed to seller possession after closing, can the buyer come on the property while the seller is still in possession?

No. The Seller Possession After Closing Agreement (Form 2A8-T) is a type of lease. Under North Carolina law, unless a lease provides the landlord with a right of entry onto the leased property, the landlord has no right of entry. **Form 2A8-T does not grant the buyer a right of entry during the term of possession provided for in that agreement.** If the buyer believes that access will be needed during that term, the **buyer should ask a licensed attorney to prepare language that can be added to the parties' agreement.**