

The Time for Remote Co-op Closings Has Arrived

By Margery N. Weinstein and Jeffrey Lederman

New York City has been dramatically impacted as a direct result of the COVID-19 virus and the efforts to combat this unusually deadly disease.¹ As a result of Governor Andrew Cuomo's "New York on Pause" orders as amended², social-distancing requirements have been enacted and enforced, with non-essential businesses closing their doors and many companies requiring their employees to work from home. In order to protect the safety of cooperative apartment residents and employees during the pandemic, New York City's cooperative apartment corporations have instituted policies such as limiting entry into the buildings, restricting package deliveries, requiring the wearing of facial masks in common areas, and prohibiting or restricting moves in and moves out.³

The pandemic has been detrimental to New York City's real estate market. Significantly fewer real estate listings have been posted online⁴ and sales have dropped⁵ as people fear exposure to the virus and limitations have been placed on brokers' abilities to show properties.⁶ This downturn has affected the pace of cooperative apartment sales, which came to an abrupt halt⁷ as the quarantine began, partly because apartments were not fully accessible for inspection and use by purchasers, but also because cooperative apartment corporations require in-person "sit-down" closings at their managing agents' offices. Such gatherings could not occur during a time when managing agent staff worked from remote locations, and the parties to the closing were restricted by stay-at-home policies.

Rather than facilitating apartment transfers, the traditions of the "sit-down" cooperative closing became an obstacle to consummating deals.

In order to overcome that impediment during the height of the pandemic, some creative cooperative apartment corporations recognized that closings could occur remotely, via escrow. Such escrow closings accommodated parties already in contract who did not want to delay, or could not delay, closing on an apartment. These included sellers who had already vacated their apartments, estate sellers with taxes due, purchasers with either leases or loan commitments that were expiring or interest rates that would increase with delay, and purchasers who desired to close before the New York on Pause orders were fully lifted in order to prepare and file renovation plans.

Remote closings—also known as "virtual closings" and "escrow closings"—are commonplace in complicated, multi-state and multi-party real property transactions. They are typically facilitated by a title company, which receives all documents and funds and, following the carefully detailed and approved directions of the parties, disburses such documents and funds when the parties' obligations are satisfied.

In the post-New York on Pause / pre-vaccine world that we may soon be entering, managing agents and cooperative apartment corporation boards should offer remote apartment closings as an option, if not the norm. It will be both unnecessary and unwise for multiple parties to meet in one place for a cooperative apartment closing. There is readily available technology that can help make sit-down closings unnecessary. Maintaining social distancing, whether required by law or merely by volition, is prudent behavior, as the risks associated with COVID-19 exposure will remain for some time to come.⁸

Traditional Versus Remote Closings

In a traditional cooperative apartment "sit down" closing, a purchaser, a seller, the purchaser's lender (if there is financing), the payoff bank (if the seller has an outstanding loan that must be paid off) and their respective attorneys gather together at a managing agent's office to sign and exchange documents and distribute funds. Often there are ten or more persons crowded into a small conference room.

A remote escrow closing can lead to the same outcome—the payment of fees to various parties, including the cooperative apartment corporation and its managing agent; the cancellation of the old stock certificate and proprietary lease; the issuance of a new stock certificate and the assignment of, or issuance of, the proprietary lease to the purchaser; and the payment of the purchase price to the seller—but through a very different process.

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Enlist Available Technology

For a remote closing to be successful, in addition to increased attentiveness and cooperation of the parties, 21st century innovations should be utilized to serve functions that normally would be performed in-person at a sit-down closing.

Cellular phones, facsimile machines, and electronic mail have existed for years. They should be relied on more than ever, as should videoconferencing services, all of which are essential to avoid in-person contact. Some of the common videoconferencing services include, but are not limited to, Skype, Facetime, Zoom, WhatsApp, Microsoft Teams, Jitsi, Amazon Chime, Cisco Webex and GoToMeeting. If enhanced security is a concern, there are private companies that provide videoconferencing services as well, such as ClickMeeting.⁹

Notarization of documents using audio-visual means is allowed under the New York on Pause.¹⁰ Provided remote videoconference notarization continues to be legally permissible, it can and should be used whenever possible to further avoid unnecessary contact in closing a transaction. This is especially important to ease the transmission of documents that must be notarized, such as the New York City Real Property Transfer Tax forms and the duplicate original proprietary leases, power of attorney documents, and other ancillary closing documents. If a lender is involved, the purchaser's attorney should confirm whether a specific secure (RON) or video online notary (VON) platform must be used and whether that platform is available.

The New York on Pause orders, however, contain provisions of only limited scope with respect to remote videoconference notarizations.¹¹ The Pause orders only allow for notaries licensed and located in the state of New York to use videoconference technology to notarize signatures of persons physically located in the state, and they only permit the use of such remotely notarized documents for the duration of the New York on Pause orders. Also, there is no consistency among title underwriters as to the specific procedures to be followed for a remotely notarized document to be considered valid and, where applicable, insurable, as title underwriters throughout New York State have each developed their own guidelines to be followed by notaries and signatories when documents are notarized remotely.

Going forward, the New York State legislature would be wise to follow Gov. Andrew Cuomo's lead

during the pandemic and enact permanent legislation allowing for videoconference notarization of documents and establishing related procedural mechanisms for RONs and VONs. Since videoconference capabilities are not limited by state borders, the New York State Legislature may also proactively consider whether to recognize and permit remotely notarized documents with both out-of-state signatories and non-New York notaries.

Overcoming the Obstacles

There are a number of obstacles that have, in the past, prevented remote cooperative apartment closings from becoming a popular option among practitioners and their clients, as well as cooperative apartment

corporations and their managing agents.

Wet-Ink Originals.
Lenders making loans in New York

State, unfortunately, have not yet waived the need for "wet-ink" signatures on loan documents. In addition, cooperative apartment corporations continue to require original signatures on the stock certificate, proprietary lease, and certain ancillary transfer documents, although they may be willing to agree to counterpart original signature pages in order to facilitate a closing.

In an all cash transaction, where the purchaser is not obtaining financing, the cooperative apartment corporation may facilitate the remote closing by permitting the purchaser to scan her signature on the co-op's transfer documents, with the caveat that "wet" signatures are to be delivered within a specified time period. Signatures on behalf of the cooperative apartment corporation may be similarly scanned. If financing is involved, however, originals are still required on the stock certificate and proprietary lease, which will be the collateral for the purchaser's loan.

Increased Timing. Given the importance of the documents, and the numbers of signatories, it is imperative that the parties are able to transmit such documents reliably. All loan documents and transfer documents generated by the managing agent on behalf of the cooperative apartment corporation need to be circulated to the parties in advance for signature and return.

The use of comparatively old-fashioned delivery services are essential at a time where minimal contact is desired, especially since certain key parties to the co-op closing continue to require the delivery of original documents. The parties or their attorneys should be prepared to utilize Federal Express, UPS or private courier ser-

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VICES for reliable delivery of all such original documents. Delivery delays can be difficult to overcome.

The purchaser should be the first to sign the duplicate proprietary leases, and should return them to the cooperative's officer for countersignature; this will avoid circulating the partially signed proprietary leases, with the cooperative officer's signature affixed, prior to the closing. Where financing is being obtained, the parties should note that many lenders are willing to provide the loan documents to the purchaser or her attorney only one day prior to the scheduled closing, making the timing of deliveries especially crucial to the success of the transaction.

Attorneys should, whenever possible, obtain their clients' powers of attorney in advance of the closing. This will help ensure a smooth closing process by reducing the number of signatories needed for the closing documents.

The parties must take in sufficient time for signatures to be obtained, especially if messengers or overnight courier services are necessary.

Financing. Remote closings are more complicated when financing is involved. To date, we are unaware of any residential lenders that will accept documents containing electronic signatures and/or notarizations as collateral for a purchaser's loan. In addition, lenders have historically required the receipt of the original stock certificate and a duplicate original proprietary lease as collateral for authorizing the release of their loan proceeds for the transaction, so timing of such deliveries has become critical to the success of the remote closing.

In remote closings that have occurred during the pandemic, the standards have varied as to when such original collateral documents must be received by the lender's counsel in order for the loan to be funded. The requirements are often affected by the working interrelationships and histories among the borrower, the attorneys, and the loan officers. Some lenders continue to require the originals to be held by their attorney before they will fund, and others allow funding to occur when the escrow agent acknowledges receipt of the original collateral documents, provided that such original documents are forwarded immediately to the lender's attorney following the closing. The flexibility that some lenders have recently shown as to the timing of delivery of collateral documents may facilitate more widespread acceptance of this practice by purchasers, sellers, and cooperative apartment corporations as well, even in transactions without financing.

Increased Costs. A successful virtual closing requires diligent pre-planning by attentive parties. The purchaser and seller should determine all adjustments and the flow of funds well in advance of the remote closing.

Unfortunately, remote closings may require additional time by both the managing agent and the parties' attorneys, which may translate into additional fees payable to such parties. There also may be an escrow agent fee, especially if a neutral, third-party escrow agent such as a title company is chosen. The parties should determine in advance who is responsible for payment of all such fees, which may vary from deal to deal. In New York City, title companies serving as the escrow agent have generally charged fees ranging from \$1,250 to \$2,500 depending, in part, on the level of complexity of the transaction, the number of overnight mailings and/or messenger services required, and the volume of wire transfers required to be sent.

Wires, not Checks. All closing payments should be made via wire transfers. This is a major change from the current practice at sit-down closings, where exchanging bank checks is customary. Multiple wires need to be prepared, including to the seller and its payoff bank, the cooperative apartment corporation and its managing agents, the brokers and the attorneys.

In addition, safety precautions should be taken to minimize potential risks with wire transfers that do not exist with bank checks. Prudent practitioners should verify all wiring instructions over the telephone and in writing (by email) to prevent wire fraud, and as otherwise may be required by the sending bank, escrow agent or title company. Also, some practitioners have insisted on multiple parties from the same firm or company verifying instructions as a further safeguard against fraudulent changes to instructions. As wire fraud has become more prevalent, such cautious actions should become standard practice.

Given the occasional delays with the delivery of wired funds, practitioners should build in sufficient time to make sure that all wired funds reach the intended parties. If this means either adding an additional day of interest for a bank payoff, or initiating a wire transfer first thing in the morning, the parties should be prepared to make such adjustments in order for the remote closing to have a successful outcome.

The Escrow Agent

To facilitate a remote closing, an escrow agent or agents, who will circulate documents and distribute funds, must be selected by the cooperative apartment corporation and the parties.

If the purchase is being financed, the lender may require that its attorney act as escrow agent, and may also have its own escrow procedures that must be followed.

Provided there is no financing, the managing agent, an attorney involved with the transaction or a title company are all possible escrow agents. Generally speaking,

managing agents prefer to be in control of the original transfer documents. While they may also be comfortable having the transfer documents delivered to a reputable title company as escrow agent, most managing agents do not want, or do not have the capacity to, distribute funds between purchaser and seller, either by wire or bank check.

In some transactions, one of the parties' attorneys may be designated to handle the funds, but that situation may be an impossibility in contentious closings, given power dynamics between the parties to the contract of sale.

Often, the best—and sometimes the only—alternative is to select a title company to serve as the escrow agent. As all parties to the transaction must trust the escrow agent to faithfully perform its responsibilities, the neutrality of a title company is a key factor in support of designating a title company for this role. The parties also want assurance that the escrow agent can diligently perform a remote closing; title companies have experience serving as escrow agents in title transfers, commercial transactions and loan financings. They are equipped to handle documents and to distribute funds, eliminating the need to have one escrow agent for the circulation of documents and a second for the exchange of money.

An Air-Tight Escrow Direction Letter: The Key Element to Success

To facilitate a remote closing, one or multiple escrow direction letters need to be signed by all parties to the transaction, designating, in detail, the obligations of the parties, when such obligations are satisfied, the distribution of documents and the flow of funds.

For an escrow direction letter to be effective, it should clearly delineate the following:

- Which documents each party must sign.
- Whether any original signatures are necessary.
- To whom the documents are to be delivered and the address for such party.
- When the various parties have parties' obligations have been met.
- When documents may be released by the escrow agent.
- The method of transmitting such documents, such as emailed copies on the date of closing followed by originals via Federal Express, courier service or otherwise.
- When funds may be released by the escrow agent.
- The method by which funds should be released, such as by wire transfer or by bank check or attorney escrow check, and if checks, the manner of

delivery such as Federal Express, courier service or otherwise.

- What person(s) are authorized to communicate on behalf of the respective parties and by what means of communication.
- Deadline for the deal to be considered consummated and "closed."
- Instructions as to the return of documents and funds in the event the deadline passes and the transaction has not closed.
- An indemnity in favor of the escrow agent.

The precise details of the escrow direction letter are shaped by the ability of the parties to work together to craft an agreement where every party feels protected. An escrow direction letter will also be affected by the specific facts of the transaction. For example, a payoff bank may only agree to deliver an original stock and lease (and a UCC-3) to either a managing agent or a title company, rather than to one of the attorneys involved in the transaction; such a requirement will help determine who can serve as escrow agent in that transaction.

The escrow agent is likely to require a limitation or exculpation of liability for its actions under the escrow direction letter. However, the specific indemnity provision will vary depending upon the role of the escrow agent—a title company may be serving solely as a logistical facilitator to the transaction, whereas an attorney may be serving a dual function representing one of the parties as well as acting as the escrow agent.

Given the importance of the escrow direction letter, various local bar associations throughout the state of New York should consider developing standard forms that can be utilized for remote cooperative apartment closings; this will be especially helpful to practitioners who occasionally handle, but do not specialize in, cooperative apartment transfers. Additionally, all parties to the closing will benefit when attention to the nuances of an escrow direction letter can be streamlined by the parties' ability to work from a recognized form.

COVID-19 and Cooperative Lien Searches and Filings

The New York on Pause orders have not lead to dramatic delays either in obtaining lien searches or in filing UCCs in connection with the closing of New York City cooperative apartment transfers.¹² According to various title companies, most New York counties accept e-recordings and utilize that option, so that no delays have occurred. However, a number of title companies indicate they have encountered some delays—usually a day or two—in searching the records and in filing UCCs for cooperative apartment transactions when the properties are located in Westchester, Nassau and especially

Suffolk counties. These delays are mainly due to the partial staffing of clerks' offices during the New York on Pause orders.

Based on an informal poll of title companies, the escalation in the number of remote cooperative apartment closings that occurred during the pandemic has not resulted in a surge in the issuance of Eagle-9 and similar title policies, probably because few cooperative apartment closings have actually occurred. If, however, purchasers, their lenders or the cooperative apartment corporations remain uncomfortable with the practice of closing remotely, the issuance of an Eagle-9 or similar title policy may become a more widespread requirement in cooperative apartment closings.

Conclusion

Due to the COVID-19 pandemic, brokers, managing agents, cooperative boards and practitioners involved in cooperative apartment transfers have had no choice but to be find creative ways to facilitate sales.

Brokers have used video cameras to prepare virtual listings, allowing for future purchasers to view apartments without leaving their homes. Managing agents have made board minutes available by email, rather than at the managing agent's office. Cooperative boards have proactively allowed board interviews to occur by video and other devices. Governor Cuomo has authorized document notarizations to occur remotely. And, cooperative apartment corporations have offered to hold closings remotely. In each phase of the sales process, technology has been used effectively. These difficult times have led many people to make smart adjustments. Such new practices ought to continue long after the pandemic ends.

Going forward, practitioners should proactively insert language into contracts that allows for remote escrow closings, and cooperative apartment corporations and their managing agents should continue to offer such remote closings as an option. Such flexibility may be required in order to assure the safety and health of the parties, as well as their attorneys. By eliminating one of the friction points in the sales process, remote closings may help to jump-start and strengthen the cooperative apartment market following the COVID-19 pandemic.

Endnotes

1. See Josh Katz and Margot Sanger-Katz, *N.Y.C. Deaths Reach 6 Times the Normal Level, Far More Than Coronavirus Count Suggests*, N.Y. Times, Apr. 27, 2020, <https://www.nytimes.com/interactive/2020/04/27/upshot/coronavirus-deaths-new-york-city.html>.
2. N.Y. Exec. Order No. 202 (Mar. 7, 2020), <https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york>, as extended and amended by, including N.Y. Exec. Order No.

- 202.6 (March 18, 2020), <https://ocfs.ny.gov/main/news/2020/COVID19-EO-202.6.pdf>. These executive orders are referred to herein collectively as the "New York Pause Orders," with the 28th extension and amendment occurring on May 8, 2020, extending protections through June 6, 2020: <https://www.governor.ny.gov/news/no-20228-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.
3. Under the New York Pause Orders, moves were allowed to occur, as "residential moving services" were considered "essential businesses" pursuant to guidance provided by the Empire State Development Corporation. *Guidance for Determining Whether a Business Enterprise is Subject to a Workforce Reduction Under Recent Executive Orders*, <https://esd.ny.gov/guidance-executive-order-2026> (last visited May 7, 2020). Nevertheless, moving prohibitions and restrictions remained widespread. See Tim Donnelly, *Moving in NYC during coronavirus is more nightmarish than usual*, N.Y. Post, April 1, 2020, <https://nypost.com/2020/04/01/moving-in-nyc-during-the-coronavirus-is-a-nightmare/>.
4. The two weeks from March 16 to March 27 saw a 72 percent decline in new sales listings from the previous two weeks, and a 75 percent drop from the same period in 2019. See Nancy Wu, *How Will COVID-19 Impact NYC Home Prices? Lessons from the Last Recession*, StreetEasy (Apr. 20, 2020), <https://streeteasy.com/blog/covid-19-impact-nyc-home-prices/>.
5. See Sylvia Varnham O'Regan, *Luxury contract signings plunge after brokers ordered to stay home*, The Real Deal (Mar. 30, 2020, 9:39 AM), <https://therealdeal.com/2020/03/30/luxury-contract-signings-plunge-after-brokers-ordered-to-stay-home/>.
6. See New York Pause Orders. See also Sylvia Varnham O'Regan, E.B. Solomont & Erin Hudson, *Cuomo orders real estate agents to stop showing homes*, The Real Deal (Mar. 20, 2020, 7:30 PM), <https://therealdeal.com/2020/03/20/cuomo-orders-real-estate-agents-to-stop-showing-homes/>.
7. See Eliza Theiss, *April Residential Sales Down 62%, Pricing Continues Upward Trajectory*, PropertyShark (Apr. 16, 2020), <https://www.propertyshark.com/Real-Estate-Reports/2020/04/16/nyc-real-estate-covid19/> ("As expected, transactional activity has trended downward since the crisis began. In particular, the effects really started to show in the fourth week of March – which came in 37% below the same period last year – obliterating the month's entire year-over-year gain"); See also Nancy Wu, *COVID-19 and NYC Housing Market: Inventory Falls, But Prices Stay Flat*, StreetEasy (Apr. 3, 2020), <https://streeteasy.com/blog/covid-19-nyc-housing-market/>.
8. See Nicole Chavez, Jason Hanna & Faith Karimi, *States are easing coronavirus restrictions and "it's going to cost lives," researcher says*, CNN (May 1, 2020, 10:42 PM), <https://www.cnn.com/2020/05/01/health/us-coronavirus-friday/index.html> (cites expert report that predicts up to two more years of pandemic spread); Allyson Chiu, *Fauci's coronavirus reality check: "You don't make the timeline. The virus makes the timeline."*, Washington Post, March 26, 2020, <https://www.washingtonpost.com/nation/2020/03/26/coronavirus-cnn-fauci/>.
9. <https://www.pcmag.com/picks/the-best-video-conferencing-software>; <https://www.theverge.com/2020/4/1/21202945/zoom-alternative-conference-video-free-app-skype-slack-hangouts-jitsi>.
10. See New York Pause Orders.
11. <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO%20202.7.pdf>.
12. In preparing this section, the authors consulted with senior officers at Benchmark Title Agency, LLC, Old Republic National Title Insurance Company, and TitleVest Agency, LLC.