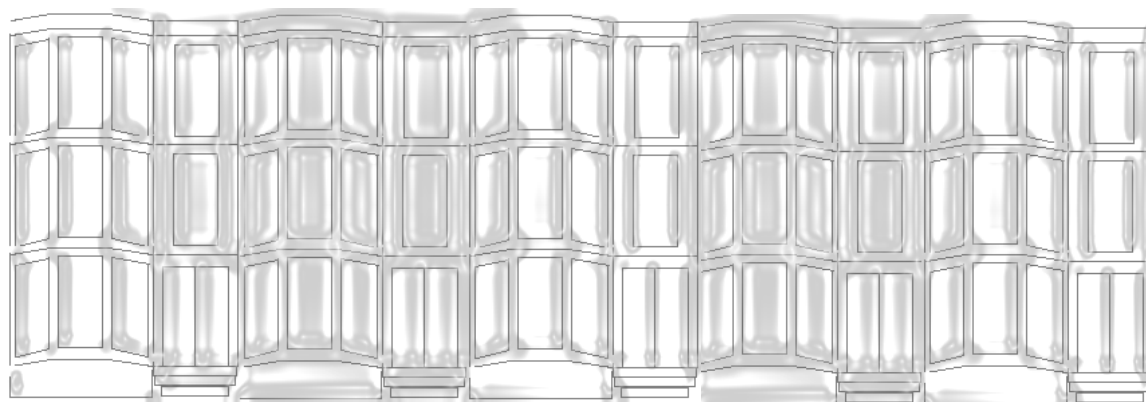


How To Navigate Closings, Deals In Contract And New Deals In The COVID-19 World



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General Guidance to Agents

- Use this time as an opportunity to reach out to your existing and past clients to say hello, ask how they are, provide support, and educate them on what you are seeing in the market.
- As per the Attorney General, you are currently not allowed to Cold Call, so focus on your current network and social platforms.
- Position yourself now for success once COVID-19 is over. The market was active pre-COVID-19 and there will be activity post-COVID-19. Remember NYC is resilient!
- Clients are looking to you as a source of information and guidance on the NYC real estate market. If other markets continue to decrease, NYC is going to be considered an even better investment asset. We are already fielding calls from investors looking for opportunistic purchases.

Deals in Contract - Delays

- Each deal must be analyzed based on the specific facts and circumstances to see if either party has leverage.
- Per New York caselaw, “on or about” language gives both sides a right to a “reasonable adjournment”. During pre COVID-19 closings, a “reasonable adjournment” was interpreted as 30 days. Parties can now argue that they are entitled to more than a 30-day adjournment due to the circumstances we are all facing.
- Deadlines are being extended on commitment letter due dates, board application due dates, additional deposit due dates (for new constructions), and closing dates. It will likely be difficult for any party to enforce deadlines at the moment.

Deals in Contract – Delays (cont'd)

- A Time of the Essence notice will likely be rejected due to a variety of reasons including inability to move into building, appraisals, walk throughs, safety concerns, inability to conduct in person closings, etc... Also, Courts are currently closed for non-essential lawsuits. Once things get back to normal, Courts will be inundated so lawsuits will be curbed.
- It is our opinion that a buyer cannot be compelled to close virtually, conduct a virtually walk through, etc..
- Electronic handling of board packages: board packages can likely be emailed instead of hand delivered or submitted via Board Packager.
- Board interviews can be accommodated via FaceTime, Skype, Zoom or Google Hangout, among others, without the interview being recorded.

Deals in Contract - Renegotiation

- “Force Majeure” (right to cancel for acts of god, governmental orders, sickness etc.) must be explicitly stated in the contract to be applicable. It is not a standard clause of NYC real estate contracts and does not exist in the majority of pre-COVID-19 contracts. As such, it is important to give your buyers reasonable expectations that they can’t simply cancel the deal and get their deposits back.
- Parties may try to use other cancellation rights to get out of a deal i.e. board interview, loan contingency. Important to remind buyers that acting in bad faith can put their deposit at risk.
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- Regardless of whether the buyer can proceed financially or not, many deals will be re-negotiated. A buyer has the most leverage to renegotiate when they are ready to close (board approval & bank is cleared to close).

Deals in Contract – Financing Contingencies

- Pre-COVID 19, standard financing contingencies do NOT give buyers the right to cancel the deal and receive a return of the down payment deposit if they lose their job or become unfinanceable between receipt of a loan commitment and closing. Also, Pre-COVID 19 contracts, do not protect borrowers if their lenders pull the loan after issuing a commitment because of issues the lender is facing.
- Lender slowdown in processing files is anticipated. For this reason, it may NOT be wise for a buyer with financing to delay closing when their bank is ready to close. If they delay the closing and lose their job or the lender decides not to fund, they will likely lose their deposit. Most lenders, however, are accommodating free interest rate extensions.
- Encourage your buyers in contract to keep a frequent line of communication with their lender regarding risks.

Current Closings

- Closings are happening!
- Post Possession Agreement may be a good option with certain deals.
- Consider the possibility of escrow, remote or virtual closings on a case by case basis.
- Some co-op managing agents are cooperating while some are not.
- Closings with financing are more difficult, but many banks are accommodating.
- Exceptions to building move-in policies: a few management companies have made exceptions to a building's move-in policy to allow for a closing and immediate move-in.
- Consider virtual final walk-throughs. If you agree to perform a final walk-through, make sure to protect yourself with lots of follow-up emails and videos between the parties and your client to mitigate your liability.
- FedEx and messengers appear to be active for the time being.

Closing in Escrow

- Buyers and sellers can take steps to implement “escrow” or “virtual” closings
 - This requires onboarding all attorneys, lenders, payoffs, management companies, transfer agents, title companies, etc. These closings can be handled remotely via messenger, shuttle service (via a title closer), or FedEx. All proceeds and closing fees can be paid via wires, and payees can accept wires instead of physical checks.
 - In “escrow closings,” the participants appoint a party (i.e. an attorney, title insurance company, escrow company or settlement company) that acts as an “escrow agent” for the parties, so they do not have to physically attend a closing. Under this type of closing, each party to the transaction signs and has notarized their respective documents, and separately sends the executed or partially executed documents to the escrow agent. Documents can be signed in counterparts. The escrow agent then collects all the documents and monies on behalf of the parties and holds them in escrow. Once all the signed documents and funds are wired to the escrow agent, and once all closing conditions are met, the transaction successfully “closes.”

Virtual Closings & Virtual Notary

- In “virtual closings” the parties do not physically gather to close a transaction, and the closing funds the same day. In virtual closings, however, the parties pre-sign documents and exchange funds via wire. The pre-signed documents can be signed in front of a notary, or depending on the lender and parties involved, via e-notary.
- Virtual Notary: To comply with Governor Andrew Cuomo’s temporary executive order, the following needs to occur:
 - The person seeking the Notary’s services, if not personally known to the Notary, must present valid photo ID to the Notary during the video conference, not merely transmit it prior to or after;
 - The video conference must allow for direct interaction between the person and the Notary (e.g. no pre-recorded videos of the person signing);

Virtual Notary (cont'd)

- The person must affirmatively represent that he or she is physically situated in the State of New York;
- The person must transmit by fax or electronic means a legible copy of the signed document directly to the Notary on the same date it was signed;
- The Notary may notarize the transmitted copy of the document and transmit the same back to the person;
- The Notary may repeat the notarization of the original signed document as of the date of execution provided the Notary receives such original signed document together with the electronically notarized copy within thirty days after the date of execution.
- For banks or title companies who do not recognize e-notaries, a one-on-one closing can occur with the buyer or seller individually, documents are signed in counter-parts, and originals delivered.

Pre-Contract Deals

- Full funding contingency for buyers: to protect them in case they lose their job or become unfinanceable at any point, even if it happens the day before closing. Also, protection if the lender stops lending, even for a reason unrelated to the buyer.
- Specific clauses to prevent parties for being penalized for COVID-19 related delays.
- If needed, a right to cancel if COVID-19-related delays push closing beyond a certain time frame i.e. 6 months.
- For buyers, consider noting that closing must include move-in, giving them a right to delay if closing is allowed but not move-in.
- Sellers should consider being flexible in granting additional contractual protections at this time.

Pre-Contract Deals (cont'd)

- Due Diligence
 - Managing agents are mostly amenable to electronically sending a building's board minutes; sometimes, they require confidentiality agreements signed by the buyer's attorney, but are generally receptive to the idea. Most management companies are fully operational and working remotely, so due diligence questionnaires and inquiries are still being completed.
- Inspections
 - Inspections are being conducted with creativity, but if you cannot successfully schedule an inspection, we can negotiate an inspection contingency.

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