

# The COOPERATOR

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## Brace Yourselves

A new co-op contract is introduced

By Eric P. Gonchar, Esq.

In April 2001, the Committee of Condominiums and Cooperatives of the Real Property Section of the New York State Bar Association, the Association of the Bar of the City of New York, and the New York County Lawyers Association approved a new form of contract of sale for co-op apartments. The new contract contains many improvements and significant modifications to its predecessor, which was approved in August 1999 and is starting to be used more and more in New York.

The new form addresses changes in the laws of New York—like the repeal of the New York State Transfer Gains Tax and disclosure requirements of lead-based paint—and also provides new procedural alternatives, so that if a particular provision is not part of the transaction, it is manually stricken from the contract. The following are the key modifications to the contract:

**Financing Contingency:** Probably the most important revision to the contract is the modification of the financing contingency provision. Financing contingency clauses allow the purchaser to terminate the contract and receive a refund of the down payment in the event he or she cannot secure a loan to purchase the apartment. More and more, sellers are demanding that purchasers remove the condition that the contract is contingent upon the purchaser obtaining a loan. Under the prior contract, if the finance contingency was struck out, it did not prevent the purchaser from obtaining a loan. If the purchaser needs the loan money to conclude the transaction, the purchaser's application could not be submitted to the board until a commitment letter was issued by their lender.

The new contract allows for three alternatives: (1) financing is permitted and the contract will provide the amount of the loan sought by the purchaser; (2) the contract is not contingent upon the purchaser obtaining a loan, but the purchaser can nevertheless conclude the transaction with financing; or (3) no financing is permitted at all. The new form requires the parties to delete the non-applicable provision regarding financing. The new form acknowledges that the purchasers who have deleted the financing contingency clause but require a loan can submit their application after the issuance of the commitment letter.

For transactions where the financing contingency has been deleted but the purchaser is still permitted to procure a loan, he or she should try to complete two important pre-requisites before signing the contract: find out whether the building itself has been approved by a lender, and have the apartment appraised. If the building is not pre-approved for a loan or if the appraisal comes in low, the purchaser may not get their loan and must forfeit their down payment.

For transactions with a financing contingency, the new contract requires the purchaser to supply a copy of their lender's commitment letter to the seller promptly after receiving it. If the purchaser gets a commitment letter that expires within 30 business days after the scheduled closing date, and cannot be renewed or extended, the purchaser has the right to cancel the contract and receive a full refund of the down payment if the commitment expires. If there is a cost to extend the commitment letter, the seller must either pay for the cost of the extension or give the purchaser the right to cancel the contract.

If the loan is denied, a copy of the denial letter from the lender must be submitted when the seller cancels the contract. According to the new contract, the purchaser needs only to apply to one lender. If a lender requirement cannot be met by the co-op corporation after the commitment letter is issued, the purchaser may cancel the contract.

**Loan Application:** A purchaser may now apply for his or her loan through a licensed mortgage broker, provided the broker submits the loan application to an institutional lender. The old contract (unless modified by the parties) only permitted loan applications through institutional lenders.

**Storage Bins, Maid's Rooms, and Parking Spaces:** The new contract acknowledges that the seller may be transferring his or her rights to any storage bins, servant's rooms or parking spaces allocated to the apartment. If any one of these interests are not included in the contract, they should be struck out of the contract.

**Delivery Date:** The "effective date" of the contract is the date a fully executed copy of the contract is delivered to the purchaser's attorney. Important time periods are measured from the delivery date of the contract, such as the time in which the purchaser must apply for a loan (five days), and the time period for the purchaser to procure a written loan commitment letter (usually between 30 to 45 days—left blank for completion).

**Sale of Current Residence:** A commitment letter containing a provision that the purchaser must sell his or her current residence, pay outstanding debts, or disclose any change in his or her financial condition will not give the purchaser the right to cancel the contract and receive a down payment refund. This is an important new provision since the purchaser takes the risk of losing the down payment if such conditions cannot be met. Before signing a contract, purchasers should make sure that their lending institution will not insist upon the sale of their current home or the repayment of current debts before making the loan to purchase a new apartment.

**Down Payment:** The seller has the right to place the down payment either in an interest bearing account or a non-interest bearing account. The seller's attorney generally determines the type of account. If the down payment is deposited in an interest-bearing account, the new contract provides that the party entitled to the down payment shall be entitled to the interest thereon and must pay the appropriate taxes associated with such additional income.

**Closing Fees:** The new contract removes the provisions set forth in its predecessor regarding the now-repealed New York State Transfer Gains Tax, which was imposed upon sellers when the property sales price was over \$1,000,000. Furthermore, the purchaser must pay any fee imposed by the corporation (or its managing agent) relating to the purchaser's financing (known as a "recognition review fee"), as well as any co-op board application fees.

**Uncollected Checks:** If the purchaser's down payment check is returned for collection, the purchaser must replace the uncollected check with a certified or official bank check within three business days after being notified of the returned check.

**Modification of Agreement:** Attorneys are permitted to extend the time periods in the contract,—the time periods to apply for a loan, obtain a commitment letter, to submit the application, etc.—all other provisions may be changed only in writing by the concerned parties.

**Liens:** The purchaser must provide the seller's attorney with a lien search disclosing all liens, encumbrances and judgments ten days prior to closing. The seller has the right to postpone the closing up to 60 days—but not later than the expiration of the purchaser's commitment letter—to remove any liens, encumbrances or judgments against the seller.

**Board Approval:** Co-op board approval must be unconditional. Accordingly, if the co-op insists upon a personal guarantor or a monetary escrow deposit, the purchaser can terminate the contract unless they agree to the conditions.

**Smoke Detectors:** The apartment must be delivered with operational smoke detectors.

**Closing Documents:** The new contract specifies that if the seller has lost or misplaced the stock and the proprietary lease—which must be surrendered at the closing—the seller must pay any fees imposed by the co-op for the issuance of a new stock and lease. This clause applies even if the seller's lender has misplaced the stock and lease. (Most lenders will reimburse the purchaser for any expense paid to the co-op corporation or the managing agent if the lender has lost the stock and/or lease.) Sellers should be forewarned that some co-ops insist on being issued a bond if stock certificates have been lost. This can cost the seller thousands of dollars. The co-op must also deliver a new stock certificate to the purchaser with a statement indicating the last date of maintenance payments.

**Representations:** The new contract provides for many new representations by both the seller and purchaser. A representation is important because the party to whom the representation is made will rely on such statement in entering the contract.

1. Seller's Representations:

- a. The seller will promptly order any loan payoffs to satisfy any open liens against the apartment
- b. The seller has not made any material (emphasis added) alterations or additions to the apartment without the consent of the corporation, and that such alteration or addition to the apartment was not made without compliance with applicable law (i.e. Building Department approval).
- c. There are no agreements between the seller and the corporation that would be binding upon the purchaser after closing—like alteration or sublease agreements.

2. Purchaser's Representations:

- a. The purchaser has not filed for bankruptcy within the last seven years.

- b. The purchaser is over 18 years old and is purchasing the apartment for purchaser's own account.
- c. There are no judgments or liens against the purchaser as of the date of the contract or at the time of closing.

The new contract includes several additional suggested representations in a rider at the end of the contract that can be struck out if not applicable.

1. The purchaser represents that he or she has and will have at closing sufficient liquid cash and cash equivalents (i.e. stock or securities) in an amount equal to the balance of the purchase price.
2. The purchaser represents that the maintenance (and any assessments) will not equal more than 25 percent of his or her gross income.
3. The purchaser shall immediately after closing have a positive net worth.
4. If the purchaser is obtaining a loan, he or she represents that the combined monthly loan payment, maintenance and assessment--if any--does not aggregate more than 35 percent of his or her total gross monthly income.
5. The seller represents that he or she is not aware of any material default or condition under the proprietary lease, and that if any such exist, will be cured at or prior to closing.

Death of a Purchaser: The new contract states that in the event of death of the purchaser (or all parties representing the purchaser), the contract shall terminate and the down payment will be refunded.

Cooperation of Parties: The new contract provides that the parties will cooperate and sign all documents requested by the corporation and the purchaser's lender or title company, if applicable, in order to consummate the transaction.

Lead-Based Paint: The new contract also provides that the parties will complete and sign the lead based paint hazards disclosure form attached to the contract in accordance with new legislation. The form requires the seller to disclose the presence of any lead based paint in the apartment and give the purchaser the opportunity to have the premises inspected.

Due Diligence: The purchaser's attorney must now either review the corporate minutes or waive the rights to review them as part of the pre-contract due diligence review of the co-op corporation.

The new form addresses many issues that have developed over the last 12 years. It serves the needs of most co-op transactions. However, each sale may involve a set of facts that require further amendments to the standard form, and given the new contract's flexibility and thoroughness, it seems clear that the new form will eventually become the industry standard.

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