

CLOSING REAL ESTATE TRANSACTIONS DURING A PANDEMIC

Description

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An “unprecedented global health crisis” is a common phrase we have sadly grown accustomed to hearing as the world grapples with the impact of COVID-19. Unsurprisingly, the pandemic has presented unique and novel challenges across a spectrum of industries with real estate being no exception. From legal to practical impediments to performance, the real estate industry has faced a plethora of challenges in the recent months. Force majeure, frustration of purpose and impossibility of performance have certainly become much talked about legal doctrines with parties trying to assess and limit their legal risk exposure during the pandemic. Legal challenges aside, the realities of working remotely have also presented logistical barriers for real estate law practitioners and their clients. Parties ready and willing to perform under their contract must tackle another COVID-19 related question – what does performance look like in this new, physically-distanced world of ours?

Can we leverage technological advancements to get parties to the proverbial “closing table”? The answer is yes, but not without first considering the fast-moving legal framework that in a short period of time has made virtual closings possible.

REAL ESTATE’S OWN SPINOFF ON “A TALE OF TWO CITIES”

Before discussing the legal framework supporting remote, virtual closings, it is worth noting the major impact COVID-19 has had on the volume of real estate transactions in general.

There is no denying the coronavirus has had a clear, negative impact on commercial transactions across the nation, with urban areas taking the biggest hit¹. The rapid pace at which the pandemic spread earlier this year forced a number of companies to pivot toward the work-from-home model².

As many workers, who previously commuted to the office, have been forced to adapt to virtual meetings, commercial landlords are left wondering whether COVID-19 has set in motion long-lasting trends with significant impact to their real estate portfolio³. As a result, commercial sales volume during the second quarter of 2020 declined by 5%, while sales volume for properties valued at \$2.5 million or above were down by 68% year-over-year⁴. According to recent studies, sales prices are down by 3%, and leasing volume has fallen 4% as a direct response to the pandemic.⁵

¹ Jim Berry, *COVID-19 Implications For Commercial Real Estate, Preparing for the “Next Normal”*, Deloitte Insights (May 1, 2020), <https://www2.deloitte.com/us/en/insights/economy/covid19/covid-19-implications-for-commercial-real-estate-cre.html>.

² Vaibhav Gujral, Robert Palter, Aditya Sanghvi & Brian Vickery, *Commercial Real Estate Must Do More Than Merely Adapt to Coronavirus*, McKinsey & Company (April 9, 2020),

<https://www.mckinsey.com/industries/private-equity-and-principal-investors/ourinsights/commercial-real-estate-must-do-more-than-merely-adapt-to-coronavirus>.

³ Kenan Institute of Private Enterprise, *How Will COVID-19 Affect Commercial Real Estate*, Kenan Insights (April 2020), <https://kenaninstitute.unc.edu/kenan-insight/how-will-covid-19-affectcommercial-real-estate/>.

⁴ National Association of Realtors Research Group, *Commercial Real Estate Trends & Outlook, July 2020 Report*, National Association of Realtors (July 2020).

⁵ *Id.*

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U.S. commercial lending figures for the second quarter (Q2) of 2020 paint an equally dim picture⁶ as commercial lenders turned toward temporary lending freezes and conservative underwriting⁷. These measures resulted in fewer than originally anticipated loan closings for Q2 2020⁸ and have prompted industry leaders to project a continued downward trend through the end of the year⁹.

By contrast, residential real estate appears to be performing at much better rates than its commercial counterpart. Statistics consistently show this sector is booming despite the ongoing pandemic. According to a recent report issued jointly by the U.S. Census Bureau and the Department of Housing and Urban Development, sales of new single-family houses rose by 4.8% in August when compared to July 2020 rates, and by a startling 43.2% when compared to August 2019¹⁰. Residential closings in Virginia seem to support this national trend toward growth; according to the Virginia Realtors Report¹¹, Virginia's housing market bounced back quite strongly in July with significant increases in sales activity throughout the Commonwealth¹². Statewide July 2020 sales were up 13.2% compared to sales in July 2019, and up 10.7% over June 2020 sales¹³.

THE LEGAL FRAMEWORK FOR REMOTE CLOSINGS

When considering the historic low mortgage rates we are currently experiencing, it is hardly a surprise to see the boom in residential real estate. But as that growth continues, buyers and sellers ready to proceed with their transactions continue to face logistical roadblocks to closing. Traditionally, real estate transactions involved execution of written instruments in the presence of a notary public, with the executed originals then being delivered to the settlement agent for closing. Pre-COVID, signing in the presence of a notary public was the prevailing method for executing closing documents. Federal and state laws permitting electronic signature and remote online notarizations, while available, were rarely relied upon to facilitate closings.

⁶ A recent study performed by Promontory Interfinancial Network, LLC indicates that surveyed executives rank commercial real estate and business lending among the major impacts of COVID19, with nearly a quarter of all surveyed respondents ranking commercial and industrial lending as their top concern during COVID times. Promontory Interfinancial Network, LLC, *Bankers Fear Impact of COVID-19 on Commercial Real Estate, C&I Lending*, CISION PR Newswire (August 18, 2020), <https://www.prnewswire.com/news-releases/bankers-fear-impact-of-covid-19-on-commercial-realestate-ci-lending-301114235.html>. See also Bill Hughes, *Initial Impact of COVID-19 on Commercial Real Estate Operations*, Applied Research Initiative, Bergstrom Real Estate Center (September 22, 2020), <https://news.warrington.ufl.edu/faculty-and-research/initial-impact-of-covid-19-on-uscommercial-real-estate/>.

[estate-operations/](#).

⁷ Richard Barkham, Spencer G. Levy and Mark Gallagher, Q2 U.S. Lending Figures, CBRE (2020), <http://cbre.vo.llnwd.net/grgservices/secure/US%20Lending%20FiguresQ2%202020.pdf?e=1601148648&h>

⁸ *Id.* at 3.

⁹ National Association of Realtors Research Group, *supra* note 4.

¹⁰ U.S. Census Bureau, *Monthly New Residential Sales, August 2020, Release Number CB20-148* (September 24, 2020).

¹¹ Virginia Realtors, *Homes Sales Reports*, (July 2020), <https://virginiarealtors.org/researchstatistics/home-sales-reports/>.

¹² *Id.*

¹³ *Id.* It should be noted that during the initial stages of the pandemic, Virginia homes sales indicate a decrease in transactions volume with the biggest decline felt in May when home sales were down 31.88% compared to May 2019 numbers. Virginia Realtors, *Homes Sales Reports*, (March – June 2020), <https://virginiarealtors.org/research-statistics/home-sales-reports/>.

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Over the course of the last two decades, a number of laws and statutes have addressed the permissibility of digital tools to facilitate the execution and notarization of instruments. In 1999, the Uniform Electronic Transactions Act (UETA) established a legal foundation for the use of electronic communications and signatures in certain transactions¹⁴. A year later, the Electronic Signature in Global and National Commerce (ESIGN) Act¹⁵ was passed to permit the use of electronic records and signatures in interstate and foreign commerce. Both UETA and ESIGN provide the general legal framework for electronic signatures in the United States and ensure that electronic signatures remain on the same legal footing as original signatures. In one form or another, 47 states, Washington, D.C. and U.S. Virgin Islands have all adopted UETA and ESIGN, while the three remaining states (Illinois, New York and Washington) have passed their own versions of electronic signature laws which are more or less consistent with UETA and ESIGN¹⁶.

In addition to electronic signature laws, over the past few years an increasing number of states have also passed Remote Online Notarization (RON) laws enabling a notary to take acknowledgment of signatures from remote parties using electronic means (i.e. Zoom video, Skype, etc.). In 2011, Virginia became the first state to pass a RON statute allowing for remote online notarizations¹⁷. Following Virginia, 23 other states have passed RON statutes recognizing the legal validity and enforceability of remote online notarizations¹⁸. RON laws vary state by state and it is important to refer to the state-specific RON statute in order to determine the requirements for remote online notarizations. In addition to RON laws, states have also adopted electronic notarization statutes, which by contrast allow the notary to use an electronic seal while the signatory executes an instrument electronically (i.e. via DocuSign). Many states without RON legislation (or whose RON legislation is temporary) have electronic notarization statutes instead.

Prior to the onset of COVID-19, approximately 55% of states had yet to pass legislation regarding the acceptability of RONs¹⁹. However, recognizing the challenges presented by COVID-19 and in an effort to clear the path for business continuity during the pandemic, states have increasingly issued emergency executive orders or passed legislation, which among other items, address the legality of electronic signatures and remote online notarizations²⁰. These orders permit remote online

notarizations either on a temporary or permanent basis, and while intended to clear any logistical barriers to real estate closings, a number of these orders present their own challenges for out-of-state parties. Executive orders in several states recognize the validity of remote online notarizations as long as both the signatory and the notary public are physically located in that state, with the added condition that the notary public must be a duly licensed attorney in that state. For out-of-state buyers and sellers unable to travel during the pandemic, such requirement can become a difficult logistical barrier to overcome causing many parties to either delay closing or find a way to revert back to the traditional wet signature method of executing closing documents.

¹⁴ Frank E. Arado and Adam J. Engel, *The COVID-19 Pandemic: Impacts on Real Estate Transactions*, National Law Review Vol. X, No. 206 (July 24, 2020). UETA does not apply to wills, codicils or testamentary trusts, transactions governed by UCITA, certain provisions of the UCC or transactions states explicitly carve-out as exceptions. *Id.*

¹⁵ 15 U.S.C. Â§ 96 (2000).

¹⁶ Frank E. Arado and Adam J. Engel, *supra* note 14.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* See also Stephen Connolly and Christine DiBiase, *How COVID-19 Can Impact Upcoming Real Estate Transactions and What Buyers and Sellers Can Do to Avoid Default*, The AP&S Business Law (March 17, 2020).

²⁰ Fannie Mae has also recently issued a letter approving the use of RON statutes for certain residential mortgage loans subject to its guidelines and required title insurance. Fannie Mae, Lender Letter (LL-2020-03) (March 23, 2020).

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Recognizing the need for consistent RON standards, federal bipartisan efforts are underway to pass federal legislation addressing remote and electronic notarization. The Securing and Enabling Commerce Using Remote and Electronic (SECURE) Notarization Act of 2020 was introduced to the U.S. Senate on March 18th and has thus far been endorsed by the American Land Title Association, the Mortgage Bankers Association and the National Association of Realtors. The bill is currently sitting with the Committee on the Judiciary, but if adopted, the SECURE Notarization Act would authorize every notary in the United States to perform remote online notarizations and establish minimum standards for electronic and remote notarizations.

Moreover, an important facet of digitized instruments is their acceptability by local recording offices. Many states have adopted legislation derived from the Uniform Real Property Electronic Recording Act ²¹, which authorizes the recording of instruments executed and notarized via electronic means. On a national basis, we are seeing more and more recording offices accept documents for electronic recording. However, each jurisdiction varies in its permissibility of electronic recordings and it is important to check on specific local rules before proceeding with electronic signatures and remote online notarization.

COVID-19 has challenged us to re-think the conventional real estate closing methods. Recent legal changes addressing the validity of electronic signatures and remote notarizations have, to a degree, facilitated the path toward full virtual closings. Nonetheless, it remains to be seen whether COVID19

has pushed the real estate closing process toward long-term changes or whether the industry will revert to its pre-COVID practices once the pandemic is over. One thing is certain: COVID-19 is forcing real estate practitioners to leverage RON laws and all they have to offer.



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Category

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