

On January 5, 2020, Bernalillo County reported it had been hit by a suspected ransomware attack, forcing it to close most county buildings, including the county clerk's office. This development has impacted a number of Closings and prompted many questions:

CLOSING

The title companies are requesting that if the parties can delay Closing, to please do so. The closure of Bernalillo County offices has made it impossible to file deeds, mortgages and other documents, as well as check the records for any new liens or judgments against the Property. In addition, the title companies are unable to get current tax information required for Closing. Consequently, if the parties are in a position to delay Closing, they should do so by amendment to the Purchase Agreement (NMAR Form 5104). It is anticipated that this issue will resolve by week's end, but there are no guarantees.

In the event Closing cannot be delayed or the parties are unwilling to do so, please review the following.

In the NMAR Residential Purchase Agreement, Form 2104 ("PA"), Closing is defined as "a series of events by which Buyer and Seller satisfy all of their obligations in this Agreement." Closing is broken down into three sections:

- **Settlement/Signing Date:** *the date by which all parties must sign and deliver to the responsible Closing Officer all documents required to complete the transaction and to perform all other Closing obligations of this Agreement; AND provide for the delivery of all required funds, exclusive of lender funds, if any, using wired, certified, or other "ready" funds acceptable to the Closing officer.*
- **Funding Date:** *the date by which the buyer must make all funds available to the Closing Officer for disbursement; and*
- **Possession Date:** *the date the Seller must deliver possession of the Property to the Buyer*

Settlement/Signing

Given these definitions, despite the county closure, the parties would still be able to "Settle/Sign." However, if funding cannot take place by the Funding Date (see below), the parties may be relieved from performance. **Consequently, if the lender will not fund, the parties should either extend the Closing Date (if the parties are amenable to doing so) or seek legal counsel before proceeding to sign the Closing documents.**

Funding

Some lenders are funding as usual. Some are reluctant to fund out of concern that their security interest (the mortgage or deed of trust) will not have priority. Those with concern, will either not disburse funds to the title company or will not allow the title company to

disburse the funds to the seller until recordation has occurred. **It will be imperative for the buyer to communicate with the lender and the title company about funding.**

Lender is WILLING to Fund

Some lenders will fund without conditions. Some lenders that would not otherwise fund will do so if the title company is willing to give the lender assurances their security interest will be in first position in the record. If the lender is willing to fund and to allow the title company to release those funds to the seller prior to recordation, then the issue becomes one of the Possession Date. (see below).

Lender Is UNWILLING to Fund

In the event the lender is NOT willing to fund, then the Force Majeure of the PA, the financing contingency of the PA and/or the defense of impossibility may be relevant.

1. The **Force Majeure** paragraph of the PA (Para. 47) addresses certain circumstances beyond the parties control that result in a delay in performance or an inability of one or both parties to perform. In the case of a Force Majeure event, all time periods, including Closing Date, will be extended up to 10 days after Bernalillo County allows for filings. If the clerk's office remains closed 30 days beyond the respective Settlement/Signing Date, then either party would have the unilateral right to terminate the PA by delivering written notice to the other and any earnest money deposited would be refunded to the buyer"; or
2. The failure of the buyer to obtain funding by the Funding Date, through no fault of the buyer's, may trigger the **Financing Contingency**. The financing contingency in the PA states *"this Agreement is contingent upon Buyer's ability to obtain a loan(s) in the amount stated above in Para. 2(B)."* If the buyer cannot obtain funds because the lender won't fund by the Funding Date, then the financing contingency provides that the buyer is not in breach; however, the buyer is at risk of losing their earnest money if a written rejection letter is not obtained from the lender within three¹ days before Closing; or
3. The buyer may be able to assert ***impossibility of contract performance***, which is an excuse for the nonperformance of duties under a contract based on a change in circumstances, the nonoccurrence of which was an underlying assumption of the contract, that makes performance of the contract impossible. A defense of impossibility would be raised in response to a claim that the buyer breached the PA by failing to timely remit funds.

¹ In the PA, the default for notification of a written rejection from the lender is 3 days, unless otherwise stated by the parties.

Possession

First review the PA to determine when the buyer is to receive possession of the Property. The first box under Possession Date in the PA, and the option most commonly chosen, states that possession will take place when Funding Date Requirements are met. Funding Date Requirements are met when *“the Closing Officer has all funds available to disburse as required by the PA; and the Closing Officer has recorded with the County Clerk all required documents.”*

If the PA provides the buyer will get possession when the Funding Date Requirements are met, then despite funding, the buyer will **not** get possession until the title company is able to record. In order for the buyer to take possession upon funding, but before recording, the PA would have to be amended to provide that the buyer gets possession *when seller receives all funds the buyer is required to remit under the PA* (NMAR Form 5101).

Q AND As

Q: If the deed executed by the seller conveying the Property to the buyer is not recorded, has the Property been conveyed to the buyer?

A: Yes. New Mexico law is clear *“deed of land, though not recorded, is good as between grantor and grantee, and divests the title of the former.”* In other words, if the seller signs the warranty deed, but it is not recorded, the Property has been conveyed to the buyer. With this said, the PA between the buyer and seller provides that the buyer must compensate the seller by a certain date (Funding Date) for the conveyance of the Property. For this reason, if the lender will not fund, the parties should either extend the date for Settlement/Signing, Funding and Possession or speak to legal counsel before signing Closing documents.

Q: If all Closing documents are signed and lender has funded, but the deed is not yet recorded and the buyer moves into the Property, will the parties need a Buyer Occupancy Agreement?

A: No. In the event the buyer takes possession after Settlement/Signing and funding, an Buyer Occupancy Agreement is not necessary, as the buyer is the owner of the Property. If the buyer is going to move in before Closing documents are signed, a Buyer Occupancy Agreement would be necessary.

Q: If something should happen to the Property after the buyer takes possession, will the buyer’s homeowner’s insurance cover the loss?

A: It’s unlikely that recordation of the deed is required for the buyer’s homeowner’s insurance to be effective, **but the buyer should confirm that the buyer’s homeowner’s insurance does not require recordation of the deed for insurance.** If the buyer’s insurance does require recordation, then the seller will need to maintain their policy until recordation takes place and notify their carrier that they are NOT occupying the home.

Q: What if it is a cash or seller financed transaction?

A: In the event the transaction is a cash or a seller-financed deal, the buyer will not be at the mercy of the lender and funding should take place as normal. The issue of possession, as discussed above, would remain the same.

Q: What if the seller gets a lien filed against the Property prior to filing of the deed conveying the Property to the buyer?

A: Several points are relevant here:

- While the county clerk's office is closed, other parties are also unable to file liens against the Property (it's not just the title companies);
- **Title insurance will cover the buyer up until the time the deed is recorded, so the buyer is covered for any last-minute liens or clouds on the title that are filed before the deed conveying the Property to the buyer is filed;**
- Paragraph 13(C) of the PA requires the seller to satisfy any such lien or judgment; and
- Some title companies may have the seller sign an additional document in which the seller acknowledges their obligation to satisfy any such and lien and/or judgment and to indemnify (reimburse) the title company for any money they should have to pay out to the buyer to cover such a lien or judgment.

Q. Is all of this applicable to a closing that is contingent on another transaction?

A. Title companies are reviewing these type transactions on a case-by-case basis. These type files have a greater chance of getting recorded erroneously and the title company may refuse to Close them until recording can take place.

Q. Up to what date were the title companies last able to search?

A. Title companies were able to search up to the date the last filings were posted, so binders should be certified through 5:00 pm on January 4, 2022. Confirm with the title company.