

NOTES TO NEW COOPERATIVE CONTRACT OF SALE
New York City Bar Association

A new form of contract of sale for the transfer of a cooperative apartment has been approved by both the New York City Bar Association and the New York State Bar Association. The new contract form contains significant improvements and changes to the predecessor form of contract, which has been in use since 2001. Work began on the new contract form in the autumn of 2017 at the City Bar's Committee on Condominium & Cooperative Law¹.

Notably, the general format and paragraph order between the predecessor contract form and the new form are unchanged, so the new form should seem familiar and easy to follow to most readers who have used the predecessor form. The new form clarifies many provisions of the predecessor form and, in an even-handed manner, addresses many of the "hot-button" topics of the last two decades in the field of cooperative conveyancing. A primary goal of the City Bar and the State Bar, in approving the new form, is that it become the industry standard. The new form should help to reduce the time and expense of negotiations, leading to a more streamlined cooperative transfer process for all participants.

The changes from the predecessor form and the new form are primarily intended to accomplish the following goals:

- I. *To update the predecessor form and make it easier to comprehend for parties and practitioners;*
- II. *To incorporate provisions frequently added to the predecessor form through riders with the recognition that "seller" and "purchaser" riders, and the resulting negotiation of common issues, may not be eliminated altogether but should be more abbreviated;*
- III. *To recognize customary methods of communication commonly in use; and*
- IV. *To provide protection to parties and to practitioners who may be unfamiliar with the form of contract for cooperative transactions and/or with the laws applicable to cooperative corporations.*

¹ A review panel of attorneys from the City Bar met regularly for approximately three years; the panel was initially led by Robert J. Smith, Esq. and then by Margery N. Weinstein, Esq. Other active participants included Andrew P. Brucker, Esq., Douglas P. Heller, Esq., Richard Klein, Esq., Jeffrey S. Lederman, Esq., Steven Troup, Esq., and (at the time) law students Tatiana Z. Pawlowski and Andrew E. Zeyer. Members of the City Bar who participated in the approval process include Alfred R. Fuente, Esq., Ronald Gold, Esq., Elise Kessler, Esq., and Christopher Tumulty, Esq. In addition, Erica Buckley, Esq., Arun Chandra, Esq., Kenneth Finger, Esq., Steven M. Goldman, Esq., Diane M. Lowenberger, Esq., Ingrid Manevitz, Esq., and Roger Wolper, Esq., all representing the New York State Bar Association, participated in the approval process.

The most salient changes between the predecessor contract form and the new contract form are highlighted below. In these notes, a word beginning with a capitalized letter has the meaning ascribed to that word in the new contract form.

Some of the changes between the predecessor form and the new form are the outcome of lengthy dialogue, debate (and disagreement) within members of the review panel; the resulting language, on occasion, presents a “compromise” position between a seller’s position and a purchaser’s position. In those situations, the respective attorneys to a transaction where the new form is utilized may want to continue to strengthen their position by augmenting the new form with their own riders. These instances are noted below.

- ¶ 1: **Certain Definitions and Information.** In practice, social security numbers are typically provided by telephone, near closing, so as to protect the Seller’s and Purchaser’s privacy. In listing the contact information of the parties and their attorneys, email addresses are included as email has become one of the standard means of contact.
- ¶ 1.3: The term “Escrowee” is no longer limited to either the Seller’s or Purchaser’s Attorney, in recognition that many law firms no longer hold escrows.
- ¶ 1.11: The term “Personalty” has been changed to “Personal Property” throughout the new contract form. To avoid ambiguity, ‘scones, ceiling fans’ and ‘built-in bookshelves and articles of property and fixtures attached to or appurtenant to the Unit’ have been added to the Personal Property included in the sale. The above wording is intended to cover items such as built-in televisions (such as flat-screens) and other built-in audio equipment.
- ¶ 1.12: To avoid confusion with the term “Personal Property” (as defined in ¶ 1.11 to refer to all items included in the sale), the panel eliminates the word “personal” in ¶ 1.12 when referring to property that is not included in the sale.
- ¶ 1.13: The term “Included Interests” has been broadened (from Storage, Servant’s Room and Parking Space) to include ‘Fitness Room Membership’.
- ¶ 1.14 &
¶ 1.15 The panel discussed, at length, whether to add a “time-of-the-essence” concept to enforce the time for Closing. However, this concept was rejected due to the number of parties involved in a transfer and the multitude of factual situations that can, and do, arise. **Note:** This topic may be covered in a rider provision, if and when appropriate given the specific facts of the transaction and market conditions.
- ¶ 1.23: In describing “Proposed Occupants” of the Unit, a new subparagraph .2 has been added in which the Purchaser is to disclose which, if any, of the Proposed

Occupants will be occupying the apartment as a primary residence and which Proposed Occupants will not be a primary resident. Such information is valuable to a cooperative corporation and its managing agent.

- ¶ 1.23.3: This new subparagraph requires Purchaser to disclose any Proposed Occupants who “smoke tobacco or other products or utilize water pipes, electronic cigarettes, or vaping products”, information that may be valuable to a cooperative corporation and its managing agent, particularly since many cooperative corporations allow smoking within apartment units but continue to confront second-hand smoke issues in their buildings.
- ¶ 1.23.4: While Purchaser is still required to disclose the presence of “pets”, this new subparagraph clarifies that service animals or any other animals which Purchaser may harbor under disability statutes “relating to a disability which Purchaser is able to document” are not “pets” and do not need to be disclosed.
- ¶ 1.25: This new section applies within the City of New York and potentially other jurisdictions, as required by law. It is a reminder to practitioners to attach the applicable cooperative corporation’s smoking policy as an exhibit to the contract.
- ¶ 1.26: This new paragraph defines “Business Day.” Note that, generally, the panel retained “Business Days” throughout the Contract for short time periods of approximately 10 or fewer days. For longer time periods in the Contract, the panel generally chose to express time periods in calendar days rather than Business Days.
- ¶ 2.2.1: **Agreement to Sell and Purchase; Purchase Price; Escrow.** Language has been added to allow for the Contract Deposit to be paid by wire if the parties and Escrowee approve. This language recognizes that, while wire transfers have become the preferred means of payment for many parties involved in cooperative transfer transactions, some parties continue to refuse to receive wired funds due to concerns with wire fraud.
- ¶ 2.2.2: Provision has been made for paying the balance at Closing by wire transfer, if Seller allows. Similar to ¶2.2.1 above, this recognizes that certain sellers and their attorneys continue to prefer bank checks to avoid wire fraud and the possible delay in acknowledging receipt of wired funds.
- ¶ 4.1.6: **Representations and Covenants.** In the predecessor form, Seller represented that Seller has not made any material alterations or additions to the Unit without any required consent of the cooperative corporation or without compliance with applicable laws. However, this representation did not survive Closing. Seller’s representations in ¶ 4.1.6 in the new form now survives in the same manner as all other Seller representations. As with all other Seller representations, any action thereon must be instituted within one year after Closing (see also ¶ 4.3).

Further, language has been added to ¶ 4.1.6 requiring that all governmental permits and approvals for alterations that a Seller performed have been closed, completed, withdrawn and/or signed off. Typically, language similar to this appears in many current Purchaser's attorney's riders. **Note:** This clause was the subject of internal debate; the panel did not extend the Seller representations to alterations performed by predecessors of Seller.

¶ 4.1.7: The provision now includes language stating that a Seller 'is not a party to', and has no knowledge of, any agreement "which has not been delivered to Purchaser" affecting title to the Unit, its use or its occupancy, or which would be binding upon Purchaser (such as a sublease or an alteration agreement). If any such agreements exist, the new contract form now requires Seller to deliver a copy thereof prior to Contract execution. **Note:** When a Seller has renovated an apartment but cannot locate and deliver to the Purchaser a copy of the pertinent alterations agreement, the Purchaser's attorney may wish to add a rider paragraph addressing the situation. This is especially important when the cooperative corporation requires an incoming purchaser to deliver a "hold harmless" agreement at Closing in favor of the cooperative corporation, with respect to the work performed under a predecessor owner's alterations agreement.

¶ 4.1.10 &
¶ 4.1.15:

New Seller Representations. New Seller representations have been added to reflect provisions that are commonly included in most current Purchaser's riders to give additional protection to the Purchasers. The review panel considered other time-frames (12 months, 18 months) but deemed 24 months to be most proper as it is consistent with the time-frame utilized in the most recent form of contract of sale for a condominium transaction. The new Seller representations are as follows:

¶ 4.1.10: This new subparagraph adds a Seller representation, qualified as to knowledge, that there have been no bed bugs "in the Unit or an adjacent or contiguous unit". The topic of Seller's knowledge of bedbug infestation building-wide was also raised within the panel, but panelists concluded that the Purchaser could obtain such information from the Managing Agent.

¶ 4.1.11: This new subparagraph adds a Seller representation, qualified as to knowledge, that there has been no determination by a licensed inspector as to the presence of toxic mold in the Unit. Note that the term "toxic mold" is not defined.

¶ 4.1.12: This new subparagraph adds a Seller representation, qualified as to knowledge, that there have been no leaks into or from the Unit and that the Unit shall be delivered free of leaks which are Seller's responsibility to repair.

- ¶ 4.1.13: This new subparagraph adds a Seller representation that Seller has made no insurance claims – this could give insight to the condition of the Unit (or the building) that a Purchaser’s review of the Board minutes might not otherwise reveal.
- ¶ 4.1.14: This new subparagraph adds a Seller representation that neither Seller nor any shareholder or occupant of the Unit have made any written complaints to the Board, Managing Agent or any other unit owner, shareholder or occupant regarding the Unit, the building or any other shareholder, occupant or unit in the building. The Board minutes may not cover this type of important information.
- ¶ 4.1.15: This new paragraph adds a Seller representation, qualified as to knowledge, that there is no material default or condition which Seller must cure. Also see new ¶ 27.2, which provides that, as a requirement of Purchaser’s obligation to close, if Seller has actual knowledge of a material default or condition requiring Seller to cure prior to Closing, Seller shall cure same before Closing.
- ¶ 4.2.7 &
¶ 4.2.9: **New Purchaser Representations.** These Purchaser representations have been added to reflect provisions almost universally included in Seller’s riders and to give additional protection to Sellers, as follows:
- ¶ 4.2.7: This new paragraph adds a Purchaser representation that the cooperative corporation will not be required to approve alterations prior to or as a condition of Closing. **Note:** The parties can provide in a rider whenever the terms of the transaction are otherwise.
- ¶ 4.2.8: This new paragraph adds a Purchaser representation that the prospective Purchaser will not require the cooperative corporation to approve a trust or limited liability company prior to or as a condition of closing. **Note:** The parties can provide in a rider whenever the terms of the transaction are otherwise.
- ¶ 4.2.9 &
¶ 4.2.10: The predecessor contract form included certain Purchaser financial representations in an “optional rider” (all of which appeared at the end of the printed form). The new contract form incorporates and clarifies such representations in ¶ 4.2.9 and ¶ 4.2.10.
- ¶ 4.3 &
¶ 4.1.6: **Note:** The survival clause was the subject of substantial debate in the review panel, particularly whether ¶ 4.1.6 (Seller’s representation as to alterations) should continue to be carved out from surviving Closing. The panel finally determined that all representations, including ¶ 4.1.6, would survive Closing, but that any action based thereon must be instituted within one year. This

treatment is consistent with the most recent (2015) form of contract suggested for use in condominium transfers throughout the State of New York.

- ¶ 5: **Corporate Documents.** This newly revised provision now requires the Purchaser to confirm that, in addition to reviewing other documents of the Corporation, Purchaser has reviewed the Corporation's purchase application, with the proviso that such purchase application has been made available to Purchaser prior to execution of the contract of sale.
- ¶ 6.2.1 **Required Approvals and References.** The change to this subparagraph reflects that a copy of the Loan Commitment Letter, if one has been issued to the prospective borrower, is a standard requirement of the cooperative corporation's purchase application and is no longer an optional component.
- ¶ 6.3: The definition "Scheduled Closing Date" (defined in ¶ 1.15) is utilized consistently; also, adjournment where the cooperative corporation has not made a decision on the application has been changed to either "30 Business Days or to such earlier date, as agreed" by the parties. The predecessor form mandated a full 30 Business Day adjournment in all such situations.
- ¶ 7.1: **Condition of Unit and Personal Property.** In addition to covenanting that all appliances and the smoke detector will be in working order at Closing, this paragraph has been modified to require Seller to covenant that all building systems and fixtures in the Unit, to the extent that they are Seller's responsibility under the proprietary lease, shall work, and that there shall be a working carbon monoxide detector in the Unit. These changes are frequently included in a Purchaser's attorney's rider.
- ¶ 7.2: In the new form, Seller is required to repair damage to the Unit caused by the removal of Personal Property but immaterial damage "such as small holes that can be removed by touch-up plaster, spackle or similar material or touch-up paint" are expressly not required to be repaired. Again, language such as this frequently appears in a Purchaser's attorney's rider.
- ¶ 8.3: **Risk of Loss.** New language has been added requiring Seller to indicate in a Loss Notice whether Seller "reasonably estimates" the casualty damage to be material (as defined in the GOL 5-1311 as more than 5% of the Purchase Price).
- ¶ 8.4 and
¶ 8.7: Certain clarifications have been made to the predecessor form that recognize that if there is material damage and Purchaser elects to proceed, the parties shall negotiate whether there will be a price abatement, and if so, its amount. If no consensus is reached, the Purchaser simply will not close.

- ¶ 9: **Closing Location.** The Closing is to be held in the same county as the Premises or to be held remotely upon the request of the cooperative corporation request; this latter change recognizes the frequency with which remote closings now occur.
- ¶ 10.1.3: **Closing.** Seller’s deliverables have been updated to include the Form IT-2664 (to reflect situations where Seller is subject to a non-resident income tax).
- ¶ 10.1.5: Key fobs, key cards, remote control devices and security codes have been added as deliverables, reflecting current devices available for providing access.
- ¶ 10.1.8: This provision adds the delivery of an affidavit that there is an operable carbon monoxide detector.
- ¶ 10.3.2: The language “other governmental filing requirements” has been inserted to reflect modifications to existing filings, or new filing requirements imposed in the future.
- ¶ 10.3.4: In order to avoid future disputes as to the authenticity of closing documents, the parties will have to deliver proof of the authority of a person signing on behalf of an entity that such person can bind such entity.
- ¶ 10.4.2: As an addition to, or an alternative to, the cooperative corporation assigning the existing proprietary lease to the Purchaser at Closing, language has been added to reflect the common practice of issuing a new proprietary lease to the Purchaser at Closing.
- ¶ 11.3: **Closing Fees, Taxes, Apportionments.** The word “expense” is added throughout, to reflect that certain funds paid in connection with a Closing are not necessarily “fees” imposed but rather are expenses incurred (for example, the expense of a lien search required by the cooperative corporation).
- ¶ 11.7 This new paragraph has been added to clarify that Seller or its designee is responsible for filing the transfer tax forms and the Form IT-2664 and making the payments thereunder in a timely manner, unless Purchaser or its designee expressly takes on that responsibility. This paragraph survives Closing.
- ¶ 12.3: **Broker.** This new paragraph includes a mutual indemnity for breaches of the brokerage representations and covenants; frequently, such an indemnity has been part of the parties’ riders to the predecessor form of contract.
- ¶ 13.2: **Defaults, Remedies and Indemnities.** In the new form, Purchaser’s remedies in the event of a Seller default or misrepresentation have been clarified to specifically include the enforcement of the brokerage indemnity in ¶12.3.

- ¶ 13.4: Wire transfers have been added as a method of payment of the Contract Deposit.
- ¶ 14.1: **Entire Agreement; Modification.** A new sentence has been added that neither party to the Contract has relied on any statements, representations, covenants or agreements by any person which is not stated specifically in this Contract.
- ¶ 14.2: In recognition of the widespread use of email, the new form includes a clause that clarifies that an email “confirmed by the recipient” constitutes “a writing” for the purposes of extending time limitations, making changes or waiving provisions in the Contract.
- ¶ 16.1: **Seller’s Inability.** If Seller is unable to perform, the time period for Seller’s adjournment of Closing has been reduced to 45 calendar days (from 60 calendar days), with such period commencing “from the Scheduled Closing Date, or the date on which the Board communicates its approval to either party, whichever is later...” The panel considered other time periods, but determined that the 45 calendar day period is most fair to both parties. The remaining portion of the change is included in the new form in order to clarify an ambiguity that has often been dealt within riders.
- ¶ 17.2,
¶ 17.3.4 & ¶ 17.7: **Notices and Contract Delivery.** The changes to the notice provision provide for email delivery of the signed Contract and other notices. The panel considered requiring receipted emails when final, fully signed Contracts are circulated, which is now the common practice, but felt that very few practitioners actually require, or wait for, such a receipt. Confirmation of transmission of an email, however, is required for notices sent only by email; panel members felt that mere emails are likely to be overlooked while the receipt of a final, fully signed Contract would not be disregarded, as the attorney would be anticipating its arrival.
- ¶ 18.1.2 **Financing Provisions.** There is new language clarifying that a lender’s conditional offer to make a loan does not become a “Loan Commitment Letter” for purposes of the Contract unless “Project Approval” (as defined by various governmental lending authorities) has been met. In addition, there is new language that provides that neither a “pre-qualification letter” nor a “pre-approval letter” is to be considered a “Loan Commitment Letter”.
- ¶ 18.2.1: The time period for Purchaser to make an application to an Institutional Lender has been changed from 5 Business Days to 7 Business Days to afford purchasers the possibility of at least one weekend to gather documents and prepare a loan application.
- ¶ 18.3.1.4 &

- ¶ 18.3.7.2: The time period for which a Loan Commitment Letter must remain in effect after the Scheduled Closing Date has been changed (from 30 Business Days to 45 calendar days) to simplify the calculation of days.
- ¶ 18.3.2: Common experience is that closings rarely occur on the date designated as the Scheduled Closing Date. The italicized clause below has been added to the new form to reflect this: a cancellation of the Contract pursuant to ¶ 18.3.1.3 or ¶ 18.3.1.4 must be delivered prior to the Scheduled Closing Date “*as same may be adjourned...*”
- ¶ 18.3.4: New language has been added to clarify the procedure by which Seller can terminate the Contract if Purchaser has not obtained a Loan Commitment Letter or has failed to waive the loan commitment contingency, while also allowing for flexibility as to the means of such notification.
- ¶ 21: **Inspections.** Inspections are now to take place in the presence of Seller or a Seller representative. Purchaser is now responsible for any damage caused by Purchaser’s representatives prior to Closing. Such clarifications are frequently found in the parties’ riders to the predecessor form.
- ¶ 23.2: **No Assignment by Purchaser; Death of Purchaser.** If Purchaser dies, the Contract is terminated; new language provides that Purchaser’s attorney shall direct the refund of the Contract Deposit. This will facilitate the ease with which Seller’s responsibility under the Contract ends and should avoid Seller having to wade into Purchaser’s estate/intestate issues. **Note:** The panel discussed, but decided against, having the termination provision apply in the event of death of *either* person comprising Purchaser, if Purchaser is comprised of multiple persons. This clarification may be the subject of a Purchaser’s rider provision when factually appropriate.
- ¶ 26: **Internal Revenue Service Reporting Requirement.** A new section has been added to require compliance with IRC §6054(e) as to reporting of real estate transactions.
- ¶ 29: **Prevailing Party Legal Fees.** This new section has been added to put both Purchaser and Seller on notice that all fees, including reasonable legal fees, related to enforcement and/or redress for breaches of the Contract shall be paid by the non-prevailing party in such a dispute. This language is intentionally broad.
- ¶ 31: **Contract Not Binding Until Signed and Delivered.** Provisions have been added stating that the Contract is not binding until Seller delivers a fully signed Contract to Purchaser or Purchaser’s attorney in accordance with ¶ 17, which includes email delivery. Providing for counterpart language and digital, electronic or scanned copies recognizes realities of practice and provisions that are frequently included in riders to the predecessor form.

¶ 31.4: The panel inserted language to cover the frequent occasion of Escrowee forgetting to sign the Contract, but such language is not applicable where a separate escrow agreement has been executed by the Escrowee and all parties.

¶ Exhibit A: **Smoking.** A placeholder has been inserted for attachment of the Corporation's Smoking Policy, which is a requirement of law in the City of New York.²

Attachment:

New Contract Form (see attached)

² NYC Administrative Code §§17-506.1(b)(2)-(5).