



E- Recording is Coming To New York

By Benjamin Weinstock, Esq.

My beloved property law professor often joked that nothing new has happened in real estate law for more than 400 years. Well, perhaps 35 years ago he was correct. However, the changes that have transpired during my career are stunning, and another game-changer is about to happen.

In a mere nine months, the way we record real estate transactions will undergo a fundamental change by entering the digital age. Deeds, mortgages, leases and other conveyances will be “on the public record” at the speed of light, rather than the snail’s pace at which many recording offices presently dysfunction.

On September 23, 2011 Governor Cuomo signed into law Senate Bill 2373A and Assembly Bill 6870A, adding section 291-1 to the Real Property Law. The law will technically become effective on Saturday, September 22, 2012, although practically it will first be operative on Monday, September 24, 2012, when recording offices open for business. On that date, everyone offering an instrument for recording in a County where the recording officer, usually the County Clerk, has opted to participate in electronic recording, will have the opportunity to record a digitized image of the original paper instrument, or an electronically executed instrument, without the need to present the original paper instrument to the Clerk.

In support of the legislation, the bill’s sponsors noted that virtually all businesses have become “e-businesses.” They concluded that local government must respond to the ongoing challenge to deliver more services with fewer



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resources. Not only will e-recording save money for County Clerks, it will assuredly be more efficient and enhance service. Even the State’s Court System has learned to be e-friendly by creating “NYSCEF” to allow electronic filing in some cases.

The sponsoring memos predict a dramatic reduction in the number of paper records that recorders will need to image and store. This will result in a corresponding reduction in personnel costs, postage for mailing hard copies of documents back to the recording party, and fewer errors in the recording process.

The exact details of how the system will work are still being developed, but certain specific mechanisms and concepts are in the statute.

The public will still be permitted to record the “old-fashioned way.” - the way it’s done now. Original signed and notarized instruments, together with the recording fees, cover sheets, transfer tax returns and equalization forms as applicable are delivered to the County Clerk, who examines the documents and then, if they are acceptable, records them in the same chronological order as received. A distinctive record number, or liber/book and page is assigned and each instrument is date and time stamped with the recording information.

Under e-recording, a scanned image of the original paper instrument may be transmitted to the County Clerk by email together with the ancillary forms. The instrument will be considered “delivered” during the Clerk’s business hours on the date and time when the instrument is first

successfully transmitted to the County Clerk. Recording is instantaneous. It occurs when the instrument is "delivered." This creates two interesting problems.

First, documents that queue up overnight (while the Clerk's Office is closed) will be first in line when the Clerk's Office opens in the morning. They will obtain priority over documents that are hand-delivered in the morning, notwithstanding that the legislation attempts to maintain parity between electronic and manual filers.

Second, the new law does not expressly give the recording officer a right to examine or reject the document offered for recording. Instead, the law says that the recording officer is required to immediately send a written on electronic notification of the delivery of the instrument, and it is deemed recorded as of the moment of delivery. It is hard for me to imagine that recording officers will easily forgo their traditional review of instruments offered for recording, and based on discussion with the County Clerk's Association, the Clerks intend to accept documents for e-recording, subject to a right to reject defective instruments.

Under current recording methods, a newly recorded instrument is not immediately viewable by the public. It is sent to be imaged electronically and surfaces for public examination days or weeks later. However, under e-recording, since the instrument is already digitized it will presumably be available for viewing immediately upon recording.

One of the biggest changes effected by the statute is that instruments may be recorded when they are signed and notarized electronically. They do not need a party's or notary's "wet signature" which the law defines as a "signature affixed in ink

or pencil or other material to a paper document." Electronic signatures and notaries are permitted. Many of us still remember when one could not record an instrument signed in blue ink in Suffolk County. Surely we would not have predicted that one day instruments signed in pencil (or signed with electrons) will be recordable.

The technological specifications for the software that one may use to deliver a digital image or electronic signature under the new law remain unknown. To help sort things out the law appoints the State's Office for Technology as the Electronic Facilitator to ensure consistency in the standards and practices Statewide and to insure adequate safety and security for the records. No matter what system is selected by the Electronic Facilitator, the statute says that it must accurately depict the information in the original paper document in a format that cannot be altered without detection. The pdf imaging technology that we all use might be insufficient.

Noticeably absent from the statute is the mechanism for the payment of recording fees. While it might be as simple as submitting payment by credit card or PayPal, the Electronic Facilitator might specify a more complicated method, perhaps involving the establishment of deposit accounts to be debited by the recording officer.

The new law has the potential to bring real estate transactions into the fast lane of the information superhighway, provided the Electronic Facilitator takes prudent action to adopt workable rules and regulations consistent with commonplace electronic commerce. To the contrary, a bureaucratic approach to e-recording will be stifling and will doom the program.

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