



REALTY NEWSLETTER

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During the 2002 session of the New York Legislature, the following laws affecting real property were enacted and signed by the Governor.

Acknowledgements-Out of State: Section 309-b RPL respecting out of state acknowledgments, was amended by the addition of a new subdivision 6, by Chapter 609, Laws of 2002. This new addition clarifies the meaning of a “non-substantial variance” which is permitted by this section respecting the validity of such an acknowledgement. A non-jurat error as to the city or other political subdivision; and the state, county or other place; is now declared not to invalidate such an acknowledgement. Became effective 1-1-2003.

Authentication of Equalization Forms: Chapter 259, Laws of 2002, by amending RPL 333(1-e)(iv), extends authority previously granted, to condemnors, tax districts, and purchasers at mortgage foreclosure sales, to certify the accuracy of Equalization Forms made in connection with transfers of title, to real property involved in such involuntary transfers of real property located within the City of New York. It also eliminated the charge of \$25.00 made by New York City recording officers for the filing of NYC Deed Transfer Tax Forms. Became effective 1-1-2003.

Brokerage Referrals - Compensation For: Chapter 482, Laws of 2002, amends the RPL by adding a new section 442-l, which prohibits a real estate broker or salesperson, to demand or receive a referral fee or compensation of any kind, from any person or other entity, relative to: (a) Finding a Seller, after a *bona fide* listing agreement has been signed; or (b) Finding a Buyer after a *bona fide* buyers’ agency agreement has been signed;- unless a reasonable cause for such payment exists. A violation of this Section shall constitute a “Deceptive Act or Practice” within the meaning of General Business Law, Section 349. Becomes effective 2-16-2003.

Carbon Monoxide Detectors: A new subdivision 5-a of Section 378 of the Executive Law, added by Chapter 257 of the Laws of 2002, requires that every one or two-family dwelling, condominium unit, or cooperative apartment constructed or offered for sale, shall have installed a operable carbon monoxide detector. Became effective 11-28-2002.

Construction Contracts: A new Article 35-E has been added to the General Business Law by Chapter 127, Laws of 2002, which establishes certain procedures for the prompt payment of all parties performing work pursuant to a “construction contract”. A “Construction Contract” is defined as a contract providing for the construction, alteration, repair, maintenance, moving or demolition of a building or structure; and the development or improvement of land. This new law affects all such defined improvements where the aggregate cost of the construction project (inclusive of labor, services, materials and furnished equipment) exceeds \$250,000.

It does not include municipal or public projects; nor does it pertain to 1, 2, or 3 family residences; residential development tracts of 150 units or less of 1 or 2 family residences; or any residential construction project of an aggregate size of less than 9,000 square feet. Likewise excluded, are projects in the World Trade Construction area in lower Manhattan in New York City.

It outlines the procedures and timeliness for the issuing and payment of invoices; with or without construction lender approval; and provides for the withholding of portions of the total project cost for final payments; and the terms and conditions relevant thereto. It provides for the payment of interest at the rate of 1% per month, commencing the day after the due date (as defined therein,) of the monies required by the statute to be paid, but which have not been paid as of such time. It further provides for the issuance of a “Notice of Intent” by a contractor or subcontractor, or the provider of materials and services, to suspend performance by

reason of their failure to receive such prompt payment; and requires that the terms and conditions of such suspension of performance be set forth in such Notice. However, it does permit as allowed causes for such non-payment: unsatisfactory or disputed job progress; defective construction work or materials; or disputed work; among others.

Except as to provisions in “construction contracts” which make the contract subject to the laws of another state; or which require litigation, arbitration, or other dispute resolution arising from the contract to be conducted in another state; or which provide that a party cannot suspend performance under such a contract, if another party to the contract fails to make prompt payment in accordance therewith;- the terms and conditions of a “construction contract” shall supersede the provisions of this Article. Became effective 1-18-2003.

Filing Surrogates Accounting: Chapter 457, Laws of 2002, amending the S.C.P.A. 719, expands the authority of the Surrogates, acting on their own initiative, or on motion of certain scheduled interested parties, to compel an accounting; and to suspend, modify or revoke letters issued to a fiduciary who fails to file an accounting; or to respond to orders of the Court; and to issue letters to a successor fiduciary. Became effective 11-1-2002.

Foreclosure of Mortgages Given for Matrimonial Attorney’s Fees: Enacted as Chapter 71, Laws of 2002, this law prohibits the bringing of a foreclosure action, or a sale pursuant to such an action, of a mortgage given by a litigant on their “primary residence”, to an attorney to secure the payment of legal fees for services rendered to such litigant in connection with a matrimonial action. Such a prohibition was specifically stated in said law not to affect the validity of the indebtedness or interest secured by such a mortgage. Became effective 5-21-2002.

“High-Cost” Home Loans; Foreclosure Thereof; Responsibility of Home Improvement Contractors: In an effort to protect home owners from being fleeced by unscrupulous lenders, Chapter 626 of the Laws of 2002, through the tri-part addition of sections to the Banking Law; the Real Property Actions and Proceedings Law; and the General Business Law, adopted special procedures relating to the creation of “High-Cost” Home Loans; the Foreclosure thereof; and the regulation of the agreements entered into in connection with the financing of such home improvements. Set forth as new section 6-1 added to the Banking Law, this portion of the

Chapter 626 regarding “High-Cost Home Loans,” applies only to a mortgage debt incurred by natural persons; the debt incurred being used primarily to finance a personal, family or household purpose; the home loan being secured by real estate in this State, upon which a structure exists, or is to be a structure, intended principally for occupancy by one to four families; one of which will be occupied by the borrower as the borrower’s principal dwelling; which does not to exceed \$300,000, or such lesser sum as is established by FNMA as the loan size limit for a comparable dwelling in a geographic area.

This section defines “high-cost” home loans as existing where the terms of the loan exceeds one or more of the following thresholds: 1. Where a first lien mortgage loan exceeds 8 percentage points over the Treasury securities yield for comparable periods of maturity of the loan; or 9 percentage points over such yield in the instance of a subordinate loan; as both of such yields are therein defined and calculated; or 2. Where the total points and fees exceeds 5% of the total loan amount, if the loan is 50,000, or more; 6% if the total loan amount, exceeds \$50,000, and the home loan is a purchase money mortgage loan guaranteed by the FHA or the VA; or these points are the greater of 6% or \$1,500, if the loan amount is less than \$50,000; provided that in certain circumstances, discounted points of up to 2 points payable by the borrower are excluded from this calculation. [See limitations on inclusions and exclusions set forth for these point calculations and conditions in Sec. 6-1(1)(g)(ii)(1) and (2).]

In relation to such “high-cost” loans, among the prohibited practices and limitations, are: 1. No provision permitting the lender, in the absence of a default, at its sole discretion, to accelerate the payment of the mortgage; 2. No provision requiring a “balloon” type scheduled payment of more than twice the amount as the average of the earlier scheduled payments, in the first 15 years of the mortgage loan; 3. No negative amortization provisions; and 4. No provision increasing the interest rate in the event of default. [See Sec. 6-1(2) for additional prohibitions and limitations.] Before such transactions involving “high-cost” home loans shall close, the prospective Borrower must be given a “CONSUMER CAUTION AND HOME OWNERSHIP COUNSELING NOTICE; the form for which is set forth in the statute; and such mortgage document executed in connection therewith, shall include a legend on top of the mortgage in 12-point type stating that the mortgage is a “High-Cost” Home Loan subject to this section.

Violators of the foregoing provisions shall be liable to the Borrower for actual damages, including

consequential or incidental damages, in addition to the following new provisions of the RPAPL, subject to a fail save provision permitted as to inadvertent errors as set forth in Subsection 4. Those provisions which deal with foreclosure of “high-cost” mortgage loans, are set forth as new section 1302 of the RPAPL, and provide that in actions to foreclose such home loans, the complaint must contain an affirmative allegation prior to the entry of judgment by default or otherwise, that plaintiff mortgage banker or exempt organization has complied with the aforesaid provisions of Section 595-A of the Banking Law; which allegation must be proven to the satisfaction of the court. It further provides that a violation of any provision of Section 6-1, is a defense to such foreclosure action.

This Chapter 626 also adds a new Section 771-a to the General Business Law, which requires a Home Improvement Contractor to disclose to the party who has engaged their services, whether such contractor has paid or received a fee, payment, or thing of value, in connection with the financing of such home improvement. If such monies or thing of value has been paid or received, the parties to such transaction must execute a writing by which they have agreed to such financing transaction. Becomes effective 4-3-2003, as to all loans made after such date, and the promulgation of rules and procedures by the Superintendent of Banking.

Mechanics Liens-Discharge by Posting of Surety: Old Sec. 19(4), of the Lien Law, repealed by this Chapter 582, Laws of 2002, provided for the posting of an undertaking by two or more sureties, equal to the amount claimed by the lienor, or such higher amount as determined by the Court, which surety arrangement was required to be approved by the Court. The major change effected by this Chapter, by way of a new Sec. 19(4), was to create an alternate procedure, which obviates the requirement of a Court order; and which provides that the amount of the bond or undertaking shall be 110% of the amount of such lien, “conditioned for the payment of any judgment which may be rendered against the property for the enforcement of the lien.”

This alternative procedure can be followed where the bond or undertaking was issued by a fidelity or surety company authorized to do such business in New York State, and where a valid and subsisting Certificate of Qualification has been issued to such entity by the Superintendent of Insurance pursuant to Sec. 1111 of the Insurance Law. Became effective 1-1-2003.

Mortgage Foreclosure - Referee’s Payment of Taxes: Chapter 348, Laws of 2002 amends previous statutory authority granted to referees

appointed in mortgage foreclosure actions to pay open real property taxes and assessments out of sale proceeds, by eliminating such authority from referees in actions to foreclose mortgages on real property in cities above 125,000 population, and below 175,000.[Previous bottom limit was 150,000.] Became effective 8-8-2002.

Mortgagee’s Tax Notification: RPTL 953(8) requires “Mortgage Investing Institutions” (ie. banks, mortgage lenders, mortgage servicers) to notify a mortgagor who has retained title, in writing, within 21 days after receipt of the final payment, that unless said mortgagor has established a new real property tax escrow account;- that said mortgagor will be obliged to pay their real property taxes directly to the appropriate tax collection officer. Chapter 520, Laws of 2002 adds a new subsection 8.A which imposes upon a non-complying “Mortgage Investing Institution” the liability for any interest or penalty charged or imposed upon the former mortgagor of such institution, by a taxing municipality, county and/or tax delinquency tax enforcement agency, for the non-payment or late payment of real property taxes in the first taxable year following the satisfaction of the mortgage held by such institution, where such required notice has not been sent by such institution. Became effective 9-17-2002.

Payment of Taxes-Officially Posted: Chapter 568, Laws of 2002, adds a new RPTL Sec. 925 which provides that a mailed (in a postpaid wrapper, properly addressed) to the appropriate collecting officer, and deposited in a Post Office or Official Depository maintained by the U.S. Post Office, shall, upon delivery to the tax collector, be deemed to have been made to such collecting officer, as of the date post marked on such wrapper. This result is not effected by a posting via a metered mail service or machine. Became effective 9-24-2002.

Real Property Tax Exemptions-One Family: Chapter 160, Laws of 2002 extends exemptions (permitted under RPTL 421-b) for one-family private residential structures; or which structures are first being used as one-family residential structures, constructed within the cities of New York and Buffalo, where construction of such residential structures are commenced prior to 7-1-2006; and which structures have been completed no later than 7-1-2008. Became effective 7-23-2002.

Real Property Tax Exemptions-Senior Citizen: Chapters 201 and 202, Laws of 2002, raised from \$20,000 to \$21,500 the maximum income eligibility

respecting exemptions granted to persons over the age of 65 years, who may, or may not have certain disabilities. Became effective 7-30-2002.

Real Property Tax Exemptions-Wind & Solar: A new subdivision 9, has been added by Chapter 608, Laws of 2002 to Section 487 of the RPTL, which authorizes counties, cities, towns, villages and school districts [except school districts lying within the Cities of New York, Buffalo, Rochester, Syracuse and Yonkers] who have permitted the continuance of such exemptions given pursuant to Section 487;- to require the owner of property which includes a solar or wind energy system to enter into a contract for payments to be made in lieu of taxes. Such tax agreements shall not operate for a period of more than 15 years from the date such exemption becomes effective; and the annual payments to be made pursuant to such agreements, shall not exceed the amounts which would otherwise have been payable as taxes, but for the enactment of this law. Became effective 10-2-2002.

Sheriff's Fees-Civil Division: Section 8011 of the CPLR has been amended by Chapter 655 of the Laws of 2002 so as to increase a series of fees chargeable by the Civil Division of the Sheriff's Department, respecting attachments against real and personal property; and other services rendered by said Sheriff's office. Services for which the fees were \$10.00 each, have been raised to \$15.00; those which were \$26.00, have been raised to \$40.00; and seizures of defendants' chattels and executions of warrants of eviction which were \$50.00, have been raised to \$75.00. Becomes effective 2-24-2003.

The following are some of the Advisory Opinions issued by the Technical Services Division of the New York State Department of Taxation and Finance in the year 2002:

Corporation Tax-Nominee Corporation: Since 1974, Petitioner-Corporation has been the record owner of certain real property. It was Dissolved by Proclamation by the Secretary of State in 1979. At all times during the relevant period, the principal partner believed that her partnership had been the owner; which partnership paid all bills; executed all leases; and made all business decisions with respect to said property. At no time did the Petitioner exercise any dominion over this property; pay any bills relating thereto; or maintain a bank account.

This Opinion found that Petitioner, as "a dissolved corporation that is merely a record holder of real

property ... as nominee for the benefit of others; is otherwise inactive; and is not conducting business in New York State as contemplated by Sec. 209.3 of the Tax Law." Accordingly, after dissolution, Petitioner was considered to be inactive; acting as a nominee; and not subject to the tax otherwise imposed. **In re Lil'1 Cricket Enterprises, Inc.**, TSB-A-02(15)C. Issued 9-13-2002.

Mortgage Tax-Partial Exemption: Petitioner is a "voluntary nonprofit hospital corporation" licensed pursuant to Article 28 of the Public Health Law. Tax Law Sec. 253.3 provides an exemption from the mortgage recording tax for mortgages made by such hospital corporations. In their analysis of the various services rendered by Petitioner, and the space used within which to render such various services, the Tax Commission concluded that Petitioner used only 43.3% of the premises for "hospital purposes" as defined by PHL Sec. 2801. Accordingly, the Commission, citing *Church Charity Foundation of L.I. v. State Tax Commission (91 A.D.2d 746)*, opined that the Sec. 253.3 mortgage tax exemption would apply only as to that portion of the loan expenditures utilized for "hospital" related purposes; to wit: 43.3% of the mortgage proceeds. **In re United Cerebral Palsy Assocs. of N.Y.S.**, TSB-A-02(3)R. Issued 6-11-2002.

Mortgage Tax-Public Benefit Corp'n & IDA Exemptions: Petitioner, a NYS public benefit corporation, is the fee owner of the subject premises; and as Landlord, has leased the same to the Developer as Tenant. Developer will provide the funds for the construction from its assets, and from the proceeds of a mortgage which it will execute together with Petitioner. Developer's mortgage will lien its leasehold interest; and Petitioner will bind its sub-leased interest which it will thereafter acquire from Developer; but not affect Petitioner's fee interest.

It is well settled that even though Tax Law Sec. 252 does not provide a specific exemption for such mortgaging activities of Petitioner, State agencies enjoy independent immunity from taxation for property utilized in the public interest. In a 1913 opinion, the Attorney General opined that no mortgage recording tax was due when the State acted as a mortgagee. (citing *Matter of Hamilton, 148 NY 310,313-314*). This principal has also been applied where the legal title to the mortgaged premises is held by an I.D.A., even though the beneficial ownership of such property is held by private interests. (cf. *1982 Opins. St. Comp. No. 82-188, P. 240 "One Park Place Assocs."*; also cf. *Hotel Waldorf-Astoria Corp. v. State Tax Comm.*, 86 A.D. 330, 334). Finally, the Battery Park City Act, specifically exempted its mortgages from

taxation, which, since as a specific, rather than a general statute, it overrides the provisions of a general statute. **In re Battery Park City Authority**, TSB-A-02(2)R. Issued 6-5-2002.

Real Estate Transfer Tax-Leasehold Assignment: The assignment of a leasehold is deemed a transfer of an interest in real property for the purposes of Tax Law Sec. 1401(e). Accordingly, this Opinion deals with the procedures for valuating a leasehold, for such purpose. This involves consideration of the value of the leasehold estate, and the value of the Seller's other assets, ie. Leasehold improvements. The Fair Market Value of the leasehold interest is determined at the present (discounted) fair market rental value; and the actual rent payable under the lease, (as the contract rent was less than the current market rent); as increased by leasehold improvements

The Commission further opined that there is no legal authority for reducing the leasehold's fair market value by the cost of hypothetical commissions and other costs; nor for subtracting from fair market value, a landlord's right of recapture under the lease, prior to the assignment. **In re Paul, Hastings, Janofsky & Walker, LLP**, TSB-A-02(5)R. Issued 9-18-2002.

Real Estate Transfer Tax-Purchaser Financed Asset: The transaction at issue, involves several transactions that are or may be considered "conveyances" within the meaning of Tax Law 1401(e): a. Purchaser's assignment of its contract interest to Petitioner; b. The Original Seller's conveyance of the premises to the Purchaser and delivery of same to Petitioner; c. A "Purchaser Financed Asset" ("PFA") transfer by which Purchaser buys the premises from Petitioner in a deferred payment basis; d. Petitioner's delivery of the original Seller's deed to Purchaser; and e. The carrying out of Purchaser's obligations under the PFA agreement through payment of the total amount due purchaser.

Tax Law 1405(b)(2) provides that conveyances which are or were used to secure a debt, are exempt from the RETT. Sec. 575.11 (a) (13) of the Regulations stands for the proposition that a conveyance by a third party (Original Seller) to a Lender, at the direction of Borrower Purchaser), is subject to a borrower (grantee). On these facts, the Tax Commission opined that only transaction "b." is taxable as regards the RETT, since the remaining transactions were accomplished solely to effect and secure Petitioner's financing of Petitioner's acquisition of the real property premises. **In re HSBC Mortgage**

Corporation (USA), et. al. TSB A-02(4)R. Issued: 7-26-2002.

Real Estate Transfer Tax-Trust Exemptions: Petitioner, a 99% Limited Partner in a limited partnership (her wholly owned corporation owns the remainder as the General Partner), seeks to transfer her entire limited partnership interest to an irrevocable Grantor Annuity Trust ("GRAT"). The partnership owns a parcel of commercial real property. Petitioner will irrevocably transfer her interest to the Grat; which, upon its termination, will transfer such interest to a Discretionary Trust for the benefit of her husband and children. Petition will receive guaranteed annuity payments from the Grat for the annuity term, since the same must be paid by the Grat out of its principal, if its income is insufficient for such purpose.

As this would be a transfer of a controlling interest (Tax Law Sec. 1401(c), the tax imposed would be measured by the fair market value of the real property, then measured by the percent of the ownership interest transferred. Accordingly, the transfer of the partnership interest to Grat, would not be exempt as a mere change of identity. As to the subsequent transfer from the Grat to the Discretionary Trust, this would be exempt as a mere change of identity, since there would be no change in the beneficial ownership. **In re Manda Muller Kalimian**, TSB-A-02(1)R. Issued:-4-3-2002.

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