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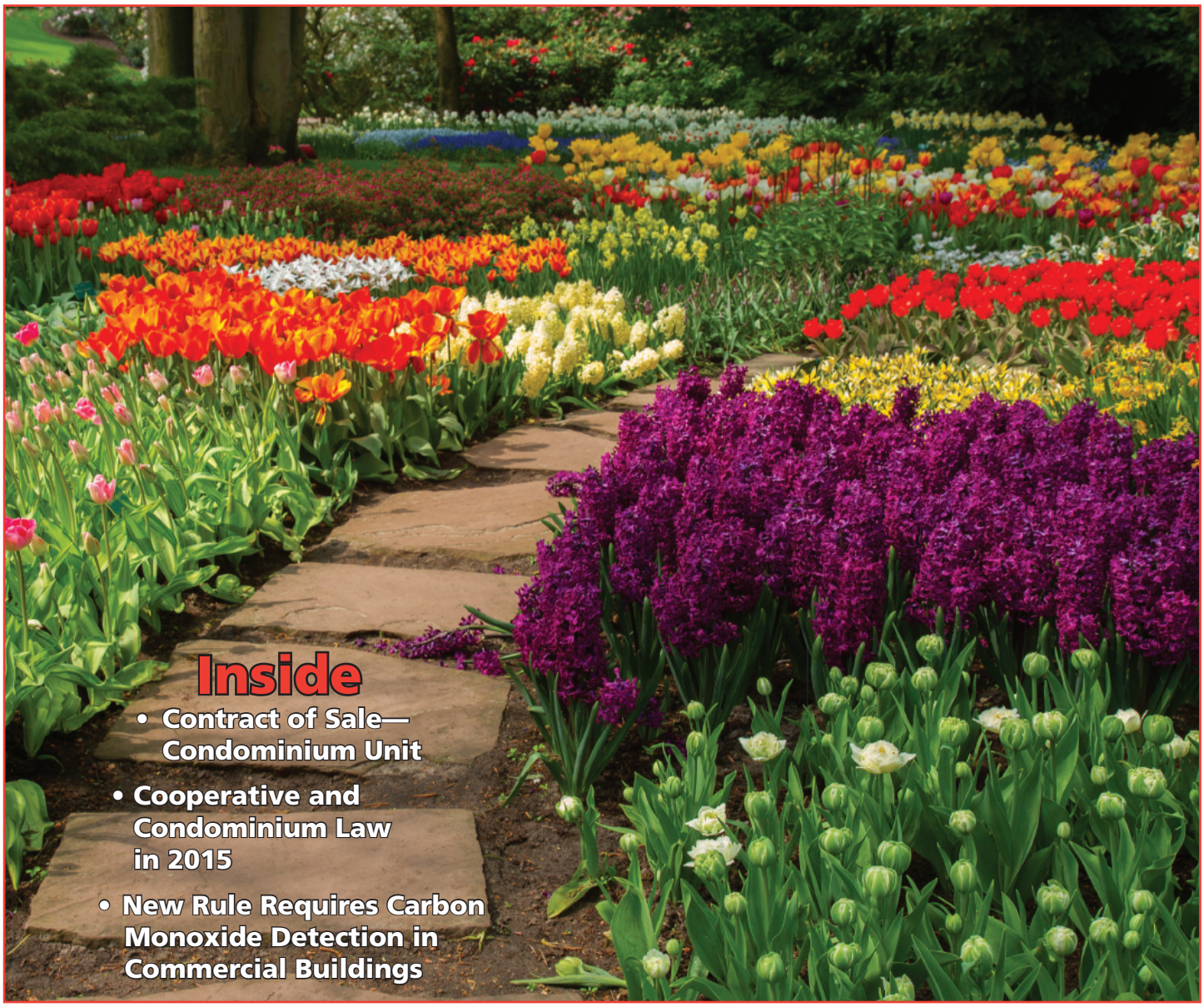
N.Y. Real Property Law Journal

A publication of the Real Property Law Section
of the New York State Bar Association



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Message from the Chair

I write this column shortly after the very successful Section meeting held at the NYSBA annual meeting in January. Once again, our CLE program and luncheon were well attended and provided the participants with valuable CLE credit and much food for thought. Thanks to Mindy Stern for a well-planned and presented program.

The first order of business at the meeting was the report of the Nominating Committee which designated Gerard G. Antetomaso, a Rochester attorney, as the next Secretary of the Section. He will progress through the officer positions, becoming chair of the Section in June, 2019. The report was accepted unanimously and enthusiastically. Congratulations, Jerry.

The annual meeting always provides evidence for me of the valuable services our Section makes available for its members. The CLE program consisted of a presentation on crowdfunding in the real estate context. While a topic not familiar to many of those attending, the presenters, Markley Roderick, David Behin, Mark Mascia and William Skelley, opened many of our minds to the opportunities presented in this arena. For me, it added to my knowledge about what we can expect as we continue to explore alternate methods of financing in the twenty-first century. These are developments we cannot ignore.

The second half of the program redirected our focus from developing trends to some of the basic concepts we deal with in our day-to-day practices. Joshua Stein led a knowledgeable panel consisting of Craig Barnett, James Burnham and Lance Hall through a discussion of valuation, accounting, insurance and finance for lawyers. The explanations and practice tips presented were invaluable for any active real estate practitioner.

In addition to these major presentations, a number of our standing committees held their own meetings. Four of the committees, the Real Estate Financing and the Real Estate Workouts and Bankruptcy committees jointly, the Condominiums and Cooperatives Committee and the Committee on Not-for-Profit Entities and Concerns held separate programs, each providing CLE credit for our members.

I am reiterating events at the annual meeting to highlight the great opportunity provided for members to continue their growth in the practice and the ability to meet and learn from others practicing throughout the state. Your membership in the Section can only be enhanced by actively participating in committee activities and, when possible, attending the annual and summer meetings for valuable CLE presentations.

I would be remiss if I did not also mention the outstanding presentation at the luncheon by John Miller, NYC Deputy Commissioner for Intelligence and Counterterrorism, who presented an intriguing picture of the investigation and prevention of potential terrorism threats. This presentation was sobering yet encouraging regarding the efforts of the New York City Police Department in conjunction with State and Federal agencies.

Of course, the highlight of the luncheon was the presentation of the real estate Professionalism Award to Andrew Herz, a well-known Manhattan real estate lawyer who has been very active on the lecture circuit, and with community activities and Section-sponsored events. Congratulations again, Andy.

Another highlight of the day was the announcement of our two Section-sponsored scholarships. The Lorraine Power Tharp Scholarship was awarded to David Ullman, a Columbia University School of Law student. The Mel Mitzner Scholarship was awarded to Nicholas Zapp, a student at Albany Law School. Congratulations to them both.

I have not focused in prior columns on the importance and the role of our District Representatives. There are District Representatives serving on our Executive Committee representing each of the State judicial districts. These individuals are listed in the back of this journal.

This group exists to serve as liaisons between the Executive Committee and members in the various districts. Many of these representatives arrange events in their districts or together with adjoining districts to try to let our members know what we are doing as a Section.

Equally important, the representatives serve as spokespeople for you, those who practice real estate law throughout the state. Please join in the Section-sponsored events in your area and take advantage of your District Representative's ability to bring to our attention your concerns and interests. We try to address issues which affect you and to provide CLEs which you would find useful. We need to hear from you.

Finally, let me once again encourage all of you to attend the annual summer meeting which will be held July 14 to 17, 2016 at the Boston Marriott Long Wharf Hotel on the waterfront in Boston. Trish Watkins, our second Vice-Chair and summer program chair, promises an enlightening CLE program and a great venue for all of you and your families. I hope to see you there.

Best to all,
Leon T. Sawyko

Contract of Sale—Condominium Unit

Note: This form is intended to deal with matters common to most transactions involving the sale of a condominium unit. Provisions should be added, altered or deleted to suit the circumstances of a particular transaction. No representation is made that this form of contract complies with Section 5-702 of the General Obligations Law ("Plain Language Law").

In the event of any alteration to this form which is not clearly indicated as such, the provisions of the original unaltered form as approved by the Cooperative & Condominium Law Committee of the Association of the Bar of the City of New York and the Committee of Condominiums & Cooperatives of the Real Property Law Section of the New York State Bar Association shall be deemed controlling, regardless of such change.

CONSULT YOUR LAWYER BEFORE SIGNING THIS AGREEMENT

This Contract (the "Contract") for the sale of the Unit as defined below is made as of _____ between "Seller" and "Purchaser" identified below.

1. Certain Definitions and Information

1.1 The "Parties" (each a "Party") are:

1.1.1 "Seller":

Prior names used by Seller:

Address:

1.1.2 "Purchaser":

Prior names used by Purchaser:

Address:

(For security, social security numbers are not included on this form but shall be provided to the attorneys for the Parties upon request.)

1.2 "Attorneys" (each an "Attorney") are (name, address telephone and email):

1.2.1 "Seller's Attorney":

1.2.2 "Purchaser's Attorney":

1.3 "Escrowee" is the [Seller's] [Purchaser's] Attorney [or Title Company] (as defined in ¶3.1.2 below):

1.4 The "Managing Agent" is (name, address telephone and email):

1.5 The real estate "Broker(s)" (see ¶18) is/are (company name, address and individual name):

1.6 The name of the "Condominium" is:

1.7 The unit number is: _____ (the "Unit") located at: _____ (the "Building");

1.8 The Unit's percentage of the undivided interest in the Condominium common elements ("Common Elements") is:

1.9 The tax lot number of the Unit as set forth in the Condominium declaration (the "Declaration") is:

1.10 The real estate taxes for the Unit for the fiscal year of are $_____. The amount of real estate taxes is provided for information only and is not a representation of Seller;

1.11 Seller agrees to sell and Purchaser agrees to purchase the Unit and the Unit's percentage interest in the Common Elements in accordance with the terms and provisions of this Contract;

1.12 The sale includes all of Seller's right, title and interest in and to the following personal property ("Personal Property") to the extent existing in the Unit on the date hereof (strike out inapplicable items): the refrigerators, freezers, ranges, ovens, built-in microwave ovens, dishwashers, garbage disposal units, washing machines, clothes dryers, cabinets and counters, lighting and plumbing fixtures, chandeliers, central air conditioning and/or window or sleeve units, venetian blinds, shades, screens, storm windows and other window treatments, wall-to-wall carpeting, plumbing and heating fixtures, switch plates, door hardware, mirrors, built-in bookshelves and articles of property and fixtures attached to or appurtenant to the Unit, not excluded in ¶1.13, all of which included property and fixtures are represented to be owned by Seller, free and clear of all liens and encumbrances other than those encumbrances ("Permitted Exceptions") set forth on Schedule A and made a part hereof; and

1.13 Specifically excluded from this sale are furniture and furnishings and all other personal property unless specifically included in ¶1.12 and:

1.14 The sale [does] [does not] include Seller's interest in [Storage] [Servant's Room] [Parking Space] No. ___ ("Included Interests") (a Rider is required if any of the Included Interests is/are (a) separate and distinct Condominium Unit(s) or subject to a transferrable license agreement);

1.15 The "Closing" is the delivery of the Closing Documents referred to in ¶3 and the payment of the Balance referred to in ¶1.17.2;

1.16 The date on which Closing is scheduled is _____ ("Scheduled Closing Date") at ___M. at the offices of [Seller's]/[Purchaser's] Attorney or at the office of Purchaser's lending institution or its counsel, provided, however, that such office is located in either the City or County in which either (a) Seller's Attorney maintains an office or (b) the Unit is located;

1.17 The "Purchase Price" is: $_____ payable as follows:

1.17.1 The "Contract Deposit" is: $_____ payable on the signing of this Contract by good check subject to collection, the receipt of which is hereby acknowledged, payable to the order of Escrowee and held in escrow pursuant to ¶13;

1.17.2 The "Balance" of the Purchase Price due at Closing is: $_____ payable by certified check of Purchaser or official bank check (except as otherwise agreed to in writing by the Parties) to the order of Seller (or as Seller otherwise directs);

1.17.3 All checks in payment of the Purchase Price shall represent United States currency and be drawn on or issued by a bank or trust company either chartered in or having a branch and doing business in New York State;

1.17.4 All checks for closing adjustments aggregating in excess of $2,500.00 shall be certified checks of Purchaser or official bank checks payable to Seller or as Seller otherwise directs.

1.18 The monthly common charges (excluding separately billed utility charges) are $_____ (See ¶2.2) (the "Common Charges");

1.19 The assessment, if any, payable to the Condominium, at the date of this Contract is $_____ (the "Assessment"), payable as follows:

1.20 The Condominium's flip tax or transfer fee (apart from the Managing Agent, Condominium or closing attorney fee), if any (the "Flip Tax") shall be paid by the Party upon whom the Flip Tax is imposed by the Condominium, or, if not so imposed, the Flip Tax shall be paid by [Seller] [Purchaser];

1.21 Financing Options (Delete two of the following ¶¶[1.21.1] [1.21.2] [1.21.3]):

1.21.1 Purchaser may apply for financing in connection with this sale and Purchaser's obligation to purchase under this Contract is contingent upon issuance of a Loan Commitment Letter (as defined in ¶19.1.2 below) by the Loan Commitment Date (as defined in ¶1.22 below);

1.21.2 Purchaser may apply for financing in connection with this sale but Purchaser's obligation to purchase under this Contract is not contingent upon issuance of a Loan Commitment Letter;

1.21.3 Purchaser shall not apply for financing in connection with this sale;

1.22 If ¶1.21.1 or 1.21.2 applies, the "Financing Terms" for ¶19 are: A loan of $_____ secured by a mortgage for a term of at least _____ years or such lesser amount or shorter term as applied for or as acceptable to Purchaser; and the "Loan Commitment Date" for ¶19 is _____ calendar days after the Delivery Date (as defined in ¶1.23 below);

1.23 The "Delivery Date" of this Contract is the date on which a fully executed counterpart of this Contract is deemed given to and received by Purchaser or Purchaser's Attorney;

1.24 The Contract Deposit shall be held in a segregated (not commingled with Escrowee's business accounts) [IOLA] [non-IOLA] escrow account. If the account is a non-IOLA account then interest shall be paid to the Party entitled to the Contract Deposit. Interest shall be payable to the party entitled to the Contract Deposit, except as otherwise required by law. The Party receiving the interest shall pay any income taxes thereon. A W-9 or W-8 form shall be submitted, as appropriate. The escrow account shall be at:

Address:

("Depository") (See ¶13)

1.25 All "Proposed Occupants" of the Unit are:

1.25.1 Persons and relationship to Purchaser:

1.25.2 Pets:

2. Representations, Warranties and Covenants: Seller represents, warrants and covenants that:

2.1 Seller is the sole owner of the Unit and the Personal Property together with the Included

Interests and Seller has the full right, power and authority to sell, convey and transfer the same. If Seller is a corporation, partnership, limited liability company, trust or other entity, the Sale has been duly authorized by such entity and the person signing this Contract is fully authorized by the entity to do so, and Seller shall deliver evidence of the same at Closing;

2.2 The Common Charges (excluding separately billed utility charges) for the Unit on the date hereof are as stated above. If the Common Charges as of the date of this Contract have been understated in this Contract, Seller shall give to Purchaser at Closing a lump sum credit equal to twelve times the amount of such understatement as Purchaser's sole and exclusive remedy for such understatement (Example: an understatement of $50.00 per month generates Purchaser a one-time credit of $600.00). Seller has not received any written notice of any intended assessment or increase in Common Charges not reflected above. Purchaser acknowledges that it will not have the right to cancel this Contract in the event of the imposition of any assessment or increase in Common Charges after the date hereof of which Seller has not heretofore received written notice. Seller also represents that Seller has no actual knowledge of an increase in Common Charges or an assessment which has been adopted by the Condominium board of managers (the "Board");

2.3 Seller is not a "sponsor" or a nominee of a "sponsor," or a successor sponsor or nominee or designee of sponsor, under any plan of condominium organization affecting the Unit;

2.4 At the time of Closing, all refrigerators, freezers, ranges, dishwashers, washing machines, clothes dryers, air conditioning equipment and other appliances, fixtures and equipment included in this sale, and all plumbing, heating and electrical systems will be in working order, to the extent maintenance and repair of same is the responsibility of Seller (as opposed to the Condominium);

2.5 If a copy is attached to this Contract, the copy of the certificate of occupancy covering the Unit is a true and correct copy. However, any certificate of occupancy is provided for information only, and the contents thereof do not constitute a representation of Seller;

2.6 Seller is not a "foreign person" as defined in ¶14. (If applicable, delete and provide for compliance with Code Withholding Section, as defined in ¶14);

2.7 Seller has made no material alterations to the Unit, except as enumerated in Schedule A-1;

2.8 Seller has never signed an alteration agreement with the Managing Agent or Board, except as enumerated in Schedule A-2. Seller has no actual knowledge of any material alteration by a prior owner affecting the Unit or alteration agreement affecting the Unit signed by a prior owner of the Unit, except as enumerated in Schedule A-3;

2.9 To the best of Seller's knowledge, there have been no leaks into or emanating from the Unit during the twenty-four (24) months prior to the date of this Contract, and the Unit shall be delivered free from leaks which are the responsibility of Seller to repair at the time of Closing;

2.10 During the twenty-four (24) months prior to the date of this Contract, neither Seller nor to Seller's knowledge any occupants of the Unit have/has made any written complaints to the Board, Managing Agent or any other unit owner regarding the Unit, the Building or any other unit owner, except as set forth in Schedule A-4;

2.11 Seller has received no written notice that the use and/or occupancy of the Unit is in violation of the Declaration, the Condominium's by-laws (the "By-Laws") or house rules (the "House Rules"), or any applicable provision of law;

2.12 Seller has no knowledge of the presence of bedbugs in the Unit or an adjacent or contiguous unit in the Building within the past twenty-four (24) months;

2.13 At Closing, Seller shall have sufficient funds, either from the proceeds of the sale of the Unit or otherwise, to pay all existing liens, judgments, mortgages and other encumbrances;

2.14 Seller has made no insurance claims with respect to the Unit within the past twenty-four (24) months.

2.15 Seller covenants that its representations and covenants contained in this ¶2 shall be true and complete at Closing and shall survive Closing, but any action based thereon must be instituted within twelve (12) months after Closing.

3. **Closing Documents:** At Closing, the Parties shall deliver the following (collectively hereinafter referred to as the "Closing Documents"):

3.1 At Closing, Seller shall deliver the following:

3.1.1 Bargain and sale deed with _____ covenant against grantor's acts ("Deed"), complying with RPL §339-o and containing the covenant

required by Lien Law §13(5), conveying to Purchaser title to the Unit, together with its undivided interest in the Common Elements appurtenant thereto (which shall be deemed to include Seller's rights and obligations with respect to any limited Common Elements attributable to or used in connection with the Unit), free and clear of all liens and encumbrances other than Permitted Exceptions. The Deed shall be executed and acknowledged by Seller and, if requested or required by the Condominium, executed and acknowledged by Purchaser, in proper statutory form for recording;

3.1.2 Provided Seller is a legal entity, and not just one or more natural persons, Seller shall deliver such resolutions and/or affidavits or other evidence as may be reasonably acceptable to Purchaser to the effect that the entity was, at the time of execution of this Contract, authorized to execute and deliver this Contract, and is, at the time of Closing, authorized to execute and deliver the Deed, and any and all other Closing Documents necessary or appropriate to effectuate Closing, and that each of the person(s) actually executing those documents on behalf of that entity is an authorized signatory for that entity for the purposes of effectuating the subject transaction. In the event Seller is a corporation, the Deed shall contain a recital sufficient to establish compliance with the requirements of BCL §909. Evidence of such authorization that would be acceptable to the title company (the "Title Company") from which Purchaser has ordered a title insurance report and which is authorized and licensed to do business in New York State (but not an agent or abstract company unless confirmed by its underwriter in writing) will be deemed to be reasonably acceptable to Purchaser;

3.1.3 A waiver of right of first refusal (the "Waiver") of the Board, evidenced in writing (the "Waiver Confirmation") if required in accordance with ¶5;

3.1.4 A written statement by the Condominium or its Managing Agent stating the date through which the Common Charges and any Assessments due and payable to the Condominium have been paid;

3.1.5 All keys to the doors of, and mailbox for, the Unit; and the keys, key codes or combinations to open or lock any cabinets, interior doors, storage spaces, alarms or other included Personal Property;

3.1.6 Such affidavits and/or other evidence as the Title Company shall reasonably require in order to omit from its title insurance policy all exceptions for judgments, bankruptcies or other returns against Seller and persons or entities whose names are the same as or are similar to Seller's name;

3.1.7 New York City Real Property Transfer Tax Return, if applicable, and New York State Real Estate Transfer Tax Return (including Real Property Transfer Report/Equalization Return, as appropriate), and if required by the Tax Law an IT-2663 form, prepared and duly executed by Seller in proper form for submission;

3.1.8 Checks as may be acceptable to the Title Company in payment of all applicable real property transfer taxes due in connection with the sale, including any tax due in connection with the filing of an IT-2663 form, if applicable, except a transfer tax (such as the so-called New York State "Mansion Tax") which by law is primarily imposed on the purchaser ("Purchaser Transfer Tax"). In lieu of delivery of such checks, Seller shall have the right, upon reasonable prior notice to Purchaser, to cause Purchaser to deliver said checks at Closing and to credit the amount thereof against the balance of the Purchase Price;

3.1.9 Certification pursuant to ¶14 below that Seller is not a foreign person or a withholding certificate from the Internal Revenue Service. (If inapplicable, delete and provide for compliance with the Internal Revenue Code sections described in ¶14);

3.1.10 Affidavit that an operable single station smoke detecting alarm device and an operable carbon monoxide detector are installed pursuant to New York Executive Law §378(5), and, if the Building and the Unit are located within New York City, an affidavit that a single station carbon monoxide detecting alarm device is installed pursuant to N.Y.C. Admin. Code §§28-312.1 and 28-312.2 and NYCRR tit. 19, §1220.1;

3.1.11 Any alteration agreement enumerated in Schedule A-2 or A-3;

3.1.12 Any assignment necessary or appropriate to transfer any Included Interest; and

3.1.13 Any currently effective written warranties and/or operating manuals in Seller's possession for any items of Personal Property that are included in the subject sale;

3.2 At Closing, Purchaser shall deliver the following:

3.2.1 Checks in payment of (y) the Balance; and (z) any Purchaser Transfer Tax (all checks in payment of any Purchaser Transfer Tax shall be in a form acceptable to the Title Company);

3.2.2 If and to the extent required by the Declaration or By-Laws, power of attorney to the Board, prepared by Seller or the Condominium, in the form required by the Condominium, which shall be executed, acknowledged and recorded by Purchaser and, after being recorded, shall be sent to the Condominium;

3.2.3 New York City Real Property Transfer Tax Return, if applicable, and New York State Real Estate Transfer Tax Return, each duly executed by Purchaser and an Affidavit in Lieu of Registration pursuant to New York Multiple Dwelling Law, each in proper form for submission, if applicable; and

3.2.4 If required, New York State Real Property Transfer Report/Equalization Return executed and acknowledged by Purchaser in proper form for submission;

3.3 It is a condition of Purchaser's obligation to close title hereunder that:

3.3.1 All notes or notices of violations of law or government orders, ordinances or requirements affecting the Unit and noted or issued by any governmental department, agency or bureau having jurisdiction which were noted or issued on or prior to the date hereof shall have been cured by Seller, but this shall not include notices of violation, the curing and removal of which are the obligation of the Condominium;

3.3.2 Any written notice to Seller from the Condominium (or its duly authorized representative) that the Unit is in violation of the Declaration, By-Laws or House Rules shall have been cured and;

3.3.3 The Condominium is a valid condominium created pursuant to RPL Art. 9-B and the Title Company will so insure;

3.4 The Parties shall provide such other documents as may be reasonably required or requested by the Title Company or the other Party to effectuate the transfer of title in accordance with this Contract and applicable law;

3.5 The Party having primary responsibility for payment of a particular tax is also responsible for paying any and all interest and penalties in connection with such tax, including any additional amount claimed to be due by the taxing authorities by reason of re-calculation of such tax, which obligation shall survive Closing.

4. Closing Adjustments:

4.1 The following adjustments shall be made as of 11:59 P.M. of the day before Closing:

4.1.1 Real estate taxes and water charges and sewer rents, if separately assessed, on the basis of the fiscal period for which assessed, except that if there is a water meter with respect to the Unit, apportionment shall be based on the last available reading, subject to adjustment after Closing, promptly after the next reading is available; provided, however, that in the event real estate taxes have not, as of the date of Closing, been separately assessed to the Unit, real estate taxes shall be apportioned based upon the Unit's percentage interest in the Common Elements;

4.1.2 Common Charges; and

4.1.3 If fuel is separately stored with respect to the Unit only, the value of fuel stored with respect to the Unit at the price then charged by Seller's supplier (as determined by a letter or certificate to be obtained by Seller from such supplier), including any sales taxes;

4.2 If at the time of Closing the Unit is affected by an Assessment which is or may become payable in installments, then, for the purposes of this Contract, only the unpaid installments which are then past due or required to be paid are to be paid by Seller at Closing. All installments which the Condominium does not require to have been paid by the time of Closing shall be the obligation of Purchaser;

4.3 Any errors or omissions in computing closing adjustments shall be corrected. The provisions of this Article 4 shall survive Closing for six (6) months;

4.4 If the Unit is located in the City of New York, the "customs in respect to title closings" recommended by The Real Estate Board of New York, Inc., as amended and in effect on the date of Closing, shall apply to the adjustments and other matters therein mentioned, except as otherwise set forth in a rider attached hereto;

5. Right of First Refusal:

5.1 If so provided in the Declaration or By-Laws, this sale is subject to and conditioned upon the Waiver. Purchaser shall in good faith submit to the Board or the Managing Agent an application on the form required by the Board, containing such data and together with such documents as

the Board requires, and pay the applicable fees and charges that the Board imposes upon Purchaser. All of the foregoing shall be submitted within 10 business days after the Delivery Date, or, if ¶¶1.21.1 or 1.21.2 applies and the Loan Commitment Letter is required by the Board, within 3 business days after the earlier of (i) the Loan Commitment Date or (ii) the date of receipt of the Loan Commitment Letter. Unless the Board requires a separate submission by Seller, Purchaser's submission of an application shall be deemed to satisfy the notice requirement set forth in the Declaration and/or By-Laws;

5.2 If the Board shall exercise such right of first refusal, Seller shall promptly refund to Purchaser the Contract Deposit and upon the making of such refund this Contract shall be deemed cancelled and of no further force or effect and neither Party shall have any further rights against, or obligations or liabilities to, the other by reason of this Contract. If the Board shall issue a Waiver Confirmation (a copy of which shall be delivered by the recipient to the Parties promptly following receipt thereof), the Parties shall proceed with this sale in accordance with the provisions of this Contract;

5.3 Closing shall be adjourned for up to 30 business days if the Board neither exercises its right of first refusal nor issues a Waiver Confirmation on or before the Scheduled Closing Date. If neither Seller nor Purchaser nor their respective Attorneys shall have received either of such notices by such adjourned Closing Date, then Seller and Purchaser each will have the right to cancel this Contract by giving Notice (as defined in Paragraph 11) to the other, provided that, prior to the giving of such notice of cancellation, neither Seller nor Purchaser nor their respective Attorneys shall have received a Waiver Confirmation. In the event this Contract is cancelled pursuant to the foregoing provisions of this ¶5.3, then the Escrowee shall refund the Contract Deposit to Purchaser;

5.4 Notwithstanding the provisions of the preceding ¶5.3 that otherwise give Seller the right to cancel by reason of not having received a Waiver Confirmation, Purchaser will have the right to reject Seller's notice of cancellation for such reason, thereby obligating Seller to fulfill its obligations and close hereunder, in the event the Title Company agrees to insure title without exception for failure to obtain a Waiver Confirmation, and if applicable Purchaser's Lender advises that it is prepared to close without issuance by the Board of a Waiver Confirmation, or if Purchaser notifies Seller that Purchaser wishes to close notwithstanding the failure of the Board to issue a Waiver Confirmation, provided that if, prior to Closing, one or both of the parties hereto receives notice from the Board of the Board's exercise of its right of first refusal, Purchaser's right to close under the provisions of this ¶5.4 shall terminate;

5.5 If the Board's failure to either exercise such right of first refusal or issue a Waiver Confirmation is attributable to either Party's bad faith conduct, that Party shall then be in default hereunder and the provisions of Article 10 shall apply.

6. Certain Transaction Fees:

6.1 Any fee imposed by the Condominium for the application to the Board for its issuance of a Waiver Confirmation shall be payable by Purchaser;

6.2 Any move-out fee (including deposits) imposed by the Condominium shall be payable by Seller;

6.3 Any move-in fee (including deposits) imposed by the Condominium shall be payable by Purchaser; and

6.4 Any fees for contributions to the working capital fund or reserve fund except for a Flip Tax specifically payable by Seller pursuant to ¶1.20 imposed by the Condominium shall be payable by Purchaser;

6.5 All fees other than those listed in the preceding subparagraphs of this ¶6 in connection with processing the transaction contemplated by this Contract (including but not limited to the legal fees, if any, of the Condominium's attorney in connection with this sale, all "flip taxes," transfer or entrance or exit fees or similar charges however denominated and whether known or unknown) which are imposed by the Condominium shall be paid by the Party upon whom they were expressly imposed. However, if there is ambiguity as to the Party responsible for a particular fee (other than the Flip Tax) then such fee shall be paid in equal portions by Seller and Purchaser. In the event any increase in any aforementioned fee is imposed between the date hereof and the date of Closing, the Party obliged to pay the fee, cost or expense or contribution shall also be obliged to pay the increase.

7. No Other Representations:

7.1 Purchaser has examined or has waived the examination of:

7.1.1 the offering plan, all amendments to the offering plan, the Declaration, the By-Laws and the House Rules;

7.1.2 the minutes of the meetings of the Board and the unit owners;

7.1.3 the alteration policy including any mandatory upgrade policy for windows, plumbing or other unit features;

7.1.4 the form of alteration agreement;

7.1.5 the form of application to purchase, application instructions and related written requirements, and the enumeration and allocation of applicable fees, if any;

7.1.6 the last financial statement of the Condominium; and

7.1.7 all other matters pertaining to this Contract and to the purchase to be made hereunder;

7.2 Purchaser has inspected or waived inspection of the Unit, its fixtures, appliances and equipment and the Personal Property, if any, included in this sale, as well as the Common Elements (except those Common Elements limited in use to other units of the Condominium), and knows the condition thereof and, subject to ¶2.5, agrees to accept the same "as is," i.e., in the condition they are in on the date hereof, subject to normal use, wear and tear between the date hereof and Closing. Purchaser does not rely on any representations made by any broker or by Seller or anyone acting or purporting to act on behalf of Seller as to any matters (including but not limited to square footage or room count) which might influence or affect the decision to execute this Contract or to buy the Unit, or said Personal Property, except those representations and warranties which are specifically set forth in this Contract.

8. **Possession:** Seller shall, prior to Closing, remove from the Unit all furniture, furnishings and other personal property not included in this sale, shall repair any material damage caused by such removal, and shall deliver exclusive possession of the Unit at Closing, vacant, broom-clean and free of tenancies or other rights of use or possession. Seller shall not be responsible for immaterial damage such as small holes that can be repaired with touch-up plaster, spackle or similar material or touch-up paint. Purchaser cannot take possession prior to Closing except pursuant to a separate written agreement signed by Seller and Purchaser.

9. **Access:** Seller shall permit Purchaser and its architect, decorator or other authorized persons to have the right of access to the Unit between the date hereof and Closing for the purpose of inspecting the same and taking measurements, at reasonable times and upon reasonable prior notice to Seller (by telephone or otherwise). Further, Purchaser shall have the right to inspect the Unit at a reasonable time after Seller vacates immediately preceding Closing.

10. **Defaults and Remedies:**

10.1 If Purchaser defaults hereunder, Seller's sole remedy shall be to retain the Contract Deposit as liquidated damages, it being agreed that Seller's damages in case of Purchaser's default might be impossible to ascertain and that the Contract Deposit constitutes a fair and reasonable amount of damages under the circumstances and is not a penalty.

10.2 If Seller defaults hereunder, Purchaser shall have such remedies as Purchaser shall be entitled to at law or in equity, including, but not limited to, specific performance.

11. **Notices:** Any notice, demand, request or other communication ("Notice") given or made hereunder, except for a request for an inspection, which shall not be deemed a Notice, shall be in writing and sent by either Party or that Party's Attorney and delivered by hand or sent by next business day delivery or certified or registered mail, return receipt requested to the other Party at the address set forth in 1.1 hereof and that Party's Attorney, at the address set forth in 1.2 hereof, unless prior Notice has been given that an address of a Party or an Attorney has been changed. A communication by email, fax, telephone or other electronic means shall not qualify as a Notice. Each Notice shall be deemed given on the same day if delivered by hand or the following business day if sent by next business day delivery or the third business day following the date of mailing. Failure to accept a Notice does not invalidate the Notice.

12. **Purchaser's Lien:** The Contract Deposit and all other sums paid on account of this Contract and the reasonable expenses of the Title Report (as defined in ¶15.1 hereof) are hereby made a lien upon the Unit, but such lien shall not continue after default by Purchaser hereunder. This Contract shall not be recorded by either Party.

13. Contract Deposit in Escrow:

13.1 Escrowee shall hold the Contract Deposit (together with any interest thereon) in escrow as set forth in ¶1.17.1 at the Depository insured by the FDIC or equivalent in amounts up to the maximum amount for which insurance is provided by the FDIC, until Closing or sooner termination of this Contract, and shall pay over or apply the Contract Deposit in accordance with the terms of this Contract. The Social Security or Federal Identification numbers of the Parties shall be furnished to Escrowee upon request. At Closing, the Contract Deposit shall be paid by Escrowee to Seller or as Seller otherwise directs. If for any reason Closing does not occur and either of the Parties gives a Notice to Escrowee demanding payment of the Contract Deposit, Escrowee shall give prompt Notice to the other Party of such demand. If Escrowee does not receive Notice of objection from such other Party to the proposed payment within 10 business days after the giving of such Notice, Escrowee is hereby authorized and directed to make such payment. If Escrowee does receive such Notice of objection within such 10 business day period or if for any other reason Escrowee in good faith shall elect not to make such payment, Escrowee shall continue to hold such amount until otherwise directed by Notice from the Parties or a final, nonappealable judgment, order or decree of a court. However, Escrowee shall have the right at any time to deposit the Contract Deposit with the clerk of a court in the county in which the Unit is located and shall give Notice of such deposit to the Parties. Upon such deposit or other disbursement in accordance with the terms of this ¶13, Escrowee shall be relieved and discharged of all further obligations and responsibilities hereunder.

13.2 The Parties acknowledge that, with regard to the Contract Deposit, Escrowee is acting solely as a stakeholder without compensation at their request and for their convenience and that Escrowee shall not be liable to either Party for any act or omission on its part unless taken or suffered in bad faith or in willful disregard of this Contract or involving gross negligence on the part of Escrowee. The Parties jointly and severally (with right of contribution) agree to defend (by attorneys selected by Escrowee), indemnify and hold Escrowee harmless from and against all costs, claims and expenses (including reasonable attorneys' fees either paid to retain attorneys or representing the fair value of legal services rendered by Escrowee to itself and disbursements, court costs and litigation expenses) incurred in connection with the performance of Escrowee's duties hereunder, except with respect to actions or omissions taken or suffered by Escrowee in bad faith or in willful disregard of this Contract or involving gross negligence on the part of Escrowee.

13.3 Escrowee may act or refrain from acting in respect of any matter referred to herein in full reliance upon and with the advice of counsel which may be selected by Escrowee (including any member of Escrowee's firm) and shall be fully protected in so acting or refraining from action upon the advice of such counsel.

13.4 Escrowee acknowledges receipt of the Contract Deposit by check subject to collection or by wire transfer and Escrowee's agreement to the provisions of this ¶13 by signing in the place indicated in this Contract.

13.5 In the event the Contract Deposit exceeds the maximum amount for which insurance is provided by the FDIC, the Parties understand the amount in excess of the maximum amount insured by the FDIC may be uninsured unless appropriate provisions are made, such as having more than one Depository.

13.6 Escrowee or any member of its firm shall be permitted to act as counsel for Seller (assuming Seller's counsel is acting as Escrowee) in any dispute as to the disbursement of the Contract Deposit or any other dispute between the Parties whether or not Escrowee is in possession of the Contract Deposit and continues to act as Escrowee.

13.7 If the Escrowee is the attorney for one of the parties hereto, that party shall be liable for any loss of the Contract Deposit. If the Escrowee is Seller's Attorney, then Purchaser shall be credited with the amount of the Contract Deposit at Closing. If Escrowee is a title company, the Party who designates the Escrowee shall be liable for any loss of the Contract Deposit.

14. FIRPTA: The Parties shall comply with IRC §§897 and 1445 and the regulations thereunder as same may be amended ("FIRPTA"). If applicable, Seller shall execute and deliver to Purchaser at Closing a Certification of Non-Foreign Status ("CNS") or deliver a Withholding Certificate from the IRS. If Seller fails to deliver a CNS or a Withholding Certificate, Purchaser shall withhold from the Balance, and remit to the IRS, such sum as may be required by law, up to and including 10% of the Purchase Price. Seller hereby waives any right of action against

Purchaser on account of such withholding and/or remittance. Any cost or expense that may be incurred as a result of such actions, including without limitation Purchaser's Attorneys fees and/or accounting fees, shall be paid by Seller. This paragraph shall survive Closing.

15. Title Report; Acceptable Title:

15.1 Purchaser shall, within 10 business days after the date hereof, or if ¶1.21.1 applies, within 3 business days after receipt of the Loan Commitment Letter, order a title insurance report (the "Title Report") from the Title Company. Promptly after receipt of the Title Report and thereafter of any continuations thereof and supplements thereto, Purchaser shall forward (or cause the Title Company to forward) a copy of each such Title Report, continuation or supplement to the Seller's Attorney. Purchaser shall further promptly notify Seller's Attorney of any other objections to title not reflected in the Title Report reasonably promptly after becoming aware of such objections.

15.2 Any unpaid taxes, assessments, water charges and sewer rents payable by the Seller, together with the interest and penalties thereon to a date not less than two days following the date of Closing, and any other liens and encumbrances which Seller is obligated to pay and discharge or which are against corporations, estates or other persons in the chain of title, together with the cost of recording or filing any instruments necessary to discharge such liens and encumbrances of record, may be paid out of the proceeds of the monies payable at Closing. Upon request made a reasonable time before Closing, Purchaser shall provide at Closing separate checks for the foregoing payable to the order of the holder of any such lien, charge or encumbrance and otherwise complying with ¶1.17. If the Title Company is willing to insure Purchaser that such charges, liens and encumbrances will not be collected out of or enforced against the Unit and is willing to insure the lien of Purchaser's lender, if any, free and clear of any such charges, liens and encumbrances, then Seller shall have the right in lieu of payment and discharge to deposit with the Title Company such funds or to give such assurance or to pay such special or additional premiums as the Title Company may require in order to so insure. In such case, the charges, liens and encumbrances with respect to which the Title Company has agreed so to insure shall not be considered objections to title. Any fees, costs or expenses incurred in connection with the payment of such charges, liens and/or encumbrances shall be paid by Seller. The provisions of this subparagraph shall survive Closing.

15.3 Seller shall convey and Purchaser shall accept fee simple title to the Unit in accordance with the terms of the Contract, subject only to: (1) the Permitted Exceptions and (2) such other matters as (i) the Title Company or any other title insurer licensed by the State of New York (but not an agent or abstract company) shall be willing, without special or additional premium, to omit as exceptions to coverage or to insure against collection out of or enforcement against the Unit. Notwithstanding the foregoing, if ¶1.21.1 applies and the Loan Commitment Letter (as defined in ¶19.1.2) is issued pursuant to ¶19, then Purchaser shall not be required to accept any defect in title which the Institutional Lender (as defined in ¶19.1.2) will not accept.

15.4 Notwithstanding any contrary provisions in this Contract, express or implied, or any contrary rule of law or custom, if Seller shall be unable to convey the Unit in accordance with this Contract (provided that Seller shall release, discharge or otherwise cure at or prior to Closing any matter created by Seller and any existing mortgage, unless this sale is subject to it) and if Purchaser elects not to complete this transaction without abatement of the Purchase Price, the sole obligation and liability of Seller shall be to refund the Contract Deposit to Purchaser, together with the reasonable cost of the Title Report, and upon the making of such refund and payment, this Contract shall be deemed cancelled and of no further force or effect and neither of the Parties shall have any further rights against, or obligations or liabilities to, the other by reason of this Contract. However, nothing contained in this ¶15.4 shall be construed to relieve Seller from liability due to willful default.

16. Risk of Loss; Casualty:

16.1 The risk of loss or damage to the Unit or the Personal Property, by fire or other casualty, until the earlier of Closing or possession of the Unit by Purchaser, is assumed by Seller, but without any obligation of Seller to repair or replace any such loss or damage unless Seller elects to do so as hereinafter provided. For purposes of this ¶16 only, the term "Unit" shall be deemed to include a terrace, balcony, private yard, parking space and/or storage space appurtenant to the Unit. Seller shall notify Purchaser of the occurrence of any such loss or damage to the Unit or the Personal Property within 10 days after such occurrence or by the date of Closing, whichever first

occurs, and by such Notice shall state whether or not Seller elects to repair or restore the Unit and/or Personal Property, as the case may be. If Seller elects to make such repairs and restorations, Seller's Notice shall set forth an adjourned date for Closing, which shall be not more than 60 days after the date of the giving of Seller's Notice. If Seller either does not elect to do so or, having elected to make such repairs and restorations, fails to complete the same on or before said adjourned date for Closing, or if the Board fails to fulfill its obligations to repair or restore any Common Element that materially affects the Unit, Purchaser shall have the following options:

16.1.1 To declare this Contract cancelled and of no further force or effect and receive a refund of the Contract Deposit in which event neither of the Parties shall thereafter have any further rights against, or obligations or liabilities to, the other by reason of the Contract, or

16.1.2 To complete the purchase in accordance with this Contract without reduction in the Purchase Price, except as provided in the next sentence. If Seller carries hazard insurance covering such loss or damage, Seller shall turn over to Purchaser at Closing the net proceeds actually collected by Seller under the provisions of such hazard insurance policies to the extent that they are attributable to loss of or damage to any property included in this sale, less any sums theretofore expended by Seller in repairing or replacing such loss or damage or in collecting such proceeds; and Seller shall assign (without recourse to Seller) Seller's right to receive any additional insurance proceeds which are attributable to the loss of or damage to the Unit or Personal Property.

16.2 If Seller does not elect to make such repairs and restorations, Purchaser may exercise the resulting option under ¶16.1.1 or 16.1.2 above only by Notice given to Seller within 10 days after receipt of Seller's Notice. If Seller elects to make such repairs and restorations and fails to complete the same on or before the adjourned closing date, Purchaser may exercise either of the resulting options within 10 days after the adjourned closing date.

16.3 In the event of any loss of or damage to the Common Elements which materially and adversely affects access to or use of the Unit, arising after the date of this Contract but prior to Closing, Seller shall notify Purchaser of the occurrence thereof within 10 days after such occurrence or by the date of Closing, whichever occurs first, in which event Purchaser shall have the following options:

16.3.1 To complete the purchase in accordance with this Contract without reduction in the Purchase Price; or

16.3.2 To adjourn Closing until the first to occur of (1) completion of the repair and restoration of the loss or damage to the point that there is no longer a materially adverse effect on the access to or use of the Unit or (2) the 60th day after the date of the giving of Seller's aforesaid Notice. In the event Purchaser elects to adjourn Closing as aforesaid, and such loss or damage is not so repaired and restored within 60 days after the date of the giving of Seller's aforesaid notice, then Purchaser shall have the right either to (x) complete the purchase in accordance with this Contract without reduction in the Purchase Price or (y) declare this Contract cancelled and of no further force or effect and receive a refund of the Contract Deposit, in which latter event neither of the Parties shall thereafter have any further rights against, or obligations or liabilities to, the other by reason of this Contract.

16.4 In the event of any loss of or damage to the Common Elements which does not materially and adversely affect access to or use of the Unit, Purchaser shall accept title to the Unit in accordance with this Contract without abatement of the Purchase Price.

17. Internal Revenue Service Reporting Requirement: Each of the Parties shall execute, acknowledge and deliver to the other Party such instruments, and take such other actions, as such other Party may reasonably request in order to comply with IRC §6045(e), as amended, or any successor provision or any regulations promulgated pursuant thereto, insofar as the same requires reporting of information in respect of real estate transactions. The provisions of this ¶17 shall survive Closing. The Parties designate Purchaser's lending institution, if applicable, or Purchaser's attorney or such other Party as shall be jointly designated by Seller and Purchaser as the person responsible for reporting this information as required by law.

18. Broker: Seller and Purchaser represent and warrant to each other that the only real estate broker(s) with whom they have dealt in connection with this Contract and the transaction set forth herein is/are Broker(s) and that they know of no other real estate broker who has claimed or may have the right to claim a commission in connection with this transaction. The Broker(s)

shall be paid a commission by Seller pursuant to separate agreement. If no Broker is specified in ¶1.5 above, the Parties acknowledge that this Contract was brought about by direct negotiation between Seller and Purchaser and each represents to the other that it knows of no real estate broker entitled to a commission in connection with this transaction. The Parties shall indemnify and defend each other against any costs, claims or expenses (including reasonable attorneys' fees) arising out of the breach on their respective parts of any representation, warranty or agreement contained in this ¶18. The provisions of this ¶18 shall survive Closing or, if Closing does not occur, the termination of this Contract.

19. Mortgage Commitment Contingency: The provisions of this paragraph are applicable only if ¶1.21.1 applies:

19.1 Definitions:

19.1.1 an "Institutional Lender" is any of the following that is authorized under Federal or New York State law to make mortgage loans and is currently extending mortgages in the county in which the Unit is located: a bank, savings bank, private banker, trust company, savings and loan association, insurance company, governmental entity, credit union or similar banking institution whether organized under the laws of this State, the United States or any other state;

19.1.2 a "Loan Commitment Letter" is a written offer from an Institutional Lender to make a loan on the Financing Terms (see ¶1.22) at prevailing fixed or adjustable interest rates and on other customary terms generally being offered by Institutional Lenders. An offer to make a loan conditional upon obtaining an appraisal satisfactory to the Institutional Lender shall not become a Loan Commitment Letter unless and until such condition is met. An offer conditional upon any factor concerning Purchaser (e.g., sale of home, payment of debt, no material adverse change in Purchaser's financial condition, etc.) is a Loan Commitment Letter whether or not such condition is met. Purchaser accepts the risk that, and cannot cancel this Contract if, any condition concerning Purchaser is not met.

19.2 Purchaser, directly or through a mortgage broker registered pursuant to Article 12-D of the Banking Law, shall diligently and in good faith:

19.2.1 apply only to an Institutional Lender for a loan on the Financing Terms (see ¶1.22) on the form required by the Institutional Lender containing truthful and complete information, and submit such application together with such documents as the Institutional Lender requires, and pay the applicable fees and charges of the Institutional Lender, all of which shall be performed within five (5) business days after the Delivery Date;

19.2.2 promptly submit to the Institutional Lender such further references, data and documents requested by the Institutional Lender;

19.2.3 accept a Loan Commitment Letter meeting the Financing Terms and comply with all requirements of such Loan Commitment Letter (or any other loan commitment letter accepted by Purchaser) and of the Institutional Lender in order to close the loan;

19.2.4 furnish Seller with a copy of the Loan Commitment Letter promptly after Purchaser's receipt thereof;

19.2.5 Purchaser is not required to apply to more than one Institutional Lender.

19.3 Provided Purchaser has complied with all applicable provisions of this Article 19 and Article 20, Purchaser may cancel this Contract as set forth below, unless Purchaser has received a Loan Commitment Letter from another Institutional Lender prior to the Loan Commitment Date, if:

19.3.1 the Institutional Lender denies Purchaser's application in writing prior to the Loan Commitment Date (see ¶1.22); or

19.3.2 a Loan Commitment Letter is not issued by the Institutional Lender on or before the Loan Commitment Date; or

19.3.3 any requirement of the Loan Commitment Letter other than one concerning Purchaser is not met (e.g., financial condition of the Condominium, failure of the Board to provide a written common charge letter or Waiver Confirmation); or

19.3.4 (a) Closing is adjourned by Seller for more than 30 business days from the Scheduled Closing Date; and (b) the Loan Commitment Letter expires on a date more than 30 business days after the Scheduled Closing Date and before the new date set for Closing pursuant to this Paragraph; and (c) Purchaser is unable in good faith to obtain from the Institutional Lender an extension of the Loan Commitment Letter or a new Loan Commitment Letter on the Financing Terms without paying additional fees to the Institutional Lender, unless Seller agrees, by Notice to Purchaser within 5 business days after receipt of Purchaser's Notice of cancellation on such ground, that Seller will pay such additional fees and Seller pays such fees when due. Purchaser

may not object to an adjournment by Seller for up to 30 business days solely because the Loan Commitment Letter would expire before such adjourned Closing date.

19.4 Purchaser shall deliver Notice of cancellation to Seller within 5 business days after the Loan Commitment Date if cancellation is pursuant to ¶19.3.1 or 19.3.2 and on or prior to the Scheduled Closing Date (as same may be adjourned) if cancellation is pursuant to ¶19.3.3 or 19.3.4.

19.5 If cancellation is pursuant to ¶19.3.1, then Purchaser shall deliver to Seller, together with Purchaser's Notice, a copy of the Institutional Lender's written denial of Purchaser's loan application. If cancellation is pursuant to ¶19.3.3, then Purchaser shall deliver to Seller together with Purchaser's Notice evidence that a requirement of the Institutional Lender or Title Company was not met.

19.6 Seller may cancel this Contract by Notice to Purchaser, sent within 5 days after the Loan Commitment Date, if Purchaser shall not have sent by then either (a) Purchaser's Notice of cancellation or (b) a copy of the Loan Commitment Letter to Seller, which cancellation shall become effective if Purchaser does not deliver a copy of such Loan Commitment Letter or Purchaser's written waiver of the Mortgage Commitment Contingency to Seller within 15 business days after the Loan Commitment Date.

19.7 Failure by either of the Parties to deliver Notice of cancellation as required by this ¶19 shall constitute a waiver of the right to cancel under this ¶19.

19.8 If this Contract is canceled by Purchaser pursuant to this ¶19, then thereafter neither Party shall have any further rights against, or obligations or liabilities to, the other by reason of this Contract, except that the Contract Deposit shall be promptly refunded to Purchaser and except for provisions of this Contract which by their terms survive termination. In addition, if this Contract is canceled by Purchaser pursuant to ¶19.3.4, then Seller shall reimburse Purchaser for any non-refundable financing, title and inspection expenses actually incurred by Purchaser.

19.9 Purchaser cannot cancel this Contract pursuant to ¶19.3.4 and cannot obtain a refund of the Contract Deposit if the Institutional Lender fails to fund the loan:

19.9.1 because a requirement of the Loan Commitment Letter concerning Purchaser is not met (e.g., Purchaser's financial condition or employment status suffers an adverse change; Purchaser fails to satisfy a condition relating to the sale of home, etc.); or

19.9.2 due to the expiration of a Loan Commitment Letter issued with an expiration date that is not more than 30 business days after the Scheduled Closing Date.

20. **Requests By Purchaser's Lender:** In the event Purchaser's lender makes written requests(s) for financial, insurance or other business information about the Condominium, Purchaser may supply a copy of each such written request to Seller and upon receiving such a copy, Seller shall make a good faith effort to encourage the Condominium or its managing agent to supply such information. Purchaser shall prepay any fees required by the Condominium or its managing agent for this service. In no event shall the failure to obtain such information affect Purchaser's obligations hereunder.

21. **Gender, etc.:** As used in this Contract, the neuter includes the masculine and feminine, the masculine includes the feminine, the feminine includes the masculine, the singular includes the plural and the plural includes the singular, as the context may require.

22. **Entire Contract:** All prior understandings and agreements between the Parties are merged in this Contract and this Contract supersedes any and all understandings and agreements between the Parties and constitutes the entire agreement between them with respect to the subject matter hereof.

23. **Captions:** The captions in this Contract are for convenience and reference only and in no way define, limit or describe the scope of this Contract and shall not be considered in the interpretation of this Contract or any provision thereof.

24. **No Assignment by Purchaser/Death of Purchaser:** Purchaser may not assign this Contract or any of Purchaser's rights hereunder. This Contract shall terminate upon the death of all persons comprising Purchaser and the Contract Deposit shall be refunded to Purchaser's Attorney in escrow. Upon making such refund and reimbursement, neither Party shall have any further liability or claim against the other Party hereunder.

25. **Successors and/or Assigns:** Subject to the provisions of ¶23, the provisions of this Contract shall bind and inure to the benefit of the Parties and their respective distributees, executors, administrators, heirs, legal representatives, successors and permitted assigns.

26. **No Oral Changes:** This Contract cannot be changed or terminated orally. The Attorneys may extend in writing any of the time limitations stated in this Contract. Any other provision of this Contract may be changed or waived only in writing signed by the Party or Escrowee to be charged.

27. **Contract Not Binding Until Signed:**

27.1 This Contract shall not be binding or effective until fully executed by both Parties and delivered by Seller to Purchaser or Purchaser's Attorney.

27.2 Digital, electronic or scanned copies of original handwritten signatures shall be considered valid.

27.3 This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

27.4 Escrowee shall be deemed to have accepted the escrow provisions of this Contract even in the absence of its signature on the Contract by depositing the Contract Deposit in its designated bank account.

28. **Lead-Based Paint:** If applicable, the complete and fully executed disclosure of information on lead-based paint and/or lead-based paint hazards is attached hereto and made a part hereof.

OPTIONAL RIDER PROVISIONS:

29. Notwithstanding anything set forth in ¶10.1 to the contrary, in the event either of the Parties seeks to enforce the provisions of this Contract or to obtain redress for the breach or violation of any of its provisions, whether by litigation or other proceedings, the prevailing Party shall be entitled to recover from the other Party all costs and expenses associated with such proceedings, including reasonable attorney's fees.

30. Supplementing and modifying the provisions of Paragraph 7 of the Contract, Seller shall be entitled to receive any abatements or rebates not offset by a corresponding assessment, including, without limitation, any real estate tax abatements given by the City and/or State of New York, which may be allocated to the Unit or received by Purchaser after the Closing, for time periods during which Seller was the record owner of the Unit. If the parties are unable to make adjustment at the Closing for any such abatement or rebate, Purchaser shall notify Seller within fifteen (15) days of receipt of any applicable abatement or rebate and Purchaser shall make payment to Seller, within thirty (30) days after receipt of such abatement or rebate, of Seller's portion of the abatement or rebate. The provisions of this Paragraph shall survive the Closing.

This Contract is [not] continued on attached rider(s).

IN WITNESS WHEREOF, the parties hereto have duly executed this Contract on the day and year first above written.

_____	_____
Seller	Purchaser
_____	_____
Seller	Purchaser
_____	_____
Seller	Purchaser
_____	_____
Seller	Purchaser
Agreed as to Par. 13: _____	Escrowee Depository: _____
	Address: _____

SCHEDULE A-1 – Material Alterations to the Unit made by Seller:

SCHEDULE A-2 – Alteration agreement(s) with the managing agent or Board of Managers signed by Seller and affecting the Unit:

SCHEDULE A-3 – Alteration agreement(s) with the managing agent or Board of Managers signed by a prior owner of the Unit and affecting the Unit:

SCHEDULE A-4 – Written complaint(s) made by Seller or occupants of the Unit regarding the Unit, the Building or any other unit owner(s):

SCHEDULE A Permitted Exceptions

1. Zoning laws and regulations and landmark, historic or wetlands designation which are not violated by the Unit and which are not violated by the Common Elements to the extent that access to or use of the Unit would be materially and adversely affected.

Consents for the erection of any structure or structures on, under or above any street or streets on which the Building may abut.

The terms, burdens, covenants, restrictions, conditions, easements and rules and regulations set forth in the Declaration, By Laws and rules and regulations of the Condominium, the Power of Attorney from Purchaser to the board of managers of the Condominium and the floor plans of the Condominium, all as may be amended from time to time.

Rights of utility companies to lay, maintain, install and repair pipes, lines, poles, conduits, cable boxes and related equipment on, over and under the Building and Common Elements, provided that none of such rights imposes any monetary obligation on the owner of the Unit or materially interferes with the use of or access to the Unit.

Encroachments of stoops, areas, cellar steps, trim, cornices, lintels, window sills, awnings, canopies, ledges, fences, hedges, coping and retaining walls projecting from the Building over any street or highway or over any adjoining property and encroachments of similar elements projecting from adjoining property over the Common Elements.

Any state of facts which an accurate survey or personal inspection of the Building, Common Elements or Unit would disclose, provided that such facts do not prevent the use of the Unit for dwelling purposes. For the purposes of this Contract, none of the facts shown on the survey, if any, identified below, shall be deemed to prevent the use of the Unit for dwelling purposes, and Purchaser shall accept title subject thereto.

The survey referred to in No. 6 above was prepared by _____ dated _____ and last revised _____.

The lien of any unpaid common charge, real estate tax, water charge, sewer rent or vault charge, provided the same are paid or apportioned at the Closing as herein provided.

The lien of any unpaid assessments to the extent of installments thereof payable after the Closing.

Liens, encumbrances and title conditions affecting the Common Elements which do not materially and adversely affect the right of the Unit owner to use and enjoy the Common Elements.

Notes or notices of violations of law or governmental orders, ordinances or requirements (a) affecting the Unit and noted or issued subsequent to the date of this Contract by any governmental department, agency or bureau having jurisdiction and (b) any such notes or notices affecting only the Common Elements which were noted or issued prior to or on the date of this Contract or at any time hereafter.

Any other matters or encumbrances subject to which Purchaser is required to accept title to the Unit pursuant to this Contract.

Explanatory Notes Accompanying Revisions to Standard Form Condo Contract

The revised standard form Condominium Contract is not being presented in a "black-lined" version referring back to the original, because the changes in form and substance were too extensive to accommodate any easy reference. These revisions are primarily intended to accomplish the following goals:

I. To update the form Contract and make it easier to comprehend for parties and practitioners;

II. To incorporate provisions frequently added to the form Contract through rider provisions;

II. To make the form Contract more like the standard form Coop Contract;

IV. To provide protection to parties and to practitioners who may be unfamiliar with the form Contract and/or with the law applicable to condominiums.

¶ 1: This paragraph is intended to essentially mirror the look, feel and content of ¶ 1 of the standard form Coop Contract. This paragraph incorporates information that was previously included in ¶¶ 1, 2, 3 and 4 of the existing form contract.

¶ 1.3: Title Company was added to reflect the fact that some law firms prefer not to act as Escrowee.

¶ 1.17.1: The term "Downpayment" that was used in the prior form Contract has been changed to "Contract Deposit," in order to avoid common confusion between this amount and the amount not being financed.

¶ 2.1: Second sentence is new and reflects representations made if the Seller is an entity.

¶ 2.2: The main reason for the inclusion of the "understatement" credit is that Seller should be able to state the amount of the monthly common charges that it pays, so Seller should bear a burden for its misstatement. The last sentence was added to recognize that certain Sellers may have specific knowledge even in the absence of a written notice, and that knowledge should be shared with the Purchaser. This also mirrors the language of ¶ 4.1.5 of the coop contract.

¶ 2.3: Designee was added.

¶ 2.4: The language about plumbing, heating and electric and the limiting language at the end were added to reflect provisions almost universally included in riders.

¶ 2.5: The second sentence was added.

¶ 2.7: This provision was added to reflect added protection offered to Purchasers regarding alterations.

¶ 2.8: Same as ¶ 2.7, but also reflects the fact that a prior owner may have made an alteration that could have an effect on all subsequent owners.

¶ 2.9: This provision was added to reflect provisions almost universally included in riders. Other time frames were considered (12 months, 18 months) but 24 months was deemed to be most proper.

¶ 2.10: This provision was added to reflect provisions almost universally included in riders. Other time frames were considered (12 months, 18 months) but 24 months was deemed to be most proper.

¶ 2.11: This provision was added.

¶ 2.12: This provision was added to reflect provisions almost universally included in riders. Other time frames were considered (12 months, 18 months) but 24 months was deemed to be most proper. The topic of Seller's knowledge of bedbug infestation building-wide was also raised, but it was concluded that this information could be obtained from the Managing Agent.

¶ 2.13: This provides protection against a Seller who might be "under water."

¶ 2.15: The survival clause was the subject of a great deal of debate, particularly whether ¶¶ 2.7 and 2.8 should be carved out. It was determined that all provisions, including ¶¶ 2.7 and 2.8, would survive Closing. This is a variation from paragraph 4.1.6 of the 2001 Coop Contract, which provides that the provision about alterations does not survive Closing.

¶ 3.1.2: This expands on ¶ 6(ii) of the existing Contract in that it includes entities other than

corporations, and acknowledges that the determination of the Title Company controls.

¶ 3.1.3: This new language hopes to clarify the waiver process.

¶ 3.1.5: Everything after the mailbox is added language, reflecting other locks and opening devices.

¶ 3.1.7: Reference to IT-2663 was added to reflect situations where Seller is subject to a nonresident income tax.

¶ 3.1.8: This recognizes the Mansion Tax as well as sponsor sales, where the burden of payment of transfer taxes is often shifted to Purchaser. Reference to IT-2663 was added.

¶ 3.1.10: Adds reference to carbon monoxide detector.

¶ 3.1.11: See notes to ¶¶ 2.7 and 2.8 above.

¶ 3.3.1: The provision at the end of the subparagraph regarding non-inclusion of notices which are the obligation of the Condominium is new.

¶ 3.4: This provision was added.

¶ 4.3: The 6-month limitation was added to reflect provision frequently found in Riders.

¶ 5.3: This provision was added to give Seller and Purchaser the right to cancel a contract where a Board of Managers is essentially holding the parties "hostage" and not issuing the waiver, and the title company will not insure, even though the by-laws may include a provision that provides that the right of first refusal is deemed waived where the Board fails or refuses to specifically act. We spoke with Mike Berey of First American who confirmed that he would likely not insure in the absence of a written waiver.

¶ 6.4: Added reference to working capital contribution.

¶ 6.5: Rather than a blanket imposition of fees on Seller, this paragraph specifically states that the determination of the Condominium/Managing Agent controls, and in cases of uncertainty, it is fair for the parties to split the fees evenly.

¶ 7.1: Removes the statement that Purchaser is "satisfied with" the documents.

¶ 7.1.5: This paragraph places an increased responsibility on Purchaser to ask the Managing Agent to see these documents in advance of the execution of the contract. That way, Purchaser has no basis to complain that the application and/or alteration documents are overly burdensome.

¶ 7.2: The reference to square footage addresses a common situation, because actual measurements typically differ from the measurements set forth in the offering plan.

¶ 8: The provision regarding touch-up plaster, spackle or similar material or touch-up paint was added to reflect a provision almost universally included in riders.

¶ 11: Electronic notification was discussed, and it was determined that each of these methods could lead to a claim of non-receipt which could neither be proven nor disproven. The Parties are free to add any of these means to a rider if they agree to do so.

¶ 13.2: The provision about indemnification of Escrowee including legal services rendered by Escrowee to itself was added.

¶ 13.5: This is a new provision providing notice regarding deposits exceeding FDIC limits. The amount was not specified, as the FDIC could change the maximum amount for which insurance is provided.

¶ 14: This paragraph was adapted from ¶ 25 of the Coop Contract, with the provisions that Seller pay costs and expenses being added.

¶ 15.1: The 10 business day/3 business day time provisions were added to provide greater specificity.

¶ 15.2: Reference in the middle of the paragraph was changed from Institutional Lender to "Purchaser's lender," because Institutional Lender refers only to the lender where there is a financing contingency. The penultimate sentence was added to clarify that, since these costs are the result of Seller's actions or inactions, they should be Seller's responsibility. The survival clause was added.

¶ 15.3: This is a change in that the lender's requirements are only relevant where the Contract is contingent on financing.

¶ 16.1: For purposes of the "Risk of Loss" paragraph only, the definition of "Unit" is expanded to include those limited Common Elements that are appurtenant to the Unit.

¶ 17: The designation of specified parties was added to reflect standard practice.

¶ 19: This paragraph is largely adapted from ¶ 18 of the Coop Contract. No reference is made to

¶ 1.21.2, because this ¶ 19 only applies where the Contract is contingent.

¶ 19.3.3: These items were modified to adapt to condos rather than coops.

¶ 19.4: The "(as same may be adjourned)" language was added to protect Purchasers where the lender withdraws the commitment for reasons that do not concern Purchaser subsequent to the Scheduled Closing Date.

¶ 20: This was added as a separate paragraph to recognize the commonly encountered situation where the lender makes certain requests for information from the Condominium or Managing Agent and Purchaser needs to get Seller's cooperation.

¶ 21: Adjusted to be more gender neutral.

¶ 24: Adapted from ¶ 23 of the Coop Contract.

¶ 26: Adapted in part from ¶ 14.2 of the Coop Contract.

¶ 27.2: Accepting digital, electronic or scanned copies recognizes realities of practice and clauses frequently included in riders.

¶ 27.3: Accepting counterpart signatures recognizes realities of practice and clauses frequently included in riders.

¶ 27.4: Covers the frequent occasion of Escrow Agent forgetting to sign the Contract.

¶ 29: A prevailing party legal fee provision was inserted as an optional Rider provision.

¶ 30: Added as an optional Rider provision to reflect common practice regarding abatements and corresponding assessments.

The State of Cooperative and Condominium Law in 2015

By Adam Leitman Bailey and Dov Treiman

The greatest changes in cooperative and condominium law this past year did not come from the legislature or from the courts but from the New York Attorney General's office (NYAG). This article will review some of those changes and the most significant appellate cases affecting cooperatives and condominiums.

Buyouts and Conversions

With respect to Cooperative and Condominium Conversions, NYAG's Real Estate Finance Bureau (REFB) has focused its mission on 1) maintaining and protecting the rent-regulated system and free-market tenants in buildings converting to cooperative and condominium ownership and 2) increasing and maintaining the number of low and moderate income housing units. As a result, REFB is shifting its focus away from protecting owners suffering from purchasing units in poorly built newly constructed buildings.

Thus, in early 2015 REFBs relied heavily on a July 9th, 1986 internal Memorandum[1] setting forth its rules with regard to buyouts. That memorandum stated that "buy-out offers cannot be accepted by the tenants until the Black Book is out. *There will be no exceptions to this policy—our experience of the past nine months has persuaded us that the only fair, even-handed way of enforcing this policy is not to allow any exceptions*" (emphasis supplied).[2] This internal memorandum was first disclosed to the public on REFB's website almost a year ago, but it had never been published before nor had it been codified into a formal regulation.

On July 9, 2015, REFB abolished and replaced the 1986 Memorandum. While incorporating some of the policies of the 1986 Memorandum, writing, "The policy concerns raised by pre-red herring buyouts are the same now as they were in 1986. As such, the guidance on these buyouts set out in the 1986 Guidance Document remains in place."[3] However, the Memorandum does not provide "guidance" at all. It provides inflexible rules and, as such, runs afoul of the State Administrative Procedure Act (SAPA). Under the 2015 Memorandum (M2015), "Sponsor must disclose the buyout offer and the DOL's position on buyout agreements in the offering literature."[4]

If either the courts uphold M2015 or if the REFB reissues its principles as a validly promulgated regulation under SAPA, the dynamics in conversions of rent regulated units to owner-occupied units will be transformed. Under prior law, developers routinely bought out rent-regulated tenants in order to achieve the percentages of converting units necessary to declare a plan effective. Under the new policy, however, those percentages will no longer be available. This new policy has therefore removed from rent-regulated tenants a right worth the developer's buying out and long-term tenants who were counting on such buyouts to finance their move to warmer climes now cannot do so. This REFB policy makes it difficult for an elderly couple in a multi-bedroom apartment to sell their rights to that apartment so that they can downsize to a unit in Florida.[5] The regulated tenants lose the buyout monies and the housing market loses desperately needed units to be sold during our current housing shortage. And the overall housing market forces home prices to remain high and unaffordable because of the large inventory of apartments kept off the market.

While the 2015 Memorandum is unclear as to precisely when the period begins in which buyouts will come under REFB scrutiny, it appears that, at the very least, any buyout agreement entered during the five months prior to the filing of the red herring is guaranteed to receive REFB disapproval.[6]

Legalizing an Illegal Rule

Although the NYAG's office first protested that the 1986 Memorandum and then the 2015 Memorandum were legal under SAPA, their violation of SAPA is clear.

SAPA provides for two different kinds of documents. Under SAPA §202-e, there are "Guidance Documents," and while §202-e regulates their publication, it does nothing to define what constitutes "Guidance."[7] Neither does the case law—there is none construing §202-e. However, case law from prior to §202-e's 2004 enactment makes clear that a guideline established by an agency is considered to be a rule or regulation requiring filing with the New York Secretary of State in accordance with N.Y. Constitution, article IV, §8 and SAPA §202 if it is "a fixed, general principle to be applied by [the] agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers."[8]

Since the 1986 and 2015 Memoranda both establish inflexible requirements applied by REFB as a rule of law, neither is valid under this body of law and REFB must instead comply with SAPA to enact a rule or regulation under SAPA §202.[9]

That process requires submitting to the NY Secretary of State a notice of proposed rule making for the Department of State to publish in the State Register, affording the public normally a period of 45 days for an opportunity to submit comments on the proposed rule.[10]

It may take litigation to require the NYAG's office to follow the law, but until then converting condo-

miniums and the sponsors, tenants and potential buyers will be unjustly harmed as a result of the illegal rule.

Mitchell-Lama Privatization

At the end of 2014, the Court of Appeals handed down *Trump Village Section 3, Inc. v. City of New York*,[11] which, had it been ruled otherwise, would have made privatizing a Mitchell-Lama cooperative much more expensive for the shareholders. Mitchell-Lama cooperatives are among the very few programs in New York State aimed specifically at assisting the middle class. In exchange for limiting their shareholders to persons who are middle income primary residents who adhere to certain needs-based allocations of apartments, the cooperatives receiving tax relief for that period that the project remains in the Mitchell-Lama program, normally twenty years.[12] Exiting the program is known as "privatization," although the only thing that is ever "public" about the program is the oversight the project receives from a supervisory agency (in New York City, either the Department of Housing Preservation and Renewal or the State Division of Housing and Community Renewal) and the resulting real estate tax benefits.

In the *Trump* case, the shareholders decided to privatize, following the path of amending the corporation's certificate of incorporation.[13] New York City claimed that this exit from Mitchell-Lama was a "conveyance" and sought over $21 million in recording taxes, interest, and penalties. The City claimed that the privatization constituted a transfer from the old Mitchell-Lama-based corporation to a brand new generic Business Corporations Law corporation. The Court ruled that the cooperative was not subject to the taxes at all.

Because the apartments in such projects receive tax benefits, privatization frees the apartments from the restrictions imposed on the owners as to whom they can sell their units. The sale generally instantly and substantially enhances the sales prices of such apartments. For the shareholders, the decision whether to privatize is a decision whether to have the benefits of cheap housing or to have more expensive housing with higher profits to be gained selling the apartment.

Thus the *Trump* case removed a disincentive to privatization and allowed such complexes to enable their shareholders to realize the full profitability of their investments in their apartments.

The Business Judgment Rule

The year 2015 saw new developments and refinements in familiar areas of cooperative and condominium law. One of the most important of these areas is the business judgment rule—the principle of law that will immunize the decisions of a board of a cooperative or condominium from the interference of the courts unless the decision in question is illegal or the result of board members' self-dealing or discrimination.[14]

In *S. Tower Residential Bd. of Mgrs. of Time Warner Ctr. Condo v. The Ann Holdings*,[15] the First Department subtly *adjusts* the standard for self-interest on the Board. The court wrote, "However, even if, arguendo, plaintiff engaged in some favoritism…, defendant failed to show prejudice therefrom." This is a clear carve-out from previous doctrine, but it leaves unclear whether a challenge to a Board for violating the business judgment rule requires a showing for *any* violation that there is *both* a violation and resultant prejudice.

In *Pomerance v. McGrath*,[16] the First Department ruled on challenges to the exercise of the business judgment rule and sustained the Board's authority. Thus, where a bylaw prohibited the Board from expending funds above $10,000 for a capital improvement without shareholder assent, the Court found the business judgment rule allowed the Board the discretion to make repairs regardless of price, without shareholder consent. It also found that the business judgment rule gave the Board authority to sue the Sponsor. A contrary finding would have been a disaster in New York where many cases attest to endemic poor construction in new construction condominiums, saddling the unit owners with the cost of making repairs. Boards *must* have the discretion to bring such suits.

In a relatively unusual application of the business judgment rule in *Jacobs v. Grant*,[17] the Second Department found in favor of the Board's discretion in moving a shareholder's property out of storage bins to a storage facility after the shareholder refused to do so. The Board moved the property for a building-wide asbestos abatement program. Unsurprisingly, the Court refused to find that there was a conversion, as the shareholder had argued. Surprisingly, the Court found that moving the personal property was within the Board's power under the business judgment rule. In other words, allowing for the possibility (without so stating) that the conduct was actually tortious, the Appellate Division implicitly found that the business judgment rule gave the Board the discretion to commit the tort.

That kind of limitation is seen in *Razzano v. Woodstock Owners Corp.*[18] Neither the business judgment rule nor anything else allows a cooperative to craft a rule that favors some shareholders over others. In *Razzano*, subletting was limited to those who had purchased their shares prior to a particular date. Since the Business Corporations Law §501(c) requires that all shares in the same class be treated alike, there can be no rule in a cooperative that favors one class over another.[19] Thus, the Board does not have the authority to discriminate against newcomers in favor of the old guard.

Fees, Fines and Assessments

Intimately associated with the business judgment rule is the power of a Board to use its judgment to impose and assess fees, fines, and assessments. Although in real life the unit owners tend to dispute the facts

of their having engaged in conduct that justifies a fee or fine and to dispute the board's justification for imposing an assessment, in the court decisions, the matter is much more about whether the Board has the legal authority for financial matters.

One such dispute was in *Cohan v. Bd. of Dir. of 700 Shore Rd. Waters Edge, Inc.*,[20] in which the bylaws permitted a fine for an illegal sublet, but the Court did not permit the Board to impose it. There was no sublet; the disputed occupancy was that of a sister, one the bylaws specifically permitted. Thus, not only did the court reverse the fine, it also awarded the shareholder her attorneys' fees.

On the other hand, in *Cave v. Riverbend Homeowners Ass'n*,[21] the Second Department upheld a late fee, making the fee free from challenge under the business judgment rule.

In *Baxter St. Condo. v. LPS Baxter Holding Co.*,[22] the court wrote, "The condominium board's determination that the assessment was necessary for 'repair' work, which, pursuant to the by-laws, does not require the sponsor's consent or the unit owners' approval, is protected by the business judgment rule." While the *Baxter* court gave the Board's justification, there need be no such showing. And even though *Baxter* is not explicit in this regard, it is the only proper way of understanding the decision. In short, the justification for the Board's action is just a makeweight. Similarly, in *40-50 Brighton Road Apartments Corp. v. Kosalapov*,[23] the Appellate Term (2nd, 11th, and 13th Jud. Dists.) ascertained that an assessment was made to finance certain work for the cooperative. The Court refused to grant any significance to the shareholders' arguments that such funds were not actually used for such purpose, but for other corporate purposes.

Of great importance is *Gabriel v. Bd. of Mgrs. of the Gallery House Condo.*,[24] in which the Court acknowledged the Board's power to impose fines, as set forth in a set of bylaws, but "the imposition of fines in the amount of $500 per day for violations of the guest policy is confiscatory in nature… The Board cites no persuasive authority to support the imposition of such a hefty fine." Board counsels face this question daily. Clients routinely ask, "How severe a fine can we impose?" The Board's inclination is generally to make the fine so severe as to *prevent* the conduct sought to be discouraged, but if the amount is too high, the court will not permit a fine at all. While there are cases that state when it is too much, there are none that provide any calculation for determining what is allowable. Since excessively small fines do not accomplish anything, it is a difficult balance to strike.

In Sum

This has been a very important year in the Cooperative and Condominium world, especially for middle class and rent-regulated tenants. The Court of Appeals has now allowed Boards of low to moderate income buildings to privatize and avoid a significant transfer tax payment. At the other extreme, NYAG has frozen rent-regulated tenants' and sponsors' ability to complete apartment lease buy-out transactions, keeping fewer units from being sold. This makes it more difficult for New Yorkers to buy homes. At the Appellate Divisions, the Courts have cleared up some debated issues on treating new owners differently than existing owners, while providing cooperatives with the power to use self help and by strictly construing the corporate documents when applying the law.

Endnotes

1. Memorandum from N.Y. State Dep't of Law on Buy-out Offers (Jul. 9, 1986).
2. *Id*.
3. N.Y. State Dep't of Law, Tenant Buyouts (2015).
4. *Id*.
5. *See* Peter D. Salins & Gerard C. S. Mildner, Scarcity By Design 29 (1992).
6. *See* N.Y. State Dep't of Law, *supra* note 3 (explaining that if a sponsor entered into pre-red herring buyout agreements "where tenants were allowed or required to remain in occupancy during some part of the five-month period that is used to determine whether long-term vacancies exist," DOL may inquire and conclude that such tenancies are not bona fides).
7. N.Y. A.P.A. Law §202-e (McKinney 2005).
8. Matter of Sunrise Manor Nursing Home v. Axelrod, 135 A.D.2d 293, 296, 525 N.Y.S.2d 367, 369 (3d Dep't 1988) (quoting Matter of Roman Catholic Diocese of Albany v. N.Y. State Dep't of Health, 66 N.Y.2d 948, 951, 489 N.E.2d 749, 750, 66 N.Y.S.2d 948, 951 (1985)).
9. A.P.A. §202.
10. *Id.* §202(1)(a).
11. *See* 24 N.Y.3d 451, 24 N.E.3d 1086, 999 N.Y.S.2d 822 (2014).
12. N.Y. Priv. Hous. Fin. Law §35(2) (McKinney 2015).
13. *See Trump*, 24 N.Y.3d at 457, 24 N.E.3d at 1086, 999 N.Y.S.2d at 822.
14. Cohen v. Kings Point Tenant Corp., 126 A.D.3d 843, 844-45, 6 N.Y.S.3d 93, 95 (2d Dep't 2015).
15. 127 A.D.3d 485, 487, 8 N.Y.S.3d 38, 40. (1st Dep't 2015).
16. 124 A.D.3d 481, 483, 2 N.Y.S.3d 436, 439 (1st Dep't 2015).
17. 127 A.D.3d 924, 925, 6 N.Y.S.3d 623, 624 (2d Dep't 2015).
18. 111 A.D.3d 522, 523, 975 N.Y.S.2d 38, 39 (1st Dep't 2013).
19. N.Y. Bus. Corp. Law §501(c) (McKinney 2015).
20. 108 A.D.3d 697, 699, 969 N.Y.S.2d 547, 550 (2d Dep't 2013).
21. 99 A.D.3d 748, 749, 951 N.Y.S.2d 758, 759 (2d Dep't 2012).
22. 126 A.D.3d 417, 418, 5 N.Y.S.3d 52, 53 (1st Dep't 2015).
23. 39 Misc.3d 27, 30, 964 N.Y.S.2d 396, 399 (Sup. Ct. App. T. 2d Dep't 2013). *Full disclosure:* Adam Leitman Bailey, P.C. represented the cooperative Board and prevailed both at trial and on appeal.
24. 130 A.D.3d 482, 483, 15 N.Y.S.3d 1, 2 (1st Dep't 2015).

Adam Leitman Bailey is the founding partner and Dov Treiman is the Landlord-Tenant Managing Partner of the New York City real estate firm Adam Leitman Bailey, P.C.

New Rule Requires Carbon Monoxide Detection in Commercial Buildings

By Gene Kelly, David Crowe and Lauren Baron

The Department of State in late 2015 adopted an emergency rule adding section 1228.4 to the Uniform Fire Prevention and Building Code (the "Uniform Code").[1] Section 1228.4 sets forth installation and maintenance requirements for carbon monoxide alarms in commercial buildings. Prior to the addition of section 1228.4, the law only required carbon monoxide detection alarms in residential dwellings, and excluded commercial buildings. The new rule became effective on June 27, 2015, and requires both new and existing commercial buildings to install and maintain carbon monoxide detection alarms.[2]

Carbon monoxide is a naturally occurring chemical compound that is created by the incomplete combustion of carbon-based fuels. It is an odorless and invisible gas, and can cause serious respiratory problems, including death, if inhaled. According to the Department of State, there are approximately 450 hospitalizations and 55 fatalities reported in New York state each year due to carbon monoxide poisoning.[3]

Section 1228.4(b)(9) of the Uniform Code defines a commercial building as "any new or existing building that is not a one-family dwelling, a two-family dwelling or a building containing only townhouses."[4] This definition seems to include any commercial building regardless of whether it is privately owned or owned by a municipality.

Existing commercial buildings are those that were constructed prior to December 31, 2015 or construction projects that filed a complete building permit prior to December 31, 2015.[5] Any building that does not qualify as an existing commercial building is considered a new commercial building.[6] Unlike owners of new commercial buildings, who will have to comply with the requirements of section 1228.4 upon construction, owners of existing commercial buildings are required to comply with the rule by June 27, 2016.[7]

Section 1228.4 does not include inspection requirements or describe the consequences for failing to comply. However, pursuant to Executive Law section 381 and the regulations governing the Department of State, the Uniform Code is enforced through the Division of Code Enforcement and Administration, which proposes minimum requirements for municipalities regarding inspections and enforcement of the Uniform Code by local enforcement officials.[8] If a property owner of a newly constructed or existing commercial building fails to comply by the respective compliance deadlines, the code enforcement official with jurisdiction over the commercial building in question is likely able to enforce compliance with section 1228.4 under the Uniform Code and applicable local law. For example, the City of Rochester has fully incorporated the Uniform Code into its own municipal city code and is able to enforce violations by issuing fines.[9]

The new rule has interesting implications for New York State schools classified as Educational Group E under the 2010 Building Code of New York state (the "Building Code"), as well as certain types of mixed use buildings, which are included within the definition of commercial buildings under the rule. Schools that are classified as Educational Group E buildings under the Building Code and that meet the requirements of section 1228.4(c)(1) are required to install carbon monoxide detection alarms and must ensure that the alarm signal is "automatically transmitted to an approved on-site location that is normally staffed by school personnel during normal school hours."[10]

Although the definition of commercial buildings encompasses many types of buildings, there are exemptions under the rule for certain types of commercial buildings, such as those which are specifically classified under the 2010 Building Code of New York state and are "occupied only occasionally and only for building or equipment maintenance."[11]

Section 1228.4 discusses specific requirements for the type and components of carbon monoxide detection alarms, as well as for the configuration of alarms within a commercial building. Commercial building owners will have to evaluate the carbon monoxide sources within their building in accordance with section 1228.4(d) in order to determine where alarms must be located.[12]

Endnotes

1. N.Y. Comp. Codes, Rules & Regs. § 1228.4 (2016), WL 19 NY ADC 1228.4.
2. *Id.* § 1228.4(a).
3. N.Y. Dep't of State, Carbon Monoxide Requirements in Commercial Buildings (2015).
4. Comp. Codes, Rules & Regs. § 1228.4(b)(9).
5. *Id.* § 1228.4(b)(12).
6. *Id.* § 1228.4(b)(13).
7. *Id.* § 1228.4(p)(3).
8. N.Y. Exec. Law § 381 (McKinney 2011).
9. Rochester, N.Y., Code § 39-101 (Gen. Code Publishers 2011), *available at* http://ecode360.com/12553592.
10. Comp. Codes, Rules & Regs. § 1228.4(h)(5)(i)(2).
11. *Id.* § 1228.4(c)(2)(i)(b).
12. *Id.* § 1228.4(d).

Gene Kelly is Senior Counsel at Harris Beach PLLC. He practices in the Environmental Law and Government Compliance and Investigations Practice Groups and serves on the Energy, Real Estate Developers, and the Municipalities and Local Agencies Industry Teams. Prior to joining Harris Beach, Mr. Kelly was the Regional Director of Region 4 of the New York State Department of Environmental Conservation (DEC), where he directed all aspects of the operation of a multi-office agency with more than 200 staff members in a nine-county region. While serving with the Marine Corps Reserve, Mr. Kelly served as an environmental law judge advocate in which he was the primary reserve legal advisor in the Office of Counsel to the Commandant, advising on a broad range of environmental/land use issues attendant to Marine Corps-wide environmental compliance strategies. He also served as an advisor to the assistant general counsel (Installations and Environment) to the Secretary of the Navy.

David Crowe is an architect, facility, and project manager and has been responsible for the planning and execution of multiple construction projects throughout New York State and Canada. He is Director of Facilities for Harris Beach and director of HB Cornerstone LLC, a non-legal consulting subsidiary of the firm. His scope of services include corporate office, residence, health care, hospitality, historic preservation, and institutional and educational projects.

Lauren Baron is an Associate who was admitted to the New York State Bar in January 2016. She is a member of the Harris Beach Environmental Law and Commercial Real Estate Practice Groups. During law school, she served as articles editor of the *Pace Environmental Law Review* and vice president of the Pace Energy and Climate Law Society. Previously, Lauren was a legal intern at the New York State Department of Environmental Conservation.

Bergman on Mortgage Foreclosures

Interesting Look at Redemption—and a Dilemma for Lenders and Borrowers

By Bruce J. Bergman

We all understand that overwhelmingly the mortgage holder wants to be paid—the goal is not to sell the property for its own sake. It is also fairly well recognized that the time to redeem, to pay off the mortgage, exists and continues up until the moment the hammer falls at the foreclosure auction sale. [This latter conclusion can be obscure. For those wanting a detailed analysis of the subject, see 1 *Bergman on New York Mortgage Foreclosures* §2.21, LexisNexis Matthew Bender (rev. 2015).]

While redemption is usually pursued by the borrower/property owner, any other party with an interest in the mortgaged premises has a right to redeem as well. But how does a party know precisely what sum is due? The simple—and practical—answer is that a payoff letter is requested from the mortgage holder. Because the right of redemption is so sacred [see discussion at 1 *Bergman on New York Mortgage Foreclosures* §4.07, LexisNexis Matthew Bender (rev. 2015)] the mortgage holder needs to issue that payoff letter lest it be deemed interference with the right of redemption and be compelled to send the letter with a likely counterproductive stay of the action imposed.

The last point to present before tackling a disturbing new case on this subject is the method to redeem: an unconditional tender of the full amount due.

This was all confirmed by the new case [*LIC Assets, LLC v. Chriker Realty, LLC*, 131 A.D.3d 946, 13 N.Y.S.3d 41 (2d Dept. 2015)] but the facts may lead to some confusion on the part of both lenders and borrowers.

Here are the somewhat uncommon facts leading to the ruling which in turn give pause.

After the judgment of foreclosure and sale was entered and the foreclosure auction was scheduled, a nonparty took an assignment of a junior mortgage on the property in foreclosure—that assignment from a party who had appeared in the action but had not in any way opposed it.

One day before the auction sale, the assignee faxed a letter to the plaintiff advising of the assignment of the mortgage to it and asking to be provided prior to the auction with a payoff amount pursuant to the judgment. The plaintiff did not respond to the request, the sale was conducted and the plaintiff was the sole bidder.

Not surprisingly—and editorially we might note in conformance with general understanding—the assignee moved to set aside the sale to permit it to redeem. The trial court *denied* the assignee's motion and the Second Department affirmed.

The ruling was that the letter from the assignee requesting the payoff amount—even were it to be deemed a stated intention to redeem the mortgage—was not the equivalent of an unconditional tender of the full amount due prior to the sale of the property. Thus, having not met the definition of a tender, redemption in a sense was no longer an issue.

So what's the problem?

From a foreclosing lender's point of view, borrowers and others often request payoff letters, sometimes repeatedly, and then never pay. How many times then must such letters be sent? (It's an open question.) And if a party requests a payoff but one day prior to the sale, is the lender obliged to go through the exercise of preparing and sending it, and then worrying about a clash of a tender interfering with the sale?

It may be that in this case the assignee purposely waited until the eve of sale to make its request and such a dilatory tactic played a role in the decision. But if a party entitled to redeem otherwise makes a request for a payoff letter (again needing to know what amount to tender) can the foreclosing lender simply ignore that request? The answer has always been "no," but this case suggests that—at least under the unusual events encountered—the answer is "yes."

It is therefore not quite clear when a lender can ignore a payoff letter, nor is it apparent when a party wishing to redeem hits a cutoff point when it is too late to request revelation of the sum needed to redeem.

A party with a right to redeem should not be so careless as to wait until the eleventh hour to request a payoff letter. But this decision only serves to cloud some of the principles relating to redemption. Precisely what it means in the end is perhaps an imponderable.

Mr. Bergman, author of the four-volume treatise, *Bergman on New York Mortgage Foreclosures*, LexisNexis Matthew Bender, is a member of Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. in Garden City. He is a fellow of the American College of Mortgage Attorneys and a member of the American College of Real Estate Lawyers and the USFN. His biography appears in *Who's Who in American Law* and he is listed in *Best Lawyers in America* and *New York Super Lawyers*.

JP Morgan Chase Bank, Nat'l Ass'n v. Hill: The Third Department's Application of the *Aurora* Standing Requirements

By Soohuen Ham

Recently, in *Aurora Loan Services v. Taylor*, the Court of Appeals held that only a party deemed "the owner of the underlying mortgage loan with standing to foreclose" may commence a foreclosure action.[1] In *Aurora*, the plaintiff was able to establish standing by providing: (1) a copy of the note the defendants executed to secure the loan; (2) a copy of an allonge attached to the note, indicating the note's chain of custody; and (3) an affidavit of the plaintiff's agent based on an in-person examination of the original note, indicating that the plaintiff exclusively possessed the original note and had not transferred it to any other entity.[2] Although the plaintiff never provided the original note, due to the defendants' lack of demand for it during discovery, the court held that the plaintiff, through the three documents presented the chain of ownership, establishing standing to commence the foreclosure action.[3]

In a previous publication of the *N. Y. Real Property Law Journal*, Briana Hart discussed the implications resulting from the Court of Appeals' decision in *Aurora*.[4] More specifically, Ms. Hart expressed concern that the decision in *Aurora* would be interpreted broadly by lower courts.[5] That concern was not misplaced. Five months following the decision in *Aurora*, the Supreme Court, Appellate Division, Third Department rendered a decision in a foreclosure action where standing was raised that did indeed broaden *Aurora*.[6]

In 2004, Mr. and Mrs. Hill, defendants *pro se* ("defendants"), executed a note in favor of the Bank of New York to finance the purchase of real property.[7] The loan was secured by a mortgage on the property. In 2013, the defendants defaulted on the mortgage and consequently JP Morgan Chase ("plaintiff") commenced a foreclosure action. When the defendants did not appear, the plaintiff moved for summary judgment. In response, the defendants then appeared and cross-moved for an order directing the plaintiff to produce the "wet-ink" note—referring to the original note, raising the standing issue. The trial court denied the defendants' motion and granted the plaintiff's motion for summary judgment. In 2015, the defendants' appealed to the Third Department.[8]

On appeal the court deviated from the holding of *Aurora*, that the plaintiff could establish standing by demonstrating that it was the holder or assignee of the note at the time the foreclosure action was commenced.[9] Similar to the plaintiff in *Aurora*, the plaintiff submitted to the court: (1) the note; and (2) an affidavit from the plaintiff's agent.[10] Here, however, the court found that this was not enough for the plaintiff to prevail. In a divided opinion, the court noted that the present facts were readily distinguishable from those in *Aurora*. First, the note in this case included only a blank indorsement, whereas the note in *Aurora* had an indorsement from a trustee bank.[11] Second, the affidavit submitted in support of the plaintiff's position was based on "a review of system records without an examination of the original note" even though the defendants had made such demands upon the plaintiffs over a year before.[12] Finally, the defendants alleged that the Bank of New York had commenced a separate foreclosure action in 2008 regarding the same default on the mortgage payments.[13] This prior lawsuit was allegedly dismissed with prejudice.[14] Based on these facts and allegations, the court's majority held that the plaintiff failed to establish standing because there was no specific chain of ownership demonstrating a clear assignment or ownership of the mortgage.[15]

With the court divided three to two, the majority was mainly concerned with following the standards set forth in *Aurora*. The majority understood the standard but skillfully distinguished the current case. Beyond the three factors set forth above, that the majority considered, there may be a fourth factor that was not explicitly mentioned in the opinion: the majority may have been influenced by the defendants' *pro se* status.[16] Because the defendants had been sued by Bank of America in 2008 and again in 2013 by the plaintiff, the court likely wanted to provide a layer of protection for the defendants prior to allowing a lender to foreclose on their home because there was no certainty as to which entity was the true assignee or owner of the note.

One disappointment in the majority's opinion was its failure to address the dissent's UCC § 3-204 argument. The dissent reasoned that the method by which the plaintiff acquired possession of the note was irrelevant because possession alone is sufficient "to make [the] plaintiff a bearer and holder of a note indorsed in blank."[17] If the dissent's interpretation of the UCC is correct, then the mere possession of the note is sufficient to commence a foreclosure action.

Otherwise, should this case be appealed to the Court of Appeals, the Third Department's holding should be affirmed.

Endnotes

1. 34 N.E.3d at 366 at 362, 12 N.Y.3d at 615 (quoting 14A Carmody-wait 2d § 92:79 [2012]).
2. *Id.* at 362, 34 N.E.3d at 366, 12 N.Y.3d at 615.
3. *Id.*
4. *See* Briana Hart, Case Comment, *Aurora Loan Services, LLC v. Taylor: New York Court of Appeals opens the door for a less stringent standing requirement in residential foreclosures*, N.Y. Real Prop. L. J., Vol. 44, No. 1, 19-20 (2016).
5. *Id.*
6. JP Morgan Chase Bank, Nat'l Ass'n v. Hill, 133 A.D.3d 1057, 21 N.Y.S.3d 363 (3d Dep't 2015).
7. *Id.* at 1057, 21 N.Y.S.3d at 364.
8. *Id.*
9. *Id.* at 1057, 21 N.Y.S.3d at 364-65.
10. *Id.* at 1058, 21 N.Y.S.3d at 365.
11. *Id.* at 1059, 21 N.Y.S.3d at 365-66.
12. *Id.* at 1059, 21 N.Y.S.3d at 366.
13. *Id.*
14. *Id.*
15. *Id.*
16. *See id.* at 1057, 21 N.Y.S.3d at 364.
17. *See id.* at 1060, 21 N.Y.S.3d at 366-67 (citing UCC §§ 1-201(b)(5), (21), 3-204(2)).

Soohuen Ham is a third-year student at St. John's University School of Law and the Executive Managing Editor of the *N.Y. Real Property Law Journal*.

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Syracuse, NY 13202-2078
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ddegenshein@stroock.com

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joewalsh@spalaw2.com

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lwolk@rosenbergestis.com

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Harry G. Meyer
Hodgson Russ LLP
The Guaranty Building
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Buffalo, NY 14202
hmeyer@hodgsonruss.com

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JBinstok@yorkleaseaudit.com

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Keane & Beane, PC
445 Hamilton Avenue, Ste. 1500
White Plains, NY 10601
nward-willis@kblaw.com

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Bracken Margolin Besunder, LLP
1050 Old Nichols Road, Ste. 200
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lmargolin@bmblawllp.com

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161 Ottawa Street
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377 Broadway
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Gallet Dreyer & Berkey LLP
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Legislation
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Woods Oviatt Gilman LLP
700 Crossroads Building
2 State Street
Rochester, NY 14614-1308
stilton@woodsoviatt.com

Richard A. Nardi
Loeb & Loeb LLP
345 Park Avenue, 21st Fl.
New York, NY 10154
rnardi@loeb.com

Low Income and Affordable Housing
Laura Ann Monte
HSBC Bank USA
95 Washington St., Ste. 1 SE
Buffalo, NY 14203
Laura.A.Monte@us.hsbc.com

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rsinger@hseny.com

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mdegennaro@empirejustice.org

Publications
Vincent Di Lorenzo
St. John's University School of Law
8000 Utopia Parkway
Belson Hall, Room 4-46
Jamaica, NY 11439
dilorenv@stjohns.edu

Marvin N. Bagwell
Old Republic National Title Insurance Co.
400 Post Avenue, Ste. 310
Westbury, NY 11590
MBagwell1@OldRepublicTitle.com

William P. Johnson
Nesper, Ferber & DiGiacomo, LLP
501 John James Audubon Pkwy
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Amherst, NY 14228
wjohnson@nfdlaw.com

Real Estate Construction
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Schiff Hardin LLP
666 5th Avenue, Ste. 1700
New York, NY 10103
BLustbader@schiffhardin.com

Gavin M. Lankford
Harris Beach PLLC
99 Garnsey Rd
Pittsford, NY 14534-4532
glankford@harrisbeach.com

Real Estate Financing
Heather C.M. Rogers
Davidson Fink LLP
28 East Main Street, Ste. 1700
Rochester, NY 14614
hrogers@davidsonfink.com

Richard S. Fries
Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019
richard.fries@sidley.com

Real Estate Workouts and Bankruptcy
Garry M. Graber
Hodgson Russ LLP
The Guaranty Building
140 Pearl Street, Ste. 100
Buffalo, NY 14202-4040
ggraber@hodgsonruss.com

Gino Tonetti
620 West 42nd Street
New York, NY 10036-2017
gino_tonetti@yahoo.com

Daniel Neil Zinman
299 Ridgewood Ave
Glen Ridge, NJ 07028
danzinmanesq@gmail.com

Student Affairs
Shelby D. Green
Pace University School of Law
78 North Broadway
White Plains, NY 10603-3796
sgreen@law.pace.edu

Ariel Weinstock
Katsky Korins LLP
605 3rd Avenue, 16th Fl.
New York, NY 10158-0180
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Task Force on NYSI D TI Regs
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Gerard G. Antetomaso, PC
1674 Empire Boulevard, Ste. 200
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jerry@ggalaw.com

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The Law Firm of Hall & Hall, LLP
57 Beach Street
Staten Island, NY 10304-0002
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Toni Ann Christine Barone
Law Firm of Barone & Barone,LLP
43 New Dorp Plaza
Staten Island, NY 10306
tabarone@verizon.net

Gerard G. Antetomaso
Gerard G. Antetomaso, PC
1674 Empire Boulevard, Ste. 200
Webster, NY 14580
jerry@ggalaw.com

Website and Electronic Communications
Susan M. Scharbach
D'Agostino, Levine, Landesman & Lederman, LLP
345 Seventh Avenue, 23rd Fl.
New York, NY 10001
sscharbach@dagll.com

Michael P. Stevens
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11 Park Place, Ste. 1212
New York, NY 10007
michaelpstevens@gmail.com

Section District Representatives

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Nancy A. Connery
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551 Fifth Avenue
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ldgesq@ldigiovanna.com

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28 E. Main Street, Ste. 1700
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Mississauga, ON L5T2X9 Canada
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lstenson@metlife.com

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90 Merrick Avenue, 9th Floor
East Meadow, NY 11554
dbaker@certilmanbalin.com

Sanford A. Pomerantz
7 Jodi Court
Glen Cove, NY 11542
sandyslaw@optonline.net

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Joseph J. Risi
Risi & Associates
35-11 36th Street, Ste. 404
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risi.associates@rcn.com

Steven Wimpfheimer
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Whitestone, NY 11357-1522
wimpf1@gmail.com

Twelfth District
Martin L. Popovic
Bronx County Surrogate Court
851 Grand Concourse, Room 330
Bronx, NY 10451-2937
mpesq@verizon.net

Thirteenth District
Toni Ann Christine Barone
Law Firm of Barone & Barone, LLP
43 New Dorp Plaza
Staten Island, NY 10306
tabarone@verizon.net

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501 John James Audubon Parkway
One Towne Centre, Suite 300
Amherst, NY 14228
wjohnson@nfdlaw.com

Marvin N. Bagwell
Old Republic National Title Insurance Co.
400 Post Avenue, Suite 310
Westbury, NY 11590
mbagwell1@oldrepublictitle.com

Prof. Vincent Di Lorenzo
St. John's University School of Law
8000 Utopia Parkway
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dilorenv@stjohns.edu

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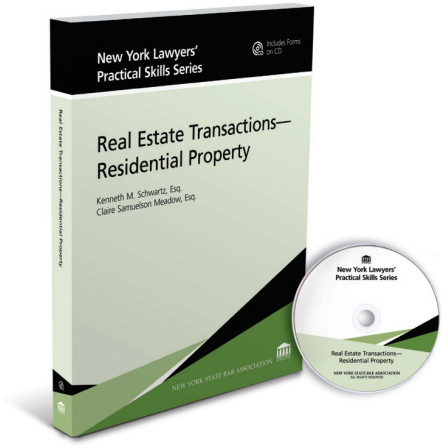

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