

New York State Legislature Reintroduces Bills to Extend Mortgage Recording Tax to Mezzanine Debt and Preferred Equity

By: Steven E. Coury and Marissa Levy

Real Estate Alert

2.12.21

Companion bills in the New York State Legislature, Assembly Bill No. A3139 and Senate Bill No. S3074, if enacted, would subject mezzanine loans and preferred equity investments to the same recording and taxation requirements placed on mortgages.

The bills were reintroduced last month after similar bills (S7231/A9041) were introduced in the 2019-2020 legislative session. The prior bills died in committee when last year's legislative session adjourned.

As discussed in our prior alert, the proposed bills would require: (1) a financing statement evidencing any mezzanine debt and/or preferred equity investments related to real property to be filed in the county in which the real property is located and (2) a recording tax, at the same rate as the applicable mortgage recording tax rate (2.80% for commercial mortgages over \$500,000 in New York City), to be imposed on the amount of the debt and/or investment at the time the financing statement is filed. The bills contain a limited carve-out for owner-occupied residential cooperatives.

Under the proposed legislation, the senior lender will be unable to record its mortgage if the recording tax is not concurrently paid on the subordinate financing. Subsequent mortgage recordings such as assignments, releases and discharges of mortgages will also be prohibited if the tax is not paid. Ultimately, failure to file the financing statement and pay the recording tax will result in an unperfected security interest, which could prevent mezzanine lenders from enforcing remedies under Article 9 of the UCC (e.g., the right to sell the collateral may not be available upon default of the mortgages).

The pair of bills were first introduced in January 2020, seeking to impose mortgage recording tax on mezzanine loans only. The legislation was amended last August to clarify that mortgage recording tax would also be imposed on preferred equity investments. Like the prior bills, the new legislation poses a number of questions and uncertainties which will need to be addressed for any changes to become operational (for example, the bills fail to narrowly and precisely define mezzanine debt and preferred equity investments, and treat preferred equity as secured debt).

The bills are currently in committee stage.

If you have questions relating to a specific loan, please contact Steven E. Coury (courys@whiteandwilliams.com; 212.631.4412) or another member of our Real Estate and Finance Groups.

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.