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Zoning Resolution Undergoes Radical Changes to Stimulate Affordable Housing

In conjunction with the rezoning of large sections of the Hudson Yards and Greenpoint-Williamsburg areas from manufacturing to residential use, the New York City Council recently approved radical changes in the New York City Zoning Resolution to stimulate the construction of affordable housing in those areas. These changes may prevent a runaway market by creating incentives for the provision of affordable housing in a climate of escalating condominium sales prices.

These changes are significant when viewed in the context of the development of the zoning resolution in the City of New York. In the early 1900's, New York City enacted what is believed to be the first comprehensive zoning resolution in this country. This resolution, which was barely 100 pages in length, dealt with basic zoning issues such as building height and bulk and the separation of non-residential from residential uses.

This simplified zoning scheme was replaced by the current Zoning Resolution in 1961 which introduced new concepts in zoning. These included the calculation of permitted bulk based upon the ratio between floor area and lot size, known as floor area ratio ("FAR"), and the introduction of "incentive zoning" which was the granting of discretionary bonuses in exchange for the commitment to provide a socially desirable amenity.

In 1987, the concept of permitting a developer greater floor area than otherwise allowed in exchange for the provision of low income housing in a development was added to the Zoning Resolution. This concept, known as the "inclusionary housing" bonus, was optimistically viewed as a means of remedying the shortage of affordable housing in the City of New York. However, there were several limitations placed on the applicability of inclusionary housing bonuses.

First, the Zoning Resolution was amended to provide such bonuses in high density areas only. Second, the use of the bonus was strictly voluntary. The lower income housing generating the bonus had to be located within the same community

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Estoppel Certificates: A Necessity When Buying Commercial Real Property

Estoppel Certificates ("EC's") serve as an insurance policy to a buyer of commercial real property. They equitably "estop" a tenant from later disputing critical lease provisions after a buyer closes on the purchase of the property. The EC's are relied upon by a prospective purchaser of real property or lender where the property contains commercial tenants.

An EC is often a basic form requesting information of a commercial tenant to confirm certain terms and conditions of a tenant's commercial lease. For example, a typical EC will request that a tenant confirm (in the form of a sworn certificate) such basic items as:

- the rent and additional rent that the tenant is currently paying
- the term of the tenant's lease
- the amount of the security deposit held by the Landlord
- whether the tenant has certain renewal or option rights contained within the lease

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- confirmation that the commercial tenant does not have the right to purchase the premises
- that the tenant does not have any claims, offsets or defenses to the payment of rent or additional rent.

Buyer's or lender's counsel should insist that as a condition to closing on a piece of property that contains commercial tenant, that it receives an EC for each commercial tenant. If the contract provides that the buyer is entitled to an EC prior to closing and the buyer does not receive the EC at or prior to closing, the failure to receive the EC can form a basis of the buyer's refusal to close.

Normally, the EC form is agreed to in advance of executing the contract of sale and is attached as an exhibit to the contract of sale. This exercise avoids protracted arguments between buyers and sellers as to what form the EC should take as opposed to negotiating the form during the period between contract and closing.

Careful drafting of a contract of sale should address the following possibilities:

- a tenant fails to deliver an EC prior to closing when required to do so
- where a tenant executes an EC but the certification is different from the terms and conditions contained within the lease
- if the Tenant crosses out provisions in the EC entirely or professes a lack of knowledge of a significant terms or condition of the lease.

This article was written by Daniel Altman, a BBW&G partner practicing in the firm's Transactional Department. If you have any questions regarding Estoppel Certificates or other issues associated with purchases or sales, please contact Mr. Altman or Craig Ingber or Robert Jacobs, BBW&G's other Transactional Department partners.

Daniel Altman

Just the Facts

An owner's review of what may be the most crucial part of a Contract for the sale of multifamily property is often overlooked—the rent roll.

Each owner has its own software program to keep track of their own properties. Each program has a different way to designate the regulatory status of residential tenants, i.e., rent stabilized; rent controlled; "free market." Contracts without representations may inadvertently be interpreted as Contracts containing representations when rent rolls contain otherwise innocuous notations regarding the rent regulatory status of a tenant which are intended solely to provide the owner with information on its property.

While the most basic form of Contract contains what is commonly referred to as a "merger clause", careful drafting should be the first line of defense to protect owners against purchasers' claims of representations where none are intended to be made.

Essentially, a merger clause states that any discussions, negotiations and/or documents which are exchanged prior to the signing of the Contract do not "count" and cannot be construed as representations under the Contract unless specifically contained in the Contract. The "catch all" merger clause is intended to encourage the exchange of information before the Contract is executed without having such information resulting in representations and/or warranties. Merger clauses are usually enforced by courts for this very reason.

However, courts can cite compelling circumstances to arrive at results that are contrary to the stated intent of a Contract. To avoid that possibility, be sure to review, with counsel, the contents of any rent roll, exhibits and related documents included in any Contract before it is signed to avoid any possible inadvertent representations when none were intended.

This article was written by Craig Ingber of BBWG's Transactional Department. For questions related to sales of multifamily properties and preparation of contracts, please contact Mr. Ingber.

Craig Ingber

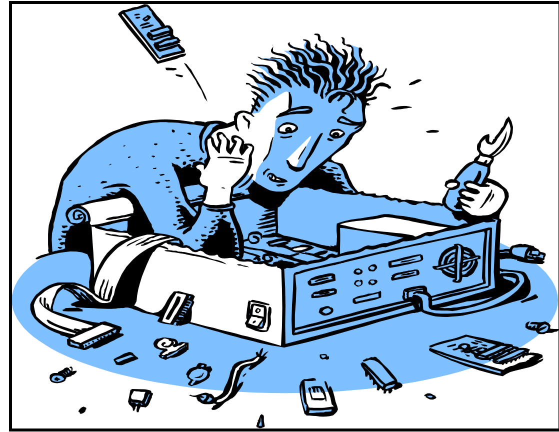
Anxiousness Leads to Anxiety: Making a Non-Contingent Financing Bid

In the heat of battle to be chosen as the successful bidder for a one of a kind property, Purchasers are often instructed by their real estate brokers to say that their bid is "not contingent on financing." What in fact does "not contingent on financing" truly mean and how does it impact the transaction from the Purchaser's perspective?

Gone are the days of Purchasers having 30-45 days to obtain a mortgage commitment letter from a lender affording Purchasers a right to cancel the deal and receive a return of the down payment if they are unable to obtain a commitment letter from a lender. Currently, the majority of transactions in New York City do not contain a financing contingency clause. In essence a Contract of Sale without a financing contingency clause means that if Purchasers are not able to obtain financing from a lender, the Purchasers are still obligated to close on the transaction. In the event the Purchasers can not obtain financing and can not pay all cash, the Purchasers are at risk of being in default under the Contract of Sale, which can result in the forfeiture of the Purchaser's ten (10%) percent down payment as liquidated damages.

Purchasers should be aware that, irrespective of the fact that their bid is not contingent on financing, they still have the right to reserve the option to finance the transaction. Under this scenario Purchasers who are unable to obtain financing would still be obligated under the Contract of Sale to proceed with the transaction. In addition, there are certain situations, specifically in a cooperative setting, where a non contingent finance bid may be understood to mean "all cash," as various cooperatives do not look favorably on prospective shareholders financing their units. Therefore, it is imperative that Purchasers understand the risks and ramifications involved in waiving the financing contingency and that Purchasers make sure to clearly relay their intentions to the Seller, real estate brokers, and their attorneys regarding the Purchasers' financing needs.

There are several ways for Purchasers to protect themselves if they intend on making a not contingent on financing bid. First, prior to making a bid on a property, Purchasers can obtain a pre-approval letter from a lender. The pre-approval letter basically provides the Purchasers with some assurance that the lender will lend up to a certain dollar amount to purchase a property based on their credit worthiness, subject to satisfaction of certain underwriting conditions which take into account a Purchaser's credit worthiness and the subject property. Second, the Purchasers can check with the lender prior to execution of the Contract of Sale to determine whether or not the property is on the lender's "approved list", *i.e.*, that the subject building has been previously approved for lending by the Lender's underwriters.



BBW&G recommends to all Purchasers that they discuss with their attorney all of the implications and the full ramifications of waiving any contingencies in a Contract of Sale prior to the execution of a contract..

This article was written by Craig Price, an associate practicing in the BBW&G's Transactional Department.

Craig Price

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board or a ½ mile radius of the development. Also, the use of inclusionary housing bonuses precluded the developer from taking advantage of other governmental benefits.

Time has shown that the changes made to the Zoning Resolution in 1987 did little to produce any significant amount of affordable housing. In order to address the limitations of the 1987 amendment to the Zoning Resolution, the City Council recently enacted changes which are expected to measurably increase the amount of new affordable housing in New York City. While changing much of the underlying zoning for the affected areas from commercial or industrial to mixed use or residential, the City Council made changes to the inclusionary housing incentive bonus provisions of the Zoning Resolution to stimulate the construction of affordable housing in the Hudson Yards and Greenpoint-Willamsburg areas.

Amid zoning changes in the Hudson Yards and Greenpoint-Williamsburg areas permitting residential development, City Council enacts changes to Zoning Resolution to encourage construction of affordable housing in an escalating real estate market.

With respect to the Hudson Yards, the City Council enacted several changes to the Zoning Resolution. The first reflects a compromise between making inclusionary housing mandatory or voluntary. The overall density (FAR) for the district was lowered but the inclusionary housing FAR bonus was increased. In other words, the maximum FAR for the area was reduced to 9 and the bonus was raised from 20% to 33%. In addition, the bonus was also made available in lower-density areas. Also, the income limits of residents of inclusionary housing was increased to include individuals with incomes up to 125% of average moderate income levels and 175% of average middle income levels. This change increases the availability of affordable housing to more income levels. Lastly, the Zoning Resolution was changed to permit other forms of governmental housing assistance to be provided without disqualifying a project from the inclusionary housing bonus.

The changes in the zoning provisions affecting the Greenpoint-Williamsburg areas go even further to stimulate affordable housing. As in the Hudson Yards, much of the area was downzoned. In other words, the housing density per lot (FAR) was decreased across the board. However, the inclusionary bonus percentage was increased, resulting in a greater incentive to build inclusionary housing. In addition, the Administration and City Council agreed to support state action to prohibit developers, who build as-of-right housing in the waterfront section of Greenpoint-Williamsburg without using the inclusionary housing bonus, from purchasing 421-a certificates. The Department of Housing Preservation and Development (HPD) provides real estate tax credit certificates to developers of qualifying housing in certain areas, which are then sold in the open market to developers of otherwise qualifying housing in areas where certificates are not granted by HPD. Therefore, while inclusionary housing is still voluntary, there are negative consequences to electing to forego the bonus in the Greenpoint-Williamsburg areas.

Only the passage of time will tell whether these changes to the Zoning Resolution will result in a significant and sustainable increase in affordable housing. But many are optimistic that the new changes will stimulate new affordable housing construction over the long run in the City of New York.

This article was written by Robert Jacobs of BBWG's Transactional Department. For questions on the zoning amendments and related matters, please contact Mr. Jacobs.

Robert Jacobs