

First Things First: The What, Why and When of Brokerage Agreements

One of the most frequently encountered problems with brokerage agreements is also one of the most important ones to deal with when selling real property or a cooperative apartment. Determining when a brokerage commission is actually due is one of the first things to look for when reviewing a brokerage agreement (after confirming that there is, in fact, a written brokerage agreement).

Unsuspecting sellers may sign a brokerage agreement without questioning its contents after merely determining the amount payable to the broker. In New York State, a broker is deemed to have earned its commission when it presents a buyer who is ready, willing and financially able to purchase the real property or cooperative apartment in question. An unsuspecting seller can find himself/herself liable for payment of a commission, after the acceptance of an offer if a broker presents a purchaser who is ready, willing and financially able to purchase the property in question even if a closing never takes place. This financial liability is neither the expected nor the intended result for most sellers.

There is a simple and effective way to guard against this potential liability by amending the brokerage agreement to provide that the brokerage commission is

only earned and payable in the event the closing (or transfer of the property in question) takes place. This simple modification more accurately represents the true intentions of the seller of the property.

Selling a piece of property is daunting enough. For many people it is one of the most significant financial events of a lifetime. Anyone considering listing property for sale should consult with their lawyer starting at the beginning of the process in an effort to eliminate or minimize easily avoidable complications.

This article was written by Craig Ingber, a partner in BBW&G's Transactional Department. If you have any questions regarding brokerage agreements, please contact Mr. Ingber, or any of the other partners in our Transactional Department.



Craig Ingber

Preserving Possible Transfer Tax Relief for Co-op/Condo Investors/Owners

As a result of a recent decision by the Chief Administrative Law Judge of the New York City Tax Appeals Tribunal, condominium investors/owners are likely to receive, if upheld on appeal, future tax relief when purchasing multiple condominium units.

In this hot condominium marketplace, it has become more common for purchasers to buy more than one condominium or cooperative unit and close on the units on the same day, notwithstanding the fact that they were purchased under separate contracts. As the law currently stands, the transfer of multiple units between

the same parties, requires that sellers pay the commercial rate of tax which is 1.425% of taxable consideration when it is \$500,000 or less, and the rate of 2.625% when more than that amount. [In circumstances where a purchaser is buying a newly constructed unit from a sponsor, the obligation to pay the RPTT is typically transferred by the sponsor to the purchaser and the RPTT is increased pursuant to regulation to include the tax paid by the purchaser on the sponsor's behalf as additional consideration resulting

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in increased tax liability to the purchaser.]

In the recent decision of the *Matter of the Petition of Cambridge Leasing Corp.* (“*Cambridge*”) the NYC Tax Appeals Tribunal held that when a purchaser buys multiple condominium units on the same day, the purchaser is no longer subject to the commercial rates of New York City’s Real Property Transfer Tax (“RPTT”) but, instead, should pay at the lower residential transfer tax rates.

For example, the RPTT generally applied to the transfer of a one- to three-family dwelling, or an individual residential condominium unit, or an individual residential cooperative apartment is at the rate of 1 % of taxable consideration when it is \$500,000 or less, and at the rate of 1.425 % of taxable consideration when it is more than \$500,000.

The New York City Department of Finance maintained in *Cambridge* that a multiple transfer of condominium units on the same day is subject to the higher, commercial transfer tax rates. If upheld on appeal, the *Cambridge* determination will likely have a far-reaching impact on the sale of multiple condominium units between the same parties in the City and could potentially spill over to cooperative units as well.

A recent article written by Michael Berey of First American Title Insurance Company and Stuart M. Pack entitled “*New York City’s Real Property Transfer Taxes and Bulk Sales,*” indicated that the City will appeal the *Cambridge* determination and, pending the outcome of the

appeal, the Tax Department will continue to apply the commercial rates to multiple condominium sales. The article states that the Tax Department believes it will be administratively easier to refund overpaid RPTT if *Cambridge* is upheld than trying to collect additional RPTT if it is overturned. Therefore, stay tuned. We will continue to monitor the progress of the *Cambridge* appeal and let you know the outcome in a future article.

In the interim, pending the *Cambridge* appeal, as Mike Berey suggests in his recent article, in the event the determination of the ALJ is upheld, payments of RPTT on multiple sale transfers of condominium units and cooperative apartments should now be made “under protest” to reserve rights to a future refund.

This article was written by Daniel Altman, a partner in BBW&G’s Transactional Department. If you have any questions regarding the impact of the Cambridge decision, please contact Mr. Altman, or any of the other partners in our Transactional Department.



Daniel T. Altman

Don’t Fall in Love Before Doing Your Due Diligence: Part II

In our November 2004 Update issue, we focused on the importance of due diligence in the purchase of a cooperative or condominium. In this issue, we will focus on due diligence when purchasing a 1 to 4 family home.

Due diligence is generally undertaken after the essential business terms of the transaction are agreed upon. It involves a pre-contract analysis of the merits of a transaction from a building and tenancy perspective.

Perhaps the most important element in the due diligence process in a 1-4 family home transaction is the physical home inspection. As with all contracts for the sale of real property in New York, the principle of *caveat emptor* or “buyer beware” applies. The most commonly used forms of contract in New York provide that the home will be transferred in “as is, where is” condition on the date of closing, thereby limiting the recourse a potential buyer may have if adverse building conditions are discovered that were not specifically addressed in the contract.

Since 2002, New York State, in an effort to provide purchasers of residential real property with greater disclosure of the condition of the properties they are purchasing, has imposed a requirement that all sellers of residen-

tial real property, with certain minor exceptions, must deliver a Property Condition Disclosure Statement (“PCDS”) to the buyer or buyer’s agent prior to the buyer signing a binding contract. In the event the seller fails to deliver the PCDS to the buyer, upon transfer of title the buyer receives a credit of five hundred (\$500.00) dollars against the agreed upon purchase price. Due to the leniency in the penalty imposed on non-compliant sellers and due to the extremely “hot” market, purchasers and brokers are often being pushed to execute a contract as quickly as possible without taking the necessary steps to insure the purchaser’s awareness of the physical condition of the home being purchased.

BBW&G strongly urges all of its purchaser-clients to hire a professional home inspection company to conduct a thorough examination of all physical aspects of any 1-4 family building they are considering purchasing. The inspection should consist of a detailed analysis of all of the major systems in the house, including, but not limited to, the electrical, plumbing, heating and air conditioning, water and septic/sewer systems, and all major kitchen and bathroom appliances. The inspection should also provide information

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A Bit of This and That: Leasehold Cooperatives

A cooperative corporation generally owns the land and building where the cooperative is located. However, a less common form of cooperative corporation exists—the leasehold cooperative. A leasehold co-op is a form of cooperative ownership where the cooperative corporation leases the land and building it operates as a cooperative corporation from the owner of the land and building where the cooperative corporation is located. (New York State law does not permit residential condominium ownership where the land is leased.)

Prospective purchasers of Leasehold Co-op's are presented with additional issues to consider when deciding whether to buy an apartment. For example, in a Leasehold Co-op, a portion of each shareholder's maintenance is allocated towards the payment of the Leasehold Co-op's rent under the ground lease between the owner of the land and the Leasehold Co-op. Prospective purchasers must also consider the duration of the Leasehold Co-op's lease with the owner of the land and whether there are existing renewal options available to the Leasehold Co-op.

Purchasing a Leasehold Co-op is more complicated than purchasing a 'traditional' cooperative apartment or condominium. As a result, a prospective purchaser of a Leasehold Co-op is well advised to consult an attorney who will help advise prospective purchaser's of the unique considerations involved in this type of purchase.

This article was written by Barry Lenson, an associate in BBW&G's Transactional Department. If you have any questions regarding leasehold co-ops, please contact Mr. Lenson, or any of the partners in our Transactional Department.



Barry Lenson

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on the age and current condition of the roof, windows, floors, walls, ceiling, basement and attic and the overall maintenance level of the home in question. A good home inspector will also check all of the kitchen and bathroom faucets, shower heads, fixtures for potential leaks and the overall water pressure in the home.

In addition to the physical inspection of the home, a termite and radon inspection should be conducted to determine the existence of any termite infestation and/or radon gas presence at the home. Also, many homes are sold with in-ground and above ground swimming pools, sprinkler systems and other physical structures on the property that also need to be inspected to determine their actual condition and operability.

The home inspection report, customarily provided within 1-3 days following the inspection, typically sets forth a detailed analysis of the home and recommends certain corrective and/or preventive measures for the proper maintenance required for the various systems in the home. Very often the inspection report will disclose specific problems that need to be addressed immediately and often result in additional expenses not initially contemplated by the purchaser. The due diligence process can become a very complicated process and the assistance of an attorney is typically required. Other important issues that should be addressed in your due diligence (that are beyond the scope of this article) include (1) a review of the certificate of occupancy for the build-

ing, (2) an examination of the leases; and (3) an analysis of the rent regulated status of the tenants, since a 1-4 family home can contain rent regulated tenants.

It should be noted that, in the purchase of a 1-4 family home, due diligence is performed prior to signing the purchase agreement. In fact, the results of your due diligence may require either reconsideration of the purchase or further negotiation of the terms of the deal.

The failure of a prospective home purchaser to conduct a proper due diligence prior to executing a contract of sale can result in additional expenses and certainly some headaches....if not heartaches. Therefore, do your due diligence before falling in love!

This article was written by Craig L. Price, an associate in BBW&G's Transactional Department. If you have any questions regarding due diligence in a 1-4 family or townhouse transaction, please contact Mr. Price, or any of the partners in our Transactional Department.



Craig Price

Tick Tock: Timing Improvements and the Reserve Fund

The timing of improvements is critical in order to take advantage of the credit against the reserve fund mandated for converters of occupied buildings in New York City. Owners and developers considering converting occupied buildings to cooperative or condominium ownership in New York City must bear in mind that the City's Administrative Code requires the Sponsor to establish a reserve fund as a condition of having the Plan accepted. The Reserve Fund is to be used exclusively by the Condominium or Cooperative Boards for making capital repairs, replacement and improvements to the converted building.

Significantly, there is a substantial credit (the "Reserve Fund Credit") available to the Sponsor against the Reserve Fund for capital replacements undertaken after the proposed plan (the "Red Herring") is submitted to the Attorney General's Department of Law.

Pursuant to the Reserve Fund Law, the Reserve Fund is required to be in an amount equal to either:

- (a) 3% of the total price (which is defined in the Reserve Fund Law as the sum of the cost of all units in the offering at the last price which is offered to Existing Tenants prior to the effective date of the plan regardless of the number of sales made); or
- (b) 3% of the actual sales price of all condominium units sold by the Sponsor at the time the Plan is declared effective, provided, however, that if such amount is less than 1% of the total price, then the Reserve Fund shall be established as a minimum of 1% of the total price; plus supplemental contributions to be made by the Sponsor at a rate of 3% of the actual sales price of condominium units for each unit held by the Sponsor and sold to bona fide purchasers subsequent to the effective date of the Plan and within five years after the date of the First Unit Closing.

While the latter alternative allows the Sponsor to delay contributing to the Reserve Fund, the total amount contributed could exceed 3% of the total price. Further, if five years from 30 days after the First Unit Closing the total contributions by the Sponsor to the Reserve Fund are less than 3% of the total price, the Sponsor must pay the difference between the amount contributed and 3%

of the total price.

The Reserve Fund may be funded from the sale of the closing of the first cooperative or condominium unit (the "First Unit Closing"). It is solely within the Sponsor's discretion to determine which method to use in establishing the Reserve Fund, and the Sponsor need not elect either method until 30 days after the First Unit Closing.

The Sponsor is entitled to the Reserve Fund Credit equal to the lesser of:

- (i) the actual cost of any capital repairs, replacements or improvements begun by Sponsor after the "Red Herring" is submitted to the Department of Law and before

the Plan is declared effective; or (ii) 1% of the total price offered to Existing Tenants before the Plan is declared effective, provided that the replacements and their actual or estimated costs are disclosed in the Plan or an amendment to the Plan.

As a result, if a Sponsor is planning improvements, it behooves the

Sponsor to wait to perform some only after the "Red Herring" is submitted to the Department of Law in order to qualify for the Reserve Fund Credit.

A capital replacement is defined as a building-wide replacement of a major component of any of the following systems: elevator, heating, air-conditioning, ventilation, wiring, windows, and plumbing or a major structural replacement to the Building other than replacements to cure violations of record. The Reserve Fund may not be reduced by any of the Sponsor's or Purchaser's closing adjustments.

This article was written by Robert A. Jacobs, a partner in BBW&G's Transactional Department. If you have any questions regarding condominium or cooperative conversions you may contact Mr. Jacobs or Aaron Shmulewitz.



Robert A. Jacobs

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