

Tran\$actional Department News

Buying, Selling, Leasing & Financing

Our firm's Transactional Department continues to expand. Craig Price formerly of Eiseman Levine, et. al. joined the Transactional Department in March. Barry Lenson, also formerly of Eiseman Levine, has recently joined the Department as well.

REFINANCING

In the past, owners refinanced their mortgages when the "spread" between their existing interest rate and the market was sufficient to justify the expenses associated with refinancing a mortgage. The time period required to recoup the costs of refinancing has been compressed by low rates. Some of the options we have seen our clients choose when refinancing are:

1. Standard five year loans with options to renew for an additional term (most often five years) with the rate determined by adding a margin or spread to the then current five year treasury bill;
2. Two to three year loan terms with interest only payments at rates determined by the prime rate and the addition of a spread;
3. Two to three year loan terms with interest only payments using LIBOR – or the London Interbank Overnight Rate. LIBOR based loans typi-

cally require the selection of a "contract" or "commitment" to an interest rate for 30, 60, 90 & 180 day duration. Consequently, during the term of a three year loan, the interest rate of the loan may change several times. Many owners have benefited from the decrease in rates afforded by the flexibility offered by the LIBOR loans. Clients have also negotiated rights to convert LIBOR based loans to fixed rate loans, as well as upon the payment of agreed upon fees and using a predetermined index and spread.

Financing options have gotten more creative, and some clients mix and match financing structures depending upon the property, location and risk tolerance of the owner. Some pointers for you to consider when thinking about refinancing.

- ♦ Make sure that you obtain the lender's consent to provide you with an assignment of its loan for the next time you refinance. Many lenders hesitate to provide an assignment of mortgage and attempt to extract payment from the owner who is refinancing. In the past, lenders provided an assignment of mortgage and just asked the borrower to pay its attorneys fees.

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These days with the lenders' efforts focused on fee generation, some will attempt to take advantage of owners who did not have the foresight to make sure that they received the right to request and receive an assignment of mortgage.

- ◆ It is a common misconception but, in New York State, a lender is not obligated to provide a mortgagor/borrower with an assignment of its mortgage; providing an assignment of a mortgage is discretionary.
- ◆ When refinancing, it is important to remember that the cost of title insurance to insure the lender's loan is reduced if there has been a previous mortgage policy issued within the ten year period prior to the refinancing.
- ◆ Refinancing presents an opportunity to ensure that all of the filing requirements of the borrowing entity have been completed correctly. For example, with a limited liability company, the review of documents for closing often reveals that the publication requirements have not been completed in a timely manner by the limited liability company. While failure to complete publication of a limited liability company does not prohibit the limited liability company from conducting business, it does provide an affirmative defense to a defendant in a law suit by the limited liability company.

TERRORISM INSURANCE

On the immediate horizon lies the question of whether Congress will renew the legislation necessary for the insurance industry to continue to provide Terrorism Insurance. The Treasury Department must make its intentions known to the insurance industry with ample time for that industry to react and determine its risks and resultant

premiums. The availability of Terrorism Insurance is not just an issue for owners of "Trophy Properties." Unfortunately, New York is in the highest rated risk area — together with San Francisco and several other major U.S. cities.

THE WRITTEN DEED — AN ENDANGERED SPECIES

The City of New York has moved another step closer to replacing the written deed, which has reigned supreme as evidence of the passing of title since replacing the passing of the twig in ancient times.

As we advised in our June 2003 Update, the Register's Office of the City of New York has introduced its online document management system for real property records. Under this system, copies of real property records, such as deeds and mortgages, can be retrieved online. The name of the new system is called the Automated City Register Information System or ACRIS. The system has seen widespread use by title companies, lawyers, real estate professionals as well as the public in general. Now, the City has launched phase two of its ACRIS system. The new system represents a major change in the way the recording of documents will be processed. Under the new system, slated to be introduced in the next couple of weeks, the City will require that certain Real Property Tax forms submitted to the Register's Office for recording be prepared on-line in its new ACRIS 2.1 E-Tax Forms module.

This new system represents another step toward the electronic recording of deeds. ACRIS is accessed by going to the Department of Finance's web site (<http://www.nyc.gov/html/dof>) and clicking the Property Records button and then the AC-

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RIS menu button. ACRIS can be accessed directly by going to <http://www.nyc.gov/html/dof/html/acris.html>.

THE §1031 EXCHANGE

There is good news and bad news in a strong real estate market. The good news is that owners get more dollars for their property. The bad news is the taxable gain on sales. As a result, “Section 1031 exchanges,” a tax savings device that has seen widespread use in property transfers in the West Coast, is now becoming increasingly popular in the East Coast. Here are some concepts for you to consider:

- ◆ *Not a true tax avoidance:* A 1031 Exchange is sometimes referred to as Tax Free Exchange. This is a misnomer. A transaction under Section 1031 of the Internal Revenue Code (“Code”) is the sale and purchase, or exchange of “like kind” property, where the gain realized in the property relinquished is deferred until the purchased property is sold. The exchange is a tax-deferral mechanism rather than a true tax avoidance mechanism. The taxpayer’s basis in the exchanged property is transferred to the acquired property. The tax is paid when the acquired property is sold, unless the taxpayer engages in another Section 1031 Exchange.
- ◆ *Many forms of real estate qualify:* For real estate transactions, “like kind” property is any property held for investment purposes related to realty or interests therein. This may include, but is not limited to, condominiums, apartment buildings, cooperative apartments, shopping centers, office buildings, manufacturing buildings, warehouses, vacant land, and single-family homes as

long as the home is not occupied as a residence of the taxpayer. Even the sale of air rights or developments rights can qualify for Section 1031 treatment.

- ◆ *Timing is Critical:* Like many things in life, timing is critical when it comes to a Section 1031 Exchange. In fact, if the time limitations in a Section 1031 Exchange are not strictly adhered to, the tax deferral will be disallowed. First, the person doing the exchange (the Exchangor) must properly identify the properties sought to be acquired or risk losing the favorable tax treatment. The Exchangor has 45 days, from the date of the sale of the property, to identify property to be acquired or replaced (known as the “Replacement Property”). The Exchangor then has 180 days from the date the Property was sold to acquire the Replacement Property.
- ◆ *Plan Early:* Because of the critical timetable involved in a Section 1031 Exchange, it is best to start planning the “exchange” before you sell your property. Those interested in pursuing a Section 1031 Exchange are thus well advised to consult one of our Department’s Partners before marketing your property for sale. Our Transactional Department would be pleased to work with your tax advisors in structuring a Section 1031 Exchange that is most advantageous to you.

SALES OF CO-OPS: REFUND OF FILING FEE ON COOPERATIVE TRANSFERS

The New York City Department of Finance (“DOF”) has announced that it is refunding the Fifty (\$50.00) Dollar filing fee it had been collecting with all New York City

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Real Property Transfer Tax Returns (RPT) in connection with all cooperative apartment transfers and other non-deeded transactions since January 1, 2003. The DOF announced the refund due to a technical error in the law enacting the filing fee that took effect on January 1, 2003. If you sold a cooperative apartment or purchased a unit from a sponsor of a cooperative (and therefore were the responsible party for payment of the RPT) since January 1, 2003, you should expect a refund in the coming months. The DOF also announced that the collection of the filing fee will no longer be required in connection with cooperative apartment

transfers and other non-deeded transactions until the technical error in the law is legislatively corrected.

PURCHASING PROPERTY

The internet is a fantastic tool for helping prospective purchasers do due diligence when considering buying property or buildings in New York. Whether it be an office building, a brownstone walk-up with rent stabilized tenants or a residential apartment building, you can obtain a wealth of information from the internet. Below are a few sites that our Transactional Department has found helpful in guiding clients through the due diligence process:

| <u>Description</u> | <u>Website</u> |
|---|---|
| ACRIS—Information by party name, including, Deeds, Mortgages, UCC and Federal Liens | http://a836-acris.nyc.gov/Scripts/DocSearch.dll/PName |
| Department of Buildings (DOB) | www.nyc.gov/html/buildings |
| Property Shark—NYC Property Auctions, Comparables and Foreclosures | www.propertyshark.com |
| Department of Environmental Protection (DEP) | www.nyc.gov/html/dep |
| Department of Finance (assessment info, taxes paid, etc.) | http://www.nyc.gov/html/dof/home.html |
| Department of Housing Preservation and Development (HPD) | www.nyc.gov/html/hpd |
| Department of Housing Preservation and Development (HPD) — violations, building reg info., etc. | http://167.153.4.71/hpdonline/provide_address.aspx |
| Landmarks | http://www.ci.nyc.ny.us/html/lpc |
| NYC Property Taxes | http://nycserv.nyc.gov/NYCServInquiry/NYCSERVMMain |
| NYS real estate database (shows owners of property and for LI, pictures of homes) | www.uspdr.com |

If you have any questions, or would like further assistance in performing due diligence when considering purchasing a property in New York, you can contact one of our partners in the Transactional Department: Daniel Altman, Craig Ingber, Howard Wenig or Robert Jacobs.