

HABITAT

Co-opCondoBoard

ASK THE
ATTORNEY

TWO CASES

Tax Trouble

By MARK HANKIN and GEOFFREY MAZEL

I am in the process of purchasing a cooperative apartment in Whitestone. I recently read that the governor's proposed 2010 budget for the state included a new tax on purchasers of cooperative shares in residential housing. Can you explain this proposed tax and how it will affect my purchase?

You are correct. In his attempt to reduce a multi-billion-dollar deficit facing New York State, the governor has proposed a new "cooperative loan tax" in his 2010 budget which is similar to the mortgage recording tax currently imposed by the state on the financing of one-, two- and three-family dwellings and individual condominiums.

It is proposed that Section 253 of the tax law of the state of New York be amended to include a provision which imposes the payment of a tax upon the filing of every "financing statement" by a lender providing financing for the purchase of a cooperative apartment. A financing statement is a statement which provides notice to the world that a lender has provided funding for the purchase of a cooperative apartment and that, as collateral for the purchase, the purchaser has signed a security agreement giving the lender the right to retain and sell (upon default) the stock and lease of the purchaser subject to the rights of the cooperative corporation. Currently, no tax is required upon the filing of financing statements with the state of New York. The amendment would require the payment of a tax with the filing of each financing statement effective 90 days after the bill becomes law.

As with most closing fees and costs imposed upon lenders as part of the loan process, the cooperative loan tax will be passed along to you as the purchaser. Determining the actual tax based upon the proposed amendment is not an easy task. The language of the proposed amendment is ambiguous and needs tweaking. This tweaking usually occurs before the bill becomes law.

Assuming the governor is seeking a parity of taxes for all residential real estate, then the current state tax of \$1 for each \$100 of the loan amount (for loans less than \$500,000) and \$1.125 for each \$100 of the loan amount (for loans equal or greater than \$500,000) would be the proposed tax. For example, if you were intending to take a loan in the amount of \$100,000 for the purchase of your cooperative apartment, a cooperative loan tax in the sum of \$1,000

would be required to be paid to the state upon the filing of the financing statement by the lender. If the loan was \$500,000, the cooperative loan tax equals \$5,625. The tax rate varies by county, amount of loan, and type of property.

The amendment also permits local governments to implement a similar tax. In New York City, a mortgage recording tax is currently paid for mortgages filed against property within the five boroughs. The state and city have combined their payments for collection of the tax at closing. The combined rate for one- and two-family residential homes is \$2.05 for each \$100 of the mortgage loan (for loans less than \$500,000) and \$2.175 for each \$100 of the loan amount (for loans equal or greater than \$500,000). The combined rate for one-, two- and three-family homes or, individual residential condominium units is \$2.80 for each \$100 of the mortgage loan amount (for loans equal or greater than \$500,000). Assuming the city follows the state's proposal to implement a cooperative loan tax (highly likely), then your tax rate will be based upon the factors discussed here.

Remember, the governor's proposed budget – required to be approved by the legislature on or before April 15, 2010 – contains many bills which seek to create and/or raise taxes to offset a burgeoning deficit. This proposed cooperative loan tax may not survive the ultimate compromise between legislators on the final budget. In any event, you can control your own destiny and avoid this proposed tax, by closing before it becomes law.

—Mark Hankin



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MARCH 2010 \$3.95

Second-Hand Headache

I live in a cooperative apartment in Queens with my wife and infant child. Our next-door neighbor is a chain-smoker. The smoke seeps into our apartment and we feel we have respiratory problems as a result. We have asked management of our cooperative to intervene on our behalf, but they have advised that our next-door neighbor has the right to smoke within his apartment. Who is responsible to alleviate this smoke condition?

What you have described is a condition that has become commonplace in residential buildings. The issue of "second-hand smoke" is still a grey area in the law and subject to further court and legislative opinion. As a lessee of the cooperative apartment, you and your family are entitled to

the "implied warranty of habitability" under Real Property Law, Section 235-b. This warranty was created by the legislature to insure that owners of residential apartment buildings provide for the health, welfare, and safety of all occupants residing in the premises.

The warranty specifically prohibits the owner from subjecting the lessee to any "conditions" which are detrimental to their life, health, or safety. In 2006, a civil court housing judge specifically held that second-hand smoke is a condition that poses a significant health hazard to residents (*Poyck v. Bryant*). Therefore, it is subject to the protection(s) of the warranty of habitability.

The court cited the U.S. Surgeon General, the New York State Legislature, and the New York City Council declaration(s) that a substantial body of scientific research has proven that breathing second-hand smoke causes a significant health hazard. Although, this is a lower court case, it has not been challenged and there does not appear to be any other cases to the contrary.

Accordingly, your cooperative as owner of the premises in which you reside, has an obligation and responsibility to alleviate the smoke condition if it results in a substantial deprivation of the use and enjoyment of your premises.

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The question remains as to how far in scope that obligation and responsibility will be enforced. Your next-door neighbor has the right to smoke in their apartment. As a lessee, your next-door neighbor has the right to quiet enjoyment and use of his/her apartment without threat of litigation.

Moreover, as the complaining lessee, you have the burden to prove that the second-hand smoke condition has affected the health and welfare of your family resulting in a substantial deprivation of use and enjoyment of your premises.

The cooperative has to weigh the rights of each lessee in an attempt to satisfy their complaints while, at the same time, complying with the laws affecting each individual. This is a difficult position for cooperatives and other residential building owners.

However, there are reasonable measures that can be taken to try and satisfy all parties concerned. The cooperative can:

- ban smoking in common areas of the building
- request that the smoker only smoke by a window or a ventilated area in his or her apartment
- request that the smoker install exhaust fans which remove smoke from the apartment
- inspect ventilation systems within and between the apartments to determine whether there is any crossover and remedy same
- tape, spackle, and cork all seams, cracks, and holes

As a lessee of the cooperative, you have every right to request the cooperative take these reasonable measures to protect the safety and well-being of your family. Under the current law, their failure to do so could entitle you to an abatement of your maintenance charges.

The most effective way to resolve the problem is to work together with your neighbor and management with the understanding that each party has rights and that a fair compromise is always the best alternative.

—Geoffrey Mazel