

ASK THE FORMER REGULATOR

Understanding the Mortgage Recording Tax Credit Deadline Suspension

Now that the state of disaster emergency is coming to an end, real estate professionals must make sense of some of the more nuanced relief provided for under Governor Cuomo's orders, keeping in mind the overall intent of the orders—to provide for assistance in coping with the unprecedented COVID-19 pandemic. In this edition of her Ask the Former Regulator column, Erica F. Buckley explains the mortgage recording tax credit and the governor's executive order suspending its deadline.

By Erica F. Buckley

I am a sponsor of a new construction condominium plan in Manhattan. I understand that the Governor's executive order suspended the deadline to take advantage of the mortgage recording tax credit. Can you explain the credit, the executive order, and how the suspension works?

Answer

N.Y. Real Prop. Law §339-ee(2) provides that: "In the event the proceeds of a construction mortgage were applied to construction of a unit of a condominium submitted to the provisions of [the Condominium Act], or in the event that a unit submitted to the provisions of [the Condominium Act] was subject to a blanket mortgage whose proceeds were applied exclusively to payment of the construction mortgage or to capital expenditures or expenses for the development or operation of the condominium, or

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to purchase of land or buildings for the condominium provided that such purchase was no more than two years prior to the recording of the declaration of condominium, and a mortgage recording tax was duly paid on such construction or blanket mortgage in accordance with article eleven of the tax law, then, as each unit is first conveyed, there shall be allowed a credit against the mortgage recording taxes (except the special additional mortgage recording tax imposed by subdivision one-a of section two hundred fifty-three of the tax law) that would otherwise be payable on a purchase money mortgage, said credit to be in the amount resulting from the product of the purchaser's pro rata percentage of interest in the common elements and the mortgage tax already paid on the construction or blanket mortgage. No credit shall be allowed

under this subdivision (a) on account of the special additional mortgage recording tax imposed by subdivision one-a of section two hundred fifty-three of the tax law or (b) where the first condominium unit is sold more than two years after the construction or blanket mortgage was recorded."

For illustrative purposes, the mortgage recording tax credit works as follows: Buyer A enters into a purchase and sale agreement to buy Condo Unit A for \$16,050,000.00 from Sponsor. Unit A has 1.6066% common interests in the condominium. Buyer A plans to finance 80% of the purchase price of Condo Unit A, which would equal \$12,840,000.00.

Sponsor has a total of \$266,000,000.00 in construction loans on the property that it is converting to condominium. The mortgage was recorded on Jan. 1, 2019. Sponsor previously paid mortgage recording tax in the amount of \$7,447,997.21, of which \$6,782,997.46 is eligible for the mortgage recording tax credit under N.Y. Real Prop. Law §339-ee(2).

The New York state and New York City combined mortgage recording tax rate for a single residential condominium unit for a loan of \$500,000.00 or more is 2.175% of the mortgage

principal. For residential transactions, the mortgage lender pays .25% of the total mortgage recording tax. This means that the total mortgage recording tax Buyer A would pay on Condo Unit A is 1.925% (i.e., 2.175% minus .25%), less \$30.00 for the first \$10,000.00.

At closing, Buyer A will be expected to pay \$247,140.00 in mortgage recording tax at closing, before Sponsor's mortgage recording tax credit is applied, (i.e., 1.925% of \$12,840,000.00 is \$247,170.00, and then subtracting \$30.00 for first \$10,000 per N.Y. Tax Law §253(2)(a)).

Assuming the closing for Condo Unit A takes place within two years from January 1, 2019, Sponsor is eligible for a mortgage recording tax credit of **\$108,975.64** from Buyer A, with Buyer A's remaining portion of the mortgage recording tax payable in the amount of \$138,164.36.

Relief Under Executive Order 202.55

On Aug. 5, 2020, Governor Cuomo issued Executive Order 202.55 as part of the disaster emergency in New York due to COVID-19, which provided for the following: "Section 339-ee(2) of the Real Property Law, and any order, rule, or regulation in furtherance of the requirements thereof, to the extent it provides that as each unit on a condominium is first conveyed, 'there shall be allowed a credit against the mortgage recording taxes [except the special additional mortgage recording tax imposed by subdivision one-a of section two hundred fifty-three of the tax law] that would otherwise be payable on a purchase money mortgage,' in respect of a portion of certain mortgage taxes previously paid, provided certain two-year time periods [as specified therein] have not elapsed before the recording of the declaration of condominium or the first condominium unit is sold, as the case may be, the run-

ning of any such two-year period(s) is hereby suspended for the duration of this Executive Order, and any such two-year period is hereby extended for a period equal to the duration of this Executive Order plus an additional period of 120 days."

As of the date of this article, Executive Order 202.55 was extended 14 times by EO 202.60, 202.67, 202.72, 202.79, 202.87, 202.91, 202.94, 202.95, 202.100, 202.103, 202.107, 202.108, 202.109, and 202.110. Executive Order 202.55 by extension, is in effect through July 5, 2021, plus 120 days, which suspends the two-year deadline set forth in N.Y. Real Prop. Law §339-ee(2) to 480 days in total. Each of these subsequent Executive Orders extended the relief provided for by Executive Order 202.55 by its plain language, and therefore the relief is cumulative. (For example, EO 202.110 states: "... I hereby extend any directives unless superseded, modified or otherwise expired, made by Executive Order 202 and each successor Executive Order to 202 ...") Based on its plain language, the relief under Executive Order 202.55 was extended by each of the subsequent Executive Orders, and none of the Executive Orders altered or modified the suspension of the two-year deadline set forth in N.Y. Real Prop. Law §339-ee(2).

To make sense of all of this, let's apply the relief provided under EO 202.55 to the scenario above for Buyer A. Absent the relief provided for under EO 202.55, Sponsor would have needed to record the condominium declaration and have its first unit closing within two years of Jan. 1, 2019 to take advantage of the mortgage recording tax credit under N.Y. Real Prop. Law §339-ee(2). Instead, the two-year time period is suspended for 334 days, plus an additional 120 days, starting on Aug. 5, 2020. As of Aug. 5, 2020, Sponsor had 148 days to meet the two-year deadline under

the statute, which requirement was suspended as a result of Executive Order 202.55. So instead of having to record the condominium declaration and have its first unit closing by Dec. 31, 2020, it appears that Sponsor must now do so by March 30, 2022, which is the date that is equal to the 148 days remaining prior to the suspension of the law by Executive Order 202.55, plus the additional 454 days of relief afforded thereunder.

Conclusion

Without a doubt, the disaster emergency in New York has caused unprecedented changes to the real estate market in New York (as well as every other industry), and the relief provided for by various executive orders served to obviate unwanted harm to the marketplace caused by delays and other disruptions to life as we know it. Luckily, Governor Cuomo was able to consider various upsets to the marketplace when issuing certain executive orders, and now that the state of disaster emergency is coming to an end, real estate professionals must make sense of some of the more nuanced relief provided for under his orders, keeping in mind the overall intent of the orders—to provide for assistance in coping with the unprecedented COVID-19 pandemic. If all goes as planned, agencies may issue guidance to confirm interpretations such the one provided in this article, or otherwise, attorneys will need to rely on trade organizations and bar associations to interpret the vast executive orders so we can uniformly return to life as we once knew it.