

Real Estate Industry Alerts Tracker - July 17, 2020 Issue

July 17, 2020

 Kelley Drye Real Estate
INDUSTRY ALERTS

NYC Mayor Signs Two Measures Aimed at Providing Relief to Certain Commercial and Residential Property Taxpayers

On July 7, 2020, New York City's Mayor Bill de Blasio signed into law two bills that were passed by the New York City Council last month, both of which reduce the interest payable by certain commercial and residential property owners in connection with the late payment of real property taxes for a short term in response to the economic impact of the pandemic. Both measures were effective immediately upon execution by the mayor and are retroactive through June 25, 2020.

Measure 1964-A reduces the interest payable by certain commercial and rent-regulated property owners for non-payment of real property taxes from 18% to 7.5% for the period beginning July 1, 2020 to October 15, 2020, on real property taxes due on July 1, 2020 for fiscal year 2021. The interest rate reduction applies to:

- Owners of Class 4 properties (commercial and industrial properties) with assessed values ranging from \$250,000 to \$750,000 that have experienced a minimum of 50% decline in income from the property between March 7, 2020 and June 30, 2020, as compared to the corresponding period in 2019.
- Owners of residential properties with an assessed value of greater than \$250,000 if: (a) a minimum of 50% of the property is used for residential rental dwellings; (b) the property has no more than 30 rental dwelling units, of which 50% or more are rent regulated; and (c) the owners have experienced a minimum of 25% decline in income generated from the property as compared to the corresponding period in 2019.

Measure 1974-A sets a 0% interest rate in connection with the late payment of real property taxes for certain residential property owners who have been affected by the pandemic and are unable to pay real property taxes due on July 1, 2020, for the period of July 15, 2020 through September 30, 2020. Residential property owners are eligible for the 0% rate under Measure 1974-A if:

- a. they own a condominium or Class 1 property (generally, 1 to 3-family residences) with an

assessed value of \$250,000 or less;

- b. the property is the primary residence of at least one of the owners for an uninterrupted period of not less than one year preceding July 1, 2020, and
- c. the combined “income” (as defined in subdivision (a) of Section 11-322.1 of the administrative code) of all of the owners is less than \$150,000.

Under both measures, the property owner must submit documentation to the Commissioner of Finance demonstrating that such owner has been “adversely affected by the COVID-19 pandemic” (see applicable definition in each measure) by no later than September 30, 2020.

A copy of measure 1964-A may be found [here](#) and a copy of measure 1974-A may be found [here](#).

New York Court Issues Rare Preliminary Injunction Temporarily Blocking Mezzanine Lender’s UCC Foreclosure Sale

On June 23, the New York Supreme Court (New York County) issued a rare preliminary injunction in favor of a mezzanine borrower staying a UCC foreclosure sale for 30 days, and instructing the foreclosing lender to re-notice the sale, “giving the market at least 30 additional days of notice” and to develop “a plan for a commercially reasonable sale to be reflected in the new notice.” This appears to be the first decision that goes against a line of established New York cases denying requests for preliminary injunctions to prevent UCC foreclosure sales by a mezzanine lender. The mezzanine borrower is the sole member of an LLC that owns a hotel on the Upper East Side of Manhattan, which was a prominent and profitable landmark hotel prior to the pandemic. As a result of government mandated shutdowns related to the pandemic, the hotel was forced to close its doors in late March and the hotel owner was unable to make its May 1 mortgage payment on a \$230 million senior mortgage loan secured by the hotel. Governor Cuomo’s executive orders staying foreclosures prevented the senior lender from initiating foreclosure proceedings until August 20, 2020. The default under the senior mortgage loan triggered a cross default under the \$35 million mezzanine credit facility and the mezzanine lender decided to halt negotiations for a forbearance and gave 36 days’ notice that it planned to conduct a UCC foreclosure sale of 100% of the mezzanine borrower’s membership interests in the hotel owner (the “Collateral”). On June 6 the mezzanine borrower sought a preliminary injunction to temporarily block the sale arguing it was not commercially reasonable as required under Section 9-610(b) of the New York Uniform Commercial Code and a “predatory attempt to capitalize on the COVID-19 pandemic” and take the hotel. A preliminary injunction may be granted if the party seeking the injunction can demonstrate:

- a. a likelihood of success on the merits of the case;
- b. the prospect of irreparable harm if the relief is withheld; and
- c. a balance of the equities tipping in the moving party’s favor.

The court found that for purposes of a preliminary injunction the mezzanine borrower had sufficiently demonstrated that several aspects of the proposed foreclosure auction that may not be commercially reasonable. The court reviewed the question of commercial reasonableness in the

context of “the sale of a landmarked hotel during the world-wide COVID-19 pandemic.” First, the court found that the 36 day notice period may be unreasonable under the circumstances, noting that the mezzanine borrower submitted affidavits showing that for complex commercial real estate assets (such as a hotel with bars and restaurants), a typical foreclosure sale would take between 60 and 90 days, making a 36 day period unusually short. The hotel was closed for 27 out of the 36 days of the notice period due to the pandemic, which limited the ability of potential bidders to inspect the property. 700 potential bidders were notified of the sale, but only 2 bidders were able to make a bid, which bolstered the mezzanine borrower’s argument that 36 days was not enough time to attract enough bids and obtain a fair market price for the property. Additionally, the bid was structured so as to minimize third-party bidders by requiring a 10% deposit at bidding, with the balance to be paid within 24 hours after closing of the sale. The court also noted that the borrower was initially precluded from having contact with potential bidders or from making its own bid.

The court next analyzed whether irreparable harm would result if a preliminary injunction is not issued. Typically courts will not grant injunctive relief if the plaintiff can be made whole monetarily. Importantly in this case the court found in favor of the mezzanine borrower on the irreparable harm analysis based on the inclusion in the mezzanine the loan documents of a standard provision that precludes monetary damages and limits the mezzanine borrower’s remedies to injunctive relief. According to the court, “[s]uch a provision is enough to establish irreparable harm.”

Lastly, in determining that the balance of the equities favored the mezzanine borrower, the court found that the hotel is a unique landmark property and if the mezzanine lender is successful in selling the Collateral, the mezzanine borrower “will be deprived not only of its sole asset but also its ownership and control rights in the plaintiff’s wholly owned subsidiaries that own, operate and manage” the hotel. The court also noted that such a loss of control will also eliminate the mezzanine borrower’s ability to control public perception of the hotel name and trademark.

A copy of the court’s decision may be found [here](#).

New Rental Assistance Program in New York

On July 14, New York’s Governor Andrew Cuomo announced the COVID Rent Relief Program, an emergency rental assistance program aimed at keeping low-income families in New York in their homes. The program will provide aid to tenants that have lost income as a result of the pandemic and the Department of Homes and Community Renewal will prioritize aid for individuals and families with the “greatest economic and social need,” accounting for income, rent burden, percentage of lost income and risk of homelessness.

Eligible households must meet the following criteria:

- a. before March 1, 2020 and at the time of application, household income must have been below 80% of the area median income, adjusted for household size (each county’s area median income, based on household size, may be found [here](#));
- b. before March 1, 2020 and at the time of application, the household must have been paying more than 30% of gross monthly income towards rent (gross income includes wages as well as any cash grants, child support, social security, unemployment benefits, etc...); and
- c. applicants must have lost income during the period of April 1, 2020 to July 31, 2020.

Eligible households will receive a one-time rental subsidy with payments being sent directly to the recipient's landlord and any assistance provided under the program does not need to be repaid. The program is not "first come, first served" and applications will be accepted throughout the two-week application period. "The rental assistance payment will cover the difference between the household's rent burden on March 1, 2020 and the increase in rent burden for the months the household is applying for assistance." Applicants may apply for up to four months of rental assistance.

Additional information on New York's COVID Rent Relief Program, including FAQs and eligibility requirements may be found [here](#).

Application Deadline For New PPP Loan Applications Extended

While many businesses have taken advantage of the U.S. Small Business Administration's Paycheck Protection Program, more than \$120 billion in funds remain available for PPP loans. To provide additional aid to businesses, the application deadline for PPP loans was recently extended from June 30 to August 8, 2020, providing extra time for businesses that have not yet applied for PPP funds. Please note, however, that the extension does not provide for additional loans to a business that has already received a PPP loan.

Additional information may be found [here](#).

Virginia Becomes the First State to Adopt a COVID-19 Workplace Mandate

On July 15, Virginia adopted new mandatory COVID-19 workplace safety measures. Virginia is the first state in the nation to adopt such a mandate, which, according to Governor Northam, is essential "in the absence of federal guidelines." Among other things, the mandate requires businesses to provide workers with personal protective equipment (PPE) and adhere to certain parameters for the sanitization of work spaces and enforcement of social distancing protocols. Businesses must prohibit any employee who has had contact with an infected person from coming to work for either 10 days or until the employees tests negative for COVID-19 in two consecutive tests. Businesses must also inform all employees within 24 hours if a worker tests positive for the virus. The mandate is in place for a period of six months and may become permanent according to the governor's office. Governor Northam's May 26, Executive Order Number 63 (2020) tasked the Virginia Department of Labor and Industry's Safety and Health Codes Board with creating such enforceable measures.

The emergency temporary standards, infectious disease preparedness and response plan templates, and training guidance will be posted on the Virginia Department of Labor and Industry website [here](#) and additional information may be found [here](#) and [here](#).

Mandatory Screenings Required for Massachusetts Offices

The coronavirus statistics in Massachusetts have greatly improved over the past few months and on July 6 the Commonwealth moved into Phase 3 of its reopening plan. Phase 3 is made up of two steps and generally permits many businesses, including office spaces to return to the workplace. Under

Phase 3, mandatory screenings are required for all office employees at the start of each shift. The Massachusetts mandatory office space safety standards, key documents and checklists may be found [here](#) and [here](#), and additional general information on Phase 3 may be found [here](#).

New Jersey Enacts Permit Extension Act

On July 12, New Jersey Governor Phil Murphy signed the Permit Extension Act of 2020 into law. The new law suspends the running of the approval period for state and local government approvals that were in effect on March 9, 2020, until six months after the public health emergency ends. It does not, however, extend the duration of permits or approvals that expired before the public health emergency was declared, nor does it impact permits that expire after the conclusion of six months after the end of the public health emergency. The suspension applies to a variety of development approvals, such as municipal land use approvals and environmental approvals.

U.S. Congressman Circulates Draft Bill to Address the Pending Crisis in the Commercial Real Estate Market

Texas Representative Van Taylor circulated a draft bill that would require the U.S. Treasury Department (the “Treasury”) to establish and administer a credit facility to guarantee certain preferred equity investments in commercial real estate borrowers affected by the pandemic. The bill will be called the “Helping Open Properties Endeavor Act of 2020” or the “Hope Act of 2020” (the “Hope Act”). Although various lending facilities, such as TALF, PPP, and the Main Street lending programs were all established to provide market liquidity, the programs have not directly addressed issues within the CMBS market. In general, commercial real estate loan documents restrict a borrower’s ability to take on additional debt (other than unsecured trade debt, with certain restrictions). However, with balance sheet loans, lenders may have some flexibility to provide assistance to borrowers looking for access to such government relief programs. In the CMBS market, where loans are serviced by loan servicers (as opposed to the originating lender), the servicers are restricted from materially modifying loans once the loans have been securitized. The Hope Act is intended to provide access to financial programs to commercial real estate borrowers, including borrowers with CMBS debt, by guaranteeing the purchase by eligible financial institutions of preferred equity instruments issued by eligible borrowers. The loan facility would be funded by utilizing amounts already appropriated for providing liquidity to eligible businesses under Section 4003(b)(4) of the CARES Act.

The Hope Act would provide lenders with incentives to purchase preferred equity instruments by (a) guaranteeing that the Treasury will purchase the preferred equity instruments, (b) reimbursing the lenders for a portion of the preferred equity instruments, and (c) paying the lenders an annual servicing fee. However, unlike the PPP program which allows the loans to become grants under certain conditions, the loans are not forgiven under the Hope Act. The following are the eligibility requirements:

Lender Eligibility. Financial Institutions are eligible to participate in the program if they are authorized to make or approve loans under the PPP program or Section 1109 of the CARES Act, or if the Secretary of the Treasury approves the financial institution.

Borrower Eligibility. Borrowers must generally establish that they have been adversely affected by the pandemic and that the revenue from the property in question was significantly reduced following the onset of the pandemic. As drafted, in order to be eligible:

- a. a borrower's revenue from the property during any consecutive three-month period between March 1, 2020 and February 28, 2021, would need to be at least 25% less than the revenue generated from the property during the same consecutive three-month period in the previous year;
- b. the Borrower cannot be in default under a mortgage for the property in question as of March 1, 2020;
- c. the property's debt service coverage ratio must have been at least 1.3x on an annual basis during 2019 or its debt service coverage must have been at least 1.3x on an annual basis during both 2017 and 2018;
- d. the property securing the mortgage cannot be owner occupied; and
- e. the borrower cannot have already received financial assistance under the Hope Act.

Preferred Equity Terms. The Hope Act would require preferred equity instruments to satisfy certain criteria in order to be eligible to be guaranteed by the Treasury:

- a. the amount paid for the preferred equity instrument cannot exceed 10% of the outstanding amount owed on the underlying mortgage;
- b. the purchase amount of the instrument must be made available to the borrower in an account that can be drawn down by the borrower, at any time, for any purpose that the borrower determines may "help the property," during the one-year period following the date the purchase is made;
- c. it may be unsecured and provide no right of foreclosure;
- d. it may not provide any voting rights to the financial institution;
- e. with the exception of default interest, it must have an annual interest rate of 2.5% compounded monthly on all amounts that are drawn down;
- f. it may be redeemed by the borrower at any time, without penalty;
- g. it must require that the initial payment is due after the end of the two-year period beginning on the earlier of: (i) the date on which all funds have been drawn down by the borrower; or (ii) the end of the one-year period beginning on the date the instrument was purchased;
- h. it must fully amortize over a seven-year period beginning on the date the initial payment is due;
- i. it must require immediate redemption if there is more than a 50% change in the ownership of the borrower since the date the instrument was purchased (excluding transfers by devise or descent on the death of an owner);
- j. it must be approved in advance by the Treasury Secretary; and
- k. the proceeds may only be used by the borrower for the benefit of the property and the

preferred equity interest (i.e., principal, interest, insurance, taxes, utilities and fees).

Additional information may be found [here](#).

New York Legislators Propose Bill That Would Cancel Rent and Mortgage Payments During the Pandemic

Last week, Assemblywoman Yuh-Line Niou and Senator Julia Salazar recently proposed the “Rent and Mortgage Cancellation Act of 2020,” which would cancel residential rent payments accrued between March 7, and the end of New York’s ongoing public health emergency, plus an additional 90 days. Homeowners who live in buildings with six or fewer units would have their mortgage payments cancelled for that same period. The proposed bill does not place hardship qualifications on the cancellation of rent and it prohibits a landlord from imposing late fees or other charges, obtaining a money judgement or evicting a tenant during that period. Additionally, landlords would be prohibited from reporting the tenant’s non-payment of rent during that period to credit reporting agencies. The proposed bill would also establish a relief fund for affected landlords that would be administered by the State Commissioner of Housing and Community Renewal. Landlords and public housing authorities could be reimbursed from the relief fund for cancelled rent during that period, but with certain strings attached. Reimbursement would be contingent on the landlord’s agreement to a five-year freeze on rent increases as well as a commitment to not evict tenants without good cause. The proposed bill also provides for fines for landlords or lenders that take “adverse action” against tenants and “small homeowners” (undefined). Fines escalate from \$10,000 for a first violation to up to \$100,000 or forfeiture of the property for a third violation. The proposed bill would require substantial government funding. Landlord advocates and counsel have come out against the bill, finding it unconstitutional and unduly burdensome on struggling landlords.

Additional information may be found [here](#).

Governor Cuomo Extends Order Temporarily Adjusting the Notary Law to Permit Use of Audio-Video Technology

On March 19, Governor Cuomo issued Executive Order 202.7, which relaxed New York’s notarization requirements to allow for remote online notarization of documents using “audio-video technology” under certain conditions. The Executive Order, which was extended through August 5, 2020, permits electronic notarization as long as the following conditions are met:

- a. if the signatory is not personally known to the notary, he or she must present a valid photo ID to the notary during the videoconference;
- b. the document(s) being notarized must be executed during the conference (pre-recorded videos of the documents being executed are not acceptable); and
- c. the person seeking notary services must represent that he or she is physically located in the State of New York at the time of the audio or video conference with the notary and must send (either by fax or email) a signed copy of the document to the notary on the date it was signed.

The notary may then notarize the transmitted copy and send it back to the signatory.

A copy of the Executive Order extending the use of electronic notarization may be found [here](#).

Heard Around the Industry

Non-Residential Construction Costs Decline in As Competition Increases: According to an international leasing construction service company's second quarter cost index, construction costs have decreased in the U.S. due to the pandemic. The quarterly index measures the country's costs in the non-residential construction market. It factors in labor rates and productivity, prices for materials and marketplace competition. According to the report, the second quarter building costs had a measurement of 1177 which represents a 1.01% reduction in costs as compared to the first quarter of 2020. A vice president of the company attributed the decrease in construction costs to increased competition by trade contractor to secure any backlogs in construction due to their uncertainty as to future opportunities. He also noted that the company expects to have a clearer picture as to the fluctuating costs in the construction industry in the third quarter.

A copy of the second quarter index may be found [here](#) and additional information may be found [here](#).

Renewed Lending Activity During the Pandemic: According to a financial services company, a major misconception about capital markets is that capital is not readily available to lend. However, its managing partner notes that, in fact, there is bottled up capital that lenders are interested in lending now. Even though some lenders are being more conservative in their underwriting due to the pandemic, there are ample capital sources available to underwrite deals for all property types other than hospitality. One basis for the misconception as to the availability of funds results from comparisons to the 2008 financial crisis. However, unlike the 2008 financial crisis, which originated in the real estate sector, the real estate sector was strong prior to the COVID-19 shutdowns and it is expected to rebound as the economy re-opens.

Additional information may be found [here](#).

Report Identifies the Housing Markets that are Most Vulnerable to the Economic Impact of the Pandemic: A recent report by ATTOM Data Solutions found that several housing markets in Northern Illinois and along the East Coast are the most vulnerable to the economic upheaval caused by the pandemic. The report, which is based on second quarter data from 406 counties across the country, found that 43 of the 50 counties that are most vulnerable are located along the east coast from Connecticut to Florida and also in the Chicago area. Todd Teta, chief product officer at ATTOM Data Solutions, stated that the data "is starting to show that eight years of price gains may be coming to an end amid the economic damage flowing from the virus pandemic."

Additional information may be found [here](#).

Office Leasing in Los Angeles at Lowest Point Since Great Recession: According to a director of research for CBRE, office leasing transactions for the second quarter were about 60% to 70% below normal and fell to their lowest point since the Great Recession. He noted that the combination of market uncertainty and the difficulty in touring office spaces during the pandemic (and stay-at-home orders) are some of the causes for the dramatic drop in leasing transactions in the second quarter. However, from a landlord's perspective, the office market still remained in decent shape as the vacancy rate of 12.8% was lower than it was for the second quarter of 2019. Additionally, the

monthly asking rental rates held steady at about \$3.87 per square foot for Class A office space. The researcher also noted that the rental market has stabilized lately, but tenants (large and small) are more interested in shorter term leases of 12-18 months as opposed to the 5-10 year lease terms that were the norm in the past.

Additional information may be found [here](#).

Office Leasing in Chicago is Down More Than 75% From the First Quarter of 2020:

According to a recent report from a prominent real estate services firm, leasing activity in downtown Chicago decreased by more than 75% in the second quarter of 2020 as compared to the first quarter of 2020. According to the reports, tenants leased approximately 800,000 square feet in the second quarter, which included leases that were negotiated prior to the pandemic and related shutdown order. Other leasing transactions were short or medium term extensions of existing leases, as opposed to new leases. The report also noted that available spaces in downtown Chicago increased in the second quarter of 2020 to 16.7%, which was its highest level in two years.

Additional information may be found [here](#).