

## **The Proposed Mezzanine Debt Mortgage Tax**

On January 13, 2020, legislation was introduced in the NYS Senate to amend: the NY Real Property Law to require the recording of mezzanine debt in conjunction with the recording of a related mortgage; and the NY Tax Law to require payment of the mortgage tax upon the recording of such related mezzanine debt. It specifically directs that the taxes paid on such mortgage with related mezzanine debt are “to be paid over...” to the recorder in the county or NYC “...for the development, maintenance or management of public housing and/or affordable housing”. A copy of Senate Bill 07231 is attached.

### PROPOSED LEGISLATION

The amendment provides that:

- mezzanine debt obtained simultaneously with (or in the same transaction as) the mortgage debt must be recorded and a mortgage tax paid on the sum of the mortgage and mezzanine debt;
- mezzanine debt is defined as “debt carried by a borrower that may be subordinate to the primary lien and/or common shared and reported assets for the purposes of financing such primary lien”; and
- the mortgage tax on the mezzanine debt is to be paid upon the recording of mortgage (including any mezzanine debt) and the receipt for payment of the tax is to be indorsed by the recorder on any mortgage and any mezzanine debt included with such mortgage.

### FAILURE TO RECORD

The amendment does not deal with enforcement for failure to record the mezzanine debt. If a mortgage tax is not paid on a mortgage, the existing statute does not permit the mortgagee to assign or satisfy the mortgage of record or to foreclose the mortgage until the unpaid tax plus interest and penalties are paid. However, as the collateral for mezzanine debt is an equity pledge of the member/partner/shareholder’s ownership interest(s) in the borrowing entity (which owns, directly or indirectly, the mortgage borrower). The equity pledge is perfected either by delivery of the certificated ownership interests under UCC Article 8, or a UCC-1 filing against the uncertificated ownership interests under UCC Article 9. In either case, the mezzanine lender’s remedy is for a non judicial public or private sale of the certificates.

### UNANSWERED ISSUES

What instrument is to be recorded for the mezzanine debt, the pledge agreement, the loan agreement or a memorandum of mezzanine debt? Will it constitute simply a constructive notice or have some lien-like attributes by being of record? Will the recording of the mezzanine debt and payment of the mortgage tax only apply to simultaneous (or combined) financing transactions? What if mezzanine debt is obtained separately without the financing or refinancing of the mortgage debt? Will a mortgage not be assignable or unable to be satisfied, or be unenforceable, in the event the mezzanine debt is not recorded nor the tax paid? Without recording and payment of the mortgage tax, will the mezzanine lender be unable to transfer, satisfy or enforce its equity pledge in a non judicial sale?

### SINGLE PURPOSE ENTITY STATUS

Will this joinder of the debt of the mortgage borrower and the mezzanine borrower of record affect the status, or perception of, the bankruptcy remote status of both SPE borrowers in the opinion of capital markets investors, the credit rating agencies or the bankruptcy courts?

JPForte  
General Counsel

# STATE OF NEW YORK

7231

## IN SENATE

January 13, 2020

Introduced by Sen. SALAZAR -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the real property law, in relation to requiring the recording of mezzanine debt; and amend the tax law, in relation to including mezzanine debt in the mortgage recording tax

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The real property law is amended by adding a new section  
2 291-k to read as follows:

3 § 291-k. Recording of mezzanine debt. Whenever a mortgage instrument  
4 is recorded in the office of the recording officer of any county, any  
5 mezzanine debt related to the real property upon which the mortgage  
6 instrument is filed shall also be recorded with such mortgage instru-  
7 ment. For the purposes of this section, "mezzanine debt" shall mean debt  
8 carried by a borrower that may be subordinate to the primary lien and/or  
9 common shares and reported as assets for the purposes of financing such  
10 primary lien.

11 § 2. Section 250 of the tax law is amended by adding a new subdivision  
12 4 to read as follows:

13 4. The term "mezzanine debt" shall have the same meaning as provided  
14 in section two hundred ninety-one-k of the real property law.

15 § 3. Section 253 of the tax law, as amended by chapter 350 of the laws  
16 of 1969, subdivision 1-a as added by chapter 788 of the laws of 1978,  
17 paragraph (a) of subdivision 1-a as amended by chapter 522 of the laws  
18 of 2008, subdivision 2 as amended by chapter 151 of the laws of 1971,  
19 paragraph (a) of subdivision 2 as amended by chapter 394 of the laws of  
20 2016 and subdivision 3 as amended by chapter 527 of the laws of 2007, is  
21 amended to read as follows:

22 § 253. Recording tax. 1. A tax of fifty cents for each one hundred  
23 dollars and each remaining major fraction thereof of the total sum of:  
24 (a) the principal debt or obligation which is, or under any contingency  
25 may be secured at the date of the execution thereof or at any time ther-  
26 eafter by a mortgage on real property situated within the state recorded  
27 on or after the first day of July, nineteen hundred and six, and (b) any.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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1 mezzanine debt related to such real property recorded pursuant to  
2 section two hundred ninety-one-k of the real property law, is hereby  
3 imposed on ~~[each]~~ such ~~[mortgage]~~ total amount, and shall be collected  
4 and paid as provided in this article. If the principal debt or obli-  
5 gation which is or by any contingency may be secured by such mortgage  
6 recorded on or after the first day of July, nineteen hundred and seven,  
7 and any mezzanine debt is less than one hundred dollars, a tax of fifty  
8 cents is hereby imposed on such mortgage and mezzanine debt, and shall  
9 be collected and paid as provided in this article.

10 1-a. (a) In addition to the tax imposed by subdivision one of this  
11 section, there shall be imposed on the total sum of (i) each mortgage of  
12 real property situated within the state and (ii) any mezzanine debt  
13 related to such property recorded pursuant to section two hundred nine-  
14 ty-one-k of the real property law, except mortgages wherein the mortga-  
15 gee is a natural person or persons, or is a credit union as defined in  
16 section two of the banking law, and in either case the mortgaged prem-  
17 ises consist of real property improved by a structure containing six  
18 residential dwelling units or less, each with separate cooking facili-  
19 ties, a special additional tax of twenty-five cents for each one hundred  
20 dollars and each remaining major fraction thereof of principal debt or  
21 obligation which is, or under any contingency may be secured at the date  
22 of execution thereof or at anytime thereafter by such mortgage and any  
23 mezzanine debt. The tax, if any, imposed by this subdivision shall in  
24 cases of real property principally improved or to be improved by one or  
25 more structures containing in the aggregate not more than six residen-  
26 tial dwelling units, each dwelling unit having its own separate cooking  
27 facilities, be paid by the mortgagee, and such tax shall not be paid or  
28 payable, directly or indirectly, by the mortgagor except as otherwise  
29 provided in sections two hundred fifty-eight and two hundred fifty-nine  
30 of this article and except such tax shall be paid in such cases by the  
31 mortgagor where the mortgagee is an exempt organization described in  
32 paragraph (b) of this subdivision. In all other cases, such tax shall be  
33 paid by the mortgagor except that the tax shall be paid by the mortgagee  
34 where the mortgagor is an exempt organization described in paragraph (b)  
35 of this subdivision. All of the provisions of this article shall apply  
36 with respect to the special additional tax imposed by this subdivision  
37 to the same extent as if it were imposed by said subdivision one of this  
38 section, except as otherwise expressly provided in this article.

39 (b) An organization organized other than for profit which is operated  
40 on a nonprofit basis no part of the net earnings of which inures to the  
41 benefit of any officer, director or member and which is exempt from  
42 federal income taxation pursuant to subsection (a) of section five  
43 hundred one of the internal revenue code shall be exempt from the  
44 special additional tax imposed by this subdivision.

45 2. (a) In addition to the taxes imposed by subdivisions one and one-a  
46 of this section, there shall be imposed on the total sum of (i) each  
47 mortgage of real property situated within the state recorded on or after  
48 the first day of July, nineteen hundred sixty-nine, and (ii) any mezza-  
49 nine debt related to such property recorded pursuant to section two  
50 hundred ninety-one-k of the real property law, an additional tax of  
51 twenty-five cents for counties outside of the metropolitan commuter  
52 transportation district, as defined pursuant to section twelve hundred  
53 sixty-two of the public authorities law, and thirty cents for counties  
54 within such metropolitan commuter transportation district for each one  
55 hundred dollars and each remaining major fraction thereof of principal  
56 debt or obligation which is, or under any contingency may be secured at

1 the date of execution thereof or at any time thereafter by such mort-  
2 gage, and any mezzanine debt., saving and excepting the first ten thou-  
3 sand dollars of such principal debt or obligation in any case in which  
4 the related mortgage is of real property principally improved or to be  
5 improved by a one or two family residence or dwelling. All the  
6 provisions of this article shall apply with respect to the additional  
7 tax imposed by this subdivision to the same extent as if it were imposed  
8 by the said subdivision one of this section, except as otherwise  
9 expressly provided in this article. Notwithstanding article eighteen-A  
10 of the general municipal law and titles eleven and fifteen of article  
11 eight of the public authorities law, no mortgage of real property situ-  
12 ated within the state in counties located within the metropolitan commu-  
13 ter transportation district, the Niagara Frontier transportation  
14 district, the Rochester-Genesee transportation district, the capital  
15 district transportation district, and the central New York regional  
16 transportation district executed, given, made, or transferred or  
17 assigned by or to an agency created under article eighteen-A of the  
18 general municipal law, an authority created under title eleven or  
19 fifteen of article eight of the public authorities law, an agent or  
20 agent of such agent of such agency or authority, a project operator  
21 receiving financial assistance from such agency or authority, a project  
22 occupant of such agency or authority, or an owner of a project receiving  
23 financial assistance from such agency or authority shall be exempt from  
24 the additional tax imposed by this subdivision. For the purposes of this  
25 subdivision the term "financial assistance" shall have the same meaning  
26 as defined in section eight hundred fifty-four of the general municipal  
27 law. The imposition of this additional tax on mortgages and mezzanine  
28 debt recorded in a county outside the city of New York, other than one  
29 of the counties from time to time comprising the metropolitan commuter  
30 transportation district, the Niagara Frontier transportation district,  
31 the Rochester-Genesee transportation district, the capital district  
32 transportation district or the central New York regional transportation  
33 district may be suspended for a specified period of time or without  
34 limitation as to time by a local law, ordinance or resolution duly  
35 adopted by the local legislative body of such county.

36 (b) Any local law, ordinance or resolution suspending the imposition  
37 of this additional tax as provided in paragraph (a) of this subdivision,  
38 or amending or repealing such local law, ordinance or resolution, shall  
39 take effect only on the first day of the third month succeeding the  
40 month in which such local law, ordinance or resolution is duly adopted.  
41 Such a local law, ordinance or resolution shall not be effective unless  
42 a certified copy thereof is mailed by registered or certified mail to  
43 the state tax commission at its office in Albany at least sixty days  
44 prior to the date the local law, ordinance or resolution shall take  
45 effect. However, the tax commission may waive and reduce such sixty-day  
46 notice requirement to a requirement that such certified copy be mailed  
47 by registered or certified mail within a period of not less than thirty  
48 days prior to such effective date if it deems such action to be consist-  
49 ent with its duties under this article. A certified copy of any local  
50 law, ordinance or resolution adopted pursuant to this subdivision shall  
51 also be filed with the state comptroller within five days after the date  
52 it is duly adopted.

53 3. Notwithstanding any other provision of law to the contrary, the  
54 mortgage recording tax shall not be imposed upon any mortgage executed  
55 by a voluntary nonprofit hospital corporation, fire company or voluntary  
56 ambulance service as defined in section one hundred of the general

1 municipal law, or upon any mortgage executed by or granted to the dormi-  
2 tory authority.

3 § 4. Section 257 of the tax law is amended to read as follows:

4 § 257. Payment of taxes. The taxes imposed by this article shall be  
5 payable on the recording of each mortgage of real property, including  
6 any mezzanine debt, subject to taxes thereunder. Such taxes shall be  
7 paid to the recording officer of any county in which the real property  
8 or any part thereof is situated. It shall be the duty of such recording  
9 officer to indorse upon each mortgage and any mezzanine debt included  
10 with such mortgage a receipt for the amount of the tax so paid. Any  
11 mortgage so indorsed may thereupon or thereafter be recorded by any  
12 recording officer and the receipt for such tax indorsed upon each mort-  
13 gage shall be recorded therewith. The record of such receipt shall be  
14 conclusive proof that the amount of tax stated therein has been paid  
15 upon such mortgage, including any mezzanine debt.

16 § 5. Subdivision 3 of section 261 of the tax law, as amended by chap-  
17 ter 443 of the laws of 2017, is amended to read as follows:

18 3. On or before the tenth day of each month the recording officer of  
19 each county shall pay over to the county treasurer of said county, and  
20 in the counties of New York, Kings, Queens, Richmond and Bronx to the  
21 commissioner of finance of the city of New York for credit to the gener-  
22 al fund of such city, the balance of the moneys received during the  
23 preceding month upon account of taxes paid to him or her as herein  
24 prescribed, after deducting the necessary expenses of his or her office  
25 as provided in section two hundred sixty-two of this article, except  
26 taxes paid upon mortgages which under the provisions of section two  
27 hundred sixty of this article are first to be apportioned by the commis-  
28 sioner, which taxes and money shall be paid over by the commissioner of  
29 finance of the city of New York as provided by the determination of the  
30 commissioner and except taxes paid upon any mortgage with related  
31 recorded mezzanine debt, which taxes and money shall be paid over to the  
32 county treasurer or to the commissioner of finance of the city of New  
33 York for the development, maintenance, or management of public housing  
34 and/or affordable housing in such officer's county or the city of New  
35 York. In each county not within the city of New York, the whole of the  
36 net amount of such balance, after the deduction by the county treasurer  
37 of the necessary expenses of his or her office provided in section two  
38 hundred sixty-two of this article, shall be held by him or her and shall  
39 be allocated to the tax districts of the county according to the  
40 location of the real property covered by the respective mortgages upon  
41 which the tax was collected. The recording officer and county treasurer  
42 shall prepare a joint semi-annual report on or before May fifteenth and  
43 on or before November fifteenth in each year showing the amounts to be  
44 credited to each tax district of the county of the moneys collected  
45 under this article during the preceding periods of six months each which  
46 ended respectively on March thirty-first and September thirtieth. Such  
47 report shall be made in duplicate in accordance with the rules and regu-  
48 lations of the commissioner and filed with the clerk of the board of  
49 supervisors and the commissioner. The board of supervisors, on or before  
50 the fifteenth day of June and on or before the fifteenth day of December  
51 in each year, shall issue its warrant for the payment to the respective  
52 tax districts of the amounts so credited, provided, however, that in a  
53 county in which a town contains within its limits an incorporated  
54 village, or portion thereof, the board of supervisors shall apportion to  
55 such village so much of the share credited to the town as the assessed  
56 value of said village or portion thereof bears to twice the total

1 assessed valuation of the town, and provided, further, that, at the  
2 option of the governing board of the county, the county may instead  
3 prepare and file such a joint report and make such payments on a monthly  
4 or quarterly basis. Where the county elects to make monthly payments,  
5 the recording officer and county treasurer shall prepare a joint report  
6 on or before the fifteenth day of each month showing the amounts to be  
7 credited to each tax district of the county and the moneys collected  
8 under this article for the month preceding the most recently concluded  
9 month, and the board of supervisors shall issue its warrant for payment  
10 on or before the fifteenth day of the following month. Where the county  
11 elects to make quarterly payments, the recording officer and county  
12 treasurer shall prepare such a joint report on or before the fifteenth  
13 day of May, August, November, and February, showing the amounts to be  
14 credited to each tax district of the county of moneys collected under  
15 this article for the preceding three-month period ending March thirty-  
16 first, June thirtieth, September thirtieth, and December thirty-first,  
17 respectively and the board of supervisors shall issue its warrant for  
18 payment on or before the fifteenth day of June, September, December, and  
19 March, respectively. The warrant shall direct payment to the city treas-  
20 urer of the amount due the city, to the town supervisor of the amount  
21 due the town, and to the village treasurer of the amount to which the  
22 village shall be entitled. Mortgage tax moneys allotted to cities, towns  
23 and villages shall be applied to the payment of the general expenses  
24 thereof. The commissioner shall prescribe the method of adjustment and  
25 correction of errors heretofore or hereafter made in the distribution of  
26 moneys collected under this article. Provided, however that in the town  
27 of Ossining, county of Westchester, monies due to the unincorporated  
28 portion of the town shall be placed in the unincorporated town fund  
29 instead of into the general fund of such town.

30 § 6. This act shall take effect on the ninetieth day after it shall  
31 have become a law.