



STATE OF NEW YORK

DEPARTMENT OF LAW

REAL ESTATE FINANCE BUREAU

MEMORANDUM

Re: Small Residential Building No-Action Letters

Date: January 8, 2016

This information is being provided by the Department of Law as a guidance document pursuant to State Administrative Procedure Act § 102(14).

Applicability: The New York State Department of Law has received a significant number of applications for no-action letters that attempt to create condominiums in buildings with five or fewer units. These small condominiums are typically established for estate planning, tax purposes or expense-sharing among a group with collective title to the property.

In some instances, these applications are submitted by property owners wishing to subdivide a multifamily dwelling and convey title to its current occupants, who are frequently family members. Attorneys submitting these applications often cite and conform their submissions to the regulations applicable to De Facto Condominiums in Part 23. In other instances, the applications are submitted pursuant to the “Tenant-Sponsored” regulations of Part 23, typically with three or fewer tenants wishing to purchase a unit in a condominium that will convey the remaining units to the owners of record at the time of the application.

Both categories of applications are frequently submitted with conditions that do not meet the regulatory requirements for a no-action letter. Attorneys have submitted applications for buildings in which there are vacant units, with the representation that all units are occupied by the owner or owners of record for residential use. In other instances, applications have contained affidavits in which tenants waive their rights to purchase. Additionally, many applications are submitted in which an applicant has owned the property to be converted for less than two years, in contravention to 13 N.Y.C.R.R. § 23.9(d)(1)(i). In considering submissions involving Small Residential Buildings, the Department of Law will employ a strict application of the regulations. Strict construction of the regulations governing no-action letters will lead to an equitable application of the Department’s regulatory authority in this area.

Definitions: For the purposes of this memo, all terms used herein are to be ascribed the meanings below:

Small Residential Building: Any building containing five or fewer units, with one or more of the units being zoned and designated for residential use. The number of units is not based on the number of units to be contained in the proposed condominium, but is instead based on the number of constructed units that can be legally occupied pursuant to the local building code, the building’s certificate of occupancy or the local zoning law.

De Facto Condominium: A condominium created through the issuance of a no-action letter from the Department of Law under the submission requirements of 13 N.Y.C.R.R. § 23.9(d). Pursuant to 13 N.Y.C.R.R. § 23.9(a)(2)(ii), a De Facto Condominium has the following characteristics:

- a) It is a commercial or residential property;
- b) It is owned and occupied solely by declarants as joint tenants, tenants by the entirety, tenants-in-common, sole shareholders of a corporate owner, sole partners in a partnership or members of an LLC;
- c) It has been owned by all of its owners in one of the aforementioned forms of ownership at least two years prior to submission of the no-action application;
- d) It is fully occupied, without any vacancies or subtenants;
- e) It is established by a transaction in which the declarant under a plan would be the same as the offeree.

Tenant Sponsored Condominium: A condominium created through the issuance of a no-action letter from the Department of Law, under the submission requirements of 13 N.Y.C.R.R. § 23.9(e). Pursuant to 13 N.Y.C.R.R. § 23.9(a)(2)(iii), a Tenant-Sponsored condominium has the following characteristics:

- a) It is the offering and sale of units of commercial or residential property;
- b) It is the subject of an offer by tenants of the building, pursuant to their own proposal or a promoted proposal;
- c) It is established by the submission of a no-action application, in which all tenants have joined;
- d) It is fully occupied, without any vacancies or subtenants.

Purpose and Procedure: Given the volume of Small Residential Building no-action applications that have been submitted in recent years, the Department of Law is issuing a clarification of its procedures and the relevant regulations.

De Facto Condominium Submission Procedure: The following are required components of a no-action application for a De Facto Condominium, per 13 N.Y.C.R.R. § 23.9(b) and (d):

- a) A transmittal letter, conforming to the requirements of 13 N.Y.C.R.R. § 23.9(b)(2);
- b) The application fee of \$225, pursuant to 13 N.Y.C.R.R. § 23.9(b)(3);
- c) An affidavit from all of the owners of the building, complying with the requirements of 13 N.Y.C.R.R. § 23.9(d)(1). All of the subsections of 23.9(d)(1) are required to be present except subsection (iii), which is necessary only if applicable.

In addition to these regulatory requirements, the following items will also be required for De Facto Condominium consideration:

- d) A 339-i opinion letter from an expert on condominium operations, setting forth the calculation of common interest in the proposed condominium and indicating that the allocation of common interest, as proposed, conforms with the Condominium Act;
- e) Recent electric/utility bills for the building's units, showing a pattern of usage as proof of occupancy;
- f) An M-10, if so requested by the Department of Law.

Applications that fail to comply with the required components of submission will not be considered until all deficiencies are cured. An incomplete submission will, therefore, substantially delay the consideration

of an application. The Department of Law strongly suggests that applications for no-action letters include all of the required documents with the initial submission.

It is the position of the Department of Law that the purpose of the regulations for De Facto Condominium no-action letters (13 N.Y.C.R.R. § 23.9(d)) is to allow owners who have collectively taken title to a property in some manner other than a condominium deed (*e.g.* joint tenants, tenants by the entirety, tenants-in-common, sole shareholders of a corporate owner, sole partners in a partnership or members of an LLC) to take advantage of condominium ownership. The Department of Law has determined that in such instances, the protection of an offering plan is not necessary, given the owners' familiarity with the property and the proposed transaction. A tenant or non-owner-occupant in a small building, on the other hand, may not have the same access to information as an owner and is entitled to disclosure under the Martin Act. Accordingly, the inclusion of a tenant or other occupant of a building in a no-action application violates the requirement of 13 N.Y.C.R.R. § 23.9(a)(2)(ii) that all declarants under the plan are the same as the offerees. A De Facto Condominium, therefore, is an inappropriate option for buildings that have non-owner occupants.

Tenant-Sponsored Condominium Submission Procedure: The following are required components of Tenant-Sponsored no-action application, per 13 N.Y.C.R.R. § 23.9(b) and (e):

- a) A transmittal letter, conforming to the requirements of 13 N.Y.C.R.R. § 23.9(b)(2);
- b) The application fee of \$225, pursuant to 13 N.Y.C.R.R. § 23.9(b)(3);
- c) An affidavit from all of the owners of the building, complying with the requirements of 13 N.Y.C.R.R. § 23.9(e)(1) and containing all of the subsections of 23.9(e)(1), except subsection (ii), which is necessary only as applicable;
- d) An M-10;
- e) An affidavit from all of the tenants of the building, complying with the requirements of 13 N.Y.C.R.R. § 23.9(e)(2), with every required statement of 13 N.Y.C.R.R. § 23.9(e)(2) present.

Similar to the De Facto Condominium, the following items are required components of a Tenant-Sponsored no-action application:

- f) A 339-i opinion letter from an expert on condominium operations setting forth the calculation of common interest in the proposed condominium and indicating that the allocation of common interest, as proposed, conforms with the Condominium Act;
- g) Recent electric/utility bills for the building's units, showing a pattern of usage as proof of occupancy.

As stated above, incomplete applications will not be reviewed until all outstanding deficiencies are cured, which may result in a substantial delay in their consideration.

It is the position of the Department of Law that the purpose of a Tenant-Sponsored Condominium is to allow a group of tenants to purchase a building from an owner. To that end, the Department of Law has determined that such circumstances do not constitute an offering to the public, so long as the building is fully occupied and all tenants will acquire the property. A failure of even one tenant to join will render the application for a Tenant-Sponsored Condominium invalid, as will any waiver of participation in the transaction or waiver of rights to an offering plan that is executed by a non-purchasing tenant.

Overall Effect: The no-action application process is not altered in any way by this memo. It is, however, the purpose of this memo to clarify the procedures for Small Residential Building transactions giving rise to no-action treatment pursuant to the regulations.

The regulations provide that no-action letters for Small Residential Buildings cannot be issued for the following:

- a) Buildings with vacancies;
- b) Transactions in which a condominium is formed and a non-occupying owner retains some ownership interest in the condo with the purchasing tenants;
- c) Buildings that have an owner or owners who have held title for less than 2 years;
- d) Buildings that seek to declare a De Facto Condominium in which one or more tenants currently reside.

Request for Exemption: Transactions involving small buildings that have characteristics not contemplated by the regulations may be considered for an exemption under 13 N.Y.C.R.R. § 23.1(k). Any such applications must conform to the submission requirements outlined in that section and must include a transmittal letter executed by an attorney that outlines the provisions from which an exemption is sought, along with the grounds for the exemption. Exemptions may be granted for transactions where the Department of Law deemed that an enforcement action is neither necessary to effectuate the purposes of the General Business Law or to protect the investing public.

Effective Date: This memo will take effect immediately and will affect new and pending applications before the Department of Law for consideration.