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STATE OF NEW YORK

DEPARTMENT OF LAW

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REAL ESTATE FINANCE BUREAU

M E M O R A N D U M

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**Re: No-Action Letter Requests for Projects  
That Include an Affordable Housing  
Component or Involve the New York City  
Department of Housing Preservation and  
Development**

**Date: January 26, 2016**

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The Department of Law publishes this memorandum as a guidance document pursuant to New York State Administrative Procedure Act § 102(14).

**Introduction**

Various government agencies have programs designed to create incentives for developers to produce affordable housing. For financing purposes a condominium structure is often required to participate in these programs. Because the parties involved in these transactions are often real estate development professionals and/or related parties, declarants (“Declarants”) generally submit No-Action Letter Applications (“NAL Applications”) in lieu of full offering plans. To ensure that Declarants understand the requirements for the issuance of a No-Action Letter under these circumstances, this memorandum sets forth the relevant requirements. A No-Action Letter will be required when a Declarant: (1) seeks a property tax exemption or abatement of any kind (e.g. RPTL §§ 420-c or 421-a); (2) will be subject to a deed restriction or comparable document containing rent and/or occupancy requirements; or (3) will be subject to a regulatory agreement with or an enforcement mortgage from the New York City Department of Housing Preservation and Development (“HPD”), the New York City Housing Development Corporation (“HDC”), New York State Homes and Community Renewal (“HCR”) or another government agency.<sup>1</sup>

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<sup>1</sup> This memo should be read in conjunction with the NYAG policy memo “Mixed Use Buildings Expanded No-Action Treatment” dated 1/29/2009.

## **Submission Requirements**

Any NAL Application for a project that falls into one of the three categories mentioned above must include the following:

1. 339-i Letter. Opinion letter stating that the method used to determine the undivided percentage of common interest of each unit in the common elements in the condominium complies with New York Real Property Law § 339-i.
  - a. The letter must include the allocations.
  - b. The letter must comply with the Department of Law's May 14, 2014 memo "N.Y. Real Prop. Law § 339-i and 13 NYCRR Part 20."
2. Organizational Chart. If the Declarant will not be retaining title to each condominium unit, an organizational chart illustrating the complete ownership structure for each proposed unit must be provided. See page seven of this memorandum for a model.
3. Check. Submit a check in the amount of \$225.00, as required by New York General Business Law § 352-e(7)(a).
4. Attorney Transmittal Letter. The transmittal letter must state:
  - a. Reasons why the transaction meets the standards set forth in 13 NYCRR § 23.9(a)(1);
  - b. That the attorney has no actual knowledge of any omission or untrue statements of a material fact included in the application; and
  - c. That the attorney has prepared or has reviewed all legal documents necessary to form the condominium and believes it to be a valid condominium under the New York Condominium Act (or the laws regulating condominiums in the state where the property is located). If the condominium is not in existence at the time the application is submitted, the attorney will cause the condominium to be formed in conformity with applicable law, including the New York Condominium Act (or the laws regulating condominiums in the state where the property is located).
5. Declarant Affidavit(s). Declarant affidavit(s) must contain the following:
  - a. Declarant Information.
    - i. Name, business address and legal status.
    - ii. If the Declarant is an entity, the affidavit must include the jurisdiction of incorporation and state that the entity has filed an application for authority with the State of New York.

- iii. If, at the time the NAL Application is submitted, title is held pursuant to a nominee agreement, the NAL Application must include two Declarant affidavits, one from the beneficial title holder and one from the record title holder. Please note that the DOL takes no position on the legality of nominee agreements.
  - iv. If the land owner is a ground lessor, the ground lessee must also provide a Declarant affidavit.
- b. Declarant's Relationship to the Property. Describe the Declarant's relationship to the subject property. (Does the Declarant own the property? Is the Declarant in contract to purchase the property?)
- c. Building and Unit Information.
  - i. Borough, block and lot(s);
  - ii. Street address;
  - iii. Number of buildings;
  - iv. Total number of units in the condominium;
  - v. Specific unit or units being offered; and
  - vi. Percentage of common interest allocated to each unit.
- d. Offeree Information. Name, business address, legal status and nature and length of any relationship between Declarant and any offeree.
- e. Description of the Proposed Transaction.
  - i. Anticipated date of condominium formation;
  - ii. Description of the property (including any a/k/as);
  - iii. Description of the conveyance;
  - iv. Description of any and all public financing, including but not limited to: federal or state tax credits, bond loans and/or subsidy loans from HCR, HPD, HDC, the Borough President's Office, etc.
  - v. Descriptions of any real property tax benefit or exemption that will be sought or that has been obtained;
    - 1. If Real Property Tax Law § 421-a benefits are being sought, include the following: "Applicant will be applying for real estate tax benefits for the Premises pursuant to New York State Real Property Tax Law § 421-a. Applicant agrees that each of the residential rental apartments in the Premises will be registered as rent stabilized in accordance with the requirements of the New York State Division of Housing and Community Renewal and New York City Department of Housing Preservation and Development."

2. If Real Property Tax Law § 421-a benefits will not be sought, state same.
- vi. Representation that if, at some point in the future, the Declarant wishes to transfer, to a non-affiliate, a residential unit that (1) includes rent-stabilized apartments, (2) has benefitted from any public subsidy or (3) benefits from any tax exemption or abatement, it will do so only after issuance of an amended No-Action Letter by the Department of Law;
  - vii. The following representation regarding subdivision:
    1. Declarant represents that it will subdivide neither the \_\_\_\_\_ Unit nor the \_\_\_\_\_ Unit into separate condominium units to be offered for sale to third parties as such or conveyed to a cooperative housing corporation for sale to third parties only after issuance of an amended No-Action Letter by the Department of Law or an offering plan for the Unit has been accepted for filing by the Department of Law in compliance with § 352-e *et seq.* of the General Business Law and applicable regulations, as applicable.
  - viii. The following representation regarding rent stabilization:
    1. Declarant acknowledges that (a) the formation of the \_\_\_\_\_ ( ) unit condominium pursuant to this No-Action Letter shall not permit any owner of the \_\_\_\_\_ Unit to remove any residential rental apartments of the Building from rent stabilization (if applicable) pursuant to the exemption for units owned as a cooperative or condominium under the Rent Stabilization Code (9 N.Y.C.R.R. § 2520.11), the Emergency Tenant Protection Act of 1974 (9 N.Y.C.R.R. § 2500.9), or the Rent Stabilization Law of 1969 (N.Y.C. Admin. Code § 26-504) (hereinafter collectively referred to as the “Rent Stabilization Laws” and [(b) the formation of a \_\_\_\_\_ ( ) unit condominium does not change the requirement under N.Y. Real Prop. Law § 421-a (“§ 421-a”) that all residential rental apartments are subject to Rent Stabilization Laws, during the period and under the circumstances stated in § 421-a and the rules promulgated thereunder.]<sup>2</sup> Nothing contained herein shall preclude the filing and acceptance of an offering plan in compliance with General Business Law § 352-e (and §§ 352-eee or 352-eeee, as applicable) and the governing regulations nor shall anything contained herein

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<sup>2</sup> Bracketed text is not required if the affidavit states that no § 421-a benefits are being sought in connection with the project.

preclude the execution of bona fide interim leases that are not subject to Rent Stabilization, subsequent to the acceptance for filing of a Part 20 or a Part 21 offering plan (if applicable).

- f. List of Information to be Provided to Each Offeree Prior to Submission of NAL Application. (Applicable only when Declarant or affiliates of Declarant will not be retaining title to each and every condominium unit contemplated by the NAL Application.)
- i. Purchase price;
  - ii. Percentage of common interest allocated to the unit;
  - iii. Estimated common charges and real estate taxes and the proposed budget;
  - iv. Copy of any mortgage or ground lease on the property (or in New York City the City Register File Number (the “CRFN”));
  - v. Information known to the Declarant that may result in extraordinary expenses for the offerees including, but not limited to, liabilities, dangerous or hazardous conditions, pending litigation and administrative proceedings;
  - vi. A copy of the certificate of occupancy for the building; and
  - vii. Such other information as the Department of Law may require to be presented to each offeree.
- g. Representation Regarding the Use of Property. Use of property will comply with property’s certificate of occupancy, zoning, building and housing laws, rules and regulations, or if the proposed use will not comply with the legally permissible use, discuss what steps must be taken to comply with or to change the legally permissible use and identify which party will assume responsibility to take such steps.
- h. Representation Regarding Prior NAL Applications. Whether the Declarant, within the preceding five years, have participated in any other applications for a No-Action Letter or have made any other offerings that were not pursuant to an offering plan filed with the Department of Law and the address of any property that was the subject of such application(s) or offering(s).
6. Offeree Affidavit(s). Each proposed offeree will provide an affidavit containing the following:<sup>3</sup>
- a. Name, business address and legal status of the offeree;

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<sup>3</sup> This includes instances where a nominee agreement will be entered into (1) after submission of the NAL Application; and (2) with an entity that is not controlled by the Declarant.

- b. Subdivision and rent-stabilization representations [5(f)(vii) and (viii) *supra*] for each condominium unit to which it will take title;<sup>4</sup>
- c. Representation that the relationship between the Declarant and the offeree is of such a nature that the offeree does not require the protection of an offering plan;
- d. Representation that the offeree has read the affidavit(s) of the Declarant submitted as part of the NAL Application;
- e. Representation that the offeree understands that no offering literature other than as required by the No-Action Letter will be provided;
- f. Representation that the offeree has inspected the subject property; and
- g. Representation that, if the offeree wishes to transfer, to a non-affiliate, a residential unit that (1) includes rent-stabilized apartments, (2) has benefitted from any public subsidy or (3) benefits from any tax exemption or abatement, it will do so only after issuance of an amended No-Action Letter by the Department of Law.<sup>5</sup>

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<sup>4</sup> This representation is required only when the offeree will take title to a unit to be used for residential purposes.

<sup>5</sup> Alternatively, the Declarant may include the representations in paragraph 5(e)(viii) *supra* in the condominium declaration.

