
REAL ESTATE FINANCE BUREAU

M E M O R A N D U M

Re: Occupied Buildings and Part 20 Offerings

July 10, 2015

The Department of Law publishes this memorandum as a guidance document in accordance with the New York State Administrative Procedure Act § 102(14).

I. Introduction

This memorandum amends and restates the Department of Law’s previous memorandum on Occupied Buildings and Part 20 Offerings dated March 4, 2014, and addresses the Department of Law’s position with respect to the New York General Business Law (“GBL”) Art. 23-A (the “Martin Act”) and condominium offering plans drafted to comply with New York Compilation of Codes, Rules and Regulations (“NYCRR”) title 13, part 20 that:

- (i) were **never consummated**, *see* 13 NYCRR § 20.1(c)(6); **and**
- (ii) have occupants in the residential units (or a portion thereof)¹; **and**
- (iii) the sponsor thereof (or its successor) seeks to offer the residential units for sale.

Conditions (i), (ii) and (iii) above are hereinafter collectively referred to as the “Operative Conditions.”

II. The Law

A. Tenant Protections Provisions in the Martin Act

The sections of the Martin Act that govern the conversion of residential property to condominium status include protections for tenants, senior citizens, and disabled persons residing at the property to be sold. In New York City, these protections are laid out in GBL § 352-eeee. Both market-rate and rent-regulated tenants in New York City enjoy

¹ If **all** the occupants of the residential units have executed **both** a purchase agreement and an interim lease, *see* 13 NYCRR § 20.3(n), sponsor is excepted from the requirements set forth in this memorandum.

certain protections from eviction, harassment or unconscionable rent increases, and tenants are accorded a right to purchase their homes. *See id.* Other provisions supply non-purchasing rent-regulated tenants, senior citizens and disabled persons with additional rights. *See id.*

In Nassau, Rockland and Westchester counties a separate section of the Martin Act governs. *See* GBL § 352-eee. Dozens of local municipalities in these three counties have elected to provide tenants, senior citizens and disabled persons with additional protections from eviction as well as a right to purchase the home they live in pursuant to this section. Similarly, other municipalities elsewhere in the state have also elected to provide tenants, senior citizens and disabled persons with certain protections from eviction, as well as a right to purchase their homes, pursuant to GBL § 352-e(2-a).

Common among all these provisions of the Martin Act is a statutory prohibition on the Attorney General's acceptance of an offering plan that omits the applicable tenant protections. *See* GBL §§ 352-eeee(2); 352-eee(2); and 352-e(2-a)(b).

B. Part 20 Offering Plans Lack Tenant Protections

Part 20 offering plans are submitted to and accepted for filing by the Department of Law when a sponsor intends to construct and then immediately sell the new, vacant residential units to home purchasers. Accordingly, by their very nature, Part 20 offering plans do not have the tenant protections of the Martin Act because newly-constructed, vacant residential units lack tenants needing protection.

The presumption that a sponsor of a Part 20 offering plan would quickly consummate its offering plan rather than rent its residential units was upended by the contraction in demand for condominium units that followed the 2008 financial and property market collapse. Many buildings that were the subject of a Part 20 offering plan have now been operating as residential rental buildings for years. More recently, some sponsors of unconsummated Part 20 offering plans have rented out contracted-for units prior to declaring the plan effective, thus compromising the rights of both its tenants and its contract vendees.

Permitting a sponsor to amend its unconsummated Part 20 offering plan so as to sell its now-occupied residential units without according to tenants the statutory protections of the Martin Act is not permissible. The Martin Act *mandates* that the Attorney General refuse to accept for filing an offering plan that converts residential rental buildings to condominium status if it does not comply with the substantive and procedural tenant protection provisions of the Martin Act. *See* GBL §§ 352-eeee(2); 352-eee(2); and 352-e(2-a)(b). Accordingly, the Department of Law will not allow sponsors of now-occupied residential rental buildings to proceed with a Part 20 public offering that lacks the applicable tenant protection provisions of the Martin Act, and provides the following guidance.

III. Guidance

1. If the Operative Conditions exist, then a sponsor has two options: (a) abandon its offering plan pursuant to 13 NYCRR § 20.5(g); or (b) amend and restate the entire offering plan so that it complies with the tenant protection provisions provided for in the applicable sections of the Martin Act and 13 NYCRR Part 23.
2. Sponsors are advised that if the Operative Conditions exist, and a sponsor receives a partial property tax exemption pursuant to New York Real Property Tax Law § 421-a, then the Department of Law will, among other things, verify the building's rent-stabilization registration status with the New York Division of Homes and Community Renewal. Determining the rent registration status of a building that has been operating as rental while in receipt of § 421-a benefits is a threshold matter before the Department of Law will accept any form of amendment to the offering plan.
3. The directives and guidance set forth herein shall apply regardless of whether a sponsor (or its successor) may have:
 - (a) disclosed in its Part 20 offering plan any right to rent rather than sell its residential units²; and/or
 - (b) at some point in time declared its offering plan effective; and/or
 - (c) amended its Part 20 offering plan at some point in time to disclose that its residential units became occupied.

A. To Abandon The Offering Plan

1. In such circumstances where a sponsor abandons its Part 20 offering plan, it should:
 - (a) Undertake abandonment in accordance with the applicable provisions of 13 NYCRR §§ 20.1(1)(2) and 20.5(g);
 - (b) cease and desist from any marketing or sales activity of the residential units;

² Such disclosures, made pursuant to 13 NYCRR §§ 20.3(c)(1), (d)(4) and (t)(1), are intended to supply prospective purchasers of a Part 20 offering plan with material information about the future governance and control of the condominium. Such a disclosure cannot be read to exempt a sponsor of its statutory obligations concerning its tenants, nor does it relieve the Attorney General of his statutory mandate to refuse to accept offering plans for occupied property without the applicable tenant protections. *See supra* at II(A). Moreover, the Department of Law's prior acceptance of a Part 20 offering plan containing such a disclosure is not an approval or endorsement of that provision. *See Whalen v. Lefkowitz*, 36 N.Y.2d 75, 78 (1975).

- (c) notify all occupants in the residential units that sponsor has abandoned its intention to sell the units they occupy;
- (d) cause a termination³ or amendment⁴ of the condominium declaration to be recorded with the relevant local authority and file same with the Department of State; and
- (e) comply with all applicable state and local laws concerning tenants, rents and evictions; including, without limitation, the prohibitions on tenant harassment or retaliation in the Martin Act, the Real Property Law, and the Rent Stabilization Law and Code of New York City, as applicable.

B. Exemption to Amend and Restate The Offering Plan

The Department of Law is empowered pursuant to GBL § 352-g and 13 NYCRR § 23.1(k) to grant an exemption from certain disclosure requirements set forth in GBL § 352-e as well as various sections of 13 NYCRR Part 23. When such an exemption is granted, it may effectively permit a Part 20 offering plan to be amended and restated as a Part 23 offering plan. The issuance of such an exemption is within the Department of Law’s discretion and is necessarily fact-sensitive. Outlined below are the contours within which the Department of Law is generally prepared to entertain the application for such an exemption. Not all determinative factors and considerations are presented here, but compliance with these and other provisions of law and policy will inform the Department of Law whether and what kind of an exemption should be granted.

1. For sponsors of buildings with **40** or fewer units being offered, an exemption from fulfilling both certain statutory provisions of GBL § 352-e and regulatory provisions of 13 NYCRR Part 23 may be granted by the Department of Law. An exemption will be granted only if the Department of Law is satisfied that the sponsor: (a) has adopted adequate measures that are protective of all residential tenants; and (b) has submitted a non-eviction offering plan. In such cases, the Department of Law may, in its discretion, grant an exemption from, *inter alia*, the four-to-six month plan acceptance date requirement of GBL § 352-e, certain disclosure requirements set forth in GBL § 352-e(1)(b), as well as various sections of 13 NYCRR Part 23.
2. The Department of Law is without authority to grant an exemption from the statutory provisions of GBL § 352-e for sponsors offering for sale **41** or more

³ For guidance on terminating a condominium declaration, sponsors are referred to the Department of Law’s memorandum on Letters of No Objection to Termination of Condominium Declaration dated Jan. 22, 2015, available at http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/real_estate_finance/Effective-memos/Termination_of_Condominium_Jan_22_2015.pdf.

⁴ The Department of Law acknowledges that a sponsor may want to preserve a condominium structure for the purpose of segregating ownership of the non-residential units as real property. Counsel for such a sponsor should contact the Department of Law in such circumstances, as it may be necessary for the Department of Law to issue a Letter of No Objection prior before certain localities will accept an amendment to a condominium declaration for recording.

units. *See* GBL § 352-g. However, an exemption from complying with certain regulatory provisions of 13 NYCRR Part 23 may still be granted, in the Department of Law's discretion, pursuant to 13 NYCRR § 23.1(k). Such an exemption will be granted only if the Department of Law is satisfied that the sponsor: (a) has adopted adequate measures that are protective of all residential tenants; and (b) has submitted a non-eviction offering plan.

3. An application for an exemption must be presented in writing from sponsor's counsel, and set forth the exact provisions of GBL § 352-e or 13 NYCRR Part 23 that sponsor is applying for an exemption from, together with the reasons therefor. Counsel should refer to GBL § 352-g and 13 NYCRR § 23.1(k) for further information on exemptions.