



STATE OF NEW YORK

DEPARTMENT OF LAW

REAL ESTATE FINANCE BUREAU

M E M O R A N D U M

**Re: Delay in First Closing
in Newly-Constructed Condominiums
and Rescission**

May 18, 2012

Issues have repeatedly arisen in connection with the application of 13 NYCRR § 20.3(o)(12), which provides as follows:

State when sponsor expects the first closing of a unit to occur which should correspond to the first year of operation projected in schedule B. State that if such date is delayed 12 months or more, purchasers will be offered rescission.

The Department of Law's regulations require only that the first closing of title to a unit occur within 12 months of the projected first closing date, which is always the same as the date of commencements of condominium operations provided in the proposed budget (Schedule B).

The regulations do not impose any requirements as to when subsequent closings must occur. Nor do the regulations provide that sponsors need not offer rescission if the first closing does not occur within 12 months of the projected first closing date if the offering plan specifies a shorter time period. Rather, the regulation provides an outer limit as to how long the first closing may be delayed.

Recently, the Department of Law has seen an increasing number of situations where one closing occurs just under 12 months from the projected date (obviating the need to offer rescission based on 13 NYCRR § 20.3(o)(12)), but no subsequent closings are scheduled for months or even years afterwards.

Additionally, some of these first closings have occurred under circumstances indicating that the closing was not bona fide or that condominium operations did not in fact commence with the first closing.

The following memorandum attempts to address these and related issues.

First Closing

The first closing as contemplated in 13 NYCRR § 20.3(o)(12) must be bona fide. The DOL will determine whether the first closing is bona fide under the totality of the circumstances presented. The relevant factors include, but are not limited to:

1. the relationship between the purchaser and the sponsor and its principals, agents, affiliates, or relatives thereof;
2. the timing of the transaction and circumstances surrounding the purchase agreement and closing; and
3. the payment of more than nominal consideration.

Additionally, the closing of title to a unit for which a temporary or final residential certificate of occupancy has not been issued will not satisfy the requirements of 13 NYCRR § 20.3(o)(12) for condominiums including residential units.

Disclosure Concerning Timing of Closings

To ensure that purchasers are fully aware of the fact that the deadline for the first closing does not provide a deadline for their own closings, all offering plans should disclose the following as a special risk:

The Sponsor anticipates that the first closing of a unit will occur by [month, date, year]. Purchasers will be offered a right of rescission if: (i) the actual date of closing of title to the first unit; or (ii) the projected date of closing of title to the first unit occurs later than [month, date, year], twelve months after the projected date for the first closing. If the Plan is amended to provide for a later projected date for the first closing, purchasers will be entitled to an offer of rescission if the first closing occurs more than 12 months beyond that amended, later date.

However, if the first unit closing occurs before [month, date, year], the Sponsor may schedule the closings of title to other units significantly later than such date. Unless your Purchase Agreement contains an outside closing date, the Sponsor is not obligated to schedule your closing within any specified time frame or to ensure that closing of title to your Unit will occur by any date certain.

PROSPECTIVE PURCHASERS SHOULD THEREFORE CAREFULLY CONSIDER SUCH RISKS IN THEIR DETERMINATION AS TO WHETHER TO PURCHASE A UNIT.

The regulations do not prohibit sponsors and purchasers from negotiating individual outside

closing dates. If all purchase agreements contain outside closing dates the sponsor need not include the foregoing special risk.

The offering plan must also disclose the exact date (*i.e.*, the month, date, and year) after which rescission must be offered if the first closing has not yet occurred.

Sponsor Must Give Purchasers Adequate Time to Rescind

The offering plan must also disclose that purchasers will have at least 15 days from presentation of an offer of rescission within which to elect to rescind.

Election to Rescind

All amendments offering rescission must include as an attachment a form that purchasers may use to elect to rescind their purchase agreements or waive their right to rescind. A sample form that is acceptable to the Department of Law is annexed to this memorandum.

Changes in Projected Date Of the First Unit Closing

Sponsor may change the projected date of the first unit closing by amending the offering plan. Such an amendment will extend the projected date only as to purchasers who sign purchase agreements after the amendment is accepted for filing.

Confusion exists concerning who must be offered rescission in the unusual situation where the first closing does not occur within 12 months of the original projected closing date, a new date is set, and the first closing still does not occur within 12 months of that new date.

The regulation provides that whenever the date of the first closing “is delayed 12 months or more, purchasers will be offered rescission,” and does not distinguish between classes of purchasers. Consequently, even if a purchaser declined to accept an offer of rescission based on the initial delay, sponsor must offer that purchaser another opportunity to rescind based on any subsequent delays. The same principle applies with equal force to multiple offers of rescission based on other portions of the regulations, such as material changes adverse to purchasers (13 NYCRR § 20.5(a)(5)) or a six-month delay in commencement of condominium operations coupled with a 25 percent increase in budgeted expenses (*id.* § 20.3(h)(1)).

For example, a purchaser who signed a purchase agreement when the projected date of the first unit closing was January 1, 2011, will be entitled to an offer of rescission if the first unit closing does not occur before January 1, 2012. A purchaser who signed a purchase agreement after sponsor amended the offering plan to change the projected date of the first unit closing to July 1, 2011, will be entitled to rescission only if the first unit closing does not occur by June 30, 2012. In this example, the first purchaser will be entitled to a second offer of rescission if she or he declined to rescind based on the first offer and the first closing still has not occurred by June 30, 2012.

The following disclosure is an example of an acceptable means of describing the change in the projected first unit closing date and its effect on various purchasers if the first unit closing date is being amended for the first time:

FIRST UNIT CLOSING DATE/OFFER OF RESCISSION

The projected date of the first unit closing in the Plan was [January 1, 2011]. The projected first unit closing date is updated in this amendment to [January 1, 2012].

Pursuant to 13 NYCRR §20.3(o)(12), Purchasers who entered into purchase agreements prior to the presentation of this amendment are entitled to rescission because the first closing did not or will not occur before January 1, 2012.

Purchasers who enter into purchase agreements after the presentation date of this amendment, as well as purchasers who are entitled to rescission pursuant to this amendment but decline to rescind, will be entitled to rescission if the actual first unit closing date or any further updated projected first unit closing does not occur before January 1, 2013.

It is not acceptable to refer to purchasers who bought pursuant to a specified previous amendment without disclosing the relevant dates.

Scope of Coverage of this Memorandum

All offering plans submitted after the date of this memorandum must contain the disclosures required herein. All offering plans filed before the date of this memorandum shall be amended to include the disclosures required herein at such time as the plan is next amended.

ELECTION FORM-RIGHT TO RESCIND

_____ [Insert name of sponsor] hereby offers purchasers the right to rescind their purchase agreements pursuant to the _____ Amendment to the Condominium Offering Plan for the _____ Condominium because [the first closing of title to a unit did not occur before [date] [and/ or] [specify other reason]].

If you choose to rescind your purchase agreement, _____ [insert name of sponsor] will cause _____ [insert name of escrow agent].to return your down payment, together with any accrued interest, [but exclusive of any funds used for special work, as provided in the Condominium Offering Plan and purchase agreement] within ___ days of receipt of this form.

If you choose to rescind your purchase agreement with _____ [insert name of sponsor] will be terminated and you will have no further rights under the purchase agreement.

IF YOU DO NOT SIGN THIS FORM AND RETURN IT BY [specify date no earlier than 15 days from presentation of the amendment offering rescission], YOU WILL NO LONGER HAVE THE RIGHT TO CHOOSE TO ACCEPT THE INSTANT OFFER OF RESCISSION.

___ I hereby elect to rescind my agreement to purchase a unit in the _____ [insert name of condominium], terminate the purchase agreement, and recover my down payment, together with any interest earned thereon.

___ I hereby elect to waive my right to rescind my agreement to purchase a unit in the _____ [insert name of condominium] based on [insert name of sponsor]'s offer of rescission pursuant to the _____ Amendment to the Condominium Offering Plan for the _____ Condominium.

Signature: _____

Printed Name: _____

Address: _____

City, State,
And Zip Code: _____

Tel. No.: _____

Date: _____