
REAL ESTATE FINANCE BUREAU

M E M O R A N D U M

Re: Required Disclosure for Occupied Conversion Plans
Involving Renovations, Combinations, and Expansions

August 19, 2015

This memorandum is a guidance document pursuant to State Administrative Procedure Act § 102(14) involving compliance with the Martin Act and governing regulations for occupied buildings undergoing conversion to cooperative or condominium status.¹

**TRUTHFUL AND ACCURATE REPRESENTATIONS OF BUSINESS AND
RENOVATION PLANS**

In recent months, the Department of Law has launched investigations into several occupied building conversions where discrepancies were discovered between the representations contained in the offering plan filed with the Department of Law and those contained in filings made to other government agencies, the media or in marketing materials. During the course of these investigations, the Department of Law obtained numerous documents from sponsors such as operating agreements, business plans, stacking charts, marketing materials, and applications submitted to governmental agencies that all supported plans that differed from those disclosed in the offering plan.

The Department of Law recognizes that converting an occupied building to cooperative or condominium status can be a long and detailed process, and in some cases, a sponsor's specific representations at the time of red herring submission may change during the course of the review process. Even so, sponsors must disclose their overall business plan and strategy in the offering plan when converting an occupied building to cooperative or condominium status, and if sponsor's business plan changes during the review process, sponsor must either revise the red herring or update the offering plan to disclose such changes to tenants in occupancy and to the Department of Law. Such changes include: 1) plans to change the nature of the building through renovations; 2) plans to change existing units through combinations; and 3) any plans to expand the existing building (*e.g.* penthouse additions).

¹ This memo shall cite only to the relevant provisions of the Part of regulations governing the conversion of occupied buildings to condominiums. *See* 13 N.Y.C.R.R. Part 23. Sponsors must comply with the relevant provisions for cooperative conversions as well. *See* 13 N.Y.C.R.R. Part 18.

1. Plans to Change the Nature of the Building through Building-Wide Renovations

The offering plan must disclose any plans to change the nature of the building from its as-is condition. Ideally, at the time of submission of the red herring, sponsor will have approved building plans and drawings from the New York City Department of Buildings (“DOB”) or other authority having jurisdiction at the time of submission of the red herring. Including approved building plans and drawings at the time of red herring submission will expedite review.

Any renovation plans must be disclosed in the following sections of the plan:

- Special Risks
- Introduction
- Sponsor’s Statement of Building Conditions
- Description of Property

2. Plans to Change Units in the Building Through Combinations

At times, purchasers may want to buy one or more units to create larger apartments, and in other cases, sponsors may combine existing units as they become vacant to increase value and marketability of units within the building. Unit combinations are permissible, so long as they do not involve any violations of the Martin Act or other applicable laws and regulations, and are accompanied by the required changes to the condominium declaration and by-laws (if applicable).

In situations where sponsor wishes to combine units for marketing purposes, such unit combinations must be disclosed in the offering plan or in a duly filed amendment prior to commencing marketing.

If sponsor’s plans to offer combined units formalizes while the red herring is pending, sponsor must make a revision to the red herring pursuant to 13 N.Y.C.R.R. § 23.1(h) (a “Revision”). Sponsor must serve a copy of the Revision on all tenants.

If sponsor plans to add unit combinations to the offering plan after acceptance for filing, and the only change to the offering plan is the disclosure of the combined unit, sponsor may utilize a price change amendment to disclose combined units, so long as the amendment includes an updated Schedule A, Schedule A-1 (discussed below), and an updated floor plan for each combined unit.

Although approved plans and drawings from DOB or the authority having jurisdiction are not necessary to market combined units, sponsor must represent in the offering plan that it will not close on any combined units unless there is a temporary certificate of occupancy covering the unit.

Furthermore, sponsor may not market any combined units that are: 1) occupied by rent-stabilized or rent-controlled tenants²; or 2) occupied by market-rate tenants who still have a continued right to occupancy. Further, if a market-rate tenant has a right to occupancy at the time the 90-day exclusive period commences, sponsor shall not market such unit combination until the expiration of the 90-day exclusive period. After the expiration of the exclusive period, sponsor may market units occupied by market-rate tenants if such tenant has no right to a lease renewal within the statutory timeframe left to declare the offering plan effective.

Plans to combine units must be disclosed in the following sections of the offering plan:

- Schedule A
- Description of Property

In addition to the foregoing, the offering plan must also include a separate Schedule A-1 that lists all proposed units that involve unit combinations for marketing purposes. The Schedule A-1 must follow the Schedule A format and must include the following additional columns:

- Existing unit number and any common elements to be combined
- Whether the existing unit is occupied or vacant, along with the rental status (*e.g. rent regulated, market-rate*)
- If the existing unit is occupied, proposed date the unit will be legally vacated
- New combined unit number

In addition to the Schedule A-1, the sponsor's project engineer or architect should complete the Occupied Conversion Unit Combination Spreadsheet for submission to the Department of Law as a back-up document for engineering review, which is available in Excel on the Department of Law's website here: <http://www.ag.ny.gov/real-estate-finance-bureau/forms>. Revised floor plans should include bubble notes explaining all changes made to combined units.

Once an offering plan has been accepted for filing, it is possible that a purchaser may wish to contract to buy one or more units from sponsor. Where a purchaser contracts to buy one or more units to combine them, the proposed combination does not need to be disclosed prior to contract execution. Sponsor must disclose the proposed unit combination in the offering plan in an update amendment and should include a revised Schedule A and floor plan. Final approval from the DOB or authority having jurisdiction is also not required at the time of disclosure in the offering plan if the combination is at the request of the purchaser.

² The only exception to the marketing of rent-stabilized or rent-controlled units is if the sponsor has entered into a buyout agreement with such rent stabilized or rent-controlled tenant in compliance with the DOL memo entitled "Tenant Buyouts" dated July 9, 2015.

3. Plans to Expand Existing Building(s)

In some instances, including proposed unit combinations, sponsor plans to add onto existing tenanted structures, *e.g.* additional floors above the existing roof. This type of work often involves substantial structural work to the building, and all relevant aspects of construction should be disclosed, including DOB approval of submitted plans and a Tenant Protection Plan (detailed below), prior to the time the plan is accepted for filing. *See* 13 N.Y.C.R.R. § 23.3(aj) and March 10, 1988 NYAG Policy Memo entitled, “Air and Development Rights” for guidance on such requirements.

FILINGS WITH THE DEPARTMENT OF BULDINGS

The PW-1 is the first document filed with DOB to begin the application process for “Plan/Work Approval.” The form requires the property owner to certify whether the building contains *any* dwelling units that will remain occupied during construction. If any of these units are subject to rent regulation, the owner must disclose whether the scope of the work requires notification to New York State Homes and Community Renewal (“HCR”) and if so, whether the owner has complied with all requirements imposed by that agency’s regulations.

To insure compliance with DOB’s requirements and the accuracy of filings made to the Department of Law, the Department of Law reserves the right, in its discretion, to request copies of all PW-1 forms submitted to the DOB and proof of notification to HCR, if required. In the event the Department of Law requests such information, sponsors shall include all such filings electronically in compliance with the Department of Law December 3, 2014 memo entitled, “Submission of Building Plans in Electronic Format in Lieu of Paper.”

TENANT PROTECTION PLAN

In New York City, any offering plan that involves construction where tenants live in the building, regardless of whether construction is taking place in an individual unit or units or building-wide, or whether the construction is taking place on an unoccupied floor, requires the filing of a Tenant Protection Plan. *See* New York City Administrative Code § 28-104.8.4 (the “Tenant Protection Law”).

The Tenant Protection Plan must indicate in sufficient detail the specific units that are *or may* be occupied during construction, as follows:

1. Egress. At all times in the course of construction provision shall be made for adequate egress as required by this code and the tenant protection plan shall identify the egress that will be provided. Required egress shall not be obstructed at any time except where approved by the commissioner.

2. Fire safety. All necessary laws and controls, including those with respect to occupied dwellings, as well as additional safety measures necessitated by the construction shall be strictly observed.
3. Health requirements. Specification of methods to be used for control of dust, disposal of construction debris, pest control and maintenance of sanitary facilities, and limitation of noise to acceptable levels shall be included.
 - 3.1. There shall be included a statement of compliance with applicable provisions of law relating to lead and asbestos.
4. Compliance with housing standards. The requirements of the New York City housing maintenance code, and, where applicable, the New York state multiple dwelling law shall be strictly observed.
5. Structural safety. No structural work shall be done that may endanger the occupants.
6. Noise restrictions. Where hours of the day or the days of the week in which construction work may be undertaken are limited pursuant to the New York City noise control code, such limitations shall be stated.

New York City Administrative Code § 28-104.8.4.

The offering plan must include a statement in the Sponsor's Statement of Building Condition section disclosing the existence of the Tenant Protection Plan and the Tenant Protection Law. If a Tenant Protection Plan has been filed with the DOB at the time of the submission of the red herring, then sponsor must include a copy of it in the plan as an exhibit in Part II. Sponsor must also post the Tenant Protection Plan conspicuously in the building.

It is also imperative that sponsor provide any updated versions of the Tenant Protection Plan to all tenants in the building. If the Tenant Protection Plan is revised, sponsor must represent in the offering plan that it shall post the updated version conspicuously in the building.

OPEN AND TRANSPARENT COMMUNICATION BETWEEN SPONSOR AND BUILDING TENANTS

In addition to the information required by the Tenant Protection Law, sponsor must also create an open and transparent environment between tenants and sponsor. To accomplish this goal, sponsor must provide the contact information for sponsor's tenant representative, including the e-mail address and/or telephone number. The tenant representative should be available at reasonable times to answer questions about construction and renovations. Sponsor may also appoint a separate contact, such as a

building project manager, to answer questions about construction and renovations. This information should be provided to tenants at the time of delivery of the red herring to tenants. Sponsors may include such information in the mandatory notice to tenants required by 13 N.Y.C.R.R. § 23.1(e) or in a separate letter. This letter must be submitted to the Department of Law along with the red herring and back-up documents.

In addition to the notice requirements above, the Department of Law strongly encourages sponsor to have regular in-person communication with tenants on the status of construction and renovations. This could take the form of monthly meetings between tenants and sponsor's representatives.

DISCLOSURE OF OPTIONS FOR TEMPORARY RELOCATION AS AN ACCOMMODATION TO SPONSOR IN FURTHERANCE OF PLANS OF RENOVATION

Another issue that arises with construction taking place in occupied buildings is the temporary relocation of tenants in order to accomplish construction and renovation goals. In some cases, temporary relocation is in the best interests of tenants and may even be required by law. In cases where sponsor is reserving the right to enter into temporary relocation agreements with existing tenants, this should be highlighted as a special risk in the offering plan. The Special Risks section should also advise tenants to confer with counsel before they sign any relocation agreement. A form relocation agreement must be included in the offering plan, and must ensure that the tenant retains all rights that existed prior to the time of temporary relocation. Options for temporary relocation must be disclosed in the following sections of the plan:

- Special Risks
- Introduction
- Rights of Existing Tenants

If the sponsor intends to offer temporary relocation at the time of submission of the red herring, sponsor may also include such information in the mandatory notice to tenants required by 13 N.Y.C.R.R. § 23.1(e) by adding such information at the end of the letter.

Disclaimer:

The Department of Law reserves the right to request additional information from sponsor and its principals and agents at any time during the conversion process. Sponsors and its principals and agents are advised that the submission of any misinformation to the Department of Law, including a false instrument, shall be deemed a violation of the Martin Act, and may also subject both the sponsor and the purchaser to both civil and criminal liability.