

TAKE JUDICIAL NOTICE

Understanding The Mortgage Tax Credit Affidavit (Real Property Law 339 EE)

October 1, 2008

When a developer of a Condominium pays mortgage tax on his underlying construction or blanket mortgage and then subsequently sells the individual condo units, a Mortgage Tax Credit is allowed. The directive for same is Real Property Law Section 339ee and for New York City Condominiums is found at 20 NYCRR 651.1.

In order to obtain the credit the following elements of the statute must be fulfilled.

1. If the underlying development loan is a construction loan, the affidavit must recite that the proceeds were applied to construct the condo unit.
2. If the underlying development loan is a blanket mortgage then the following conditions must be recited:
 - a. The proceeds were applied to pay the construction mortgage; or
 - b. To capital expenditures or expenses for the development or operation of the condominium; or
 - c. To purchase land or buildings for the condominium, provided that such purchase occurred no more than two years prior to the recording of the declaration of the condominium.
3. Notwithstanding the foregoing, no credit will be given whether the underlying mortgage is a construction or blanket mortgage if the condominium unit is sold more than two years after the issuance of the blanket or construction mortgage.

The above elements must be recited in an affidavit which accompanies the recording of the mortgage. In the Contract of Sale between the developer and purchaser, the tax credit is usually negotiated for the benefit of the Seller/developer. As a result, the effect of the credit does not alter the mortgage tax amount paid by the buyer. The result is as follows: the title company reduces the mortgage tax on the purchaser's title bill by the amount of the credit and the Seller adds the credit as an adjustment to his purchase price. The allocation and payee of the mortgage tax changes, but the amount remains the same. Once it is concluded that the elements are satisfied, the credit is computed on the mortgage tax already paid on the underlying mortgage along with the purchaser's pro rata percentage of interest in the condo unit's percentage of common elements.

The additional mortgage tax or "the quarter point" is not affected by the credit and must be paid by the lender.