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One Minute Memo®

DC Proposed Regulations Modify Deed of Trust Recording Tax Exemptions

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Overview

New regulations proposed by the District of Columbia affect the recordation tax exemptions for purchase money deeds of trust not recorded simultaneously with the deed, deeds of trust recorded to refinance construction loans and certain other deeds of trust.

Current Law For Delayed Recording of Purchase Money Deeds of Trust

Section 42-1102 of the D.C. Code provides for an exemption from recordation tax for "a purchase money mortgage or purchase money deed of trust that is recorded simultaneously with the deed conveying the real property." Section 42-1103(b-1)(1)(B) provides, in part, that a purchase money deed of trust shall "be recorded within 30 days of the date that the deed conveying title to the real property to the purchaser is duly recorded." [Emphasis added.] The District of Columbia Recorder of Deeds and the real estate community at large have interpreted these two provisions as allowing a thirty day grace period after a deed is recorded within which to record a purchase money deed of trust exempt from a second recordation tax.

Proposed Change

A proposed amendment to Section 501 of Title 9 of the District of Columbia Code of Municipal Regulations (DCMR) would limit the recordation tax exemption for purchase money deeds of trust to those instruments recorded **simultaneously** with the deed conveying the real property. A proposed change to Section 519.3a of the Regulations would make this change also applicable to purchase money deeds of trust securing indebtedness incurred to acquire an economic interest in real property. These proposed amendments as well as the other proposed amendments discussed in this One Minute Memo will be effective for instruments executed on or after December 15, 2017.

Other Proposed Changes

Another important change is the way the Recorder of Deeds will tax modifications to construction loan deeds of trust. Currently if a construction loan is increased and a modification to the deed of trust is recorded, the recordation tax will be imposed on the excess of the face value of the modified deed of trust over the face value of the original deed of trust less any repayments of principal. Under proposed amendments to the regulations, the recordation tax will be imposed on the excess of the face value of the modified deed of trust over **the balance due** on the construction loan secured by the original deed of trust.

If the deed of trust is modified early in the construction process, this could result in a double recordation tax being paid on a large portion of the construction loan. For example, assume a secured construction loan of $50 million, of which $10 million has been drawn down. Further assume the loan is increased to $55 million and a modification to the deed of trust is recorded. Under the current rules, a recordation tax would be due on $5 million ($55-$50 million); under the proposed regulations a recordation tax would be due on $45 million ($55-$10 million).

When a permanent deed of trust replaces a construction loan deed of trust, then D.C. Code Section 42-1102(11) exempts the permanent deed of trust from the recordation tax except to the extent that the amount secured by the permanent deed of trust exceeds the amount secured by the construction loan deed of trust. Proposed amendments to Sections 510.1 and 510.2 of the DCMR make it clear that the exemption contained in Section 42-1102(11) is applicable only if the obligors under both the construction loan and the permanent loan secured by the deeds of trust are the same obligors, and the exemption applies except to the extent that the amount secured by the permanent deed of trust exceeds **the balance due** on the construction loan secured by the construction deed of trust.

Reaction

The District of Columbia Office of Tax and Revenue characterizes these proposed regulations as "coordinating" various sections of the law while it appears to many real estate practitioners as an attempt to change current statutory law by regulation. Unless and until these proposed regulations are challenged, they will become effective for security instruments dated on or after December 15, 2017.

We will continue to monitor the progress of these proposed regulations. If you have any questions about how these proposed regulations could impact your transactions, please do not hesitate to contact Stanley Jutkowitz at sjutkowitz@seyfarth.com, Ronald Gart at rgart@seyfarth.com, or Ehsan Sanaie at esanaie@seyfarth.com.

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