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US Regional Real Estate 2022

New York: Law & Practice

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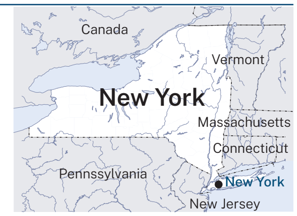
NEW YORK



Law and Practice

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1. GENERAL

1.1 Main Substantive Skills

Real estate law encompasses a broad range of skills and practice areas. To adequately represent a client, a real estate attorney must understand the nature of the client's business and the client's willingness to take risks.

A real estate practitioner must understand the myriad of potential issues that may arise for a given real estate project (typically within tax, finance, corporate, securities, environmental, energy and land use, bankruptcy, government relations, insurance and construction, among others) and have access to the breadth and expertise necessary to effectively represent clients on all relevant issues. To that end, most matters require a team approach with lawyers that have differing expertise. In addition, practitioners must be resourceful and have the ability to communicate and negotiate effectively. Current trends typically do not impact the skills required to practice real estate law; however, one must remain aware of them to effectively assist clients in moving their real estate projects forward.

1.2 Most Significant Trends

COVID-19 and impacts to the real estate market have remained the dominant trend in real estate over the past year. Restaurant and retail properties have slowly been starting to recover, followed by hotel and hospitality. The residential market remains robust across the State with demand generally outpacing supply. Looking ahead, the big question is how the real estate related trends that the pandemic accelerated will evolve over time. The "work-from-home" model appears to be holding strong and the impact on the commercial office space sector remains unclear. Brick and mortar retail continues to suffer as consumers have adjusted to and embraced remote shopping. Malls and big box retail continue to look for ways to remain important to consumers. Hospitality properties seem to be entering the workout phase as owners, lenders and franchisors work to reopen shuttered properties. Project development remains very strong but supply chain and labor challenges remain and it is unclear how rising interest rates and/or inflation will impact overall activity levels going forward.

1.3 Impact of Recent US Tax Law Changes

The Tax Cuts and Jobs Act (TCJA), enacted on December 22, 2017, included a number of benefits to the real estate industry. Because most real estate is held through limited liability companies (LLCs) treated as partnerships for US federal income tax purposes, the owners of those companies should be able to benefit from the 20% pass-through deduction on qualified business income generated by the companies.

While the federal historic rehabilitation tax credit underwent some changes, it remains in place as an incentive for real estate developers to rehabilitate historic structures. The TCJA limited the deductibility of interest expense for many businesses; however, real estate businesses can elect out of the interest deduction limitations. The TCJA denied the deductibility of excess business losses for non-corporate taxpayers for tax years beginning after December 31, 2020 and before January 1, 2026.

The CARES Act

The Coronavirus Aid, Relief, and Economic Stability (CARES) Act, enacted on March 27, 2020 as amended by the American Rescue Plan Act of 2021, extended the time the denial of deductions of excess business losses to tax years beginning before January 1, 2027.

The CARES Act made changes to the depreciation rules, including classifying qualified improvement property as 15-year property (or 20-year property under the alternative depreciation system (ADS)), effective as of December 22, 2017. As a result of these amendments, qualified improvement property (not depreciated under ADS) is now eligible for 100% bonus depreciation if it was placed in service after September 27, 2017 and before January 1, 2023.

QOZ Program

The TCJA also created the Qualified Opportunity Zone (QOZ) program, which is designed to spur investment in low-income communities. Under this program, taxpayers that sell or exchange capital assets can obtain certain tax benefits if the gain from those transactions is contributed into a Qualified Opportunity Fund (QOF), an entity organized for the purpose of investment in certain types of property located in QOZs. QOZs are low-income communities (identified by census tracts) that have been designated for the purpose of receiving investment pursuant to the QOZ program.

Taxpayers who contribute these gains to a QOF may be able to obtain various tax benefits, including deferral of recognition of capital gain until December 31, 2026. Some tax benefits previously available to investors, such as a basis step up for investors who invested in a QOF for five years prior to December 31, 2026, are no longer available due to the passage of time.

The QOZ program provides a new source of capital to develop real estate projects located in QOZs. QOZ real estate projects typically require a multidisciplinary approach from the legal team, ranging from the formation of QOFs to structuring the purchase of real property located in a QOZ in a manner compliant with applicable Internal Revenue Code and Treasury Regulation provisions.

Due to COVID-19, the Internal Revenue Service (IRS) has issued a series of notices and other guidance to delay and extend certain deadlines and other requirements associated with the QOZ program. These changes are intended to accommodate taxpayers that are currently participating or considering participation in the program.

In April 2021, in connection with the passage of the New York State fiscal budget, the New York State Legislature enacted legislation which decouples New York in certain respects from the federal income tax benefits available under the Opportunity Zones program. As a result, for taxable years beginning on or after January 1, 2021, any original gain deferred for federal income tax purposes under the Opportunity Zones program will be added back to a taxpayer's income for purposes of determining a taxpayer's New York income tax obligations.

1.4 Impact of COVID-19-Related Rules and Regulations

Entering the 2nd Quarter of 2022, new COVID-19 cases are down dramatically across the State. As a result, there has been a significant relaxing of COVID-19 rules and regulations with vaccination and mask mandates largely repealed and social distancing requirements significantly relaxed. However, everyone seems to have a wary eye on the next COVID variant and restrictions will be back in place if (or when) the next wave hits.

2. SALE AND PURCHASE

2.1 Ownership Structures

The most prevalent forms of ownership are individual and joint ownership through legal entities, such as limited liability companies, limited partnerships, corporations or trusts. Currently, these legal entities remain the primary owners of commercial real estate, especially limited liability companies due to their favorable tax treatment and flexibility in structuring the company. Typically, investors in commercial real estate take title through an entity, or series of entities, owned and controlled by the individual investors.

Residential real estate owned by more than one person may take title as tenants-in-common, joint tenancy with the right of survivorship or tenancy by the entirety for married couples.

2.2 Important Jurisdictional Requirements

Generally, parties are able to buy and sell real estate without complying with any jurisdictional requirements. Only certain types of parties or real property are subjected to State or local regulation, ie, certain charitable corporations must obtain the permission of the Supreme Court of the State of New York or the New York State Attorney General before transferring real property.

Similarly, a party seeking to purchase a residential home that is in default on a mortgage loan must comply with the New York State Home Equity Theft Prevention Act. Properties that are suffering from environmental contamination may require the selling party to notify the New York State Department of Environmental Conservation or subsequent parties in title of the existence of the contamination or any restrictions placed upon the real property.

2.3 Effecting Lawful and Proper Transfer of Title

Transfer of title is effectuated by the delivery and acceptance of a deed, in recordable form, to the subject real property. To be in recordable form, a deed must be signed, acknowledged and contain an adequate description of the property. While delivery and acceptance of a deed is sufficient to transfer title to real property, the deed must be recorded in the county clerk's office and the applicable taxes and fees paid to perfect the transfer.

This final step is important because New York State is a "race-notice" jurisdiction. This means a party can simultaneously issue two deeds to two separate parties for the same real property. The person who wins the "race" to the applicable county clerk's office and has their deed recorded first will be the owner of the real property, provided that the party had no knowledge of the other deed.

2.4 Real Estate Due Diligence

Depending on the complexity of the acquisition, purchasers of real estate typically engage third parties such as attorneys, institutional lenders, real estate brokers and appraisers, engineers, surveyors, architects, general contractors, title insurance/search companies, accountants, insurance agents, environmental consultants, zoning research companies, representatives from local municipalities and other third parties. Sophisticated purchasers often communicate directly with the above-referenced third parties. Contracts for the purchase and sale of real property typically provide the purchaser a specific time period in which to conduct all real estate due diligence.

Purchasers engage attorneys to coordinate with and review the work of the above-referenced third parties. Attorneys are also responsible for examining abstracts of title, instrument surveys and other title documents to ensure the purchaser is receiving good and marketable title to the property.

Although purchasers are responsible for conducting due diligence and choosing to proceed with the real estate transaction, sophisticated purchasers are increasingly relying on the opinions and expertise of third parties to determine whether various aspects of the real estate are satisfactory for its end use.

2.5 Typical Representations and Warranties for Purchase and Sale Agreements

While representations and warranties in a purchase and sale contract can vary greatly, in commercial transactions, the following representations and warranties are common:

- authority and capacity to execute the agreement and perform the obligations under the agreement;
- no pending or threatened lawsuits against the parties or the subject real property;
- no pending or threatened eminent domain or condemnation proceedings against the real property;
- no pending or threatened changes in the assessed valuation or tax rate applicable to the real property;
- no pending or threatened changes in the zoning classification of the real property;
- no known environmental defects with the real property or any actions being taken by any agency with respect to the environmental condition of the real property; and
- the existence and good standing of all permits and certificates necessary for legal use or occupancy of the real property.

In commercial transactions, there are generally no representations or warranties provided for under State or local law. This is not true of residential transactions. For instance, with respect to newly built homes, each sale is subject to certain warranties regarding the quality of construction under the Housing Merchant Implied Warranty.

For pre-built homes, sellers are required to make certain disclosures with respect to the condition of the real property in a Property Condition Disclosure Statement. These forms require the owner to represent certain facts, including general historical, environmental, mechanical and structural information with respect to the property.

Remedies and Protections

The remedies against a seller who breaches a representation are typically defined in the contract, including termination of the purchase agreement, specific performance and, less often, monetary damages for out-of-pocket costs incurred by purchasers owed to attorneys and third parties engaged to assist with purchasers' due diligence. However, sellers typically limit their liability for representations and warranties by negotiating into the contract a "sunset provision" on the survival of the representations and warranties.

The statutory protections that exist in residential transactions also include remedy provisions, such as payment for actual damages if covered by warranty or if the misrepresentations prevented the purchaser from learning the truth before purchasing the real property.

2.6 Important Areas of Law for Foreign Investors

The most important areas of law for a foreign investor include:

- tax considerations;
- collateral regulatory burdens (including subjection to any currently applicable sanctions restrictions); and
- Committee on Foreign Investment in the United States (CFIUS or "Committee") review.

Tax

At the federal level, the US does not tax or impose a fee on the mere acquisition or ownership of US real property. Income derived from business conducted on or through the property will generally be subject to the ordinary income tax rates. Passive income, such as rents, paid to a foreign individual or partnership is generally subject to a 30% withholding tax; however, this is often modified by tax treaties that may be in force between the USA and the country of the investor, or an election that allows rents to be taxed at ordinary income tax rates. In the event of a sale or disposition of the property, foreign investors who are not engaged in a trade or business in the USA will be subject to a 15% withholding tax on the purchase price under the Foreign Investment in Real Property Tax Act.

Nonresident individuals, trusts and estates are generally required to pay the estimated New York State income tax on the sale of real property located in the State.

Collateral Regulatory Burden

Depending on what kind of businesses an investor may own or manage, and where those enterprises operate, the acquisition of a US property may render an investor – and its other businesses – a "US person" subject to compliance with US business regulations, various sanctions regimes and other regulatory regimes, which could dramatically affect how its other businesses can operate and increase their "regulatory risk". The US Securities and Exchange Commission, the Department of Justice and the Department of the Treasury have regularly found seemingly slight and tenuous connections with the USA sufficient to establish jurisdiction over large and diverse enterprises. Sanctions regimes imposed from time to time by the Treasury may restrict sources of capital, eligible investors, and banking arrangements. And even a passive investor will be subject to any local or federal environmental regulations attached to the property or its use.

CFIUS

Historically, while foreign investors seeking a controlling interest in US real estate technically have been liable to scrutiny by CFIUS, generally that scrutiny has been lightly exercised.

However, more recent regulations now subject even non-controlling foreign investments in certain types of real estate to CFIUS review, if the investment conveys specified standard rights and falls within the list of properties described in the regulations. These descriptions largely relate to proximities (some as far as 100 miles) to certain military, national security, or "joint-use" facilities and infrastructure.

In view of the substantial penalties, prudent investors will consult with counsel regarding possible exposure and filing obligations.

2.7 Soil Pollution and Environmental Contamination

As an owner or operator of a real estate asset, the buyer could be held strictly, jointly and severally liable for pre-existing soil pollution or environmental contamination pursuant to State and federal laws. Therefore, typical allocations of environmental risk in purchase and sale agreements are tailored to the intent of the parties, the site conditions and the presence of contaminants of concern.

Under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), current owners and operators of a property are strictly liable for all response and remediation costs regarding hazardous wastes and substances that were released on a property, unless a statutory defense is established. These include acts of God or war, acts of third parties and landowner liability protections, such as the innocent landowner defense, bona fide prospective purchaser defense and contiguous property owner defense.

If the buyer expends money to clean up the contamination caused by others, there are contribution claims available under State and federal laws.

2.8 Permitted Uses of Real Estate under Zoning and Planning Law

A buyer can ascertain the permitted uses of a parcel of real estate by undertaking an analysis of the applicable zoning map and code to identify the zoning district of the parcel in question and the uses permitted by right in that district, as well as the uses permitted upon issuance of a special use permit. In addition, a buyer should review the applicable zoning code to determine the associated bulk requirements. Further background is often available in a municipality's land use/comprehensive plan. See **4.5 Agreements with Local or Governmental Authorities**.

2.9 Condemnation, Expropriation, or Compulsory Purchase

Governmental taking through eminent domain or condemnation is a possible risk in this jurisdiction. While there is only a slight risk that a governmental taking will occur, it appears more prevalent along rights-of-way to accommodate roadway-widening projects or the installation of public utilities.

The governmental taking process in New York State is codified in the New York Eminent Domain Procedure Law, and allows for condemnation by the filing of an appropriate map with the applicable county clerk (at which time the property set forth in the map vests in the governmental agency), or filing of petition to condemn, which seeks an order allowing the filing of an acquisition map. The title vests in the condemning party upon the filing of the acquisition map.

The condemning party is required to pay just compensation (defined as the fair market value of the property) to the former owner for the property that was acquired through condemnation.

2.10 Taxes Applicable to a Transaction

For the transfer of real estate, a transfer tax is due to the New York State Department of Taxation and Finance, and is paid to the applicable county clerk upon recordation of a deed. In order to record a deed, a transfer tax return (form TP-584) must be presented to the county clerk. The State transfer tax is USD2 for every USD500 of consideration paid or the fair market value of the real property. Local municipalities may also impose a separate transfer tax, which varies by county.

Transfer tax and the cost of filing a form TP-584 are customarily seller expenses. Additionally, the "Mansion Tax" – imposed on the conveyance of residential real property where the consideration is USD2 million or more – has a tax rate of USD1.25 of the consideration paid, customarily paid by the purchaser.

New York Tax Law was recently amended to provide that when the purchaser fails to pay the tax, the seller is required to pay. When the seller is required to pay the additional tax because the purchaser failed to pay, the additional tax becomes the joint and several liability of the seller and the purchaser.

A transaction of shares in a property-owning company also triggers a transfer tax obligation if the grantee, or a group of grantees acting in concert, acquires a controlling interest (50% or greater) from one or more grantors. Section 1402 of the New York Tax Law regulations provide a safe harbor for acquisitions of a controlling interest completed outside of a three-year period. The transfer tax is calculated by utilizing the consideration paid for the shares or the grantor's pro rata share of the fair market value of the real property owned by the property-owning company.

Standard Exemptions

There are certain standard exemptions, including conveyances:

- to the federal or State government, or their agencies or political subdivisions;
- to secure a debt or other obligation;
- to confirm, correct, modify or supplement a prior conveyance;
- made as gifts;
- that are only intended as a change of identity;
- given in connection with a tax sale;
- by deed of partition;
- made pursuant to the federal Bankruptcy Act;
- that only consist of certain contracts to sell, or options to purchase, real property; or
- not deemed a conveyance within the meaning of New York Tax Law.

2.11 Rules and Regulations Applicable to Foreign Investors

As noted in **2.6 Important Areas of Law for Foreign Investors**, new regulations expose even non-controlling foreign investments to potential CFIUS review if the investment conveys certain minimal rights in property within one of the proximities to key national security installations or infrastructure. Given the substantial civil penalties should CFIUS later determine a filing should have been made and its authority to block an investment or order divestiture, filing for such review by simple declaration or more detailed notice would typically seem advisable.

Investors from “excepted investor states” (currently, Australia, Canada and the UK) are exempt from filing for non-controlling investments, provided the investor meets the detailed criteria of relationship to the “excepted” state outlined in the regulations. Even for these states, however, the usual rules apply for acquisition of controlling interests.

3. REAL ESTATE FINANCE

3.1 Financing Acquisitions of Commercial Real Estate

Commercial real estate acquisitions are typically financed through commercial real estate loans from institutional lenders, customarily secured by a mortgage. In addition, commercial mortgage loans are usually further supported by guarantees of payment from the borrower’s individual principals. For new construction, borrowers can apply for a construction loan mortgage.

In addition to mortgage loans, purchasers of commercial real estate may obtain mezzanine financing to finance amounts beyond what is approved by the institutional mortgage lender. Mezzanine loans are secured by a pledge of the borrower’s equity interest in the entity which owns the property. Developers also raise funds to purchase real estate by selling equity in exchange for cash contributions.

3.2 Typical Security Created by Commercial Investors

Typically, the security interest created in connection with a mortgage loan is a first-in-priority mortgage lien on the real property. If permitted by the lender, one could borrow additional money from the same or a different lender secured by a mortgage, which would be subordinate to the first mortgage. The security interest is created upon recordation.

The mortgage lender may also choose to file a Uniform Commercial Code (UCC) Financing Statement to create a security interest in any fixtures located at the property or to perfect a security interest in all of the assets of the borrower.

With respect to mezzanine financing, the mezzanine lender may perfect its security interest by filing a UCC Financing Statement in the state of formation of the borrower entity. In addition, the mezzanine lender may require the borrower to opt in to Article 8 of the New York UCC, which changes the characterization of the pledged equity interest as a "security" under Article 8, as opposed to a "general intangible" under Article 9. In order to perfect its security interest in this manner, the mezzanine lender would require the borrower to deliver original certificates of equity interest.

3.3 Regulations or Requirements Affecting Foreign Lenders

The Bank Secrecy Act governs the obligation of financial institutions, including lenders, to engage in strict compliance and reporting measures with regard to the prevention of possible money laundering, terrorism finance, or sanctions violations in international funds transfers or guarantees. Institutions must conduct extensive diligence of the parties to such transfers, routinely report all details and file immediate reports of suspicious activity. See **2.6 Important Areas of Law for Foreign Investors**.

3.4 Taxes or Fees Relating to the Granting of Enforcement of Security

Mortgage recording taxes vary based on the county where the property is located, but generally range between 0.75% and 1.25% of the loan amount. The county clerk will also charge a fee to record the mortgage and accompanying loan documents or filing UCC Financing Statements, the cost of which vary widely based on the type of mortgage or other document being recorded, and the length of the document.

3.5 Legal Requirements before an Entity Can Give Valid Security

Generally, there are no rules or requirements that must be complied with before an entity can give a valid security interest over real estate assets besides compliance with its charter documents and applicable law. In addition, certain charitable entities may also be required to obtain the permission of the Supreme Court of the State of New York or the New York State Attorney General before granting a security interest in real estate assets.

3.6 Formalities when a Borrower Is in Default

Debtor protections vary depending on whether the foreclosure involves residential or commercial property. For commercial properties, the only debtor protections that need to be overcome are drafted into the note, mortgage and ancillary loan documents. For residential transactions, New York State law requires that, at least 90 days before commencing a foreclosure action, a lender or servicer must provide the homeowner statutory notice that includes information as to how an owner can cure the default and a list of government-approved housing counseling agencies.

An attorney commencing a foreclosure action must file a certificate of merit confirming, among other things, that the case has merit. When serving the summons and complaint, a notice must be delivered advising the owner that they may lose their home if they fail to resolve the default. Only after all of the above conditions precedent are met can a lender proceed with the foreclosure action.

Additionally, parties must go through a mandatory settlement conference before the foreclosing party can seek judgment on liability. As a result, a standard mortgage foreclosure action in New York State can take years to complete.

"Race-Notice"

No additional steps are necessary to ensure priority as New York is a "race-notice" state, meaning priority is established at recording. Any lien or interest that is recorded later will not have priority over the mortgage (excepting certain super liens, such as real property taxes/assessments). However, parties with subordinate interests need to be named in the foreclosure action so their interests can be extinguished. It is imperative that a foreclosing party file a notice of pendency placing all parties (including unnamed parties) on record notice of the foreclosure action, and binding subsequent creditors and interest holders to the outcome of the foreclosure action.

3.7 Subordinating Existing Debt to Newly Created Debt

Subordination agreements in which an existing lender agrees to be subordinate in priority to an incoming lender are common in commercial transactions. These agreements are usually recorded in the county clerk's office to place all parties on notice of each party's rights and priorities.

In New York State, "equitable subrogation" allows one party to replace another party when it comes to a legal right. For example, assume a property is encumbered by a first and second mortgage. The owner refinances only the first mortgage with a new lender. Based solely on New York State's "race-notice" statute, the second mortgage would have priority over the new lender (whose mortgage was recorded later). However, using the concept of equitable subrogation, to the extent the new lender paid off the first mortgage and intended to retain priority (ie, was unaware of the second mortgage), the new lender would preserve that priority as to the amount paid to discharge the first mortgage.

Nevertheless, best practice remains to negotiate and record a subordination agreement between the mortgage lenders.

3.8 Lender's Liability under Environmental Laws

Lenders are generally exempt from liability under federal and State environmental laws as long as the lender does not take title to, or "participate in the management" of, a contaminated property. Requiring a borrower to take action to address contamination, or renegotiating the terms of the secured interest, does not generally equate to "participating in the management" and will not subject a lender to liability. However, decision-making control over day-to-day activities or the environmental compliance of the site (ie, hazardous waste management), or taking title to the property may make lenders liable.

3.9 Effects of Borrower Becoming Insolvent

When a security interest is created and a foreclosure action is commenced prior to the filing of a bankruptcy by the borrower, the mortgage lien is generally secure and will typically survive the bankruptcy unless discharged by payment during bankruptcy. However, attempts to enforce the mortgage or pursue the foreclosure action are generally stayed unless and until the automatic bankruptcy stay is lifted.

Once a foreclosure sale occurs, the debtor's rights of redemption will have expired. If a borrower files bankruptcy after a foreclosure sale, the real property is generally considered to be outside the borrower's bankruptcy estate and the title may be transferred to a winning bidder, notwithstanding the pendency of the bankruptcy and corresponding automatic stay.

3.10 Taxes on Mezzanine Loans

On January 22, 2021, Assembly members reintroduced legislation which would require the recording of, and payment of recording tax on, mezzanine debt and preferred equity investments related to the real property, whenever a mortgage is recorded with respect to the property. This legislation, however, was not enacted.

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4. PLANNING AND ZONING

4.1 Legislative and Governmental Controls Applicable to Design, Appearance, and Method of Construction

A municipality's zoning code sets forth development criteria and regulations with respect to appearance and construction of a project. In addition, there may be supplemental/overlay design guidelines dependent on the parcel's location within a specific neighborhood or historic district. Compliance with design, appearance and method of construction is normally handled through the site plan review process with the municipal planning board.

4.2 Regulatory Authorities

The local municipal government is typically responsible for regulating development of individual parcels within the municipality, with input from municipal planning boards. The municipal zoning code provides a framework for decision-making in connection with the development of property, which is based upon the community's preferences. In addition, the municipality's land use plan bridges the municipality's comprehensive plan and zoning code by recommending the appropriate type, intensity and character of development.

4.3 Obtaining Entitlements to Develop a New Project

New projects or major refurbishments typically require approvals from local municipal boards after a formal filing is made, and a public hearing is held. Compliance with the State Environmental Quality Review Act is often included in this process. Third parties or members of the public may appear at public hearings regarding the proposal, and the municipality may consider the opinions of the public in connection with its determination.

Requests for variances require application to the municipal zoning board of appeals. Rezonings generally require an application to a municipal board for a zoning amendment, which is often referred to the municipal planning board for its review and recommendation.

4.4 Right of Appeal against an Authority's Decision

Often, a municipality will have a specific section in its municipal code for appealing a relevant authority's decision. An appeal will begin with an adverse determination by a code enforcement officer and is normally heard by the zoning board of appeals. Once all municipal avenues have been exhausted, an aggrieved party is provided the right to appeal further in the State Supreme Court.

4.5 Agreements with Local or Governmental Authorities

Agreements with local governments, authorities or utility suppliers are not generally necessary to obtain permits or approvals for development projects, however, they can be required in some instances, commonly incentive zoning agreements and reimbursement agreements. Incentive zoning offers rights to a developer in exchange for public benefits to the community. Rezoning of property is negotiated between the developer and municipality.

Some municipal zoning codes contain provisions for Planned Unit Development that allow municipalities to provide flexibility with respect to underlying code requirements for certain innovative and unique projects. In addition, reimbursement agreements allow a municipality to hire certain professionals/consultants, and require the applicant to cover all fees associated with the same. However, such fees may only be lawfully imposed if they are reasonable, necessary and not simply for the convenience of the local board.

4.6 Enforcement of Restrictions on Development and Designated Use

Restrictions on development and designated uses are typically enforced through certain bulk provisions in the zoning code regulating height, density, lot coverage, minimum/maximum parking requirements, setbacks and similar considerations. Restrictions may also be enforced through conditions to zoning approvals. Proposed development is evaluated by the municipality's planning/zoning department, and existing development is monitored through the municipality's code enforcement officer/building department. Violations can be generated through citizen complaints or permitting and routine inspections, and fines can be assessed.

5. INVESTMENT VEHICLES

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

There are several types of entities available to investors to acquire and hold real estate, including, but not limited to, limited liability companies, corporations and partnerships. Limited liability companies are the most commonly used entity type to acquire real estate because they are typically characterized by flexible organizational governance, offer limited liability protection to all members, and members can define their contractual obligation in the company's operating agreement to tailor it to reflect their business agreement and financial arrangements.

5.2 Main Features of the Constitution of Each Type of Entity

Corporation

A corporation is an association of shareholders formed under the New York Business Corporation Law that is a legal entity separate and distinct from its shareholders with the capacity for perpetual existence to:

- acquire, hold and dispose of property;
- sue or be sued; and
- have such other powers as may be conferred upon it by law.

Owners of a corporation are shareholders who do not manage the day-to-day affairs of the corporation. Shareholders elect directors and approve extraordinary transactions and activities of the corporation.

The primary benefit of corporations is that the shareholders are generally not personally liable for the debts and obligations of the corporation, and liability is limited to the assets of the corporation. Directors and officers are generally not liable to shareholders or the corporation for their actions or inactions with respect to the corporation, provided that they act consistent with their fiduciary duties of care and loyalty. Corporations may also limit or eliminate personal liability of directors for their acts and omissions.

However, corporations do not afford the same level of flexibility as do partnerships and limited liability companies (LLCs).

Limited Liability Company

An LLC is an unincorporated organization of one or more persons having limited liability for the contractual obligations and other liabilities of the business. An LLC is a hybrid business organization that combines the flexibility of governance and economic arrangements of a partnership and a corporation. The primary benefit of an LLC is that it offers its members the limited liability protection akin to shareholders of a corporation, is taxed like a partnership (except for a single-member LLC) and is governed by contract, whereby the operating agreement is the primary document defining rights of members, duties of managers and the financial arrangements among the LLC's members.

Members and managers are generally not liable for debts, obligations or liabilities of the LLC solely by reason of being a member or manager.

Partnership

A partnership is a voluntary agreement between at least two persons who bring together their money, property, labor or skills to conduct a business and share profits and losses. In this jurisdiction, commercial real estate is more often held in limited partnerships than general partnerships due to their liability structures. General partners are jointly liable for the debts and obligations of the partnership, while limited partners are not liable for the contractual obligations of a partnership unless they are also general partners, or they participate in the control of the business.

The benefit of real estate acquisition through a limited partnership is material for the limited partner whose liability is restricted to the amount that the partner has contributed to the partnership, plus the partner's share of any undistributed income. Whether a general partnership or limited partnership, the partners do not have a separate interest in the property and are therefore obliged to treat partnership property as joint property. This is often a deterrent to some commercial real estate owners or investors who value the freedom to deal with their undivided interest in the property as would be permitted under a co-ownership arrangement.

5.3 Tax Benefits and Costs

Corporations

Generally, corporations are subject to federal and State income tax at the corporate level, while shareholders are subject to income tax on distributed dividends. Certain domestic corporations may be eligible to make elections that eliminate federal and (typically) State income taxes at the corporate level.

S corporations are domestic corporations that make an election with the Internal Revenue Service and New York State Department of Taxation and Finance to not be subject to income tax. Instead, the corporation passes income and loss to its shareholders, who are subject to tax on their pro rata shares of the corporation's income. An S corporation may not have more than 100 shareholders who are US citizens or residents, certain types of trusts, estates and 501(c)(3) organizations, and must have one class of stock. Voting and non-voting classes are permissible, but all classes of stock must have the same economic rights.

Limited Liability Companies

An LLC with one member is treated as an entity disregarded as separate from its owner for income tax purposes, but as a separate entity for purposes of employment tax and certain excise taxes. An LLC with at least two members is classified as a partnership for federal income tax purposes. Although less common, an LLC can also elect to be classified as an association taxable as a corporation or as an S corporation.

Partnerships

Partnerships are generally not subject to federal and New York State income tax. The income or loss passes through to the partners, who pay income tax on any income at their respective tax rates. Unlike S corporations, there are no requirements to be a partner or limits on the number of partners. Moreover, partnerships may have multiple classes of equity, pay preferred returns and allocate income/loss in ways other than pro rata.

5.4 Applicable Governance Requirements

Corporations

The day-to-day management of a corporation's activities is the responsibility of the directors of the corporation, who generally delegate such management to officers. Corporate governance is dictated by the provisions of the certificate of incorporation, bylaws and statutory law.

Limited Liability Companies

An LLC is presumed to be managed by its members unless the articles of organization provide that the management is carried on by managers. Except as provided in the operating agreement, each member of an LLC is entitled to vote in proportion to the member's share of current profits. The articles of organization of an LLC may provide for classes or groups of members having such relative rights, powers, preferences and limitations as the operating agreement of such LLC may provide. Members in a member-managed LLC, and managers in a manager-managed LLC, who exercise management powers or responsibilities have the duty of care and loyalty.

Partnerships

Partnerships are managed by at least one general partner. Partnership governance is dictated by the terms of the partnership agreement with the partnership law setting forth statutory defaults. In order to insulate the limited partners from unlimited liability, the general partner must be solely responsible for the management and operation of the partnership business. The limited partners cannot participate in the management or operation of the business.

A limited partner who does take part in the control, management or operation of the business of the limited partnership, including signing any documents on behalf of the partnership in its own capacity as a limited partner, risks being exposed to unlimited liability.

6. COMMERCIAL LEASES

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

A lease and a license are two common legal arrangements that allow a person, company or other organization to occupy or use real estate that it does not own.

A lease is a contract between a landlord and a tenant, whereby the tenant is given the exclusive right to occupy the landlord's property for an agreed-upon time period. A leasehold is an interest in real property that can be transferred to another, subject to restrictions.

A license is an agreement granting a limited use of a property. A license is not an interest in real property. A license is typically terminable by the licensor, not transferrable, not exclusive and may be subject to a right of relocation.

6.2 Types of Commercial Leases

There are several types of commercial leases, as follows.

Net Leases

The tenant pays rent, as well as all or a portion of the operating expenses for the property, such as taxes, insurance, maintenance and utilities. Parties sometimes refer to net leases as single net leases, double net leases or triple net leases. The distinctions are not absolute, but in a triple net lease, the tenant pays all costs and expenses with respect to the real property.

Gross Leases

The landlord provides services and pays the operating expenses for the property, but these expenses are typically factored into the tenant's rent. In addition, the tenant typically pays escalation charges with regard to real property taxes and operating expenses. In Class A office buildings, the tenant typically pays its proportionate share of operating expenses over the negotiated base year.

In retail leases, the tenant typically pays their proportionate share of such expenses from the first dollar.

Ground Leases

The landlord leases the land to the tenant. The tenant pays ground rent, covers all costs and expenses, and is responsible for all improvements to the premises. Upon the expiration of the lease, possession of the land and ownership of any improvements revert to the landlord.

6.3 Regulation of Rents or Lease Terms

There is no commercial rent regulation in New York State. The terms of commercial leases are a matter of negotiation between the parties, subject to case law and statutes pertaining to specific issues. For example, statutes provide that a lease cannot contain a waiver of landlord's responsibility for its negligence and, pursuant to NY Real Property Law (RPL) Section 235-h, a tenant's waiver of the right to bring a declaratory judgment action is void.

6.4 Typical Terms of a Lease

A typical commercial lease term is five to ten years. However, a typical ground lease term is 30 to 100 years.

The tenant is typically responsible for maintaining and repairing the space it occupies, whereas a landlord is typically responsible for repairing and maintaining the common areas, the structure, and the exterior of the building and surrounding property.

Rent payments are typically made on a monthly basis, although in a ground lease, rent may be paid annually or quarterly.

6.5 Rent Variation

Rent typically increases either annually or once every three or five years, usually by a predetermined amount, depending on the terms of the lease.

6.6 Determination of Changes in Rent

Increases in rent under a commercial lease are typically determined by negotiation prior to entering into a lease. Increases can be expressed in terms of a fixed dollar amount, a per-square-foot amount or a formula based on, for example, the Consumer Price Index (CPI).

6.7 Payment of VAT

Value-added tax, or other taxes or governmental levy, are typically not payable on New York rent. An exception is the New York City Commercial Rent Tax (CRT) that is imposed on the rent paid by tenants of commercial property located south of the centerline of 96th Street in Manhattan. Generally, the CRT applies to tenants whose gross annual rent is at least USD250,000.

The tax rate is 6% of the base rent. However, all taxpayers are given a 35% base rent reduction, effectively reducing the number of taxpayers that are subject to the CRT, as well as reducing the tax rate to 3.9%. In addition, a tax credit is given to those tenants whose annual base rent is between USD250,000 and USD300,000 before the 35% reduction.

6.8 Costs Payable by Tenant at the Start of a Lease

In a net lease, the tenant is responsible for constructing or remodeling any existing improvements, and for the payment of all associated expenses. In a gross lease, landlords often deliver the space with mechanical services stubbed to the premises, or in "white box" condition, and give the tenant a negotiated allowance for the construction of improvements.

Alternatively, the landlord may be responsible for building out the space to meet the tenant's needs. This is known as a "turn-key" lease. Such leases may include a cap on the landlord's construction costs, with the tenant responsible for excess costs.

6.9 Payment for Maintenance and Repair

Landlords are typically responsible for paying for the maintenance and repair of common areas used by several tenants, such as lobbies, elevators, parking lots and gardens. However, tenants are often responsible for reimbursing the landlord for their pro-rata share of operating expenses.

6.10 Payment for Services, Utilities, and Telecommunications

Telecommunications and utilities are typically paid by the tenants. Each tenant's space is either metered or submetered for electricity, or the tenant reimburses the landlord for electric costs pursuant to a formula.

The charges for heating, ventilation and air conditioning (HVAC) depend on how the property is engineered. Each tenant may have its own cooling system, or the tenants may be served by a building-wide cooling system during business hours and subject to significant charges for after-hours HVAC. Tenants may also control supplemental HVAC systems to provide overnight cooling, typically for IT and telecom installations.

6.11 Insuring Real Estate that Is the Subject of a Lease

The landlord and tenant each have to insure their respective interests in the real estate, subject to the terms negotiated and included in the lease.

6.12 Restrictions on the Use of Real Estate

Landlords can impose restrictions on the tenant's use of the real estate via the permitted use provision, which typically lists specific permissible and prohibited uses of the space, and allows a landlord to declare a default and exercise available remedies if the tenant engages in an unpermitted use. The tenant's use can also be restricted by local zoning laws, as well as building and health regulations.

6.13 Tenant's Ability to Alter or Improve Real Estate

Tenants are typically permitted to alter or improve the real estate during the lease with the landlord's approval, and landlords generally allow cosmetic alterations without prior approval. A lease usually contains a limit on the cost and type of alterations a tenant can make without the landlord's approval.

6.14 Specific Regulations

Commercial leases are generally governed by the agreement between the parties. However, there are laws and licensing requirements that are specific to particular uses, such as the operation of hotels, restaurants, etc.

The regulations and laws that apply to residential leases were overhauled by the Statewide Housing Stability and Tenant Protection Act of 2019 (HSTPA). The key provisions of the HSTPA include the following.

Rent Regulation

Some residential buildings are subject to rent stabilization regulations that establish caps on the amount of rent landlords can charge and the amount of increases they can impose. In addition, some residential tenancies are protected by older rent control laws. The HSTPA has made it more difficult for landlords to "deregulate" units subject to such regulations, as follows.

Luxury deregulation and vacancy allowances
Prior to the HSTPA, apartments with rents above a certain threshold could be deregulated upon vacancy or when the tenant's income rose by a certain amount. Also, landlords could increase rent by up to 20% each time a unit became vacant, and earn longevity bonuses, which allowed them to increase rent by 0.6% multiplied by the number of years since the last vacancy. The HSTPA repealed these allowances.

Sunset provision
The HSTPA repealed the sunset provision, which was the date by which the legislature had to renew rent regulation laws to prevent their expiration.

Rent control
Under the HSTPA, rent for rent-controlled units can only be increased by the lesser of 7.5% or the average of the previous five increases approved by the Rent Guidelines Board.

Co-op and condo conversions
Landlords could previously deregulate stabilized apartments as part of the condo or co-op conversion process. the HSTPA imposed significant limitations on this by eliminating the eviction-plan option, and increasing the required purchase percentage for non-eviction plans from a minimum of 15% sales to third parties to a minimum of 51% sales to current occupants.

Capital improvements
Before the HSTPA, landlords could recoup costs of Major Capital Improvements (MCIs) to buildings and Individual Apartment Improvements (IAIs) to apartments through rent increases. These increases have been significantly curtailed.

MCI increases are based on the cost of the improvement and apportioned on a per-unit basis. Before the HSTPA, owners of buildings with 35 or fewer units could recoup their costs over an eight-year amortization period, while owners of buildings with 36 or more units had nine years. Annual rent increases were capped at 6% in New York City and 15% in the rest of New York State. The HSTPA imposed a 2% Statewide cap, lengthened the amortization period to 12 years, and made the rent increases temporary, requiring them to be removed after 30 years.

The HSTPA limited the number and cost of IAIs to no more than three within a 15-year period, at a maximum aggregate cost of USD15,000. As with MCIs, the rent increases are now temporary and must be removed after 30 years.

Duty to mitigate
If a residential tenant vacates before the lease expires, the landlord has a legal duty to find a new tenant before they can seek to collect rent from the vacating tenant. There is no such duty for commercial landlords. Landlords must now take reasonable and customary actions to re-rent vacant units, whether regulated or unregulated, at the lower of fair market value or the rate agreed to in the lease.

In addition, residential tenants are now statutorily entitled by law to a sanitary and safe apartment pursuant to the warranty of habitability.

On December 22, 2021, the HSTPA was modified as to the application of the following to cooperatives:

- the provisions limiting security deposits and advances;
- the requirement for the landlord to give notice if a lease renewal is not offered or if a renewal is offered at an increased rent equal to or greater than 5%;
- the limitations/prohibitions on of fees charged at the beginning of a tenancy;

- the limitations on the of payments, fees or charges for the late payment of rent;
- restrictions on what may be sought in a summary proceeding;
- the requirement for an additional five-day notice by certified mail if maintenance is not timely received; and
- the provision prohibiting the collection of attorneys' fees in a summary proceeding.

6.15 Effect of Tenant's Insolvency

The effect of the tenant's insolvency on its lease obligations is governed by the applicable bankruptcy, insolvency and creditors' rights statutes.

When the tenant files for bankruptcy, an "automatic stay" is imposed that initially restricts the enforcement of remedies or the termination of the lease by the landlord. Thereafter, there are specific requirements under bankruptcy law with respect to whether a lease is to be assumed or rejected.

6.16 Forms of Security to Protect against Tenant's Failure to Meet Obligations

Upon the signing of the lease, the landlord typically requires a "security deposit" from the tenant to protect against a default by the tenant.

The amount of the security deposit is a matter of negotiation and may be in the form of cash or a letter of credit, which is a document through which the issuing bank promises to pay the security deposit to the landlord.

A letter of credit is generally considered more desirable to a landlord than a cash security deposit because it puts the landlord in a better position in the event of the bankruptcy of the tenant.

6.17 Right to Occupy after Termination or Expiry of Lease

A tenant typically does not have a right to occupy the relevant real estate after the expiry or termination of a commercial lease. However, commercial leases typically have a "holdover" provision that states that if a tenant continues to occupy the premises after the expiry or termination of the lease, the tenant must pay a multiplier of the rent for the last month of the lease (typically 150 to 200%) and become a month-to-month tenant or a tenant at sufferance. A landlord can only evict a month-to-month tenant upon notice, whereas a tenant at sufferance may be evicted at any time after the expiry or termination of the lease, subject to applicable laws.

In addition, leases may give the landlord the right to impose consequential damages on the tenant for failure to vacate.

6.18 Right to Terminate Lease

There are several events that typically give the landlord or the tenant the right to terminate the lease. For example, the lease typically states that if the landlord fails to complete the build-out of the space, the tenant has the right to terminate after a certain date.

The parties typically have a right to terminate in the event of a casualty if the space is not restored within a certain time. In addition, a landlord can terminate the lease if the tenant defaults and fails to cure the default, eg, by failing to pay rent.

A tenant may negotiate the right to an early termination of the lease, but such early termination rights are often expensive.

A landlord may negotiate the right to relocate the tenant to other space or even terminate the lease if the landlord wants to redevelop the subject property.

6.19 Forced Eviction

A tenant can be forced to vacate in the event of default or upon the expiration of the lease. For example, a tenant can be evicted for failure to pay rent or for otherwise violating the lease. Such actions are governed by the Real Property Actions and Proceedings Law (RPAPL) of the State of New York.

The HSTPA amended RPAPL to extend the time periods in non-payment proceedings. The HSTPA eliminated oral demands to vacate and increased the notice period for written demands to 14 days, while also increasing the tenant's time to provide an answer to ten days. In addition, the HSTPA amended RPL Section 235-e to require that tenants be reminded if rent is not received within five days of the due date. Failure to provide such a reminder can be used as an affirmative defense in a non-payment proceeding.

6.20 Termination by Third Party

A lease may be terminated by the government through eminent domain (condemnation). See **2.9 Condemnation, Expropriation, or Compulsory Purchase**.

7. CONSTRUCTION

7.1 Common Structures Used to Price Construction Projects

Fixed price is still the most often used structure for pricing construction projects. Occasionally, guaranteed maximum price is used instead.

7.2 Assigning Responsibility for the Design and Construction of a Project

The responsibility for design in New York State is by law assigned to a professional, architect or engineer. Typically, the architect leads the design team, employing additional professionals as subcontractors. For construction, management of the project is generally assigned to a construction manager who either is "at risk," holding all the contracts for subcontractors, or "not at risk," meaning that the owner holds all the contracts for the work.

The "not at risk" model is used on public projects due to New York State law.

7.3 Management of Construction Risk

Construction risk is managed by indemnification, warranties, limitations of liability, waivers and insurance provisions. Indemnification is limited by New York General Obligations Law Section 5-322.1, which voids contract indemnification provisions in favor of the owner or contractor. Warranties are almost always limited in duration by express contract provision.

Limitations of liability and waivers of damages are limited to the extent that the liability or damages were in contemplation of the parties at the time of entering into the contract. Provisions relating to insurance are used to address the risks occasioned by the limitation on indemnity. This results in the owner or contractor being named as an additional insured on the Certificates of Insurance provided by contractors and subcontractors.

7.4 Management of Schedule-Related Risk

Contract provisions require contractors and subcontractors to adhere to schedules prepared by the construction manager or architect on behalf of the owner. Owners can receive compensation for delays if provided for in the contract, most often in the form of liquidated damages. Alternatively, owners can recover actual damages to the extent damages can be proven. While not common, contracts will sometimes provide contractors with cash incentives to exceed scheduling milestones or costs below budget.

7.5 Additional Forms of Security to Guarantee a Contractor's Performance

The most common form of additional security to guarantee a contractor's performance is a performance bond. Performance bonds are required for most public projects. However, it is becoming more popular for general contractors to use a subguard insurance policy in lieu of a subcontractor performance bond for private projects. It shifts the burden of losses resulting from a subcontractor's default to the insurance company.

Further, the subguard policy covers all subcontractors on a given project, or on an annualized basis for all projects combined. However, the insured (general contractor) maintains the responsibility for determining whether or not the subcontractor will be pre-qualified and thus accepted under the subguard program. Also, the general contractor is responsible for resolving the subcontractor default issues, although the costs of completing the work are covered.

7.6 Liens or Encumbrances in the Event of Non-payment

Contractors and designers may file liens to encumber property in the event of non-payment pursuant to New York Lien Law. The contractor's encumbrance will become superior to a mortgage loan lien to the extent of advances made by the construction loan lender after the filing of the contractor's encumbrance. The owner can remove a lien by posting a bond equal to 110% of the lien or by payment of money in court.

7.7 Requirements before Use or Inhabitation

A Certificate of Occupancy must be obtained before a building may be occupied.

8. TAX

8.1 Sale or Purchase of Corporate Real Estate

Federal income tax applies to the gain recognized on the sale of the property, generally the difference between the sale price and the seller's adjusted basis in the property (eg, the price the seller originally paid, plus the amount of capital improvements, less depreciation deductions). The rate of taxation will depend on:

- whether the seller is an individual or corporation;
- how long the seller held the property; and
- whether the seller held the property as inventory or a capital asset.

Minimizing or Deferring Tax

A seller may minimize or defer the tax when selling real estate. Internal Revenue Code Section 1031 provides that gain is not recognized on the sale of real property held for either productive use in a trade or business, or for investment, if the property is exchanged solely for real property of like kind, which is also to be held for either productive use in a trade or business, or investment. Section 1031 exchanges may be structured as simultaneous swaps of one qualifying property for another. However, most Section 1031 exchanges are not simultaneous. Instead, the seller usually disposes of its property, deposits the proceeds with a third party who meets certain requirements and uses the proceeds of that sale to acquire replacement property at a later date. Final regulations promulgated at the end of 2020 defined real property for purposes of tax-deferred like-kind exchanges to include property that is real property under state and local law, subject to certain exceptions. Those regulations need to be considered in conjunction with determining whether an exchange qualifies for tax-deferred treatment under Code.

A seller could also defer tax by contributing real estate to a partnership (or LLC treated as a partnership for US federal income tax purposes) in exchange for partnership (or LLC) units under Internal Revenue Code Section 721.

Federal Rules and Mortgage Tax

New York State generally follows the federal rules with respect to the income taxation of sales of real property located in the State, although New York State does not have preferential capital gains tax rates. New York State imposes a transfer tax on the sale of real estate, including the sale or transfer of at least 50% of the ownership or beneficial interest in an entity owning real estate. The State's tax applies at a rate of USD2 for each USD500 of consideration. For non-residential property located in New York City where the consideration is at least USD2 million, an additional tax of USD1.25 for each USD500 of consideration is imposed. A mortgage tax is also imposed when a mortgage is recorded on commercial real estate.

In and around New York City, the combined State and municipality mortgage tax typically varies between 1.25% and 2.17% of the mortgage debt or obligation secured. In Upstate New York, this varies between 0.75% and 1.25%.

8.2 Mitigation of Tax Liability

Parties occasionally use a Consolidation Extension and Modification Agreement to reduce mortgage recording tax. Provided both the existing lender and the new lender agree, the existing lender assigns its mortgage to the new lender, which will then amend the terms of the mortgage for refinance or purchase of the property. A buyer will then pay mortgage tax on the difference between the outstanding balance of the seller's existing mortgage and the buyer's new mortgage, rather than paying tax on the entire amount of the new mortgage.

8.3 Municipal Taxes

In Upstate New York, municipal taxes are typically not paid on the occupation of business premises or on the payment of rent.

8.4 Income Tax Withholding for Foreign Investors

Foreign investors are generally subject to a 30% withholding tax on certain US source income, including real property rental income. In certain cases, an income tax treaty may reduce the withholding tax rate.

The Foreign Investment in Real Property Tax Act requires the purchaser of real property owned by a foreign investor to withhold a 15% tax on the total amount realized on the purchase.

Foreign investors in partnerships are subject to a 10% withholding tax on the sale of their partnership interests. Because real estate in the US is frequently owned through entities treated as partnerships for US federal income tax purposes, foreign investors will have exposure to this tax if they dispose of the equity in a partnership owning real estate.

8.5 Tax Benefits

Benefits include depreciation deductions for taxpayers with respect to improvements made to real property.

In addition, to the extent that the owner of the real estate used in a trade or business financed the acquisition of, or improvements to, the property with debt, the interest is deductible. Generally, the amount of interest that can be deducted is limited to 30% of the taxpayer's adjusted taxable income, but real estate businesses that meet certain requirements can elect to fully deduct their entire interest expense.

Individuals who own real estate directly or through a pass-through entity pay tax on any long-term capital gain recognized at significantly lower rates than other types of income.

Real property owners who hold property for investment, or for use in a trade or business, may dispose of that property in tax-efficient ways not available to other types of property, such as through Section 1031 of the Internal Revenue Code as discussed above.

Historic Tax Credits

Federal and New York State historic tax credits may be available in connection with the substantial rehabilitation of certain historic buildings. If various requirements are satisfied, a taxpayer who holds title to a rehabilitated historic building (or has an ownership in a pass-through entity that holds the title) may claim a Federal tax credit equal to 20% of "qualified rehabilitation expenditures" incurred with respect to the building. The Federal tax credit is claimed on a pro rata basis over a five-year period beginning in the tax year in which the rehabilitated building is placed in service.

New York State's historic tax credit is available to a taxpayer who is allowed the Federal historic tax credit with respect to a historic building located in New York State, provided that the building is located in a census tract at or below 100% of the State's median family income. The State tax credit is currently equal to 100% of the Federal tax credit claimed, but does not need to be claimed over a five-year period.

The BCP

The New York State established the Brownfield Cleanup Program (BCP) in 2003 to encourage private sector cleanup of contaminated property, known as Brownfield sites, and redevelopment and reuse of those sites. The program offers certain legal, financial and tax incentives to encourage this private sector clean up, redevelopment and reuse. Provided that a variety of requirements are met, taxpayers that remediate and redevelop Brownfield sites are eligible to receive refundable tax credits against their New York State income tax liability.

Under the current program, the amount of the credit may be between 10-24% of eligible costs paid or incurred to cleanup and redevelop the site, with certain components capped. The amount and type of tax credits available vary by individual sites depending on location, type of use and when the site was accepted into the BCP, amongst other factors.

8.6 Key Changes in Federal Tax Reform

See **1.3 Impact of Recent US Tax Law Changes**.

Many of President Joe Biden's tax reform proposals have not garnered sufficient support in Congress to become law. As part of his 2023 Federal budget, he is proposing a minimum 20% income tax on the income and unrealized gains of households and corporations worth more than USD100 million and an increase to the top individual income tax rate. These taxes could impact real estate investors if they are passed. It is not clear whether any of President Biden's tax proposals will become law, but they bear continued monitoring.

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Phillips Lytle LLP is a premier regional firm with a highly recognized real estate practice consisting of over 40 attorneys with a broad range of expertise. With six offices across New York State, as well as offices in Washington, DC, and Ontario, Canada, Phillips Lytle has handled many high-profile real estate development projects. The firm has nationally recognized experience across numerous areas, including those involving institutional lenders, corporations, REITs, private developers, public utilities, municipalities, individuals and others in connection with large and small commercial, industrial, office, professional, hospitality, retail and residential projects. The practice includes national representation in the telecommunications, REITs, lending and foreclosure areas, as well as nationwide multilocation retail leasing and portfolio sales. Areas of expertise include commercial leasing, construction litigation, land use and zoning, real estate development, real estate finance, real estate litigation and workouts, tax, and title insurance.

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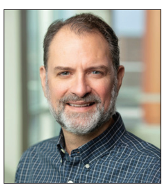

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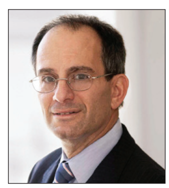

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