

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-02(6)R
Mortgage Recording Tax
December 13, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M021025A

On October 25, 2002, a Petition for Advisory Opinion was received from New York State Urban Development Corporation d/b/a Empire State Development Corp., 633 Third Avenue, 34th Floor, New York, New York 10017.

The issues raised by Petitioner, the New York State Urban Development Corporation d/b/a Empire State Development Corp., are:

(1) Whether the taxes imposed by Article 11 of the New York State Tax Law and Chapter 26 of the New York Administrative Code (collectively, the "mortgage recording tax") are due upon the recording of any mortgage of property (including, without limitation, leasehold estates) that is part of Hunters Point (Queens West) Waterfront Development Use Improvement Project (the "Project") when (a) Queens West Development Corporation ("QWDC" as hereinafter defined) is either the sole named mortgagee (whether as trustee, agent, nominee or otherwise) or a co-mortgagee (whether or not a private entity is the other co-mortgagee(s)); (b) QWDC records the mortgage; (c) the loan funds secured by the mortgage are provided by one or more persons or entities other than QWDC; and (d) the mortgage is entered into in furtherance of the Project including, without limitation, use of the loan proceeds for Project development costs incurred by parties other than QWDC in furtherance or in respect of the project (hereinafter "Development costs") or to reimburse parties (including QWDC) for any such Development costs.

(2) Whether the mortgage recording taxes are due upon the recording of the applicable instrument or otherwise if the mortgage is supplemented or if the mortgage so supplemented is thereafter from time to time supplemented to the extent that the then outstanding principal indebtedness (and/or an unfunded principal portion thereof to the extent the same constitutes or will constitute a bona fide debt) secured by or to be secured by the mortgage (or any resulting substitute mortgage) is not increased, or, if increased, mortgage recording tax is to be imposed only with respect to any increase in the amount of secured indebtedness, and then only if the mortgage is not exempt because of issue 1 and mortgage recording tax would otherwise have been required to be paid on such additional indebtedness.

Unless the context otherwise requires, references in this Opinion to Petitioner includes Petitioner and its subsidiaries and affiliates and entities in which Petitioner and/or its subsidiaries and affiliates participate, including, without limitation the Queens West Development Corporation, and their successors. "Development costs" as used in this , shall include, without limitation, all "hard" and "soft" costs with respect to the Project in respect of acquisition, demolition, construction, maintenance, repair, and rehabilitation, abatement and remediation, all carrying costs, loan fees,

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acquisition and construction period interest, start-up expenses, and all related costs, fees, charges and expenses, including contributions and/or other obligations to or associated with the cost of planning, implementing, developing or carrying the Project, until it has been finally completed. "Supplemented" , "supplementation" and "supplement" as used in this Opinion, shall include, without limitation, any assignment, consolidation, substitution, severance, splitting, restatement modification, amendment, spreader and/or extension.

In 1989, a Memorandum of Understanding was entered into among Petitioner, the New York City Public Development Corporation (now the New York City Economic Development Corporation) ("EDC"), The City of New York (the "City") and the Port Authority of New York and New Jersey (the "PA") (collectively, Petitioner, EDC, the City and the PA, being referred to as the "Public Sponsors"). The Memorandum of Understanding provided for the comprehensive redevelopment of an approximately 94-acre tract of land (including lands under water) along the East River in the Hunters Point section of Queens County, New York (the "Project site"). The Project site is generally bounded as follows: (a) on the North by the Anable Basin; on the West by the U. S. pierhead line; (c) on the South by Newtown Creek; and (d) on the East by 5th Street from the Anable Basin to 49th and 50th Avenues, then by 2nd Street between 50th Avenue and Newtown Creek. The Project site also includes a strip of land from 5th to 21st Streets comprising 48th Avenue plus an unused railroad cut on a portion of which has been constructed the Hunters Point Community Park. In 1990-91, the Petitioner adopted a General Project Plan for the Project. The Plan includes approximately 6.4 million square feet of residential space, 2.4 million square feet of office/hotel space, 225,000 square feet of retail space and 115,000 square feet of public facilities. In 1992, Petitioner, with the agreement of the City, EDC and the PA, created a subsidiary, called QWDC, for the purpose of implementing the Project. Petitioner is the majority shareholder in QWDC and EDC and the PA are minority shareholders.

The principal goal of the Project is to remove the substandard and unsanitary conditions that currently impede effective and economic use of the Project site and to replace these conditions with a viable development consisting of residential, commercial, cultural and recreational facilities and providing public access to the waterfront. The Project also seeks to implement a range of public policy objectives including:

- (1) The expansion and reinforcement of the boroughs of New York City outside of Manhattan as feasible alternate locations to Manhattan for development.
- (2) The creation of commercial sites with large floor plates for businesses which, but for the availability of such sites, would leave the City or State of New York for other locations.
- (3) The recognition of historical prominence of the Project site as the symbolic "gateway" to Queens and creation of a new image for and access to the water's edge for use by residents, employees and visitors.

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- (4) The creation of a new mixed-use neighborhood, including a significant expansion of the City's housing stock.
- (5) The expansion of the City's tax base by opening underdeveloped areas, generating new employment and business opportunities, and increasing potential revenue generation.
- (6) The creation of a significant public open space that opens the Queens waterfront to passive recreational uses for the use of all people, through the provision of a continuous publicly accessible waterfront esplanade.

The Project is intended to be implemented in four stages. The Stage I and II development areas comprise the northern end of the Project site and will be developed primarily for residential use. A portion of these residential units have been set aside for low, moderate, and middle-income households, the elderly and residents of local community board districts. The Stage III area is located at the southern end of the Project site and also will be developed primarily for residential use. The Stage IV development area, located in the southern central portion of the Project site, will form a commercial core. All four development areas will include open space for public recreational and/or community uses.

QWDC has entered into ground leases for the four development parcels comprising Stage I of the Project. Pursuant to these leases, two high-rise residential buildings have been completed as well as two community parks and other publicly accessible open space.

QWDC designated a developer (together with its affiliates or designees, the "Developer") for all seven development parcels comprising the Stage III area. Pursuant to agreements to be entered into between QWDC and the Developer, QWDC will lease the parcels to the Developer and the Developer will construct residential buildings (a portion of which shall contain retail space), a public school, and/or parking areas in accordance with Petitioner's General Project Plan and design guidelines. The Developer will also make a contribution toward the development of the Project site including the creation of open space for public recreational and/or community uses and the installation of the infrastructure for the site. Payments under leases inure to the benefit of QWDC (and through QWDC to the Public Sponsors).

The documents to be entered into between QWDC and the Developer will provide for an exemption from sales taxes on construction materials, from real estate taxes and from any mortgage recording tax. The Developer is required, however, to make certain payments to and/or on behalf of QWDC in lieu of sales, real estate and mortgage recording taxes, which will inure generally to the benefit of the QWDC or the Public Sponsors. The savings provided by the mortgage recording tax exemption would reduce the total cost of the development of the parcels. As with the Stage I development, QWDC and the Public Sponsors consider this savings to be necessary to make the development of these parcels, in accordance with the General Project Plan and the design guidelines and under current market conditions, economically feasible.

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Under the contemplated financing arrangements, the Developer will borrow funds from sources not related to or acting as nominee for the Developer other than Petitioner, QWDC or the Public Sponsors (the "Lenders"), which funds will be used to pay for or reimburse parties, including QWDC, for Development costs. The borrowings will be secured by one or more mortgages against one or more of the leasehold interests held by the Developer. QWDC's fee interest will not be encumbered by the mortgage(s). QWDC will be named mortgagee, either alone or with the Lenders, and record one or more mortgage(s) in the approximate amount of the Development costs. Although QWDC will be named mortgagee, all rights under the mortgages(s) will inure to the benefit of the Lenders, who will for all purposes be the beneficial owners of the mortgages. Upon recording the mortgage or mortgages, QWDC will assign to the Lenders all of QWDC's right, title and interest in and to the mortgage and the Lenders will at the time of the assignment, or thereafter, fund the mortgages which, at all times, will secure bona fide debt. After assigning its interest to the Lenders, QWDC will continue to hold fee title to the affected portions of the Project site and will have enforcement rights under the lease(s) therefor. However, it is also contemplated that if the Developer incurs additional Development cost beyond those originally anticipated or makes other additional expenditures in performing any obligations of QWDC with respect to the Project, QWDC will, as mortgagee, enter into the record either alone or with the Lenders, an additional mortgage or mortgages against one or more of the leasehold interests held by the Developer and thereafter assign such mortgage or mortgages to Lenders who will at the time of the assignment, or thereafter, fund such mortgage(s) which, at all times, will secure bona fide debt.

After QWDC initially records any of the mortgages and assigns its interest therein to one or more Lenders, the mortgage or mortgages may from time to time (and over a period of several years) be severed and split. The resulting substitute mortgages may be further supplemented and, in this event, appropriate instruments reflecting the supplementation will be recorded in the appropriate amounts, but in no event aggregating more than the then outstanding principal amount including any unfunded advances which constitute bona fide debt to the respective Lenders financing all or any portion of the Development costs, and the lien of the mortgage from the leaseholds not the subject of the respective resulting substitute mortgages shall be released. The Lenders (or successors thereto) will fund the loans to the extent of the amount secured by the substitute mortgage. The funding under the substitute mortgages may be in the form of advances as construction progresses on a particular leasehold or as Development costs are incurred, or in the form of a full advance of the loan proceeds upon or after an assignment of a substitute mortgage. In accordance with customary mortgage financing practices, mortgages securing construction financing may be assigned, supplemented, modified and converted to permanent financing upon completion of construction or the expiration of the term of the initial loans. Permanent loans may be refinanced or assigned by one lender to another. The identity of the mortgagor may also change by reason of the assignment of the lessee/mortgagor's interest to an affiliate or to an unrelated person. Finally, if and when a lessee exercises the purchase option contained in a lease, a leasehold mortgage may be converted into a mortgage secured by a fee interest or may be spread to cover the fee interest.

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Applicable Law

Article 11 of the Tax Law imposes taxes on the recording of mortgages of real property measured by the principal debt or obligation secured or which under any contingency may be secured by the mortgage. Section 252 of Article 11 of the Tax Law, which sets forth the preponderance of the exemptions from the mortgage recording tax, provides, with certain exceptions not relevant here, that "[n]o mortgage of real property situated within this state shall be exempt, and no person or corporation owning any debt or obligation secured by mortgage of real property situated within this state shall be exempt, from the taxes imposed by this article by reason of anything contained in any other statute."

Even though section 252 of the Tax Law does not provide a specific exemption for the operations of UDC, it is well established that State agencies enjoy an immunity from taxation independent of the statutory exemptions listed in section 252 of the Tax Law for property utilized in the public interest. (New York State Urban Development Corp., Adv Op Comm T&F, March 10, 1993, TSB-A-93(4)-R.)

Subdivision (1) of section 6254 of the New York State Urban Development Act (the UDC Act) states in pertinent part as follows:

There is hereby created the New York state urban development corporation. The corporation shall be a corporate governmental agency of the state, constituting a political subdivision and public benefit corporation. . . .

In addition, subdivision (2) of section 6262 of the UDC Act states:

The corporation may transfer to any subsidiary corporation any moneys, real or personal or mixed property or any project in order to carry out the purposes of this act. Each such subsidiary corporation shall have all the privileges, immunities, tax exemptions and other exemptions of the corporation to the extent the same are not inconsistent with the statute or statutes pursuant to which such subsidiary was incorporated.

In a March 29, 1913, opinion, the Attorney General opined that no mortgage recording tax was due when New York State acted as mortgagor and quoted the following passage from Matter of Hamilton, 148 NY 310, 313-314:

The property held by the state, or by any of its municipal divisions, for public purposes, is not, and never has been, subject to taxation . . . The end and object of all taxation is to raise revenue for the purpose of defraying the expenses of government, and since no revenue could be raised by imposing taxes on property owned by the state itself, or by any of its political divisions, such property is in no just or practical sense the subject of taxation. . . .

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This principle has been applied in exempting from the mortgage recording tax the recording of mortgages on property the legal title of which is held by an industrial development agency and the beneficial ownership of which is held by a non-exempt private party. (See 1982 Opns St Comp No. 82-188, p 240; One Park Place Associates, Adv Op St Tx Comm, May 24 1982, TSB-A-82(1)(M) and New York State Urban Development Corp., supra.)

In Hotel Waldorf-Astoria Corp. v. State Tax Commission, 86 AD2d 330, 334, in acknowledging that a \$45 million mortgage secured by the Waldorf-Astoria hotel was exempt from the mortgage recording tax because the mortgagee (the New York State Employees' Retirement System) was a New York State agency, the court stated: "as a State agency, the Retirement System enjoys an immunity from taxation independent of the statutory exemptions listed in Section 252 of the Tax Law. . . ."

Furthermore, Section 6272 of the UDC Act provides, in pertinent part, that:

The exercise of the powers granted by this act will be in all respects for the benefit of the people of this state . . . and will constitute the performance of an essential governmental function and [UDC] and its subsidiaries shall not be required to pay any taxes, other than assessments for local improvements, upon or in respect of a project or of any property or moneys of [UDC] or any of its subsidiaries, levied by any municipality or political subdivision of the state, nor shall [UDC] or its subsidiaries be required to pay state taxes of any kind, and [UDC], its subsidiaries, projects, property and moneys . . . shall at all times be free from taxation of every kind by the state and by the municipalities and all other political subdivisions of the state.

Section 6283 of the UDC Act states: "[i]nsofar as the provisions of this act are inconsistent with the provisions of any other law, general, special or local, the provisions of this act shall be controlling."

Also, Section 6284 of the UDC Act provides: "[t]his act, being necessary for the welfare of the state and its inhabitants, shall be liberally construed so as to effectuate its purposes."

Consistent with the legislative mandate of the UDC Act, courts have given liberal interpretation to its tax exemption provisions. For example, in Wein v. Beame, 43 N.Y.2d 326, the New York Court of Appeals upheld an exemption from real property taxes as applied to the Commodore Hotel property in Manhattan. The hotel had been sold to Petitioner for one dollar, then leased back to the seller for 99 years. Arguments that Petitioner had no real interest in the property, and was a "straw man" brought into the project solely to provide a tax exemption, were rejected. The court stated:

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It is not for us to speculate as to the motive for UDC's participation, nor to delineate the amount of active participation which is necessary to denominate a particular project a UDC project. Here, UDC will be the owner of the building, and it is enough that UDC has to combat otherwise inevitable urban blight, and which is thus clearly in accordance with the benign purposes of the Legislature in creating UDC. . . . (emphasis added)

An apparent inconsistency exists between the Tax Law and the UDC Act. Where a conflict exists between two enactments relating to the same subject matter, the latter specific enactment governs the earlier general enactment. (Williamsburgh Power Plant Corp. v. City of New York, 255 App Div 214, affd 280 NY 551 and New York State Urban Development Corp., supra.)

As the pertinent provisions of section 252 of the Tax Law as cited previously in this Opinion were enacted in 1909, they must yield to the exemption provisions contained in the law creating UDC which were enacted in 1968.

Furthermore, the UDC Act gives Petitioner the power to make mortgage loans, secured by first mortgage liens. Having this power implies that Petitioner may also perform the activity of recording mortgages. Section 253 of the Tax Law imposes the mortgage recording tax on the exercise of the privilege of recording a mortgage, not on the mortgage itself as property. (Franklin Society for Home Building and Savings v. Bennett, 282 NY 79; Matter of Silberblatt, Inc. v. Tax Comm., 5 NY2d 635; and One Park Place Associates, and New York State Urban Development Corp., supra.)

Also, in an informal opinion of the Attorney General, dated March 7, 1956, it was stated that:

It should be noted that section 257 of Article 11 of the New York State Tax Law is silent as to which party to the mortgage shall pay the tax. Under its terms the taxes shall be payable on the recording of each loan subject to tax so that the party who records is the one upon whom the tax is imposed. . . . (1956 Atty Gen [Inf Opns] 27, at 28.)

Furthermore, Section 6272 of the UDC Act specifically provides that Petitioner or its subsidiaries shall not be "required to pay state taxes of any kind" and Petitioner, its subsidiaries, projects, and moneys "shall at all times be free from taxation of every kind by the state and by the municipalities and all other political subdivisions of the state."

Also, Section 255(1)(a) of the Tax Law provides, in pertinent part, as follows:

If subsequent to the recording of a mortgage on which all taxes, if any, accrued under this article have been paid, a supplemental instrument or mortgage is recorded for the purpose of correcting or perfecting any recorded mortgage, or pursuant to some provision or covenant therein, or an additional mortgage is recorded imposing the lien thereof upon property not originally covered by or not described

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in such recorded primary mortgage for the purpose of securing the principal indebtedness which is or under any contingency may be secured by such recorded primary mortgage, such additional instrument or mortgage shall not be subject to taxation under this article . . . unless it creates or secures a new or further indebtedness or obligation other than the principal indebtedness or obligation secured by or which under any contingency may be secured by the recorded primary mortgage. . . .

Also, Section 250(2) of the Tax Law provides that "[a] contract or agreement by which the indebtedness secured by any mortgage is increased or added to, shall be deemed a mortgage of real property for the purpose of this article, and shall be taxable as such upon the amount of such increase or addition."

In addition, once a mortgage has been given and recorded, the recorded primary mortgage may be changed by a supplemental mortgage and, under the provisions noted above, no additional recording tax will be due as long as the amount secured remains the same. (City of New York v. State Tax Commission, 130 AD2d 890, 891 and New York State Urban Development Corp., supra.)

Conclusions

Based on the foregoing, it is concluded that the mortgage recording tax is not due upon the recording of any mortgage recorded in connection with the Project, if Petitioner or QWDC is named mortgagee (whether as trustee, agent, nominee or otherwise) and Petitioner or QWDC presents the mortgage for recording.

Also, to the extent that the mortgage continues to secure the same principal debt or obligation, the recording of any assignment, supplement, modification or amendment of a mortgage described in the preceding paragraph is exempt from the mortgage recording tax, either because such instrument does not create a new mortgage subject to tax under section 253 of the Tax Law, or because the instrument constitutes a "supplemental mortgage" under Section 255 of the Tax Law. (New York State Urban Development Corp., supra.) To the extent that a new or further indebtedness were secured in conjunction with the recording of any assignment, supplement, modification or amendment of such mortgage, mortgage recording tax would be imposed only with respect to any new or further indebtedness, and then only if mortgage recording tax would otherwise have been required to be paid on such new or further indebtedness.

DATED: December 13, 2002

/s/
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.