

# The Kane Kessler, P.C. Real Estate Newsletter

1350 Avenue of the Americas, New York, New York 10019  
(212) 541-6222

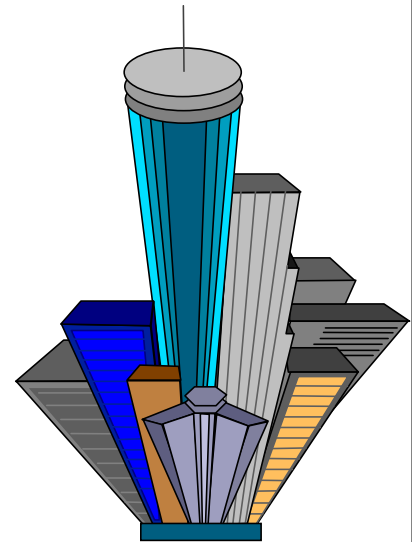
**AS AUTUMN FALLS ON NEW YORK, THE REAL ESTATE MARKET HAS SEEN DROPS IN THE STOCK MARKET, LENDING INSTITUTIONS THAT HAVE FOLDED AND HIGHER INTEREST RATES. NEVERTHELESS, SALES AND PURCHASES REMAIN STRONG AND COMMERCIAL RENTAL RATES ARE HIGHER THAN EVER. PLEASE ENJOY OUR THIRD QUARTER 2007 NEWSLETTER.**

## **CONDITIONS FOR CONDOMINIUMS CONTINUE TO GROW**

Apartment purchasers and sellers are aware that it is usually easier to buy and sell a condominium than a co-op because a co-op sale needs the consent of the co-op board. Recently, however, many condominiums have been following the footsteps of cooperative apartments in Manhattan. Because condominiums have been selling at extraordinary high prices, condominium boards have been setting and imposing more and more restrictions and tightening rules that were once only seen by co-ops. The condominium's position is usually that it is not using the board review process and tighter rules to limit sales: rather it is using these procedures to maintain the image of the building and have more control over the quality of people who reside in the building.

The first and most noticeable change in condominium procedures are the conditions that have been added to the closing process. In most New York City condominiums, the sale of a condominium apartment is conditioned upon the issuance of a waiver of right of first refusal by the board of managers. The waiver itself is a written document on condominium letterhead that simply provides that the condominium has waived its right to purchase (or rent) an apartment that is for sale or lease. The waiver of right of first refusal does not apply to first time sales by sponsor/developers. This requirement gives the condominium the right to purchase the apartment at the same price offered to a bona fide third party purchaser under the same terms and conditions. Condo boards very rarely exercise this right since it would require the condo to raise sufficient funds to purchase the apartment. In addition, most condominium by-laws require a 2/3 vote of all unit owners to purchase the apartment. If the condominium does not exercise its right of first refusal, the board of managers will waive its right to purchase the apartment and the sale to the third party can be concluded. The rules about leasing are also fairly relaxed. The condo must either exercise its right to rent the apartment under the same terms as the lease being offered to the proposed tenant or the condo itself must rent the apartment. The board of managers of a condominium cannot deny a purchaser or a renter and leave the owner with no alternative.

With a sale or lease, the seller agrees to give notice promptly to the board of the contemplated sale of the unit to purchaser, which notice shall be given in accordance with the terms of the condominium declaration and by-laws. The purchaser agrees to provide all applications, information and references reasonably requested by the board. If the board of managers exercises its right of first refusal, the seller must refund the down payment to the purchaser and upon making such refund, the contract shall be cancelled. If the board shall fail to exercise such



right of first refusal within the time and in the manner provided for in the declaration or by-laws or shall declare in writing its intention not to exercise such right of first refusal, either seller or purchaser shall have the right to terminate the contract and all monies paid under the contract should be refunded.

The actual waiver document must be presented at the closing and delivered to the purchaser's title company. The delivery of the waiver is a condition to closing and failure to deliver the waiver will result in unmarketable title to the premises. If the purchaser is obtaining financing, a lender will refuse to fund the transaction unless the title company is satisfied with this condition.

In the past, condominium applications were less formal and detailed than co-op application's. In most cases, upon receipt of the application, the condominium immediately waives its right to purchase the apartment and the closing is concluded quickly and efficiently. In very limited circumstances, the condominium will exercise its right to purchase the apartment, in which case the contract of sale between the purchaser and seller is terminated and the purchaser is entitled to a refund of his or her down

payment. Until recently, condominiums merely required a very basic, informational form to be completed by the purchaser and a request by the seller for the waiver of right of first refusal. Recently, many condominiums have modified the application significantly sometimes asking for tax returns, W-2 forms, bank statements, paycheck stubs, reference letters, letters from current landlords, letters from employers and full financial statements of the purchaser. In other instances, the condominium has asked for personal interviews of the purchaser. This office has also seen condominiums asking for personal guarantees from a relative and/or prepayment of common charges or large sums to be held in escrow by the condominium to insure prompt payment of common charges, particularly when the applicant shows no income or assets. Condominiums have become more concerned about who will be living in their buildings and quality of life issues like noise and odors.

Purchasers must be made aware of the requirements of the condominium application before the contract is signed. It is imperative that purchasers become familiar with these requirements so they are prepared and will not be surprised when the condominium board acts intrusively. Many purchasers do not want to disclose their personal financial information (one of the main reasons why people buy condominiums). Prior to any condominium sale, the seller or his or her counsel should review the by-laws of the condominium to determine the requirements for the sale. The by-laws will provide how much information the condominium can require from a prospective purchaser. Many by-laws provide that the purchaser must supply documentation reasonably requested by the condominium. The by-laws will also provide the number of days the condominium has to respond to a request for a waiver. Generally, this time period is 20 to 30 days. It is advisable when submitting a condominium application to obtain either a written acknowledgement of receipt or sent the application in by certified mail/return receipt requested. This will enable the seller to keep track of the date when the application was submitted. On many occasions, the by-laws may provide that in the event the condominium does not issue a waiver within the respected time period, the condominium will be deemed to have waived its right of first refusal and the transaction can proceed to closing without the waiver.

When the condominium delays in issuing or fails to issue the waiver, the transaction is held up indefinitely. The condominium must either exercise its option or waive the option to purchase. In the event the condominium has failed to issue the waiver, the seller may be forced to commence legal action against the condominium for specific performance which will force the condo to issue the waiver. Condominiums have been using this power to extrapolate additional information from purchasers by failing to provide the waiver of right of first refusal. Sometimes the problem is that condo boards are asking for additional detailed personal information after the application has been submitted. This request can cause problems with the transaction: A purchaser can state he or she will not provide personal information but without it the condominium will not waive its right of first refusal. The transaction stalls and sits in a stalemate. It appears that the days of free transferability in high profile condominiums are slowly coming to an end.

The second most evident change in condominium procedures is the imposition of stricter rules. For example, more and more condos are setting minimal rental periods (usually no less than one year) or that the unit owner must reside in the apartment for a minimum number of years before the apartment is sublet. The feeling is that transient residents put more wear and tear on a building. Recently, a condominium passed a restriction which provided that no more than 25% of all of the apartments in the building could be leased at any one time. Other condos have been setting stricter policies regarding renovations and improvements. Numerous condos have imposed costly application fees, supervision fees and security deposits on the owner for larger alteration projects. In such instances, these restrictions and fees should be authorized in the condominium by-laws. If not, the condo may need to amend the by-laws setting such restrictions and fees. Most by-laws can only be amended by a vote of 2/3 of the unit owners. If the by-laws do not specify such restrictions but the condominium is imposing them, the unit owner must either engage in litigation to challenging this position or pay the appropriate fees (being that the cost of maintaining a legal action is quite expensive, most unit owners pay the fee). Furthermore, we have seen condos adopt rules that prevent open houses when an apartment is for sale or even limit pet ownership.

In a recent case, a purchaser of a condo unit sued the seller to cancel a contract and obtain a refund of the down payment because the condominium did not issue a waiver of right of first refusal. In Lisenenkov v Kaszirez, the condominium did not issue a waiver of right of first refusal as required under the contract of sale and demanded that the purchaser provide additional financial information to the condominium to support the payment of monthly common charges as a condition to issuing a waiver. Upon examination of the by-laws, the condominium did not have to issue a right of first refusal. The purchaser supplied the additional information but the condo was concerned about the purchaser's financial ability to pay the common charges and demanded that the purchaser place 2 years of common charges in advance. The New York State Appellate Division held that the condo had gone too far: it did not have the right to demand and the purchaser had no obligation to pay the common charges in advance. The court required the seller to refund the down payment.

There have also been a significant number of changes for foreign investors as well as corporations and limited liability companies due to security reasons. Diplomats are required to waive the right to hide behind "diplomatic immunity". Many condominiums require details about (i) who will be the responsible individual to pay common charges if the foreigner or entity is not paying and (ii) who will actually be residing in the apartment. Some condos have gone as far as requiring a criminal background check (one building, upon doing so, found a purchaser who was a convicted child molester).

Condominiums have also voted to impose a transfer fee (known in co-ops as a "flip tax") where a portion of the sale profits are paid into the reserve fund of the building when an apartment is sold. A flip tax has always been a means for co-ops to generate funds for renovations or capital improvements.

To conclude, when purchasing or selling a condominium apartment, it is wise to review the application and check to see what specific requirements the condominium has prior to signing the contract of sale.

### RECENT TRANSACTIONS OF INTEREST

Kane Kessler, P.C. represented a commercial tenant to see if we could assist them in finding a way to either

terminate or to negotiate better financial terms for their office lease. The original term of the client's current lease had three years left. The terms were very landlord favorable: The rent was far above market and the lease contained terms that made assigning and subletting very difficult and costly. The client's business was strong, however, the leased space was far too large for their needs and therefore was causing an unnecessary decrease in the client's profits. After we reviewed the lease, the best scenario for the client would be to sublet the space at a rent that was lower than the client's current rent under the lease (it would have been difficult to sublet at the same rent since it was significantly above market). Our client would then rent more suitable space at a rent low enough so that the rent on new space along with the difference in the rent on the sublet space would be significantly less than the rent the client was paying on the original lease. While this scenario was the only possibility to solve the client's issue, their lease contained a clause providing for a commission to be paid to the landlord in connection with an assignment or sublet in addition to any broker's commission that would be due as well as obtaining consent from the landlord to the sublet or assignment.

To overcome the issue of the extra commission to the landlord and the necessary consent, we were able through the help a broker, find a new tenant that was willing to sublet the remainder of the term on the client's lease and enter into a separate lease with the landlord for a 10 year term to commence immediately following the end of the client's lease. Since the landlord was able to negotiate a favorable long term lease with a creditworthy tenant, the landlord agreed to consent to the sublet and waive the commission it was otherwise entitled to under the lease. The lease negotiations were handled by Gary Ostroff, Esq.

\*\*\*\*\*

In August, 2007, Kane Kessler, P.C. represented the private banking division of a prominent international bank in a transaction involving luxury residential real estate valued at over \$25,000,000.00 located in Greenwich, Connecticut. The firm was engaged on short notice to close a \$16,000,000.00 credit facility to consolidate five separate credit facilities encumbering properties owned by the borrower which were located in various states. The entire closing and payoff process was handled by Michael J. Romer, Esq.

\*\*\*\*\*

In August, 2007, Kane Kessler, P.C. represented the owner of luxury residential property located on Central Park West with respect to a license agreement with a movie studio. The studio was seeking to film a portion of a major motion picture within our client's residence. As part of the agreement, we were able to negotiate a substantial per diem payment for our client as well as numerous provisions protecting our client's interests (i.e. insurance, escrow for potential damages etc.). The license agreement and the ensuing transaction were handled by Michael J. Romer, Esq.

\*\*\*\*\*

In March 2007, Kane Kessler, P.C. represented a limited liability company that had entered into a contract to purchase a mixed-use building in the West Village. Several alterations were made to the building that were never approved or signed off by the NYC Department of Buildings. Our client planned on making significant alterations to the building. We conferred with our client's expeditor to determine that the sign-offs and approvals for the old alterations were not necessary because our client was applying for new permits to alter the building which would supersede the old alterations. However, our client's lending institution was requiring that the NYC Department of Building' issue permits prior to the closing. Since a contract vendee can not obtain such permits, we negotiated with our client's lending institution to hold a small sum of money in escrow and to give our client 6 months after the closing to obtain the necessary building permits.

The second obstacle we faced was the "Mansion Tax". For all purchases of residential properties in New York State, the state imposes a 1% tax on the purchaser called the "Mansion Tax" when the sales price is \$1,000,000 and over. The certificate of occupancy designated the building as mixed-use with approximately 52% being used for commercial purposes and 48% being used for residential purposes. In order to prevent our client from paying the Mansion Tax on the entire purchase price, we developed a formula that would be acceptable to the NYC Department of Finance enabling our client to only pay the Mansion Tax on the residential portion of the building. We examined the appraisal report and determined the total square footage in the building and divided it by the total square footage that was appurtenant

for residential use. From that we determined that 48% of the purchase price was allocated to the residential portion of the building. Our client paid the Mansion Tax on 48% as opposed to the entire purchase price. In doing so, we saved our client approximately \$18,000. When we transmitted the transfer taxes, we included a letter to the Department of Finance explaining how we determined the correct amount of the Mansion Tax and attached the relevant pages from the appraisal report to demonstrate how we determined the tax breakdown.

As the transaction progressed, we suspected suspicious activity taking place on the seller's behalf. The entity that entered the contract as the seller was the same entity listed on the deed as the owner of the building. Our title company, as well as our office, began receiving phone calls from two different parties claiming to be the owner of the building. We subsequently discovered that the party who signed the contract fraudulently represented itself as the current owner of the building. This fraudulent party was simultaneously under contract with the actual owner of the building (under a different name) to purchase the building for a lower price than the price in the contract with our client. Our client threatened to sue the fraudulent entity for entering into the contract for a property which they did not actually own and for misrepresenting itself as the true owner of the building. We required that the fraudulent seller deliver releases to our client for any obligations stated in the original contract and thus cancelled that contract. We then contacted the true owner of the building and scheduled the closing. All of this unfolded two days prior to the scheduled closing date. We signed the new contract at the closing with the correct seller and closed the transaction without a delay or financial hardship to our client. This transaction was handled by Eric P. Gonchar, Esq. and Pierre E. Debbas, Esq.

\*\*\*\*\*

In August of 2007, our firm represented a purchaser of a residential condominium unit and a commercial condominium unit that were on the first and second floors of a building located in Greenwich Village. Our client purchased both units from the sponsor who converted the building from a rental property to a condominium approximately 10 years ago. The commercial unit was leased to a clothing store under a 3 year lease which was set to expire in 2009. Our

client planned on occupying the residential unit and assume the lease for the commercial unit. In order to save on income taxes, our client formed two separate limited liability companies in Florida (where he resided) and our firm registered those LLC's in New York. Upon executing the contract, we made it contingent upon the lease being assigned to our client and the tenant executing an affidavit stating that the rent was current and that there were no claims by the tenant against the landlord or vice versa.

In New York City, there is a transfer tax of 1.425% for residential units and 2.625% for commercial units, which are both paid by the seller and there is a "Mansion Tax" of 1% for purchases over \$1,000,000 for residential units only that is paid by the purchaser. Initially the residential unit was being offered for a higher price than the commercial unit. In order to try to save our client money on the Mansion Tax and also increase the depreciation our client can take on the commercial unit, we negotiated with the seller to increase the purchase price of the commercial unit and decrease the purchase price of the residential unit. While this increased the amount of the transfer taxes for the seller due to the higher rate for commercial unit, they agreed to do this in order to finalize the transaction. Once all of these items were agreed upon, we were able to effectuate a very smooth transaction. This transaction was handled by Eric. P. Gonchar, Esq. and Pierre E. Debbas, Esq.

### **KANE KESSLER OFFERS MEDIATION PROGRAM FOR CO- OPS, CONDOS and UNIT OWNERS**

Kane Kessler is pleased to announce the formation of its Co-op/Condo Mediation Program. This service will provide cooperative and condominium boards with a low cost method for resolving disputes between residents and their boards or managing agents.

This new program provides experienced attorneys at moderate rates to reconcile differences, disputes and complaints in co-ops and/or condominium buildings. Mediation is a cost effective means to address these issues that are not appropriate for litigation. Because of our general representation of co-ops and condos and our volume of representing purchasers and sellers of co-ops and condos, we have a unique understanding of both sides of an issue. Our attorneys are trained to

negotiate a favorable settlement for both sides at moderate rates. The program encourages boards of co-ops and condos to adopt a pledge to use mediation to address disputes that may arise between or among residents, boards, sponsors and managing agents. A mediator can not impose or mandate an agreement. Nor does he or she act as a judge. Rather, the mediator's role is to clarify what the parties express, help them identify and explore the issues in dispute facilitate understanding of the points of view and the reality they face (including possible legal ramifications) and help them develop possible solutions.

If you have any questions or would like more information, please call us. We will offer a free consultation (up to one hour) to discuss the process, fees, location and time for the mediation. An information pamphlet will be distributed in the near future. Of course, in the event we represent the co-op or condo in question or the owner, Kane Kessler would be unable to handle the mediation due to a conflict of interest.

### **ERIC GONCHAR TEACHES REAL ESTATE CLASSES**

On October 17, 2007, Eric will be teaching an all day class at the New York University Real Estate Institute entitled "Converting Rental Properties into Co-ops or Condominium. The class is a step by step guide designed for sponsors and those interested in learning the detailed processes involved with such conversions.

Eric will also be teaching a new 3 hours course at the Real Estate Board of New York on November 14, 2007. This basic class is designed specifically for real estate brokers and will outline what steps are involved and the costs of converting properties to co-ops or condos.

### **REAL ESTATE MARKET SCARE OR FARCE: HOW DOES THE SUB- PRIME MORTGAGE MARKET REALLY AFFECT THE NEW YORK METROPOLITAN AREA?**

New York City real estate is remarkable. In the first half of 2007, while the sale of existing homes slowed and investing decreased in the rest of the country, sales in Manhattan continued to increase. Recently, there has been substantial changes in the debt market which have lead to a reduction of large mortgages and an increase in their rates. A class of purchasers, sub prime home buyers (i.e. those with little or no credit

history), have been adversely affected by the home buying universe. Sub-prime mortgages that were sold as securities are no longer a viable investment for investors. There has been no indication that the re-adjustment to the credit market or the slump in the housing market will have or has had an impact on the NYC real estate market. The Manhattan and Brooklyn market have avoided the nationwide slump for a variety of reasons:

1. Substantial bonuses and salary increases.
2. More people are moving into the city and less people are moving out.
3. The purchase power of the European market has strengthened (the foreign dollar is strong in America).
4. Hotels have become so expensive in NYC that purchasers have been purchasing pied a terres (second residences).
5. Parents are purchasing apartments for their children.
6. More people are retiring in New York Rents are rising pushing people back into purchasing apartments.
7. Jobs and personal wealth have increased (hedge funds, private equity firms and investment banks are paying record salaries, commissions and bonuses).
8. The availability of large pre-war apartments have been depleted causing bidding wars and increased prices.
9. Inventory in Manhattan has fallen while the rest of the country's inventory has greatly increased.

Although interest rates have risen, many lenders have not raised their interest rates. The short and sweet is that the real estate market in New York is not as bleak as depicted in the media and sales and purchases continue to remain strong.

**Copyright © Kane Kessler, P.C. 2007.  
All rights reserved.**

**The Kane Kessler, P.C. Quarterly Real Estate Newsletter is published by Kane Kessler, P.C. and articles contained herein cannot be reprinted without the prior written permission of Kane Kessler, P.C. If you have a real estate related question or if we can be of assistance, please contact Eric P. Gonchar, Esq., at (212) 541-6222. You may also visit Kane Kessler, P.C. on its website <http://www.kanekessler.com>. This newsletter is merely an outline of various subjects concerning real estate and should not be used to replace the advice of an attorney.**