A Message from the Section Chair

A Wish List for New York Real Estate Law

Our Section's Committee on Legislation has started to play an active role in the legislative process as it affects real property law. This effort represents an important development for us. Over time, our involvement should help produce better real property statutes in New York.

So far, we have only responded to legislation proposed by others, as we have started to understand the legislative process and define our role in it. Looking forward, we intend to propose legislation within our expertise, starting with a "technical corrections act" in which we will try to identify and fix some obvious drafting errors in statutes on real property.

Spencer Compton's Legislative Committee Report starting on page 194 of this issue describes our approach to legislation, what we have achieved so far, and where we see ourselves going.

Looking further ahead, at some point I hope we will start to identify and correct some serious (and less serious) flaws, gaps, and glitches in New York real property law. By doing so, we will clarify and improve the law and make it easier to transact real estate business in the state. Ultimately that is one of the goals of our legislative initiative, proves its value, and gives you a very good reason to get involved in our work.

To begin to lay the foundation for possible legislative initiatives in coming years, I've collected here my "wish list" of some changes I would like to see in New York statutes. I've tried to emphasize changes that would simplify and streamline the law and practice of real estate in the state, without substantively benefiting or hurting any particular group.

I've stayed away from suggesting reductions in taxes on real estate transactions, as these are obvious suggestions and not particularly creative. Although it goes against my personal views on these issues, I also note that New York's high taxes do not seem to have prevented New York real estate from doing quite well for quite a long time.

If I were appointed tomorrow as the grand czar of New York real estate law, here are the first statutory changes I would make, ranked in order of importance:

1. ***Yellowstone Injunctions.*** New York commercial lease disputes often become high-intensity full-blown litigations as a result of glitches in the Real Property Actions and Proceedings Law that artificially increase the stakes in the early stages of any landlord-tenant litigation. The tenant will often seek a so-called "Yellowstone" injunction to prevent the landlord from terminating the lease for a non-monetary default or a default in certain monetary obligations. This process often takes place on an emergency basis, late some Friday afternoon. The Legislature could readily eliminate all the excitement by saying that if a court decides a tenant was in fact in default under its lease, then after such determination the tenant will have a "last clear chance" to cure the default to prevent termination, regardless of what the lease says. Any such rule would need to be accompanied by an absolute requirement for the tenant to continue paying fixed rent (and perform any undisputed obligations) while the court decided the dispute.
2. ***Single-Purpose Entities.*** The rating agencies and the securitization industry have found a reason why New York "single member" limited liability companies are not as reliable as Delaware entities of the same type. This alleged problem has moved a significant volume of entity formation business to Delaware and created the need to involve Delaware counsel in many major transactions. Whatever problem the rating agencies and the securitization industry have identified could presumably be fixed by New York legislation. And it should be, along with anything else that makes New York less hospitable than Delaware for forming routine entities for real property transactions.
3. ***Mortgage Consolidations.*** Every New York commercial refinancing forces the parties to perpetrate a complex series of assignment, consolidation, and amendment documents, to say nothing of occasional splitters, spreaders, and "lost note" documents—all in an effort to mitigate mortgage recording tax. This massive accumulation of complexity could and should be replaced by a simple affidavit that discloses the "tax-paid" amount of debt already on the property, and the amount of any increase in that "tax-paid" debt resulting from the current transaction. Lenders would have the same incentives that they already do to assure payment of the tax. With this change, though, we could instantly eliminate mortgage

chains, most lost note affidavits, and the tedious task of drafting documents whose sole purpose is the preservation and manipulation of old mortgages.

4. ***Revolving Loans.*** New York imposes its mortgage recording tax on every readvance of a substantial commercial revolving loan—a position that simply prevents New York real property from securing such loans. The Legislature should solve this problem, as well as some other similar problems that the mortgage recording tax creates for substantial modern multi-state transactions.

5. ***Lien Law.*** The law governing mechanics' liens and construction loans is absolutely incomprehensible and unnecessarily complex. It creates a regime in which a famous lawyer for mechanic's lien claimants once bragged that for any construction loan he could always find a way that the lender had violated the lien law. This statute should be rewritten, clarified, and simplified—translated into English without changing its major substantive concepts and requirements.

6. ***Simpler Mortgage Documents.*** The New York Real Property Law on its face seems to create two great tools to simplify New York mortgage documents. First, anyone can incorporate by reference a "statutory form of mortgage" defined in the Real Property Law, thus creating a one-page mortgage. Second, anyone has the statutory right to record a "master mortgage," which can then be incorporated by reference in all future mortgages, again creating one-page mortgages. No one uses either tool. The first tool deserves not to be used because the statutory mortgage is woefully deficient and does not even satisfy the elementary requirements of New York law. The second tool makes a lot of sense and is widely used in, for example, California. The Legislature should update the statutory form of mortgage to reflect current law, and should consider taking steps to encourage the use of "master mortgages." On the other hand, because longer mortgages create more recording fees, neither of these changes seems likely to happen any time soon.

7. ***Conditional Limitations.*** If a lease expires ten days after a landlord gives notice of termination, the landlord qualifies to bring a summary proceeding. On the other hand, if the lease expires automatically when the landlord gives notice of termination, the landlord doesn't qualify to bring a summary proceeding. New York's common law calls the former a "conditional limitation" (summary proceeding allowed) and the latter a "condition subsequent" (no summary proceeding allowed). The distinction makes no sense and should be eliminated by legislation to allow summary proceedings in both cases and prevent a "glitch" in lease drafting.

8. ***Opaque Disclosure Law.*** Whatever may be the merits or wisdom of the state's recently enacted Property Condition Disclosure Act, the text of the Act is hardly a model of transparency and clear disclosure. The Act would probably flunk New York's "Plain English" law, which imposes a $50 penalty for using an incomprehensible contract in a consumer-related transaction. This and similar statutes should be written in plain English, to help serve the Legislature's goal of achieving broad and effective communication of useful information.

9. ***Separate Assignments of Rents.*** Why must a mortgagee obtain a separate assignment of rents, beyond the assignment already in the mortgage? The answer: archaic principles of real property law that should play no role in modern transactions. The Legislature should clarify by statute that no such separate document is required, and a mortgagee can enforce an assignment of rents built into a mortgage as soon as a foreclosure begins. The National Conference of Commissioners of Uniform State Laws is in the process of proposing similar changes via a model act, which New York should adopt as soon as it becomes available.

10. ***Leasehold Condominiums.*** New York law says a condominium cannot be created on a leasehold—unless the site is located in a handful of selected development areas within the city and a quasi-public agency is involved. Although this law presumably tries to protect consumers, it in fact hurts consumers by encouraging the use of cooperatives (a truly wretched form of ownership) rather than condominiums. New York should figure out a way to allow leasehold condominiums in a way that adequately protects consumers. Other states seem to do it without much trouble.

11. ***Mortgage Foreclosures on Apartment Buildings.*** New York's non-judicial foreclosure statute generally applies to commercial real property, but carves out any building where residential renters occupy more than about two-thirds of the units. If a mortgagee were seeking to foreclose out the interest of those renters, it might make sense to prohibit the use of non-judicial foreclosure. But if the mortgagee has no interest

in terminating residential leases, it is hard to see why investors in apartment buildings should be any more immune from non-judicial foreclosure than investors in office buildings or shopping centers. Therefore, the Legislature should remove this distinction, at least as long as the lender does not want to terminate any residential leases by foreclosure.

12. ***No Waiver of Landlord's Liability for Negligence.*** The New York General Obligations Law says a tenant can't release a landlord from liability for negligence. Some New York leasing practitioners argue that if a tenant promises to pay any "deductible" amount under a liability insurance policy that otherwise benefits the landlord, any such agreement by the tenant violates the General Obligations Law and hence is invalid. This argument then implies that the tenant should maintain the lowest possible deductible amounts, regardless of the tenant's risk management program company-wide. Any such requirement for low deductibles seems inappropriate, at least in a commercial transaction where the choice of a deductible amount simply represents a business decision in the tenant's risk management program. The Legislature should remove this possible issue, at least for substantial commercial leases.

Each of the "wish list" items above would remove complexity and unnecessary issues, excitement, or risks from New York real estate law. None of these items would seem likely to hurt any recognizable group of players in the real estate industry. Of course, one can hardly guarantee a lack of controversy. Almost any change may somehow hurt or at least offend someone. If that is the case, or if I have missed some compelling reason that existing law is terrific and requires no change, I apologize in advance. I also encourage the offended or otherwise objecting party to speak up, as the beginning of a discussion of where we should and should not suggest legislative improvements. (Don't worry, none of these possible changes will be moving forward on an emergency basis!)

Finally, I should emphasize that my "wish list" reflects my own opinions, or perhaps fantasies, and only at the moment of writing. This does not reflect the opinions of the Section or the Association. And my "wish list" is in no way tempered by any considerations of reality or political feasibility.

Turning to a more immediate legislative agenda, New York legislators have joined those in many other states in proposing legislation to respond to *Kelo v. New London*, the recent U.S. Supreme Court case on the use of eminent domain to facilitate private development projects as part of governmental programs to eliminate "blight." The Section intends to participate actively in the Association's responses to, and comments on, these proposals. Section members who would like to participate in that process should be in touch with any of the co-chairs of our Legislation Committee, as identified on page 198 of this *Journal*.

The *Kelo* case will be one of several areas of emphasis at the Section's continuing legal education program during the upcoming winter meeting of the Association, which will take place January 23 through 28, 2006, at the Marriott Marquis in Manhattan. Under the leadership of First Vice Chair Harry Meyer, our CLE program will also focus on several other areas of current concern to New York real property practitioners. Tentative additional topics include:

- Workouts of securitized loans;
- Indian land claims that affect wide swathes of the state;
- Recent disputes under a federal law that tries to protect places of worship in residential neighborhoods;
- How developments in appraisal technology affect real estate lending;
- Possible changes in the Property Condition Disclosure Act (though not of the nature suggested above);
- Ethical issues in real estate closings, with a continuation of Anne Copps's case study; and
- The growing use of non-attorney "closers" in residential real estate transactions.

We hope you will attend the winter meeting and get involved in our legislative activities or other Section committees. You can find contact information for all the committee co-chairs on pages 197-198 of this *Journal.*

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