STATE OF NEW YORK

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2021-2022 Regular Sessions

IN ASSEMBLY

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Introduced by M. of A. EPSTEIN, CRUZ, RICHARDSON, SIMON, L. ROSENTHAL, REYES, GLICK, BARRON, GOTTFRIED, CARROLL, ANDERSON -- Multi-Sponsored by -- M. of A. COOK, FRONTUS -- read once and referred to the Committee on Judiciary

AN ACT to amend the real property law and the uniform commercial code, in relation to requiring the recording of mezzanine debt and preferred equity investments; and to amend the tax law, in relation to including mezzanine debt in the mortgage recording tax

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The real property law is amended by adding a new section 291-k to read as follows:

§ 291-k. Recording of mezzanine debt and preferred equity investments. 1. Whenever a mortgage instrument is recorded in the office of the recording officer of any county, any mezzanine debt or preferred equity investment related to the real property upon which the mortgage instrument is filed shall also be recorded with such mortgage instrument. For the purposes of this section, "mezzanine debt" and "preferred equity investments" shall mean debt carried by a borrower that may be subordinate to the primary lien and is senior to the common shares of an entity or the borrower's equity and reported as assets for the purposes of financing such primary lien. This shall include non-traditional financing techniques such as a direct or indirect investment by a financing source in an entity that owns the equality interests of the underlying mortgage where the financing source has special rights or preferred rights such as: (i) the right to receive a special or preferred rate of return on its capital investment; and (ii) the right to an accelerated repayment of the investors capital contribution.

2. This section shall apply to both mezzanine debt and preferred equity investments if both used by the borrower or mortgagor, or either

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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mezzanine debt or preferred debt, if either is used by the borrower or mortgagor.

3. For purposes of this section, "mezzanine debt" and "preferred equity investments" shall not include debt on cooperative or common shares of a residential dwelling where the unit owner of a cooperative apartment is a shareholder of the ownership entity, has exclusive occupancy of such dwelling unit, and has established and delimited rights under a proprietary lease.

4. No remedy otherwise available to a secured party under article nine of the uniform commercial code shall be available to enforce a security agreement pertaining to mezzanine debt financing and/or preferred equity investments in relation to real property upon which a mortgage instrument is filed that is evidenced by a financing statement, unless that financing statement is filed and the tax imposed pursuant to the authority of subdivision four of section two hundred fifty-three of the tax law, has been paid.

§ 2. Section 9-601 of the uniform commercial code is amended by adding a new subsection (h) to read as follows:

(h) Security interest perfected by financing statement. 1. Notwithstanding any provision of law to the contrary, a security interest in mezzanine debt and/or preferred equity investments related to the real property upon which a mortgage instrument is filed, may only be perfected by the filing of a financing statement under subpart 1 of part 5 of this article and only after the payment of any taxes due pursuant to section two hundred ninety-one-k of the real property law.

2. For purposes of this section, the terms "mezzanine debt" and "preferred equity investments" shall have the same meaning as provided in section two hundred ninety-one-k of the real property law.

3. This section shall not be applicable to any debt on cooperative or common shares of a residential dwelling where the unit owner of a cooperative apartment is a shareholder of the ownership entity, has exclusive occupancy of such dwelling unit, and has established and delimited rights under a proprietary lease.

§ 3. Paragraph (a) of subdivision 2 of section 250 of the tax law, as amended by section 1 of part Q of chapter 60 of the laws of 2004, is amended to read as follows:

(a) (1) The term "mortgage" as used in this article includes every mortgage or deed of trust which imposes a lien on or affects the title to real property, notwithstanding that such property may form a part of the security for the debt or debts secured thereby. An assignment of rents to accrue from tenancies, subtenancies, leases or subleases of real property, within any city in the state having a population of one million or more, given as security for an indebtedness, shall be deemed a mortgage of real property for purposes of this article. Executory contracts for the sale of real property under which the vendee has or is entitled to possession shall be deemed to be mortgages for the purposes of this article and shall be taxable at the amount unpaid on such contracts. 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.

(2) Notwithstanding anything in this section or section two hundred fifty-five of this article to the contrary, a contract or agreement whereby the proceeds of any indebtedness secured by a mortgage of real property in any city in the state having a population of one million or more are used to reduce all or any part of a mortgagee's equity interest

in a wraparound or similar mortgage of such real property shall be deemed a mortgage of real property for the purposes of this article and shall be taxable as such to the extent of the amount of such proceeds so used, without regard to whether the aggregate amount of indebtedness secured by mortgages of such real property is increased or added to.

(3) Notwithstanding any provision to the contrary in this section or section two hundred fifty-five of this article, "mezzanine debt" and "preferred equity investments" as such terms are defined in subdivision four of this section, shall be taxable and shall apply to taxes in subdivisions one, one-a and two of section two hundred fifty-three of this article, but shall not apply to any other taxes in this article on or after the effective date of this subparagraph.

§ 4. Section 250 of the tax law is amended by adding a new subdivision 4 to read as follows:

4. The term "mezzanine debt" and "preferred ability investment" shall have the same meaning as provided in section 291-k of the real property law.

§ 5. Section 253 of the tax law as amended by adding a new subdivision 4 to read as follows:

4. (a) A tax, measured by the amount of principal debtor obligation which is under any contingency may be secured at the date of the execution thereof, or at any time thereafter, by a security agreement pertaining to mezzanine debt financing and/or preferred equity investments in relation to real property upon which a mortgage instrument is filed, as evidenced by a financing statement, is imposed on the filing of the financing statement.

(b) The rate and incidence of the tax shall be determined pursuant to this section.

(c) Except as otherwise provided in this subdivision, all the Provisions of this article relating to or applicable to the administration, collection, determination and distribution of the tax imposed by this section shall apply to the tax imposed under the authority of this subdivision with such modification as may be necessary to adapt such language to the tax so authorized. Any reference to a mortgage will be deemed to be a reference to a financing statement that evidences a security agreement. Such provisions shall apply with the same force and effect as if those provisions had been set forth in this subdivision except to the extent that any provision is either inconsistent with a provision of this subdivision or not relevant to the tax authorized by this subdivision.

(d) No remedy otherwise available to a secured party under article nine of the uniform commercial code shall be available to enforce a security agreement pertaining to mezzanine debt financing and/or preferred equity investments in relation to real property upon which a mortgage instrument is filed that is evidenced by a financing statement, unless that financing statement is filed and the tax imposed pursuant to the authority of this subdivision has been paid.

(e) For the purposes of this subdivision:

(1) "mezzanine debt" and "preferred equity investments" shall have the same meaning as provided in section two hundred ninety-one-k of the real property law.

(2) "financing statement" means a record or records composed of an initial financing statement and any filed record relating to the initial financing statement.

(3) "security agreement" means an agreement that creates or provides for a security interest.

(f) Counties or cities authorized under this article to impose a tax are authorized and empowered to adopt and amend local laws to impose in such county or city a tax on the filing of financing statements pertaining to mezzanine debt financing and/or preferred equity investments in relation to real property upon which a mortgage instrument is filed. Any tax that has been imposed by a county or city under the authority of this article shall be deemed to include the authority to impose and collect the tax on the recording of a financing statement pertaining to mezzanine debt financing and/or preferred equity investments in relation to real property upon which a mortgage instrument is filed in the same manner as the local mortgage recording tax.

§ 6. Subdivision 1 and paragraph (a) of subdivision 2 of section 253-a of the tax law, as amended by chapter 343 of the laws of 1990, are amended to read as follows:

1. Any city in this state having a population of one million or more, acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws imposing in any such city (A) prior to February first, nineteen hundred eighty-two a tax of fifty cents, (B) on or after February first, nineteen hundred eighty-two and before July first, nineteen hundred eighty-two with respect to (i) one, two or three-family houses, individual cooperative apartments and individual residential condominium units, and (ii) real property securing a principal debt or obligation of less than five hundred thousand dollars, a tax of fifty cents, and with respect to all other real property a tax of one dollar and twelve and one-half cents, (C) on and after July first, nineteen hundred eighty-two and before August first, nineteen hundred ninety with respect to real property securing a principal debt or obligation of less than five hundred thousand dollars, a tax of fifty cents, with respect to one, two or three-family houses, individual cooperative apartments and individual residential condominium units securing a principal debt or obligation of five hundred thousand dollars or more, a tax of sixty-two and one-half cents, and with respect to all other real property a tax of one dollar and twenty-five cents, and (D) on and after August first, nineteen hundred ninety with respect to real property securing a principal debt or obligation of less than five hundred thousand dollars, a tax of one dollar, with respect to one, two or three-family houses and individual residential condominium units securing a principal debt or obligation of five hundred thousand dollars or more, a tax of one dollar and twelve and one-half cents, and with respect to all other real property a tax of one dollar and seventy-five cents, for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is or under any contingency may be secured at the date of execution thereof, or at any time thereafter, by a mortgage on such real property situated within such city and recorded on or after the date upon which such tax takes effect and a tax of one dollar on such mortgage if the principal debt or obligation which is or by any contingency may be secured by such mortgage is less than one hundred dollars. In each instance where the tax imposed pursuant to this subdivision is one dollar and twenty-five cents for each one hundred dollars and each remaining major fraction thereof of such principal debt or obligation, fifty percent of the total amount of such tax, including fifty percent of any interest or penalties thereon, shall be set aside in a special account by the commissioner of finance of such city. In each instance where the tax imposed pursuant to this subdivision is one dollar and seventy-five cents for each one hundred dollars and each remaining major fraction thereof of such principal debt or

obligation, thirty-five and seven-tenths percent of the total amount of such tax, including thirty-five and seven-tenths percent of any interest or penalties thereon, shall also be set aside in such special account. Moneys in such account shall be used for payment by such commissioner to the state comptroller for deposit in the urban mass transit operating assistance account of the mass transportation operating assistance fund of any amount of insufficiency certified by the state comptroller pursuant to the provisions of subdivision six of section eighty-eight-a of the state finance law, and, on the fifteenth day of each month, such commissioner shall transmit all funds in such account on the last day of the preceding month, except the amount required for the payment of any amount of insufficiency certified by the state comptroller and such amount as he deems necessary for refunds and such other amounts necessary to finance the New York city transportation disabled committee and the New York city paratransit system as established by section fifteen-b of the transportation law, provided, however, that such amounts shall not exceed six percent of the total funds in the account but in no event be less than two hundred twenty-five thousand dollars beginning April first, nineteen hundred eighty-six, and further that beginning November fifteenth, nineteen hundred eighty-four and during the entire period prior to operation of such system, the total of such amounts shall not exceed three hundred seventy-five thousand dollars for the administrative expenses of such committee and fifty thousand dollars for the expenses of the agency designated pursuant to paragraph b of subdivision five of such section, and other amounts necessary to finance the operating needs of the private bus companies franchised by the city of New York and eligible to receive state operating assistance under section eighteen-b of the transportation law, provided, however, that such amounts shall not exceed four percent of the total funds in the account, to the New York city transit authority for mass transit within the city. **The tax imposed under the authority of paragraph (D) of this subdivision is deemed to include a tax imposed on the filing of financing statements evidencing a security agreement pertaining to mezzanine debt financing and/or preferred equity investments in relation to real property upon which a mortgage instrument is filed.**

(a) For the purpose of determining whether a mortgage is subject to the tax authorized to be imposed by paragraph (B) or (C) of subdivision one of this section at a rate in excess of fifty cents, or by paragraph (D) of subdivision one of this section at a rate in excess of one dollar, for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation, the principal debt or obligation which is or under any contingency may be secured at the date of execution thereof, or at any time thereafter, by such mortgage shall be aggregated with the principal debt or obligation which is or under any contingency may be secured at the date of execution thereof, or at any time thereafter, by any other mortgage, where such mortgages form part of the same or related transactions and have the same or related mortgagors **or related debtors in the case of a financing statement evidencing a security agreement pertaining to mezzanine debt financing and/or preferred equity investments in relation to real property upon which a mortgage instrument is filed**. If the commissioner of taxation and finance finds that a mortgage transaction or mortgage transactions have been formulated for the purpose of avoiding or evading a rate of tax authorized to be imposed under subdivision one of this section in excess of the lowest such authorized rate, rather than solely for an independent business or financial purpose, such commissioner shall treat all of

the mortgages forming part of such transaction or transactions as a single mortgage for the purpose of determining the applicable rate of tax. For purposes of this subdivision, there shall be a presumption that all mortgages offered for recording within a period of twelve consecutive months having the same or related mortgagors **or related debtors** are part of a related transaction, and such presumption may be rebutted only with clear and convincing evidence to the contrary. The commissioner of taxation and finance may require such affidavits and forms, and may prescribe such rules and regulations, as he determines to be necessary to enforce the provisions of this subdivision. **Any reference to a mortgage in this subdivision includes a financing statement evidencing a security agreement pertaining to mezzanine debt financing and/or preferred equity investments in relation to real property upon which a mortgage instrument is filed.**

§ 7. Paragraph (a) of subdivision 1 of section 255 of the tax law is amended by adding a new subparagraph (iii) to read as follows:

(iii) Notwithstanding the provisions of subparagraph (i) of this paragraph, the taxes imposed by the authority under subparagraph three of paragraph (a) of subdivision two of section two hundred fifty of this article shall apply to mezzanine debt and/or preferred equity investments as such terms are defined by subdivision four of such section.

§ 8. Section 257 of the tax law is amended to read as follows:

§ 257. Payment of taxes. The taxes imposed by this article shall be payable on the recording of each mortgage of real property subject to taxes [~~thereunder~~] **under this article and to taxes imposed by subparagraph three of paragraph (a) of subdivision two of section two hundred fifty of this article on and after the effective date of such subparagraph**. Such taxes shall be paid to the recording officer of any county in which the real property or any part thereof is situated. It shall be the duty of such recording officer to indorse upon each mortgage **and any mezzanine debt included with such mortgage** a receipt for the amount of the tax so paid. Any mortgage so indorsed may thereupon or thereafter be recorded by any recording officer and the receipt for such tax indorsed upon each mortgage shall be recorded therewith. The record of such receipt shall be conclusive proof that the amount of tax stated therein has been paid upon such mortgage**, including any mezzanine debt**.

§ 9. Subdivision 1 of section 258 of the tax law, as amended by chapter 241 of the laws of 1989, is amended to read as follows:

1. No mortgage of real property shall be recorded by any county clerk or register, unless there shall be paid the taxes imposed by and as in this article provided. No mortgage of real property which is subject to the taxes imposed by this article shall be released, discharged of record or received in evidence in any action or proceeding, nor shall any assignment of or agreement extending any such mortgage be recorded unless the taxes imposed thereon by this article shall have been paid as provided in this article. **For purposes of the taxes imposed and authorized by subparagraph three of paragraph (a) of subdivision two of section two hundred fifty of this article, unless such taxes shall have been paid, no mortgage of real property shall be recorded by any county clerk or register, nor shall such mortgage be released, discharged, recorded or received in evidence in any action or proceeding, nor shall any assignment of agreement extending such mortgage be recorded.** Provided, however, except as otherwise provided in subdivision two of this section, in order to obtain a release or discharge of record where the mortgagor is not liable for the special additional tax imposed under subdivision one-a of section two hundred fifty-three of this chapter,

such mortgagor or any subsequent owner of the mortgaged property or a part thereof may pay the tax imposed under such subdivision one-a and penalty, and may either apply for the credit allowable under this chapter for payment of such additional tax or may maintain an action to recover the amounts so paid against any person liable for payment of the tax or any subsequent assignees or owners of such mortgage or consolidated mortgage of which such mortgage is a part, as if such amounts of tax and penalty were a debt personally owed by such persons to the mortgagor or subsequent owner. No judgment or final order in any action or proceeding shall be made for the foreclosure or the enforcement of any mortgage which is subject to any tax imposed by this article or of any debt or obligation secured by any such mortgage, unless the taxes**,** **including taxes authorized by subparagraph three of paragraph (a) of subdivision two of section two hundred fifty of this article** imposed by this article shall have been paid as provided in this article; and, except **as** otherwise provided in subdivision two of this section, whenever it shall appear that any mortgage has been recorded without payment of a tax imposed by this article there shall be added to the tax a sum equal to one-half of one per centum thereof for each month or fraction of a month for the period that the tax remains unpaid except where it could not be determined from the face of the instrument that a tax was due, or where an advance has been made on a prior advance mortgage or a corporate trust mortgage without payment of the tax, in which case there shall be added to the tax a sum equal to one per centum thereof for each month or fraction of a month for the period that the tax remains unpaid. In any case where a mortgage of real property subject to a tax imposed by this article has heretofore been recorded or is hereafter recorded in good faith, and the county clerk or register has held such mortgage nontaxable or taxable at one amount, and it shall later appear that it was taxable or taxable at a greater amount, the commissioner of taxation and finance may remit the penalties in excess of one-half of one per centum per month.

§ 10. This act shall take effect on the ninetieth day after it shall have become a law.