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CHAMBERS GLOBAL PRACTICE GUIDES

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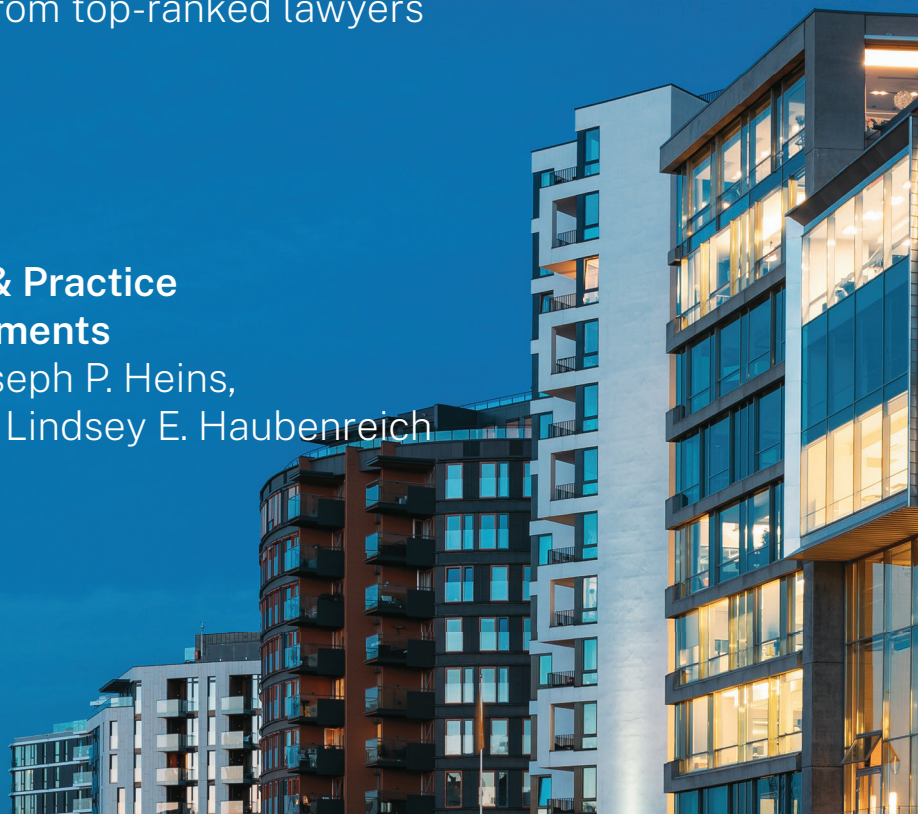
# Real Estate 2025

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Definitive global law guides offering  
comparative analysis from top-ranked lawyers

**USA – New York: Law & Practice  
and Trends & Developments**

Timothy P. Moriarty, Joseph P. Heins,  
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# USA – NEW YORK

## Law and Practice

### Contributed by:

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**Phillips Lytle LLP** is a preeminent law firm with a highly recognised real estate practice consisting of over 50 attorneys with a broad range of expertise. With offices across New York State, as well as offices in Chicago, IL; Washington, DC; and Ontario, Canada, Phillips Lytle has handled many high-profile real estate development projects. The firm has nationally recognised experience across numerous areas, including those involving institutional lenders, corporations, REITs, private developers, public utilities, municipalities, individuals, and others in con-

nection with large and small commercial, industrial, office, professional, retail and residential projects. The practice includes national, high-volume, high-technology representation in the telecommunications, lending and foreclosure areas, as well as nationwide multilocation retail leasing and portfolio sales. Areas of expertise include commercial leasing, construction compliance (including MWBE requirements) and litigation, land use, permitting and zoning, project development, real estate finance, real estate litigation and workouts, tax, and title insurance.

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## 1. General

### 1.1 Main Sources of Law

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 who 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 Main Market Trends and Deals

Over the past 12 months, the real estate market in New York State has experienced notable shifts influenced by inflation, interest rate changes, and central bank policies. The pipeline of new development projects continues to be slow as rates remain high and somewhat flat demand makes it harder for projects to “pencil out.” In September 2024, the Federal Reserve reduced its interest rate by half a percentage point, possibly signaling further cuts in the future. However, if rates continue to remain stagnant, there could be significant impacts on over-leveraged commercial owners. Industrial properties continue to grow

at a steady rate as the amount of e-commerce grows and federal stimulus targets expansion of US-based manufacturing capabilities.

Brick-and-mortar retail is slowly making its comeback post-pandemic. Consumers have adjusted to and embraced online shopping, but a stronger desire from people to make physical connections with brands and products is leading to improvements in in-store experiences for consumers. Developers continue to try to get creative to breathe new life into traditional shopping malls by converting them into mixed-use lifestyle centers with a focus on residential, restaurants, and other experiential features. Similarly, the outlook for dated commercial office space is trending towards residential conversion and, as companies begin to end the “work-from-home” model of the pandemic, demand for premium office properties has increased, especially in New York City. Restaurants and hospitality continue to rebound as more and more people are getting back to normal and travel increases.

### 1.3 Proposals for Reform

New York State Governor Kathy Hochul recently signed new legislation aimed at ending New York State's dependence on fossil fuels. The state's pending ban on natural gas is one of many steps to achieve the proposed goal of creating zero-emission buildings and reducing greenhouse gas emissions by 40% by 2030 and 85% by 2050 from 1990 levels. The natural gas ban will be effectuated through amendments to the State Energy Conservation Construction Code and the State Uniform Fire Prevention and Building Codes (the “Codes”). Specifically, the natural gas ban legislation amends the Codes to prohibit the installation of fossil-fuel equipment and building systems, including plumbing, heating, electrical, lighting, insulation, ventilation, air conditioning and refrigeration that uses fossil fuels, in:

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- new one-family residential buildings of any height beginning 31 December 2025;
- new multi-family residential buildings not more than three stories in height beginning 31 December 2025;
- new multi-family residential buildings more than three stories in height beginning 31 December 2028; and
- new commercial buildings beginning 31 December 2028.

Hesitation on future new commercial development projects has already begun, with developers wary of unanticipated utility costs associated with an outdated electrical grid that will need improving to handle the new requirements.

## 2. Sale and Purchase

### 2.1 Categories of Property Rights

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 flexibility with tax treatment and structuring the company. Typically, investors in commercial real estate take title through an entity, or series of entities, owned and controlled by the individual owners.

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 Laws Applicable to Transfer of Title

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: eg, 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, be acknowledged by a notary, 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 “*race-notice*” jurisdiction. This means a party can simultaneously issue two deeds to two separate parties for the same real property. The party that 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 such party had no knowledge of the other deed.



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### 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;
- 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.

### 2.5 Typical Representations and Warranties

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.

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 that breaches a representation are typically defined in the contract, including termination of the purchase agreement, specific performance, and monetary damages for out-of-pocket costs incurred by the purchaser owed to attorneys and third parties engaged to assist with purchaser's due diligence.

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### 2.6 Important Areas of Law for Investors

Federal and state tax law is important for an investor to consider to determine the tax consequences of any transaction. In addition, it is important for an investor to have an understanding of New York Business Corporation Law, Partnership Law and/or Limited Liability Company Law so that the investor can properly determine which type of entity should be used to acquire title to real property. Finally, to confirm that the property is acceptable for the use contemplated by the investor, it is important for the investor to have an understanding of federal and state environmental law as well as local zoning and land use rules and regulations. If the real property is residential rental property, it is also important for an investor to have an understanding of New York landlord-tenant laws.

### 2.7 Soil Pollution or Environmental Contamination

As an owner or operator of a real estate asset, the buyer could be held strictly, jointly, and severally liable for preexisting 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 actual or potential presence of contaminants of concern.

Under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), current owners and operators of a property are, except in limited circumstances, 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 spends 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 or 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.

### 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.

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The condemning party is required to pay just compensation (defined as the fair market value of the property) to the former owner of 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, although this can be negotiated. Additionally, the “*Mansion Tax*” imposed on the conveyance of residential real property where the consideration is USD1 million or more – has a tax rate of 1% of the consideration paid, customarily paid by the purchaser. Transfers of real property in New York City may be subject to additional taxes.

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.

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 Legal Restrictions on Foreign Investors

Regulations issued since passage of the Foreign Investment Risk Review Modernization Act of 2018 expose even noncontrolling foreign investments to potential CFIUS review if the investment conveys certain minimal rights in property within one of the listed proximities to specified national security installations or infrastructure. In view of the substantial penalties should CFIUS later determine a filing should have been made, as well as CFIUS’ authority to block an investment or even order divestiture, filing for such review by simple declaration or more detailed notice, if applicable, would seem advisable.

Investors from “*excepted investor states*” (currently Australia, Canada, New Zealand, and the United Kingdom) are exempt from filing for noncontrolling 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

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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 loaned 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 other non-real estate assets of the borrower.

### 3.3 Restrictions on Granting Security Over Real Estate to 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 sanc-

tions 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.

CFIUS continues to expand and modify its list of installations and infrastructure subject to the special requirements discussed above; moreover, recent administration policy statements and several proposed Congressional measures seek to expand the types of property acquisitions (especially in the agribusiness area) subject to investment review, and even prohibit certain parties from such investments.

### 3.4 Taxes or Fees Relating to the Granting and 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 the filing of UCC Financing Statements, the costs 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, an entity can give a valid security interest over real estate assets provided it owns the real estate and has complied 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.

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### 3.6 Formalities When a Borrower Is in Default

In New York, a mortgage is used to create a security interest in real property. A mortgage is perfected upon its recording in the local county clerk's office.

Prior to enforcement, it is a customary requirement in a commercial mortgage for a lender to be required to send a notice of default and provide the borrower with an opportunity to cure the default. If the mortgage is considered "*home loan*" under New York law, then an additional 90-day statutory notice is required to be sent before a foreclosure of a mortgage can commence.

The length of a mortgage foreclosure action may vary greatly depending on the jurisdiction within the State of New York, the type of mortgage involved and the litigiousness of the parties. Once commenced, a commercial mortgage foreclosure action may take as little as one year to complete. Conversely, in the City of New York, it is estimated that a standard foreclosure of a home loan will take approximately six years.

Generally, the administrative laws and orders that restricted mortgage foreclosure actions during the COVID-19 pandemic have been lifted or removed.

### 3.7 Subordinating Existing Debt to Newly Created Debt

It is possible for existing secured debt to become subordinated to newly created debt in any circumstances, but ideally parties should take several steps in their documentation to avoid pitfalls.

### 3.8 Lenders' 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), controlling expenditures, or taking title to the property may make a lender liable.

### 3.9 Effects of a 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.

### 3.10 Taxes on Loans

On 22 January 2021, New York State 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 Strategic Planning and Zoning

Governmental authority over planning and zoning is derived from the state's police power to promote the health, safety, and welfare of its citizens. This authority has been delegated to local municipalities through the General City Law, Town Law, and Village Law, which authorize municipalities to exercise control over local zoning pursuant to the police power. The Municipal Home Rule Law and the Statute of Local Governments provide additional independent authority for municipalities to adopt local zoning laws that are not inconsistent with state law. Local zoning laws must also be in accordance with a municipality's comprehensive plan. While there may be regional approaches to particular land use issues, typically, each municipality has its own zoning laws and there is little consistency between differing municipalities.

#### 4.2 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 structures. In addition, there may be supplemental/overlay design guidelines dependent on the parcel's location within a specific neighbourhood 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. This process should be consistent with the applicable zoning enabling law (General City Law, Town Law, and Village Law).

#### 4.3 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.

#### 4.4 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. Rezoning 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.

#### 4.5 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



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been exhausted, an aggrieved party is provided the right to appeal further in the State Supreme Court.

### 4.6 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 in cases of 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.

### 4.7 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 characterised by flexible organisational governance, they 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 and Tax Implications 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.

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Owners of a corporation are shareholders, who typically 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 in a manner that is consistent with their fiduciary duties of care and loyalty. Corporations do not afford the same level of flexibility as do partnerships and LLCs.

### Limited Liability Company

An LLC is an unincorporated organisation of one or more persons having limited liability for the contractual obligations and other liabilities of the business. An LLC is a hybrid business organisation 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 or unless the owners elect corporate tax treatment), and is governed by contract, whereby the operating agreement is the primary document defining the rights of members, the 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.

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 REITs

Real estate investment trusts (REITs) are available in the United States and New York, although typically they are formed under Maryland law. New York follows the federal income taxation of REITs, but subjects REITs to state corporate franchise tax if the REIT is subject to federal income tax. REITs can be publicly traded or privately held, and are available to foreign investors. There are plenty of advantages of using REITs. They provide investors with the opportunity to invest in a diversified estate portfolio; they may provide for more flexibility in terms of tax-efficient sales of real estate by investors looking to exit a real estate portfolio; and, depending on applicable tax rates, income generated by REITs may be subject to less aggregate federal income tax than real estate held through other

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types of entities. The requirements for qualifying as a REIT are numerous and complex, but the primary statutory requirements are:

- the REIT is managed by one or more trustees or directors;
- the beneficial ownership of the REIT is evidenced by transferable shares or by transferable certificates of beneficial interest;
- the REIT would be taxable as a domestic corporation but for Sections 856 through 860 of the Internal Revenue Code of 1986, as amended (the “Code”)
- the REIT is neither a financial institution nor an insurance company subject to specified provisions of the Code;
- the beneficial ownership of the REIT is held by 100 or more persons;
- at all times during the last half of each taxable year, not more than 50% in value of the outstanding shares of the REIT are owned, directly or indirectly, through the application of certain attribution rules, by five or fewer individuals;
- the corporation makes an election to be taxable as a REIT, or has made this election for a previous taxable year that has not been revoked or terminated, and satisfies all relevant filing and other administrative requirements established by the IRS that must be met to elect and maintain REIT status;
- the REIT uses a calendar year for federal income tax purposes and complies with the record-keeping requirements of the Code and Treasury regulations promulgated thereunder;
- at the end of any taxable year, the REIT must not have any undistributed earnings and profits that are attributable to a non-REIT taxable year; and
- the REIT meets other tests regarding the nature of its income and assets, and the amount of its distributions.

### 5.4 Minimum Capital Requirement

New York State does not have a minimum capital requirement to start up any type of entity.

### 5.5 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. Certain significant matters associated with the governance and operation of the corporation may require the approval of the corporation’s shareholders. 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.

#### Limited Partnerships

Limited partnerships are managed by at least one general partner. Limited partnership governance is dictated by the terms of the limited partnership agreement with the limited partnership law setting forth statutory defaults. In order to insulate the limited partners from unlimited liabil-

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ity, 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.

The Corporate Transparency Act was passed by Congress in 2021 and the law imposes a new beneficial ownership reporting requirement on entities – both newly formed and ones that are currently in existence. The objective of the legislation is to make it more difficult for bad actors to shield their identity or facilitate illegal transactions through entities which may be opaque to federal governmental authorities in terms of the identity of individuals that own and operate those entities.

### 5.6 Annual Entity Maintenance and Accounting Compliance

New York corporations and limited liability companies have biennial statement fees of USD9 each. These fees are subject to change.

## 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 lease is an interest in real property that can be transferred to another, subject to restrictions contained in the lease agreement.

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 transferable, not exclusive, and may be subject to a right of relocation.

### 6.2 Types of Commercial Leases 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, and such 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 taxes and operating expenses over the negotiated base year, but the customary practices vary by location.

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

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### Ground Leases

The landlord leases the land to the tenant. The tenant pays ground rent, covers all costs and expenses, and owns 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 a landlord's responsibility for its negligence.

### 6.4 Typical Terms of a Lease

The term of a typical commercial lease is five to fifteen years. However, the term of a typical ground lease is 30 to 100 years. It should be noted that New York State and City Transfer Taxes may be due on any lease with a term of more than 49 years, and under other circumstances.

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, 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 New 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, a percentage increase or a formula based on, for example, the Consumer Price Index or fair market rental value.

### 6.7 Payment of VAT

Value added tax, or other taxes or governmental levies, 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.

### 6.8 Costs Payable by a Tenant at the Start of a Lease

Tenants may be responsible for all or a portion of the cost to build out its leased premises to the specifications required for its operation. Landlords and tenants will negotiate the condition in which the landlord must deliver the space to the tenant, which can range from as-is to “white box” to turn key. Landlords are responsible for all costs associated with bringing the premises to the required condition, and tenants perform and pay for all additional work necessary for its use. Landlords will often also agree to pay a tenant improvement allowance, which the tenant can use to offset costs of its work.

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

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### 6.9 Payment of 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. Sometimes reimbursement commences from the first dollar and sometimes over a base amount, depending on negotiations and the structure of the lease.

Ground leases are triple net leases whereby the tenant covers all expenses for maintenance and repair obligations of the leased properties.

### 6.10 Payment of Utilities and Telecommunications

Telecommunications and utilities are typically paid for 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 Payment of Property Taxes

Other than under a gross lease or if the parties otherwise agree, a tenant is typically responsible for its share of real estate taxes or its share of increases in real estate taxes. When a tenant is the sole occupant of a property (eg, under a ground lease), the tenant will pay 100% of the real estate taxes, assuming its parcel is sepa-

ately assessed, and will likely be required to pay those taxes directly to the municipality.

### 6.12 Insurance Issues

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. Negotiated issues include whether rent abates because the space becomes unusable, for example, due to a casualty, pandemic or other force majeure, and who is required to maintain business interruption insurance.

### 6.13 Restrictions on the Use of Real Estate

A landlord can impose restrictions on a 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 the 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. Retail leases often also grant exclusive uses to tenants, which are limited to the tenant's specific product line and/or other competitors.

### 6.14 Tenant's Ability to Alter and 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 merely 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.

### 6.15 Specific Regulations Commercial Leases

Commercial leases are generally governed by the agreement between the parties. However,



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there are laws and licensing requirements that are specific to particular uses, such as the operation of hotels, restaurants, banks, etc.

### Residential Leases

The regulations and laws that apply to residential leases were overhauled by the Statewide Housing Stability and Tenant Protection Act of 2019 (HSTPA). In addition, some residential tenancies are protected by older rent control laws.

#### 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 that are subject to such regulations.

### 6.16 Effect of the Tenant’s Insolvency

The effect of a 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.

### 6.17 Right to Occupy After Termination or Expiry of a 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 “*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 an action to evict a tenant at sufferance may be commenced at any time after the expiry or termination of the lease, subject to applicable laws.

### 6.18 Right to Assign a Leasehold Interest

Assignment of leasehold interests are negotiated by landlords and tenants. Typically, tenants are permitted to assign their leasehold interest or sublease all or a portion of the leased premises with the landlord’s consent, or to assign to an affiliate or a successor to the tenant by merger, consolidation or acquisition of all or substantially all of the tenant’s assets without the landlord’s consent. Landlords will want to see financial information regarding the new subtenant and may require tenants to remain liable for its obligations under the lease and/or to pay the landlord’s attorney costs in relation to the consent for the assignment or sublease.

### 6.19 Right to Terminate a 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 period of 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.

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A tenant may negotiate the right to an early termination of the lease, but such early termination rights are often expensive as tenants may need to pay a termination fee, reimburse a landlord for its unamortized costs and continue to pay rent for a negotiated period of time.

### 6.20 Registration Requirements

There are no registration requirements under New York law, other than with respect to regulated residential apartments. Memoranda of leases may be recorded in the county's land records. However, not all landlords agree to execute a memorandum of lease because landlords do not want the memorandum of lease encumbering title to the property. Recording fees are paid by a per-page formula and are generally paid by the party requesting and recording the memorandum of lease.

### 6.21 Forced Eviction

A tenant can be forced to vacate in the event of default (such as failure to pay rent) or upon the expiration of the lease. Such actions are governed by the Real Property Actions and Proceedings Law (RPAPL) of the State of New York.

In residential leases, the HSTPA amended the 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. The time period for completion of an eviction action varies from jurisdiction to jurisdiction.

### Good Cause Eviction in Residential Leases

In April 2024, New York State passed “good cause eviction” law, which applies to New York City and any other municipalities that opt in. Where the good cause eviction law is in effect, landlords must prove that they have good cause to refuse to renew a residential lease and certain limitations are placed on rent increases. Tenants have a presumed right to renew a lease at the end of the term unless an exception applies.

### 6.22 Termination by a Third Party

Portions of the leased premises may be taken by the government through eminent domain (condemnation). Condemnation provisions in leases are negotiated by landlords and tenants. Typically, in the event of a condemnation that takes a significant portion of the leased premises such that it is no longer useable for the tenant's purposes, the parties have the option to terminate the lease. Typically, the landlord retains the right to the majority of the claim, and tenants have the right to claim for their fixtures and relocation costs associated with the condemnation.

### 6.23 Remedies/Damages for Breach

In commercial leases, remedies and damages for a tenant breach and termination of a lease are negotiated between landlords and tenants. There are no statutory or customary limitations on damages a landlord may collect.

Security deposits are negotiated between landlords and tenants. If landlords do hold a security deposit, it can be in cash or letter of credit.

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### 7. Construction

#### 7.1 Common Structures Used to Price Construction Projects

There are several structures used to price construction projects. First, there is a traditional fixed price or lump sum contract in which the contractor (or a construction manager) bears all of the risk for the job and must complete the job for that cost. On the other hand, in a cost-plus contract, the owner pays the contractor its cost plus a fee, making any cost overruns the owner's responsibility. In a guaranteed maximum price (GMP) arrangement, also referred to as a not-to-exceed price, the owner will reimburse the contractor for costs and fees up to a maximum; this offers the owner more protection than a cost-plus contract because the contractor is responsible for any additional costs that exceed the GMP. Finally, in a unit price contract, the contract price is based upon the price of individual units of work, for which the contractor provides a specific price. The owner must compensate the contractor for every unit the contractor completes.

#### 7.2 Assigning Responsibility for the Design and Construction of a Project

In New York, the design of a project must be completed by licensed design professionals, which includes Professional Engineers (PE) and Registered Architects (RA).

Traditionally, construction projects consist of a designer for the design phase and a contractor for the construction phase, a process called design-bid-build. Typically, an architect leads the design phase of a project, employing additional professionals as subcontractors. The contractor manages the construction phase of the project.

However, design-build delivery systems are becoming more popular. In this type of project delivery system, the design and construction services are constructed by a single entity using one contract. This arrangement reduces costs in both design and construction, provides a single point of responsibility, and can greatly shorten the delivery schedule by overlapping the design phase and the construction phase. The third type of project delivery system is called a construction manager at risk (CMAR) method, which is a derivative of the design-bid-build process. However, instead of the designer overseeing the design phase and a contractor overseeing the construction phase, a CMAR acts as a consultant to the project owner during the development and design phases, and then acts as general contractor during the construction phase. The CMAR holds all the contracts for the subcontracts and commits to delivering the project within a guaranteed maximum price.

#### 7.3 Management of Construction Risk

Construction risk is managed by the following:

- indemnification;
- warranties;
- limitations of liability;
- waivers;
- insurance provisions; and
- retainage.

Indemnification is limited by New York General Obligations Law Section 5-322.1, which prohibits a party involved in the construction, alteration, repair or maintenance of a building from contracting with another to indemnify or hold it harmless for injuries or damage to property caused by its own negligence, though the party may require indemnification for damages caused by the negligence of parties other than itself.

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Warranties are almost always limited in duration by express contract provision. New York General Business Law Section 777-a specifically creates warranties applicable to the sales of new construction homes that include a one-year warranty that the home will be free from defects due to poor workmanship and a six-year warranty that the home will be free from material defects.

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, but will not be enforced if they purport to protect a party from liability for conduct that constitutes fraud, gross negligence or willful misconduct. The most common limitation of liability in construction contracts is a waiver of consequential damages.

Insurance is often used to address the risks occasioned by the limitation on indemnity, and oftentimes owners and contractors will require they be added as an additional insured on the contractor's or subcontractor's commercial general liability policy, respectively.

Finally, retainage is used to reduce risk and incentivize contractors or subcontractors to complete a project by withholding a portion of payment until agreed-upon milestones are met. New York recently introduced a new law (New York General Business Law Section 756-c) that reduces the amount of retainage that can be withheld from a contractor or subcontractor on a private construction project to 5% of the contract sum for projects with costs that are equal to or greater than USD150,000. Before this law, parties could agree to withhold "a reasonable amount" of retainage.

### 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. In most, if not all, public projects and in many private projects, the owner will require the general contractor to post a performance bond.

### 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. Generally, in New York, a mechanic's lien can be filed at any time during the progress of a project, but no later than eight months after the completion of the contract or the final furnishing of labor or materials. For single-family dwellings, a mechanic's lien must be filed within four months of completion of the contract or the final furnishing of labor or materials.

The owner can discharge a mechanic's lien by depositing with the county clerk a payment equal to the amount claimed in the lien, with interest to the time of the deposit, or by posting a bond equal to 110% of the lien.

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### 7.7 Requirements Before Use or Inhabitation

An owner must obtain a certificate of occupancy stating a legal use and/or type of permitted occupancy of a building before a building may be occupied. A certificate of occupancy has no expiration date.

## 8. Tax

### 8.1 VAT and Sales Tax

New York State does not have a value added tax. New York State sales tax only applies to the sale or lease of tangible personal property and selected services. Sales tax does not apply to the sale or purchase of real estate.

### 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 15% withholding tax on the sale of their partnership interests.

### 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.

### Trends and Developments

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## USA – NEW YORK TRENDS AND DEVELOPMENTS

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### Introduction

Over the past 12 months, New York State's real estate landscape has undergone significant shifts shaped by evolving regulations, market trends and changing property dynamics. From the implementation of stricter building codes and natural gas bans aimed at reducing carbon emissions to the growing momentum behind office-to-residential conversions in response to remote work patterns, the state is seeing a redefinition of its built environment. At the same time, new wetland regulations are altering the development process, adding complexity to land use planning and construction. These factors, coupled with broader economic forces, are influencing property values, investment strategies and the future of urban and suburban spaces across the Empire State. There are several key trends reshaping New York's real estate market, which carry implications for developers, investors and residents alike.

### Building Codes and Gas Bans in New York State

In 2023, New York State Governor Kathy Hochul signed the All Electric Buildings Act (the "Act"), aimed at ending New York State's dependence on fossil fuels. The Act, a ban on natural gas to create zero-emission buildings, is one of many steps the State is taking to achieve the ambitious goals of the Climate Leadership and Community Protection Act (CLCPA), which aims to reduce greenhouse gas emissions by 40% by 2030 and 85% by 2050 from 1990 levels. The Act applies to new construction only and, at least for now, will not impact existing buildings (including renovations, repairs and equipment upgrades).

The Act will be effectuated through amendments to the State Energy Conservation Construction Code and the State Uniform Fire Prevention and Building Codes (the "Codes"). Recently,

the State Fire Prevention and Building Code Council voted to recommend major updates to the Codes that will, consistent with the Act, prohibit the installation of fossil-fuel equipment and building systems, including plumbing, heating, electrical, lighting, insulation, ventilation, air conditioning and refrigeration that uses fossil fuels. The ban will first impact certain buildings under seven stories (excluding commercial and industrial buildings over 100,000 square feet) starting in 2026 and then larger buildings starting in 2029. The Codes updates do include limited exemptions for certain uses, such as emergency backup power systems. The updates also provide an exception when electric service cannot reasonably be provided by the grid, and authority is given to the Public Service Commission to determine reasonableness for this exception.

How much homeowners and commercial building owners will pay for electrified alternatives will depend in part on the availability of alternative technologies – such as heat pumps to replace fossil-fueled heating and cooling – and whether the state can remove the existing cost and permitting barriers to promote the development of alternative energy sources. Hesitation on future new commercial development projects has already begun, with developers wary of unanticipated utility costs associated with an outdated electrical grid that will need improving to handle the new requirements. Because the focus is on new construction, the impacts of the Act are being seen by the real estate community first.

### New York State Real Property Tax Law Section 467-m Incentives for Office-to-Residential Conversions

The housing shortage throughout the United States, and especially in New York State, is well documented, and New York State government has prioritized encouraging the construction

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of new housing units over the past few years. Similarly well documented is the downturn in the office rental market due to, among other factors, the rise of remote and hybrid work schedules and the accompanying downsizing of leased office space. Both of these issues are especially acute in New York City, and in an effort to address both, the New York State Legislature adopted the Affordable Housing from Commercial Conversions Tax Incentive Benefits Program (AHCC Program) in 2024 under Real Property Tax Law (RPTL) Section 467-m.

The AHCC Program provides real property tax exemptions for conversions of existing non-residential buildings (except hotels) to residential uses. The general guidelines of the AHCC Program are as follows.

- At least 25% of the units created must be affordable, with specific allocations therein for populations at certain percentages of Area Median Income.
  - (a) Unlike the expired Section 421-a program, there is no sunset on the affordability restriction on these units, and they will remain permanently affordable and rent-stabilized.
  - (b) The market rate units cannot be isolated from the affordable units, and all rental units must share the same common areas and entrances.
  - (c) No affordable units may be rented to a corporation or other entity, nor may they be converted to cooperative or condominium ownership.
- In order to qualify, work on a project must begin no later than 30 June 2031 and must be completed by 31 December 2039.

The length of the property tax benefits is tied to the commencement date of the project and the location of the building.

- More lucrative incentives are available for projects that commence quickly, and projects located in the Manhattan Prime Development Area (defined as areas south of 96th Street) receive enhanced exemptions as well.
  - (a) For example, a project commenced within the Manhattan Prime Development Area before 30 June 2026 will receive 35 years of benefits with a 90% exemption for the first 30 years and decreasing percentages each year for the remainder of the term.
  - (b) A project outside of the Manhattan Prime Development Area commenced before 30 June 2026 will also receive 35 years of benefits, but the initial exemption starts at 65%.
- Projects commenced between 1 July 2026 and 30 June 2028 will receive 30 years of property tax benefits.
- Projects commenced between 1 July 2028 and 30 June 2031 will receive 25 years of property tax benefits.
- All buildings receive a 100% exemption during the construction period.

Notably, there are no construction wage requirements under the AHCC Program, which will lower initial costs for developers.

Finally, in addition to the property tax incentives passed at the state level, New York City has established the Office Conversion Accelerator Program, which provides building owners with a single point of contact within City government to assist with office conversion projects. The program offers to assist owners with everything from analyzing zoning to securing permits and seeks to coordinate with various agencies within

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City government to overcome bureaucratic barriers and expedite the completion of conversion projects.

### Regulation of Wetlands in New York

#### *A post-Sackett world*

In recent years, the number of federally regulated wetlands seemingly shrank in the wake of the United States Supreme Court's decision in *Sackett v Environmental Protection Agency*, 598 US 651 (2023). In *Sackett*, the Supreme Court eliminated the broader of two tests used to determine federal jurisdiction over wetlands pursuant to the Clean Water Act. The Environmental Protection Agency (EPA) and United States Army Corps of Engineers (Corps) subsequently amended the regulatory definition of “waters of the United States”. In addition, in March of 2025, the EPA and Corps jointly issued a Memorandum to the Field to:

- rescind multiple policy memoranda and training materials issued during the Biden Administration; and
- note future regulatory activities that will be undertaken to clarify the meaning of “*continuous surface connection*” for adjacent jurisdictional wetlands.

However, whatever reprieve *Sackett* may have offered to landowners and developers at the federal level might now be offset by new State regulations, under which vast acres of wetlands that were previously unregulated by New York will now be subject to permitting requirements.

#### *Freshwater Wetlands Regulations*

In December 2024, the New York State Department of Environmental Conservation (NYSDEC) adopted final regulations to implement the 2022 amendments to the Freshwater Wetlands Act, codified in ECL Article 24. The 2022 amend-

ments significantly expand NYSDEC's authority. First, NYSDEC's regulatory authority is no longer limited to the wetlands mapped on its freshwater wetlands maps, which have historically put landowners on notice that state-regulated wetlands are located on their property. Instead, NYSDEC now has regulatory authority over all freshwater wetlands at least 12.4 acres in size, regardless of whether they have been mapped. In addition, NYSDEC will have authority over wetlands of any size that meet one of 11 new criteria for “*wetlands of unusual importance*”. The third major amendment will see the threshold size of NYSDEC-regulated wetlands decrease from 12.4 acres to 7.4 acres and will take effect on 1 January 2028.

#### *New jurisdictional determination procedures*

Extending NYSDEC's jurisdiction to unmapped wetlands creates a rebuttable presumption that any area meeting the Environmental Conservation Law's definition of freshwater wetland is covered by the law and subject to its permitting requirements. As a result, the state program now resembles the federal wetlands program administered by the Corps; most landowners have to obtain a wetlands delineation and request a jurisdictional determination from NYSDEC. Upon request, the department will have 90 days to provide a jurisdictional determination, subject to weather and ground conditions. However, in a change from an earlier draft of the regulations, if NYSDEC fails to provide a jurisdictional determination within 90 days plus an additional 10 days following notice of its failure, then the department must waive its jurisdiction over the parcel's wetlands for five years.

#### *Wetlands of unusual importance*

Unlike at the federal level, where wetlands of any size can be regulated, wetlands previously had to be at least 12.4 acres to come under NYSDEC's

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jurisdiction. However, the 2022 amendments introduced 11 new criteria by which a wetland is now subject to state regulation regardless of its size. These include wetlands:

- located in a watershed that has experienced significant flooding in the past or is expected to experience significant flooding in the future from severe storm events related to climate change;
- located in or partially within an urban area, as defined by the United States Census Bureau;
- containing a plant species occurring in fewer than 35 sites statewide or having fewer than 5,000 individuals statewide;
- containing a habitat for an essential behavior of an endangered or threatened species, or a species of special concern or listed as a species of greatest conservation need in New York's wildlife action plan;
- classified as a Class I wetland;
- previously classified and mapped by the NYSDEC as a wetland of unusual local importance;
- that are vernal pools known to be productive for amphibian breeding;
- located in a Federal Emergency Management Agency (FEMA)-designated floodway;
- previously mapped by NYSDEC as a wetland on or before 31 December 2024;
- with wetland functions and values that are of local or regional significance; and
- that have been determined by the NYSDEC Commissioner to be of significant importance for protecting the state's water quality.

Of these, the urban area criteria will likely have the most significant impact. Census-defined urban areas are expansive and, particularly in western, central and upstate New York, can

include areas that outwardly appear suburban or even rural. The urban area criteria could also bring under NYSDEC jurisdiction small “*accidental wetlands*” that materialize on undeveloped parcels due to poor stormwater management. And even more suburban wetlands will become jurisdictional under NYSDEC's proposed criteria for watersheds that have or are expected to experience significant flooding.

### Grandfathering

A key component of the new regulations is grandfathering provisions for projects that are already in the planning or permitting stages. If a project received a freshwater wetlands permit from NYSDEC prior to 1 January 2025, then it can proceed under its existing jurisdictional determination, and many of the new regulations will not apply.

Additionally, certain projects that do not require a freshwater wetlands permit under the existing regulations can delay the application of the new regulations. These include:

- projects in which the lead agency accepts a Final Environmental Impact Statement pursuant to the State Environmental Quality Review Act (SEQRA) prior to 1 January 2025;
- Type I actions that receive a negative declaration pursuant to SEQRA prior to 1 January 2025; and
- projects that receive written site plan approval from a local government.

Depending on whether these projects are considered “*major*” or “*minor*” under existing NYSDEC regulations, the proposed wetlands regulations will not affect the project parcel for two to three years.

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