

New York City's Annual Income and Expenses Statement Filing Requirement - a Land Mine for the Unwary Purchaser or Owner of Real Property

By: Ryan A. McCaffrey and Albert D. Lichy

Introduction

Since 1986, New York City law has required owners of income-producing properties in New York City to file an annual income and expense statement, colloquially referred to as an RPIE statement, with the Department of Finance. The general purpose of an RPIE statement is to assist the Department of Finance in assessing the value of income-producing properties.¹ To this end, the owners of income-producing properties are required to submit annually a statement that outlines "all income derived from and all expenses attributable to the operation of such property."² Despite the draconian penalties for non-compliance - ranging from 3% to 5% of the assessed value of the property - a systemic failure of the City of New York to enforce non-compliance over the subsequent decades following the regime's enactment has led to a general unawareness of the RPIE statement filing requirements in New York City. As a result, potential purchasers of real property have failed to adequately protect themselves - in both the due diligence process and the acquisition agreement - from the consequences of a seller's historic non-compliance with the RPIE requirements.

The requirement to file an RPIE statement, however, has recently received a dramatic increase in attention due to the fact that unpaid penalties for failing to timely file an RPIE have begun to show up on the city's real estate tax records for collection. The failure to pay creates a lien on the income-producing property for which an RPIE statement was not filed. Because the penalty relates to the property (not the property owner), and does not become a lien until after it is filed on the land records, unsuspecting purchasers may find themselves subject to a lien that appears only after closing, and thus not protected by title insurance.³ Even if the purchaser was smart enough to negotiate fulsome representations and warranties from the seller that it previously filed all necessary tax returns, it may find that the outsized penalties exceed any caps on liability set forth in the purchase agreement when the cost of enforcement is factored in.

To make matters worse an unwary purchaser may be unable to make a claim under its title insurance policy or recover from the seller for a breach of a representation in its acquisition agreement are the least of its worries. Any resulting lien is almost certainly a breach of a negative covenant under the purchaser's financing arrangement if it relied on acquisition financing to acquire the property, which may or may not be subject to cure. Furthermore, given that it is a lien relating to taxes, it may, in a worst case scenario, even trigger guarantor recourse under purchaser's mortgage documents if the purchaser was

¹ See N.Y.C. Local Law No. 24 (1986).

² N.Y.C Admin. Code § 11-208.1(a).

³ See ALTA Form Title Insurance Policy: Exclusion from Coverage 3(d): "Defects, liens, encumbrances, adverse claims, or other matters... attaching or created subsequent Date of Policy."

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not diligent in limiting its non-recourse carve-outs or has otherwise posted a guaranty of carry obligations to its lender!

This potential series of dire consequences, not surprisingly, led to an outcry from the real estate world for more certainty of the risks associated with RPIE filings, which would require more clarity about the filing requirements as well as access to public records to enable potential purchasers to ascertain compliance with the RPIE requirements prior to taking ownership.

In July 2013, City of New York took steps — possibly in response to the outcry—to make the RPIE statement filing process more transparent. First and foremost, the Department of Finance must publish on its website a list of all properties for which an RPIE statement was not filed. Second, the Department of Finance must provide non-compliant owners with an opportunity to cure their failure to file an RPIE statement before imposing any penalties. Both of these significant changes are music to the ears of property owners — both new and current.

The remainder of this memorandum provides a general outline of the RPIE filing requirements for owners of real property in New York City and applicable penalties and sets forth some of the recently enacted safeguards to protect property owners from the potential penalties that may flow from failing to file an RPIE statement.⁴

What to File: RPIE Statement, Claim of Exclusion or Nothing at all

There are essentially three categories that each property owner falls into in respect of its obligation to file RPIE statements: (1) those required to file RPIE statements; (2) those required to file a claim of exclusion; and (3) those not required to file either a RPIE statement or claim of exclusion.⁵

- a. Property Owners Required to File RPIE Statements.* The general rule is that all owners of “income-producing” properties are required to file an RPIE statement. The term “income-producing” is defined by the N.Y.C. Administrative Code quite expansively to include all “property owned for the purpose of securing an income from the property itself”⁶ The general categories of income-producing properties include the usual suspects: (1) rental properties; (2) co-ops that contain over 2,500 square feet of commercial space (excluding any garage); (3) income-producing commercial condominiums;⁷ (4) rented commercial/professional space in a residential condominium; (5) properties that operate as a business (e.g., hotels; restaurants; parking garages; department stores that occupy more than 10,000 square feet; power plants; and theaters); (6) factories and industrial buildings; and (7) net-leased properties.⁸
- b. Property Owners Required to File a Claim of Exclusion.* The rules that govern the filing of an RPIE statement exempt certain categories of property owners from having to file an RPIE. These exempted property owners must instead file

⁴ Property owners would be wise to consult both the New York City Administrative Code as well as the rules promulgated by the Department of Finance. The same is true if a property owner finds itself in the crosshairs of the Department of Finance for its (or a previous owner’s) failure to submit an RPIE statement.

⁵ See http://www.nyc.gov/html/dof/html/property/property_info_rpie.shtml for the latest RPIE forms

⁶ See N.Y.C. Admin. Code § 11-208.1(a).

⁷ Owners of a residential condominium building or development must also file an RPIE statement if 10% or more of the units remain unsold. See New York City Finance Department, Real Property Income & Expense (RPIE) Filing Information at 1 (updated March 3, 2014).

⁸ This list of properties that qualify as “income-producing” is by no means exhaustive. Indeed, the rules themselves make explicit that the examples it outlines as qualifying as “income-producing” properties is not exhaustive. For a more complete picture of the properties that qualify as income-producing than those outline in this memorandum consult 19 N.Y.C. Local Rule § 33-01(b).

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a claim of exclusion with the Department of Finance.⁹ A few relevant examples of the properties exempt from the definition of “income-producing” that are required to file the claim of exclusion include: (1) residential or commercial properties that are entirely owner-occupied;¹⁰ (2) property which is fully exempt from real property taxation; and (3) property that does not generate income; for example, abandoned or uninhabitable property.¹¹

- c. Among the property owners who need to file a claim of exclusion are also those who “purchase[d] their property within the twelve month period prior to the first day of [May] immediately preceding the deadline for filing [an RPIE statement] and who are without knowledge of the income and expenses for the property for the entire year.” Instead, these property owners must only file “an RPIE statement containing the date of purchase, the sale price, the name of the grantors and all information reflecting their actual period of ownership.”
- d. The language from the Local Rule has been included because it is somewhat troubling. There has been no guidance on how to interpret “without knowledge of income and expenses” which has created confusion in light of the fact that most potential purchasers receive and review operating statements from the property during the diligence process, or, at the very least, a rent roll and the various service contracts in place at the subject property. Until such time as guidance is provided new owners of real property must proceed by filing either a claim of exclusion or an RPIE statement for the entire period in question without complete knowledge of the veracity of the numbers being submitted.¹²
- e. ***Property Owners Exempt from Filing RPIE Statements or Claims of Exclusion.*** There are four categories of properties exempt from having to file a claim of exclusion. They include: (1) any property with an assessed value of less than \$40,000; (2) residential properties containing ten or fewer dwelling units; (3) mixed-use properties with 6 or less dwelling units and no more than one retail store; and (4) certain special franchise properties which are also non-municipality owned utility properties.¹³

Other Filing Requirements

- a. ***Deadline to File.*** The RPIE statement is generally due on June 1.¹⁴ The rules, however, make clear that in 2014 the deadline is June 2.¹⁵ The June 2 deadline applies just the same to the requirement to file a claim of exclusion.
- b. ***Appropriate Timeframe.*** The timeframe that must be reflected in an RPIE statement depends on how the property owner maintains its books and records. If it’s on a calendar year basis, the property owner must file an RPIE statement

⁹ 19 N.Y.C. Local Rule § 33-02(e)(3).

¹⁰ The definition of “owner-occupied” properties includes property that leased to a business that is in common control with the property owner. 19 N.Y.C. Local Rule § 33-01(b)(2)(iv). To be sure, this definition does not include department stores that occupy over 10,000 feet, hotels, restaurants, and the like.

¹¹ Note, the owners of vacant property at the time of the filing deadline must file an RPIE if the property was for all or part of the preceding calendar or fiscal year preceding the deadline for filing the RPIE, unless the property is vacant due to an impending demolition and has no existing leases. For a more complete list of properties for which property owners need to file a claim of exclusion it is best to consult both 19 N.Y.C. Local Rule § 33-01(b)(2) and the New York City Finance Department’s Real Property Income & Expense (RPIE) Filing Information sheet.

¹² 19 N.Y.C. Local Rule § 33-02(e)(iv).

¹³ See 19 N.Y.C. Local Rule § 33-02(e)(3) (noting that the properties listed in 19 N.Y.C. Local Rule § 33-01(b)(i)-(iii) and (vii) need not file a claim of exclusion).

¹⁴ See N.Y.C. Admin. Code § 11.208.1(a).

¹⁵ See New York City Finance Department, Real Property Income & Expense (RPIE) Filing Information at 1 (updated March 3, 2014).

for the calendar year that immediately precedes the deadline.¹⁶ If the property owner maintains its books and records on a fiscal-year basis, then the RPIE statement “should be for the last fiscal year concluded as of the first day of May preceding the date the statement must be filed.”¹⁷

- c. **Joint Filings.** Generally, a separate RPIE statement must be filed for each parcel of income-producing property. The exception to this general rule is if the properties: (1) are operated together as an economic unit or are otherwise related for purposes of valuation; (2) share common ownership; (3) are on contiguous lots; (4) have the same tax class; and (5) are within the same borough.¹⁸
- d. **Description of Income and Expenses.** The property owner must list all forms of income generated by the property and expenses paid in connection with the property. The rules list some nonobvious forms of income; for example: (1) the rental value of owner-occupied space; (2) sales of utilities and services, like electricity and air conditioning; (3) rent subsidies paid by or accrued from a governmental body; (4) and the value of improvements provided by the tenant in lieu of rent.¹⁹

Due Process Protections

There are three forms of notice the Department of Finance must provide owners of income-producing properties. As an initial matter, the Department of Finance must notify them of the requirement to file an RPIE statement or claim of exclusion both in the property tax bill for the installment of real property tax due on January 1 and in the notice of property value.²⁰ Second, the Department of Finance must notify owners of their failure to timely file an RPIE statement and of the opportunity for a hearing before the imposition of any penalties.²¹ Third, the Department must provide non-compliant property owners with notice of their opportunity to cure.²² The notice must make clear that that such owners may avoid any penalties for failing to file by filing a properly completed RPIE statement no later than 30 days following the date of the notice.²³ The opportunity to cure does not apply, however, where the Department determines by audit that the property owner failed to file a substantially complete and accurate RPIE.²⁴

Penalties

A property owner can be subject to both monetary and non-monetary penalties for the failure to file a timely RPIE statement where one is required. Property owners who are not required to submit an RPIE statement but only a claim of exclusion are also subject to monetary penalties for untimely submissions. The penalties prescribed will operate as a tax lien on the income-producing property.²⁵ Alternatively, the owner of the income-producing property may be subject to suit for the penalties imposed.²⁶

¹⁶ N.Y.C. Admin. Code § 11.208.1(a)(1).

¹⁷ Id. at § 11.208.1(a)(2).

¹⁸ See 19 N.Y.C. Local Rule § 33-02(a)(i)-(iv).

¹⁹ See generally 19 N.Y.C. Local Rule § 33-01(c).

²⁰ See N.Y.C. Admin. Code § 11.208.1(d)(6).

²¹ See 19 N.Y.C. Local Rule § 33-04(a)(ii).

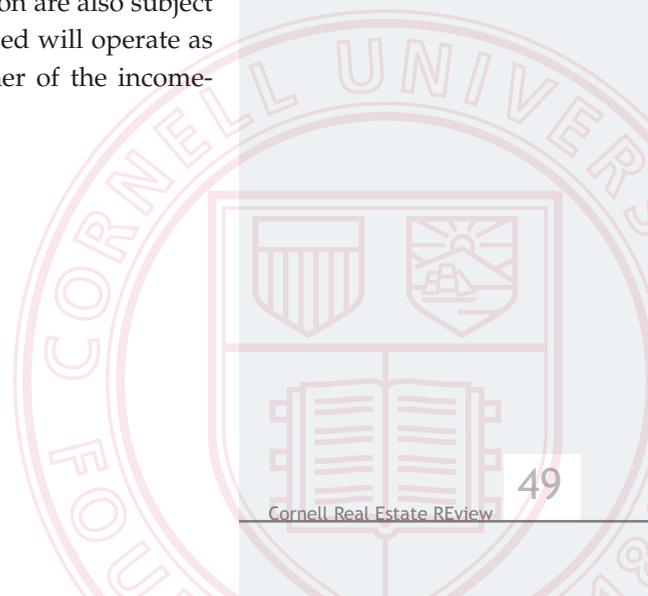
²² See 19 N.Y.C. Local Rule § 33-04(a)(ii).

²³ See id.

²⁴ See 19 N.Y.C. Local Rule § 33-04(a)(iii).

²⁵ See N.Y.C. Admin. Code § 11.208.1(d)(1).

²⁶ See id.



The penalty schedule for filing an untimely RPIE statement is as follows:

- Failure to file by June 2, 2014: up to 3% of the final actual assessed valuation for the property for the tax year in which such statement had to be filed;
- Failure to file by December 31, 2014: up to 4% of the same assessed value;
- Failure to file a timely RPIE statement in any of the two years immediately following an untimely filing: up to 5% of the same assessed value.

The penalty schedule for filing an untimely exclusion, by contrast, is as follows:

- Failure to file a claim of exclusion in one year: \$100
- Failure to file a claim of exclusion in two consecutive years: \$500;
- Failure to file a claim of exclusion in three consecutive years: \$1,000.

The potential penalties for failing to file a timely RPIE are not limited to monetary penalties. The Tax Commission is also vested with the power to deny a tax appeal on the property for which an RPIE statement was not filed.²⁷ And notably, the property owner's opportunity to cure does not extend to the denial of the right to file a tax appeal.

Protections for New Purchasers

Traditionally, new purchasers were especially at risk to feel the brunt of the failure to file an RPIE statement. This is because the Department of Finance did not maintain a central repository where noncompliant properties could be found. Thus, new purchasers could not be sure whether the prior owner had filed a timely RPIE statement. In light of a change to the statutory regime governing the filing of an RPIE statement, this void appears to have been filled.

In July 2013, the New York City Council amended the statute governing the filing of RPIE statements such that the Department must publish on its website, at least 30 days prior to the imposition of a penalty, a list of all properties for which an RPIE statement (or claim of exclusion) was not timely filed.²⁸ Likewise, no later than February 1, the commissioner is statutorily required to publish on the Department of Finance's website a list of all property for which an RPIE or claim of exclusion should have been, but was not, timely filed.²⁹ As of the date of this memorandum, however, the database has published only a list of non-compliant properties for the previous reporting period, making it impossible for prospective purchasers to ascertain historic non-compliance of existing property owners.

New purchasers are protected more still: the Department of Finance now has the discretion to waive a penalty or cancel a lien imposed as a result of such penalty where the closing of some property precedes the publication of these lists.³⁰

²⁷ Whether the tax commission is categorically prohibited from entertaining the appeal is somewhat unclear. The N.Y.C. Administrative Code provides that the "tax commission shall deny a hearing on any objection to the assessment of property for which an income and expense statement is required and has not been timely filed." N.Y.C. Admin. Code §11.208.1(d)(2) (emphasis added). Section 33-03(c) of the rules of the City of New York, however, indicate that the Tax Commission has discretion in determining whether to hear the appeal. It provides that "[t]he Department of Finance shall provide to the Tax Commission a list of the income-producing properties whose owners failed to file an income and expense statement for use by the Tax Commission in determining if a hearing on any objection to the assessment of property shall be denied by the Tax Commission, pursuant to §11-208.1, subdivision d, paragraph (2) of the Administrative Code." 19 N.Y.C. Local Rule §33-03(b) (emphasis added).

²⁸ See N.Y.C. Local Law No. 52 §(d)(1) (2013); N.Y.C. Admin. Code § 11.208.1(d)(7).

²⁹ See N.Y.C. Local Law No. 52 §(d)(1) (2013); N.Y.C. Admin. Code § 11.208.1(d)(7). The list contains identifying information about the property, including the penalty amount imposed by the Department of Finance, and to the extent practicable, the number of consecutive years the property owner failed to file either an RPIE statement or claim of exclusion. Despite the apparent utility of this centralized database of noncompliant properties, it suffers from a substantial shortcoming — that is, the list is not published until well after the June 1 filing deadline. Thus, where a new purchaser purchases a property for which an RPIE statement was not filed between June 1 and February 1, they will inherit a piece of property that can be subject to enormous fines.

³⁰ N.Y.C. Admin. Code § 11.208.1(d)(8).

Conclusion

It appears as if the City of New York has made progress over the past nine months to provide prospective purchasers (as well as property owners in general) of income producing property in New York City some additional tools to protect themselves from the potential pitfalls of running afoul of the RPIE filing requirements. A prospective purchaser would be wise to (a) include searches of the RPIE Non-Compliance Lists as part of its due diligence process, (b) add protections in its acquisition agreement so it is sure it will have recourse to the seller in the situation where the closing occurs prior to the publication of the non-compliance lists (this would include ensuring the cap on liability and survival period for the applicable representations and warranties are sufficient to make the purchaser whole) and (c) ensure that any financing documents provide flexibility to cure any liens that may arise as a result of prior non-compliance and do not create recourse to purchaser's guarantor.

Relying on representations from a seller, is admittedly an imperfect solution to the problem posed by the patchwork statutory regime from which the RPIE statement requirement derives. The ultimate goal of any future legislation should be to provide certainty to prospective purchasers by either providing a resource with comprehensive non-compliance history, or, alternatively, waiving historic non-compliance for potential purchasers for periods of time not covered by the RPIE non-compliance database. In addition, potential purchasers and existing property-owners who receive notice and an opportunity to cure should also be able to avoid both a loss of its right to appeal tax assessments and monetary penalties. There seems to be no rational basis to bifurcate the two types of penalties, as both could lead to substantial economic harm to property owners.

