

Department of Legislative Services
Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 1056 (Senator Haines)
Judicial Proceedings and Budget and Taxation

**Real Property - Indemnity Mortgage - Effect of Foreclosure on Payment of
Recordation Tax**

This bill specifies that a purchaser of a foreclosed residential property secured by an indemnity mortgage is not required to pay the recordation tax unless the purchaser of the property is the grantor of the indemnity mortgage. The bill establishes that recordation taxes are excluded from the requirement that all public taxes, assessments, and charges must be paid before a property may be transferred on the assessment books or records.

The bill applies prospectively to any indemnity mortgage recorded on or after the bill's June 1, 2010 effective date.

The bill takes effect June 1, 2010.

Fiscal Summary

State Effect: The bill does not directly affect State finances or operations.

Local Effect: Potential decrease in local recordation tax revenues.

Small Business Effect: Potential minimal.

Analysis

Current Law: Except as otherwise specified, property may not be transferred on the assessment books or records until (1) all public taxes, assessments, and charges due on the property have been paid to the treasurer, tax collector, or finance director of the county where the property is assessed; and (2) all personal property taxes owed by the transferor have been paid when all land owned in the county by the transferor is being transferred.

Recordation tax is imposed on an instrument of writing recorded with the clerk of the circuit court for a county. An “instrument of writing” includes a mortgage, deed of trust, or other contract that creates an encumbrance on real property. The recordation tax rates apply to each \$500 or fraction of \$500 of the consideration payable or of the principal amount of the debt secured for an instrument of writing. The consideration includes the amount of any mortgage or deed of trust assumed by the grantee. (*See Tax – Property Article §§ 12-101 through 12-103.*)

Except as otherwise specified, if the total amount of secured debt has not been incurred at the time of recording or filing the instrument, the recordation tax applies only to the principal amount of the debt incurred at that time. Thus, if an indemnity mortgage secures a contingent obligation of a guarantor for the repayment of a loan extended to a third-party borrower, debt is not incurred at the time of recording the indemnity mortgage and no recordation tax is owed upon the recording of the instrument. However, a county transfer tax of up to 1.4% of the amount of the indemnity mortgage is imposed in Prince George’s County.

The guarantor remains primarily liable for payment of the recordation tax that becomes due on an indemnity mortgage when the contingency, usually the borrower’s default, occurs that gives rise to the guarantor’s liability. The recordation tax remains due even if the default is subsequently cured and any foreclosure action on the indemnity mortgage is dismissed. The failure of the guarantor to pay the recordation tax does not invalidate the secured party’s lien under the indemnity mortgage, however, nor does it give the State priority to payment out of the proceeds of the foreclosure sale. (74 Op. Att’y Gen. 281 (1989).)

Chapter 639 of 2000 authorized county tax collectors, rather than clerks of the circuit courts, to collect recordation taxes. Several counties – Anne Arundel, Baltimore, Carroll, Charles, Howard, and Montgomery – now collect the recordation tax.

Background: To establish an indemnity mortgage, a lender agrees to loan money to a borrower on two conditions: (1) that a third party guarantees repayment of the loan; and (2) that the guarantor executes a mortgage on real property to secure the guarantee. The

indemnity mortgage manifests the pledge of the property and is recorded to establish a lien on the property. Since the recordation tax is based on the amount of debt incurred at the time of recording, and an indemnity mortgage involves a debt that has not yet been incurred, the recordation of the indemnity mortgage ultimately defers recordation taxes.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Prince George's County, Maryland Land Title Association, Harford and Montgomery counties, State Department of Assessments and Taxation, Office of the Attorney General (Consumer Protection Division), Judiciary (Administrative Office of the Courts), Maryland Association of Counties, Department of Legislative Services

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