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TO: Maryland House of Delegates -Ways and Means Committee

FROM: John P. (Jack) Machen, Special Chief Solicitor, Baltimore City Law Department

RE: Testimony in Opposition to HB 371—(Recordation Tax - Indemnity Mortgage Exemption - Threshold Amount)

DATE: February 10, 2023

Indemnity deeds of trust and mortgages (collectively “IDOTs”) are, with a few limited exceptions, an abusive sham.

The basis of the IDOT exemption from paying the recordation tax is that grantor/property owner under the IDOT, because it is a mere guarantor of the underlying debt and not the principal obligor under a promissory note, has not “incurred” any debt, and therefore there is no taxable basis on which to impose the recordation tax.

Typically, this legal trick is accomplished by the property owner forming a single member limited liability company as a subsidiary. The subsidiary LLC signs the promissory note, and the parent entity signs a guaranty which recites that the liability of the guarantor is contingent and secondary. The IDOT secures the contingent guaranty, not the promissory note. Presto ... the property owner has not incurred the primary underlying debt, and therefore no recordation tax is due on the IDOT.

For years IDOTs were used in nearly all commercial transactions, the net effect of which was that the only people who paid a recordation tax on a mortgage or deed of trust were residential homeowners. Commercial borrowers with lawyers who knew how to structure an IDOT loan paid no recordation tax.

The General Assembly caught on to this trick and closed the loophole with several changes in Tax Property Article §12-105(f)(7), the most recent being in 2013 which declared as a matter of law that the guaranteed debt is “deemed to be incurred” under these situations, and thus the recordation tax applies.

However, in response to intense lobbying and in deference to complaints of developers of smaller projects, the 2013 statute exempted from its effect any loans or series of loans part of the same transaction for less than \$3 million. That narrow exemption was part of a compromise, for at the same time the IDOT statute was amended, the legislature changed Tax Property Article 12-§108(g) to expand the recordation tax exemption on mortgage refinancing to commercial loans. Previously, the refinance exemption was available only for residential loans.


Now, ten years later, the commercial borrowers are apparently dissatisfied with that compromise and wish to expand the IDOT exemption five-fold from \$3 million to \$15 million.

If the Maryland General Assembly deems that increasing the recordation tax exemption is in the best interest of the citizens of the State of Maryland, then a more efficient legislative approach would be to simply declare that all commercial loans for less than \$15 million are exempt from the recordation tax.

**That is the net effect of HB 371: Homeowners would pay the recordation tax; developers borrowing less than \$15 million would not.**

Most people would view that as bad policy.

Respectfully submitted,

A handwritten signature in blue ink that reads "John P. Machen". The signature is fluid and cursive, with a long horizontal line extending to the right.

John P. (Jack) Machen  
Special Chief Solicitor  
Baltimore City Law Department