STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
MIDDLE ISLAND ASSOCIATES	:	DECISION DTA Nos. 810677
for Revision of Determinations or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	and 811113

Petitioner Middle Island Associates, c/o Bilt-Rite Steel Buck Corp., 95 Hopper Street, Westbury, New York 11590, and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on September 22, 1994. Petitioner appeared by Stuart J. Stein, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Paul A. Lefebvre, Esq., of counsel).

Petitioner filed a brief in support of its exception and in opposition to the Division of Taxation's exception. The Division of Taxation filed a brief in support of its exception and a letter stating it would not be filing a reply brief. This letter was received on April 26, 1995 and began the six-month period for the issuance of this decision. Oral argument was not requested.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs. Commissioner Francis R. Koenig took no part in the consideration of this decision.

ISSUE

Whether the "additional interest" under the Second Mortgage, as modified, and whether the "fees" under the First Mortgage, as consolidated, constitute allowable costs or whether the Division of Taxation was correct in disallowing the same.[1]

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation ("Division") and petitioner, Middle Island Associates, agreed to a stipulation of facts which has been incorporated into the following Findings of Fact.

Petitioner is a New York general partnership.

In 1986, petitioner purchased "The Shores at Lake Pointe", Lake Pointe Circle, Middle Island, New York, acquiring 360 apartments, 92 of which were aggregated and sold as cooperative apartments.

The 1986 purchase was subject to an existing first mortgage (the "First Mortgage") held by Barclays Bank and further subject to a purchase money second mortgage (the "Second Mortgage") given by Greater New York Savings Bank ("Greater").

The Second Mortgage and the note which it secures, in addition to provisions for mortgagor's payment of interest, events of default and other customary matters, also provided for permitted sale of condominium units on certain payment terms, as they are sold to individual buyers.

Subsequently, the First Mortgage, initially held by Barclays Bank, was assigned to and consolidated with an additional first mortgage given by Home Savings Association of Kansas

---

[1]The Division of Taxation and petitioner agreed to stipulated issue(s) on December 2, 1993.

City, F.A. ("Home").[2] This consolidated First Mortgage, in addition to providing for customary terms such as payment of interest, taxes, insurance and other usual matters, also required payments ("fees") to be made on the sale of cooperative units in the aggregate amount of $95,000.00. These payments were not to be applied in reduction of the principal amount of the Second Mortgage,[3] as consolidated.[4]

The transfer to the cooperative housing corporation took place on February 8, 1988.

The Second Mortgage and note were modified in 1989 to provide for permitted sales under a cooperative offering plan, rather than as condominium sales. Under the Second Mortgage and the note, as modified, Greater was to receive, for each unit sold, (i) a "Release Consideration" which was to be applied in reduction of the principal balance of the Second Mortgage, and (ii) a payment designated as "additional interest" of $10,000.00 for each unit sold. This additional interest was not to be applied in reduction of the Second Mortgage.[5]

The $95,000.00 fee under the First Mortgage, as consolidated, and the $920,000.00 "additional interest" under the Second Mortgage, as modified, were paid.

On June 6, 1990, petitioner filed a Claim for Refund of Real Property Transfer Gains Tax, as well as finalized Forms DTF-700, 701 and 703 (gains tax questionnaire and schedules). Petitioner requested a refund of $121,397.00 in gains tax based on the updating of Forms DTF-700, 701 and 703 to reflect the sellout of the cooperative project. Petitioner's original Forms DTF-700, 701 and 703 contained only estimates.

---

[2]The "Consolidated and Extension Agreement and Restatement of Mortgage Security Agreement, Assignment of Rents and Financing Statement" between petitioner and Home was executed on July 7, 1987.

[3]The stipulated facts incorrectly reference the Second Mortgage. The correct reference is to the First Mortgage.

[4]Section 16.03 of the Consolidation and Extension Agreement, executed on July 7, 1987, is set forth in Appendix A.

[5]Paragraphs 23 and 24 of the Middle Island Associates to Greater New York Savings Bank Mortgage Note, dated August 14, 1989, is set forth in Appendix D. Appendices B and C contain pertinent excerpts of the Middle Island Associates to Greater New York Savings Bank Mortgage Note, dated December 17, 1986; Mortgage and Security Agreement, dated December 17, 1986; and Mortgage Modification Agreement, dated July 7, 1987.

In response to petitioner's claim for refund, the Division issued to petitioner a Notice of Determination (L-002151093-7), dated November 5, 1990, asserting real property transfer gains tax due of $20,827.87, plus interest of $3,614.62 and penalties of $7,289.65. The notice contained the following recalculation of tax:

"Consideration

Cash Sales	$ 6,318,000.00		
Mortgage Indebtedness	4,800,000.00		
Less: Reserve Fund	(10,000.00)		
Working Capital Fund	(10,000.00)		
Rebates		`$815,481.00	
Less: Disallowed (Note 1)		(9,411.00)	(806,070.00)
Adj. Consideration	10,291,930.00		
Brokerage Fees Claimed	$ 331,426.00		
Less: Disallowed for Advertising		(78,706.00)	
Adj. Brokerage	252,720.00		
Original Purchase Price Claimed			$ 7,262,865.00
Disallowed:			
(1) Other Acquisition Costs (Note 2)			(219,548.00)
(2) Personal Property			
(a) Lawn Furniture			(8,168.00)
(b) Custom Blinds			(540.00)
(3) Operating Expenses - Office Expense			(3,376.00)
(4) Bank Conversion Fees			
(a) Home Savings Bank (Note 3)			(95,000.00)
(b) Greater N.Y. Savings Bank (Note 4)			(920,000.00)
Adj. O.P.P.			6,016,233.00
Gain Subject to Tax			4,022,977.00
Tax Due			402,297.70
Tax Paid (Note 5)			381,469.83
Balance Due (penalty and interest will be computed from 5/18/89, the date the last unit was transferred)."			$ 20,827.87

Note 2, Note 3 and Note 4, which were referenced in the calculation and accompanied it, contain the rationale for disallowance of certain claimed deductions. The reasons given for these disallowances were:

> "(Note 2) - For other acquisition costs, you claimed $382,693.00, which had been allocated from a total amount of $1,500,759.00. Of the $1,500,759.00, costs of $639,786.00 were incurred as a result of the acquisition in December 1986. The remaining $860,973.00 were costs incurred in July 1987 to re-finance a previous mortgage. Since the $860,973.00 were not costs incurred in acquiring the real property, these costs are being disallowed. Of the $860,973.00, the amount allocated to this project was $219,548.00.

"(Note 3) - The $95,000.00 claimed was a cost also incurred in July 1987 to re-finance the previous mortgage. Since this re-financed mortgage was not obtained to acquire the real property the cost of $95,000.00 is being disallowed.

"(Note 4) - Claimed as part of your costs were payments made to the Greater New York Savings Bank (Bank), which totaled $920,000.00. The payments were made pursuant to the provisions of an agreement dated September 29, 1986, between you and the Bank for a second mortgage to be used in acquiring the real property. The agreement provided for a 'Release Fee' of $10,000.00 to be paid for each unit as it was sold. These release fees were not to be applied in reducing the principle [sic] balance of the loan.

"Black's Law Dictionary defines the term 'interest', in part, as payments a borrower pays a lender for the use of the money. Interest is the compensation allowed by law or fixed by the parties for the use or forbearance or detention of money.

"Based on a review of the agreement, we consider the 'Release Fee' to be a form of interest paid on the mortgage with the Bank. Since Section 590.15(c) of the Gains Tax Regulations provides, in part, that interest paid on loans where the proceeds of such loan were used to acquire the real property are not allowable, we are disallowing the $920,000.00 fees as interest incurred as a result of the acquisition loan."

On November 20, 1990, petitioner by its authorized representative, Seymour Z. Katchen, submitted a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS").

Petitioner submitted a second Claim for Refund of Real Property Transfer Gains Tax in which it requested a refund of $128,708.00 because it had failed to deduct construction interest "on Forms DTF 700, 701 and 702."[6] Petitioner included the following calculation of how the construction loan was determined:

1st Mortgage Barclay Bank		$13,500,000.00
2nd Mortgage Greater NY Bank for Savings		9,500,000.00
		$23,000,000.00
Cost of land & building		22,724,683.00
Balance		$ 275,317.00
Add Back		
Downpayment	$150,000.00	
½ commitment fee 1st mortgage	67,500.00	
½ commitment fee 2nd mortgage	95,000.00	312,500.00

[6]In response to an issue involving construction period interest that was first discussed at the conciliation conference on September 23, 1991, and at the Commissioner's recommendation, petitioner filed the second (amended) claim for refund.

Construction loan proceeds		$ 587,817.00
Average prime rate 10/1/86 - 12/31/87	7.75	
Points over prime	2.00	
Interest	9.75	
15 months		$ 73,110.00
10% tax		$ 7,311.00

A BCMS conference was held on September 23, 1991. Petitioner appeared by Seymour Z. Katchen, CPA. Pursuant to the conference, a Conciliation Order (CMS No. 109830), dated January 3, 1992, was issued with the following recomputation of the statutory notice (L002151093):

Determination	$11,678.57
Penalty	Computed at Applicable Rate
Interest	Computed at Applicable Rate

Petitioner filed a petition dated March 27, 1993, which requested a revision of the determination of additional real property transfer gains tax and further requested the amount requested in the refund claim. Petitioner alleged that the Division erred in determining that petitioner's original purchase price for the property was $6,019,609.00 rather than the $7,335,975.00 figure determined by petitioner. Petitioner asserted that the Commissioner based his determination:

> "upon the disallowance of (i) other acquisition costs in the amount of $219,548, (ii) acquisition costs for personal property in the aggregate amount of $8,708, (iii) bank conversion fees in the amount of $95,000 and $920,000, and (iv) construction period interest in the amount of $73,110."[7]

The Division filed an answer, dated May 15, 1992, denying petitioner's allegations in the petition and stating that the burden of proof is upon petitioner to establish that the determination of the Division is erroneous and/or improper.

---

[7] Petitioner's allegation that the construction period interest was disallowed was premature. The issue of construction period interest was not raised in petitioner's June 5, 1990 claim for refund.

In response to petitioner's September 27, 1991 refund claim, the Division issued a refund denial letter dated May 29, 1992. The Division denied the refund in its entirety for the following reason(s):

> "Pursuant to Section 590.16(d) of the Gains Tax Regulations, interest paid during the construction period on loans where the proceeds of such loans were used to make capital improvements may not be included in the original purchase price for real property not undergoing the activities necessary to prepare it for its use. As it appears that only minor improvements and general maintenance was done to this property after its purchase no construction period was established. Therefore construction period interest is not being allowed."

Petitioner filed a petition dated August 13, 1992, which requested a refund of real property transfer gains tax. Petitioner also requested that this action be consolidated with the prior action, filed in March 1992, which involved the same issues. Petitioner alleged that the Division erred in determining that petitioner's original purchase price for the property was $6,019,609.00 rather than the $7,335,975.00 figure determined by petitioner. Petitioner asserted that the Commissioner based his determination:

> "upon the disallowance of (i) other acquisition costs in the amount of $219,548, (ii) acquisition costs for personal property
>
> in the aggregate amount of $8,708, (iii) bank conversion fees in the amount of $95,000 and $920,000, and (iv) construction period interest in the amount of $73,110."

These are the same allegations raised in petitioner's prior petition.

The Division filed an answer dated December 17, 1992. Subsequently, an amended answer was filed on January 6, 1993 due to an error in the original answer. The Division's amended answer denied petitioner's allegations and stated that the burden of proof was upon petitioner to establish that the determination of the Division was erroneous and/or improper.

The stipulation which petitioner and the Division entered into on December 2, 1993 pertained to the "additional interest" under the Second Mortgage and the "fees" under the First Mortgage, as consolidated.

OPINION

First Mortgage

In her determination, the Administrative Law Judge concluded that the $95,000.00 in fees paid on the sale of the cooperative units pursuant to the First Mortgage were allowable "cooperative conversion costs" and includible as part of petitioner's original purchase price. The Administrative Law Judge stated: "While these fees may not have been customary or ordinary, they were necessary to effectuate the cooperative conversion" (Determination, conclusion of law "F").

The Division argues that, in order for the expenses of the First Mortgage to be allowed as part of petitioner's original purchase price, such expenses must be "customary, reasonable and necessary" to create property ownership interests in cooperative form, "as such fees and expenses are determined under rules and regulations prescribed by the tax commission" (Division's brief, pp. 2-3). In response, petitioner argues that the modification of the First Mortgage to provide for payment of these fees was necessary in order to file an acceptable cooperative offering plan with the Attorney General. Therefore, these fees were a necessary prerequisite to creating a cooperative form of ownership.

We affirm the determination of the Administrative Law Judge on this issue.

Article 31-B of the Tax Law was enacted "as part of a comprehensive package of tax measures designed to provide necessary revenues" (Trump. v Chu, 65 NY2d 20, 489 NYS2d 455, appeal dismissed 474 US 915). Tax Law § 1441 imposes a tax on gains derived from the transfer of real property at the rate of 10%. A cooperative conversion is treated as a single transaction for purposes of applying the gains tax (Mayblum v. Chu, 109 AD2d 782, 486 NYS2d 89, mod 67 NY2d 1008, 503 NYS2d 316; Matter of 1230 Park Assocs. v. Commissioner of Taxation & Fin., 170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455). The tax, however, is due upon the transfer of shares to individual purchasers pursuant to a cooperative plan.

Former Tax Law § 1440(5)(a) defines "original purchase price" as follows:

> "the consideration paid or required to be paid by the transferor; (i) to acquire the interest in real property, and (ii) for any capital improvements

> made or required to be made to such real property . . . . Original purchase price shall also include the amounts paid by the transferor for any customary, reasonable and necessary legal, engineering and architectural fees incurred to sell the property and those customary, reasonable and necessary expenses incurred to create ownership interests in property in cooperative or condominium form, as such fees and expenses are determined under rules and regulations prescribed by the tax commission."

The Legislature, in section 1440(5)(a)(ii), expressly vested "explicative power in the [former] state tax commission" to determine which costs of conversion are allowable and which are not allowable (Matter of Mattone v. State of New York Dept. of Taxation & Fin., 144 AD2d 150, 534 NYS2d 478). Pursuant to the authority of section 1440(5)(a), the Commissioner promulgated 20 NYCRR 590.39 (amended and renumbered 20 NYCRR 590.40, effective November 9, 1994) which contains an illustrative list of costs of converting property to cooperative form which are included in original purchase price. That section provides:

> "Question: What are the allowable costs of co-oping (or converting property to condominium form) if paid or required to be paid by realty transferor?
>
> "Answer: The following list illustrates costs that are includible in original purchase price as costs to convert property to cooperative or condominium form:
>
> - legal, accounting and engineering fees incurred directly as a result of cooperative or condominium formation and transfer of title to the cooperative corporation
> - filing and recording fees
> - costs of printing offering plan
> - title insurance
> - New York City Real Property Transfer Tax paid as a result of conveyance of title to the cooperative corporation
> - New York State Real Estate Transfer Tax paid as a result of conveyance to the cooperative corporation
> - appraisal fees
> - mortgage recording tax on mortgages created as a result of conveyance of title to the cooperative corporation
> - mortgage commitment fees
> - points paid to lender
> - the cost of 'buying down' the interest rate on co-op loans to purchasers
> - the cost of 'buying out' nonpurchasing tenants
> - amounts paid to relocate nonpurchasing tenants" (former 20 NYCRR 590.39).

Not all cooperative conversion costs are includible as part of the transferor's original purchase price (see, Matter of Belhara Assocs. Ltd. Partnership, Tax Appeals Tribunal,

January 26, 1995). For example, as we stated in Matter of 44 West 62nd St. Assocs. (Tax Appeals Tribunal, August 11, 1994), conversion period interest and conversion period real property taxes were not properly included in original purchase price because they:

> "are not costs incurred to create ownership interests in cooperative form. These costs are merely expenses incurred to carry the property and not incurred to create ownership interests in the property (Matter of Mattone v. State Dept. of Taxation & Fin., 144 AD2d 150, 534 NYS2d 478). We direct petitioner's attention to our decision in Matter of 1230 Park Assocs. [Tax Appeals Tribunal, July 27, 1989, affd Matter of 1230 Park Assocs. v. Commr. of Taxation & Fin., 170 AD2d 842, 566 NYS2d 957] where we stated the test was whether the cost 'can be characterized as an expense incurred to create ownership in the cooperative form'" (Matter of 44 West 62nd St. Assocs., supra).

In the present case, paragraph 16.03 of the Consolidation and Extension Agreement, dated July 7, 1987, which resulted in the consolidated First Mortgage, generally prohibited the transfer of any interest in the mortgaged property. The transfer to a cooperative corporation was excepted from this general prohibition, provided that a number of conditions were satisfied. Among these conditions was the requirement that the lender receive and approve of the "Borrower's agreement to pay Lender a fee as shares in the Cooperative Corporation are sold from time to time, such fee to be paid in installments upon the sale of each unit owned by the Cooperative Corporation" (Appendix A). Because petitioner was required to incur the obligation to pay the $95,000.00 in fees as a condition of transferring the real property to the cooperative corporation, this was a cost incurred to create ownership in the cooperative form.

Although the fees were paid after the property was transferred to the cooperative corporation, this does not preclude their allowance. The statute allows a transferor "customary, reasonable and necessary expenses incurred to create ownership interests in property in cooperative or condominium form" (Tax Law § 1440[5][a]). There is nothing in the statute that imposes a requirement that the costs incurred must be paid prior to the transfer to the cooperative corporation to be an element of original purchase price. In addition, imposing such a requirement is inconsistent with the basic definition of original purchase price which begins with the statement that original purchase price includes "the consideration paid or required to be

paid by the transferor" to acquire the real property or to make capital improvements. This language can only mean that incurring the obligation to pay at the time of transfer is sufficient to include the cost of acquisition or capital improvements in the transferor's original purchase price, whether or not the cost is ever paid (Matter of V & V Properties, Tax Appeals Tribunal, July 16, 1992). The same rule should apply in the case of costs incurred to create cooperative ownership. Therefore, because liability for the instant cost was incurred in order to create an ownership interest in the property in a cooperative form, we believe it is an allowable cost. The fact that it was actually paid subsequent to the transfer is irrelevant.

Second Mortgage

In her determination, the Administrative Law Judge concluded that the fees expended pursuant to the provisions of the Second Mortgage were not conversion costs but were, as the Division argues, pre-payment penalties. In the Second Mortgage, the amount of the fees was specifically related to the amount of pre-payment penalty set forth in the mortgage, and the release fees were to be an offset to the pre-payment penalty. We affirm the determination of the Administrative Law Judge on this issue.

Petitioner argues that:

> "[i]n customary mortgages, pre-payment penalties are measured either as (i) between 1% and 5% of the original principal balance of the mortgage or (ii) calculated by the difference between the yield to the Bank on the mortgage less the cost to the Bank of the funds necessary to place the mortgage . . . . It thus becomes absolutely clear that the intent of this pre-payment penalty, which is now 38% of the original principal amount was not intended to be the customary pre-payment penalty but rather to avoid the Bank having the mortgage paid off without receiving the agreed upon Release Fees" (Petitioner's brief in support, p. 4).

Petitioner argues that the release fee was an "additional profit" to the Bank from the making of the mortgage loan. Petitioner argues that:

> "[t]he effect of these payments was to guarantee to the Bank that it would receive the profit it bargained for and that payment of the mortgage before the sale of these units would not deny the Bank its profit" (Petitioner's brief in support, p. 4).

There is no evidence in the record of the Bank's intentions or of the rate of pre-payment penalties in customary mortgages. However, a determination of whether the release fees are includible in petitioner's original purchase price does not depend on whether these fees are designated as pre-payment penalties or additional profit. Even if petitioner was correct, the release fees paid pursuant to the Second Mortgage would not be appropriately considered as part of petitioner's original purchase price.

There is no evidence that these fees are "customary, reasonable and necessary expenses incurred to create ownership interests in property in cooperative . . . form, as such fees and expenses are determined under rules and regulations prescribed by the tax commission" as required by section 1440(5)(a) and as such fees and expenses are illustrated by 20 NYCRR 590.39.

In Matter of 1230 Park Assocs. (supra), we disallowed negative carrying costs as part of the transferor's original purchase price because they represented a cost of carrying the property in the cooperative ownership form, not creating it. In the present case, the release fees associated with the Second Mortgage were not expended to create ownership interests in property in a cooperative form but were incurred in order to sell property interests in a cooperative form of ownership.

In 1230 Park Associates, we considered the fact that some of the allowable costs listed in section 590.39 may be incurred subsequent to creating ownership in the cooperative form. We concluded that this did not imply that all costs associated with cooperative conversion were necessarily included as part of the original purchase price. We stated:

> "[p]etitioners' argument that the Division of Taxation allows other costs which are incurred long after the cooperative ownership was created is not persuasive. Most of the examples petitioners point to are allowed under other provisions of the statute, not under the language at issue here . . . . The one example listed by petitioners that is allowed as a cost to create cooperative ownership is the cost of buying out and relocating a non-purchasing tenant (20 NYCRR 590.39). These costs are allowed because the realty transferor is enhancing its ownership interest in the shares by removing the non-purchasing tenant (see, 20 NYCRR 590.15 which generally allows lease buy-out costs as an element of original purchase price in other than cooperative conversions). The fact that the Division allows such an ownership enhancement expense as a cost to create

> ownership in cooperatives does not logically require that petitioners' cost to carry the unsold units must also be allowed" (Matter of 1230 Park Assocs., supra).

Unlike buy-out costs and relocation costs, the payment of the release fees by petitioner herein did not enhance petitioner's ownership interest in the cooperative shares and they are not a cost of creating cooperative ownership.

Petitioner argues that the release fees were similar to the payment of "points." Petitioner argues that these fees and points are both "fixed in amount, do not vary based on the principal balance of the mortgage outstanding from time to time and do not vary based on the period of time the loan is outstanding" (Petitioner's brief in opposition and reply, p. 4). Petitioner argues that the "mere deferral of payment until units are sold does not affect the essential characteristics of these payments" (Petitioner's brief in opposition and reply, p. 5). We disagree. It is clear from section 590.39 that the points and mortgage commitment fees included in original purchase price relate only to a mortgage given in connection with the creation of the ownership of the property in cooperative form. Here, the Second Mortgage was given prior to the conversion to cooperative form. The fees were contingent and might never be expended. If expended, they resulted from the sale of shares representing cooperative units after the financing was in place, not from the creation of cooperative ownership. As such, they were part of petitioner's selling expenses. This is in contrast to the terms of the First Mortgage requiring an agreement to pay certain fees as a prerequisite to creating of cooperative ownership. Certain selling expenses are allowable as part of original purchase price ("customary, reasonable and necessary legal, engineering and architectural fees incurred to sell the property" [Tax Law § 1440(5)(a)]). These selling expenses are set forth in 20 NYCRR section 590.18. They do not include the type of fees paid here by the transferors. As a result, they are not includible in petitioner's original purchase price.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The exception of Middle Island Associates is denied;

3. The determination of the Administrative Law Judge is affirmed; and

4. The Notice of Determination and disallowance of the claim for refund, as modified by conclusions of law "F" and "H" of the Administrative Law Judge's determination, are sustained.

DATED: Troy, New York
September 21, 1995

/s/John P. Dugan
John P. Dugan
President

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner

APPENDIX A

"Consolidation and Extension Agreement and Amendment and Restatement of Mortgage, Security Agreement, Assignment of Rents and Financing Statement executed July 7, 1987 by Middle Island Associates, mortgagor, and Home Savings Association of Kansas City, mortgagee ('First Mortgage').

"ARTICLE XVI

Transfer of Mortgaged Property

* * *

"Section 16.03 Transfer to the Cooperative Corporation

"Borrower's right to transfer its interest to the Cooperative Corporation pursuant to Section 16.02(b) hereof shall be subject to prior receipt and approval by Lender in the exercise of its reasonable discretion of the following:

* * *

"(K) an assumption agreement duly executed by the Cooperative Corporation evidencing its assumption of all of the obligations of Borrower hereunder and under the Note and Loan Documents, granting Lender a prior perfected Lien and security interest in the proceeds from the sale of the stock of the Cooperative Corporation and the proprietary leases, and Borrower's agreement to pay Lender a fee as shares in the Cooperative Corporation are sold from time to time, such fee to be paid in installments upon the sale of each unit owned by the Cooperative Corporation and calculated by multiplying $95,000 times a fraction, the numerator of which is one (1) and the denominator of which is the number of units in the cooperative . . . ."

APPENDIX B

"Middle Island Associates to The Greater New York Savings Bank Mortgage Note, dated December 17, 1986 ('Second Mortgage').

* * *

"24. It is agreed that the ownership, control, management and operation of the Premises covered by the Mortgage securing this Note by Maker of which Edward Lapidus and/or David

Glaser are the controlling partners, ('The Principals') is a material inducement to the Payee to make the Loan evidenced by this Note and secured by the Mortgage and that the control, management and operation of the Premises by others, who or which does not in the Payee's sole opinion possess the business or managerial acumen and experience of the Principals will seriously endanger the security represented by the Mortgage. Accordingly, the whole debt evidenced by this Note and secured by the Mortgage shall immediately become due and payable at the option of the Payee at any time title to, control, management or operation of the Premises or any part thereof is transfereed [sic] to any entity not controlled, owned or operated by Principals. Notwithstanding the foregoing, if a valid condominium plan is declared effective for the Premises, Maker may convert the Premises into condominium ownership and the Payee will release from the lien of the Mortgage pro rata, each condominium unit sold upon said sale provided Maker is not in default of the Lien Instruments and provided the Payee receives as consideration for the release of each Unit from the lien of the Mortgage, the following: (i) an amount equal to the product obtained by multiplying (x) the percentage of common interest allocated to the unit, as calculated in accordance with all declarations of condominium to be filed for the Premises, being released by, (y) $9,500,000.00 by (z) 110% ('Release Consideration'); and (ii) $10,000.00 ('Release Fee'). All payments of Release Consideration shall be applied in reduction of the Principal balance of the loan evidenced hereby, however, no Release Fee payment shall be applied in reduction of the principal balance of the Loan. At the time of each such release the Payee's Attorneys shall be paid a legal fee of $100.00 for each such release prepared plus an attendance fee, if an attendance is required. The lien of the Mortgage shall continue to encumber all condominium units which have not been released, until the principal balance of the loan evidenced hereby has been repaid in full, together with all interest accrued thereon, and payment of all sums and fees due to the Payee under the Lien Instruments have been received, including payment of Release Fees totalling $3,600,000.00, notwithstanding whether the Principal balance of the loan has been repaid in full.

"Notwithstanding the foregoing, provided the Maker is not in default of the Note, the Mortgage or the Lien Instruments and provided a valid declaration of condominium is filed for the Premises, Payee shall release from the lien of the Mortgage the clubhouse, swimming pool, tennis courts and other homeowner association properties, without the payment of any Release Consideration or Release Fee provided the lien of the Mortgage is spread to cover the percentage interest in the common areas appurtenant to each condominium unit.

"25. Maker may prepay the entire Principal balance of this Note on any payment date provided Maker additionally pays as a premium for the privilege of so prepaying $3,600,000.00 less any Release Fees paid by Maker and received by Payee.

* * *

"Mortgage and Security Agreement dated December 17, 1986 between Middle Island Associates and The Greater New York Savings Bank

* * *

"Rider #1

Rider to Mortgage

* * *

"33. It is agreed that the ownership, control, management and operation of the Premises covered by this Mortgage securing the Note by Mortgagor of which Edward Lapidus and/or David Glaser are the controlling partners, ('The Principals') is a material inducement to the Mortgagee to make the Loan evidenced by the Note and secured by this Mortgage and that the control, management and operation of the Premises by others, who or which does not in the Mortgagee's sole opinion possess the business or managerial acumen and experience of the Principals will seriously endanger the security represented by this Mortgage. Accordingly, the whole debt evidenced by the Note and secured by this Mortgage shall immediately become due and payable at the option of the Mortgagee at any time title to, control, management or operation of the Premises or any part thereof is transferred to any entity not controlled, owned or operated by Principals. Notwithstanding the foregoing, if a valid condominium plan is

declared effective for the Premises and the declaration of condominium is filed, Mortgagor may convert the Premises into condominium ownership and the Mortgagee will release from the lien of this Mortgage pro rata, each condominium unit sold upon said sale provided Mortgagor is not in default of the Lien Instruments and provided the Mortgagee receive as consideration for the release of each Unit from the lien of this Mortgage, the following: (i) an amount equal to the product obtained by multiplying (x) the percent of common interest allocated to the unit, as calculated in accordance with all declarations of condominium to be filed for the Premises, being released by, (y) $9,500,000.00 by (z) 110% ('Release Consideration'); and as additional consideration (ii) $10,000.00 ('Release Fee'). The lien of this Mortgage shall continue to encumber all units which have not been released, until this principal balance of the Loan has been repaid in full, together with all interest accrued thereon, and payment of all sums and fees due to the Mortgagor under the Lien Instruments have been received, including payment of Release Fees totalling $3,600,000.00, notwithstanding whether the principal balance of the Loan has been repaid in full. All payments of Release Consideration shall be applied in reduction of the principal balance of the loan evidenced by the Note and secured by this Mortgage ('Loan'). At the time of each such release the Mortgagee's Attorneys shall be paid a legal fee of $100.00 for each release prepared plus an attendance fee, if an attendance is required. All payments of Release Fees shall be paid to Mortgagee and retained by it as a fee and not in reduction of the Principal balance or payment of interest. Notwithstanding the foregoing, provided the Mortgagor is not in default of the Note, this Mortgage or the Lien Instruments and provided a valid declaration of condominium is filed for the Premises, Mortgagee shall release from the lien of this Mortgage the clubhouse, swimming pool, tennis courts and other homeowner association properties, without the payment of any Release Consideration or Release Fee provided the lien of this Mortgage is spread to cover the percentage interest in the common areas appurtenant to each condominium unit.

* * *

"35. Mortgagor may prepay the entire Principal of the loan evidenced by the Note and secured hereby on any payment date provided that additionally Mortgagor pays, as a premium for the privilege of so prepaying, $3,600,000.00 less the aggregate of the Release Fees paid by Mortgagor and received by Mortgagee."

APPENDIX C

"Mortgage Modification Agreement dated July 7, 1987 between Middle Island Associates and The Greater New York Savings Bank

* * *

"4. Upon execution of the Splitter, the Coop Premises and the swimming pool clubhouse, tennis courst [sic] and any other property conveyed to the homeowner's association shall be released form [sic] the mortgage lien encumbering the Coop Premises and in substitution thereof Obligor shall grant Obligee a security interest in all proprietary leases and shares of stock issued by the Coop ('Coop Collateral'). The individual proprietary leases and the appurtenant shares of the Coop constituting the Coop Collateral shall be released from the lien on and security interest granted in the Coop Collateral upon the sale of the respective units appurtenant thereto upon the payment of the Release Fees, Release Consideration and attorney fees in the manner and as calculated as provided in paragraph 24 of the Note and paragraph 33 of the Mortgage as amended hereby.

"5. Paragraph 33 of the Mortgage is amended to read:

"It is agreed that the ownership, control, management and operation of the Premises covered by this Mortgage securing the Note by Mortgagor of which Edward Lapidus and/or David Glaser are the controlling partners, ('The Principals') is a material inducement to the Mortgagee to make the Loan evidenced by the Note and secured by this Mortgage and that the control, management and operation of the Premises by others, who or which does not in the Mortgagee's sole opinion possess the business or managerial acumen and experience of the Principals will seriously endanger the security represented by this Mortgage. Accordingly, the whole debt evidenced by the Note and secured by this Mortgage shall immediately become due

and payable at the option of the Mortgagee at any time title to, control, management or operation of the Premises or any part thereof is transferred to any entity not controlled, owned or operated by Principals. Notwithstanding the foregoing, if a valid condominium plan or cooperative offering plan is declared effective for the Premises and the declaration of condominium is filed, Mortgagor may convert the Premises into condominium or cooperative ownership and the Mortgagee will release from the lien of this Mortgage pro rata, each condominium unit or cooperative unit sold upon said sale provided Mortgagor is not in default of the Lien Instruments and provided the Mortgagee receive as consideration for the release of each Unit from the lien of this Mortgage, the following: A: for a condominium: (i) an amount equal to the product obtained by multiplying (x) the percentage of common interest allocated to the unit being released by, (y) the lien of this Mortgage, as split, encumbering the portion of the Premises not conveyed to the Coop by (z) 110% ('Release Consideration'); and as additional consideration (ii) $10,000.00 ('Release Fee'); B: for the Coop: (i) an amount equal [to] the product obtained by multiplying (x) the ratio the numerator of which is the number of shares allocated to the unit being released and the denominator is the total number of Coop shares by (y) the lien of the Mortgage, as split, securing the Coop Collateral, by (z) 110% ('Release Consideration'); and as additional consideration (ii) $10,000.00 ('Release Fee'). The lien of this Mortgage shall continue to encumber all units which have not been released, until this principal balance of the loan secured hereby ('Loan') has been repaid in full, together with all interest accrued thereon, and payment of all sums and fees due to the Mortgagor under the Lien Instruments have been received, including payment of Release Fees totalling $3,600,000.00, notwithstanding whether the principal balance of the Loan has been repaid in full. All payments of Release Consideration shall be applied in reduction of the principal balance of the loan evidenced by the Note and secured by this Mortgage ('Loan'). At the time of each such release the Mortgagee's Attorneys shall be paid a legal fee of $100.00 for each release prepared plus an attendance fee, if an attendance is required. All payments of Release Fees shall be paid to Mortgagee and retained by it as a fee and not in reduction of the Principal balance or payment of

interest. Notwithstanding the foregoing, provided the Mortgagor is not in default of the Note, this Mortgage or the Lien Instruments and provided a valid declaration of condominium is filled [sic] for the Premises, Mortgagee shall release from the lien of this Mortgage the clubhouse, swimming pool, tennis courts and other homeowner association properties, without the payment of any Release Consideration or Release Fee provided the lien of this Mortgage is spread to cover the percentage interest in the common areas appurtenant to each condominium unit.

* * *

"7. Paragraph 24 of the Note is amended to read as follows:

"It is agreed that the ownership, control, management and operation of the Premises covered by the Mortgage securing this Note by Maker of which Edward Lapidus and/or David Glaser are the controlling partners, ('The Principals') is a material inducement to the Payee to make the Loan evidenced by this Note and secured by the Mortgage and that the control, management and operation of the Premises by others, who or which does not in the Payee's sole opinion possess the business or managerial acumen and experience of the Principals will seriously endanger the security represented by the Mortgage. Accordingly, the whole debt evidenced by this Note and secured by the Mortgage shall immediately become due and payable at the option of the Payee at any time title to, control, management or operation of the Premises or any part thereof is transfereed [sic] to any entity not controlled, owned or operated by Principals. Notwithstanding the foregoing, if a valid condominium plan or cooperatvie [sic] offering plan is declared effective for the Premises, Maker may convert the Premises into condominium ownership or cooperatvie [sic] ownership and the Payee will release from the lien of the Mortgage pro rata, each condominium unit sold or cooperative unit upon said sale provided Maker is not in default of the Lien Instruments and provided the Payee receives as consideration for the release of each Unit from the lien of the Mortgage, the following: A for a condiminium [sic]: (i) an amount equal to the product obtained by multiplying (x) the percentage of common interest allocated to the unit being released by, (y) the lien of the Mortgage, as split, encumbering that portion of the Premises not conveyed to the Coop by (z)

110% ('Release Consideration'); and (ii) $10,000.00 ('Release Fee'); B for the Coop: (i) an amount equal [to] the product obtained by multiplying (x) the ratio the numerator of which is the number of shares allocated to the unit being released and the denominator is the total number of Coop shares, by (y) the lien of the Mortgage, as split, encumbering the Coop Collateral, by (z) 110% ('Release Consideration'); and as additional consideration (ii) $10,000.00 ('Release Fee'). All payments of Release Consideration shall be applied in reduction of the Principal balance of the loan evidenced hereby, however no Release Fee payment shall be applied in reduction of the principal balance of the Loan. At the time of each such release the Payee's Attorneys shall be paid a legal fee of $100.00 for each such release prepared plus an attendance fee, if an attendance is required. The lien of the Mortgage shall continue to encumber all condominium units or cooperative units which have not been released, until the principal balance of the loan evidenced hereby ('Loan') has been repaid in full, together with all interest accrued thereon, and payment of all sums and fees due to the Payee under the Lien Instruments have been received, including payment of Release Fees totalling $3,600,000.00, notwithstanding whether the Principal balance of the loan has been repaid in full. Notwithstanding the foregoing, provided the Maker is not in default of the note, the Mortgage or the Lien Instruments and provided a valid declaration of condominium is filed for the Premises, Payee shall release from the lien of the Mortgage the clubhouse, swimming pool, tennis courts and other homeowner association properties, without the payment of any Release Consideration or Release Fee provided the lien of the Mortgage is spread to cover the percentage interest in the common areas appurtenant to each condominium unit."

APPENDIX D

"Middle Island Associates to The Greater New York Savings Bank Mortgage Note, dated August 14, 1989

* * *

"23. It is agreed that the ownership, control, management and operation of the Premises covered by the Mortgage securing this Note by Maker of which Edward Lapidus and/or David

Glaser are the controlling partners, ('The Controlling Principals') is a material inducement to the Payee to make the Loan evidenced by this Note and secured by the Mortgage and that the control, management and operation of the Premises by others, who or which does not in the Payee's sole opinion possess the business or managerial acumen and experience of The Controlling Principals will seriously endanger the security represented by the Mortgage. Accordingly, the whole debt evidenced by this Note and secured by the Mortgage shall immediately become due and payable at the option of the Payee at any time title to, control, management or operation of the Premises or any part thereof is transfered to any entity not controlled, owned or operated by The Controlling Principals. Notwithstanding the foregoing, provided Maker is not in default of the Mortgage securing this Note, this Note or under the Lien Instruments, upon the approval of a cooperative offering plan for the Premises by the Bank, which approval shall not be unreasonably withheld, and such plan is declared effective for the Premises, Maker may convert the Premises to cooperative ownership and the Payee will release from the lien of the Mortgage securing this Note the Premises secured hereby including any property conveyed to a Home Owners Association in conjunction with said offering plan, provided Maker pledges and grants a security interest in each of the 268 cooperative units and the proprietary leases and shares of stock in the cooperative corporation to be formed appurtenant thereto. In connection therewith, Maker shall execute such instruments as are required in the opinion of Payee's counsel to perfect Payee's security interest in such collateral including but not limited to a substitute note, security agreement, assignment of leases, stock powers and U.C.C. financing statements. In addition, Payee shall possess all proprietary leases and shares of stock in the cooperative corporation until the Release Consideration and Additional Interest, as hereinafter deined, for the appurtenant unit is received by Payee. Thereafter, Payee shall deliver a release for each cooperative apartment and the proprietary lease and shares of stock in the cooperative corporation appurtenant thereto upon receipt of payment from Maker of the following: (i) an amount equal to the product obtained by multiplying (x) a fraction the numerator of which is the number of shares allocated to each unit

to be released and the denominator of which is the total number of shares for all 268 units consisting the cooperative corporation by (y) $8,172,776.84 by (z) 1.25% ('Release Consideration'); and (ii) $10,000.00 ('Additional Interest'). All payments of Release Consideration shall be applied in reduction of the Principal balance of the loan evidenced hereby, however no Additional Interest payment shall be applied in reduction of the Principal balance of this Note. At the time of each such release the Payee's Attorneys shall be paid a legal fee of $50.00 for each such release prepared plus an attendance fee, if an attendance is required. The lien of the Security Agreement to be executed in substitution hereof upon release of the Premises as described hereinabove shall continue to encumber all cooperative units which have not been released, until the Principal balance of this Note has been repaid in full, together with all interest accrued thereon, and payment of all sums and fees together with all interest accrued thereon, and payement [sic] of all sums and fees due to the Payee under the Lien Instruments or any instruments executed in substitution hereof have been received, including payment of Additional Interest totalling $2,680,000.00, notwithstanding whether the Principal balance of this Note has been repaid in full.

"24. Maker may prepay the entire the [sic] Principal balance of this Note on any payment date provided Maker additionally pays as a premium for the privilege of so prepaying $2,680,000.00 less any payments of Additional Interest paid by Maker and received by Payee."