

## BUREAU OF LAW

## MEMORANDUM

*This Tax Determination*  
*Mortgage & Land Tax*  
*Hillcrest Park, Inc., et al*  
7-7  
1968

TO: State Tax Commission

FROM: E. H. Best, Counsel

SUBJECT: Mortgages Executed by Hillcrest Park, Inc., et al. to Westchester Federal Savings and Loan Association

This is an application for refund of mortgage recording taxes totaling \$3,880.00 collected on the recording of 51 separate mortgages. The petitioner is a developer of condominiums. It constructed a condominium in the City of Peekskill in Westchester County which consisted of two groups of buildings hereinafter referred to as "Group I" and "Group II". The construction of the condominium was financed through the Westchester Federal Savings and Loan Association.

The money advanced for the construction of the buildings in Group I was secured by three mortgages which were consolidated. The total amount of the loan which the mortgages secured was \$390,540.00. Mortgage recording taxes of \$1,952.50 were paid on the recording of the mortgages. The third mortgage which consolidated the other two mortgages provided for the division of the mortgage into 24 separate mortgages, each to cover a condominium unit in the premises mortgaged. Two building and loan agreements executed in connection with the three mortgages and which were filed in the office of the Westchester County Clerk also contained the provisions for the division of the mortgage into 24 separate mortgages.

The money advanced for the construction of the buildings in Group II was secured by a mortgage for \$496,615.00. Mortgage recording tax of \$2,483.00 was paid on its recording. The provisions of the building and loan agreement which was filed and which was executed in conjunction with the mortgages were incorporated in and made a part of the mortgage. The building and loan agreement provided for the division of the mortgage into 31 separate mortgages. All of the aforesaid construction mortgages covering Group I and Group II were executed by Hillcrest Park, Inc. to Westchester Federal Savings and Loan Association.

Between February 8, 1965 and September 27, 1965, four supplemental mortgages were recorded in the office of the Westchester County Clerk covering condominium units in Group I and Group II. The mortgages were executed by Hillcrest Park, Inc. and Westchester Federal Savings and Loan Association. Mortgage recording taxes totaling \$3,396.50 were paid on their recording. Each of these mortgages contained a provision that the mortgage was executed pursuant to section 9B (Article 9-B probably intended) of the Real Property Law as amended, known as "The Condominium Act" and the mortgage tax was paid on the construction loan and the aggregate amount to be advanced on the units in the condominium group does not exceed the amount set forth and referred to in the building loan and the mortgage tax, if the amount requested on the mortgage is paid under protest. However, no statement of facts under

oath was filed on which a claim for exemption is based with the recording officer at the time of recording of the mortgages.

On September 29, 1965 another supplemental mortgage of Hillcrest Park, Inc. to Westchester Federal Savings and Loan Association covering Unit #1 in Building "A" was presented to the recording officer of Westchester County for recording with a statement of facts under oath. The statement showed that mortgage was exempt from tax. The mortgage and the statement were returned to the petitioner with a notation that it should be sent to Albany. On October 18, 1965, the mortgage was again presented to the recording officer without the statement of facts. Mortgage recording tax of \$83.50 was collected and the mortgage was recorded. Three other supplemental mortgages were thereafter recorded on October 27, 1965, November 5, 1965 and July 1, 1966 but no statement of facts under oath on which a claim for exemption of tax is based was presented for filing on the recording. Mortgage recording tax in the sum of \$207.50 was collected on the recording of the three mortgages.

The application of Hillcrest Park, Inc. asks for refund of mortgage recording taxes in the sum of \$491.50 collected on the recording of six other mortgages in addition to the tax collected on the 45 supplemental mortgages. The mortgages, which were purchase money mortgages executed in 1965, were executed to the Westchester Federal Savings and Loan Association by the following persons: 1) Rudolf and Gertrude Brautigan, 2) Robert and Mary Wisker, 3) Aaron and Gloria Block, 4) Herbert and Lillian Wrabel, 5) Kurt and Margarete Glasmann, and 6) Fritz and Inge Altrofer.

The above six mortgages covered condominium units in Group I. Hillcrest Park, Inc. was not a party to the mortgages. The mortgagors purchased the units pursuant to subscription and purchase agreements which provided that:

"The Seller (Hillcrest Park, Inc.) shall pay the following costs or fees: Title examination and title policy to insure the mortgagee; attorney's fees for drawing the mortgage instruments; mortgage and/or federal taxes; recording fee of the mortgage instruments; survey; inspection and approval fees. The purchaser does hereby agree to pay to the Seller at the time of closing of title, the sum of \$250.00, plus 1% of the amount of the mortgage to cover all of the foregoing expenses, charges and fees advanced by the Seller in connection with the mortgage loan. The purchaser may apply for a mortgage with any other lending institution at his own cost and expense or may purchase the unit on an all cash basis. In either of these events, the purchaser will pay to the Seller the sum of \$75.00 for the cost of the survey. In addition to the foregoing, the

purchaser further agrees to apportion with the Seller and pay such taxes, water rates and insurance premiums on existing policies as may be determined to be due at the time of the closing of title. The purchaser shall also make the usual and/or required adjustments with and prepayments to the lending institution."

Hillcrest Park, Inc. contends that the 51 mortgages were exempt from tax, arguing that mortgages on condominium units as they are first sold are exempt from the mortgage tax as supplemental mortgages pursuant to section 255 of the Tax Law and that section 263 of the Tax Law permits a refund of taxes collected if taxes should not have been paid. As authority for its position, it cites the memorandum of Governor Rockefeller, dated July 20, 1965, in disapproving Senate Bill No. 2410. A copy of that memorandum is attached hereto. The memorandum states that the existing statute (section 255 of the Tax Law) provides a means of avoiding mortgage tax upon the sale of units.

The proposed bill which was disapproved would have exempted the tax on purchase money mortgages given upon the first sale of condominium units. A bill of similar import allowing a credit on the tax paid on purchase money mortgages was approved and became law effective July 1, 1966. This law amended section 339-ee of the Real Property Law and provides for credit against the mortgage tax that would otherwise be payable on a purchase money mortgage in the amount resulting from the product of the purchaser's pro rata percentage of interest in the common elements and the mortgage tax already paid on the construction or blanket mortgage. All supplemental or purchase money mortgages were recorded prior to the date of the enactment of section 339-ee of the Real Property Law with the exception of one supplemental mortgage recorded on July 1, 1966.

It is my opinion that the 45 mortgages executed by Hillcrest Park, Inc. were supplemental mortgages and could have been exempt from tax. However, section 255 of the Tax Law provides that:

" . . . If at the time of recording such instrument, or additional mortgage, any exemption is claimed under this section, there shall be filed with the recording officer and preserved in his office a statement under oath of the facts on which such claim for exemption is based . . . ."

While such a statement of facts is not required in some instances where the recorded instrument is not a supplemental mortgage, it is the opinion of the Attorney General that there is no exemption from the payment of a tax for recording a supplemental mortgage, unless a statement under oath of facts on which the claim for exemption is based is filed with the recording officer at the time of recording such mortgage. (See 1914 Op. Atty. Gen. 204; see, also, Matter of Liability of Mortg. Consolidation Agreement, 1926, 34 St. Dept. 378; 1912 Op. Atty. Gen. 155.)

The petitioner further contends that the provision in each of the mortgages which claimed an exemption from tax satisfies the requirements of section 255, since the mortgages were acknowledged. Its contention that an acknowledged statement is equivalent to a statement under oath is without merit. (See 1 Carnody-Wait 2d, sections 4:12, 5:1.) Furthermore, the provisions of section 255 of the Tax Law requiring the filing of a statement under oath was added by Chapter 23 of the Laws of 1916 at which time the provisions of section 291 of the Real Property Law already required the acknowledgement of a conveyance of real property for purposes of recording.

Section 251 of the Tax Law provides that the act of a recording officer in refusing to record an instrument is subject to review in the first instance by the Tax Commission. The mortgage covering condominium Unit #1 in Building A and the statement of facts under oath were erroneously refused by the recording officer on September 29, 1965. The subsequent presentation of the mortgage and the payment of tax without the filing of the statement on October 18, 1965 did not constitute a waiver or disclaimer of the exemption from tax. There is no basis in the record on which a finding could be made, had the statement of fact claiming the exemption been submitted for filing on October 18, 1965, that no tax would have been demanded prior to the recording of the mortgage on that date. While the filing of such a statement is a prerequisite to obtaining an exemption on income tax, equity does not direct the performance of a futile, vain, useless or impossible act. Accordingly, I am of the opinion that the petitioner is entitled to a refund of \$83.50 paid on the recording of a mortgage on October 18, 1965.

I am further of the opinion that the three mortgages which were recorded subsequent to the supplemental mortgage upon which an affidavit was refused should also be exempted from the recording tax. The repeated filings of affidavits with respect to these mortgages which were similar to the mortgage on which the affidavit was refused would have been useless acts in view of the recording officer's refusal to accept the affidavit on the earlier mortgage. It is to be noted that two of the mortgages were recorded on October 27, 1965 and November 5, 1965, less than five weeks after the rejection of the affidavit by the recording officer with respect to Unit #1.

I am, therefore, of the opinion that Hillcrest Park, Inc. is entitled to a refund of \$291.00 on mortgage tax paid. It is to be noted, however, that 41 supplemental mortgages were recorded without any tender of any affidavit. The 41 mortgages were filed prior, in time, to the filing of the mortgage upon which an affidavit was tendered and refused by the recording officer. As heretofore stated such mortgages are subject to the mortgage recording tax because of the failure to file affidavits required by section 255 of the Tax Law.

Although the supplemental mortgage recorded on July 1, 1966 would probably not be a purchase money mortgage within the intent and meaning of section 339-ee of the Real Property Law, it is not necessary to ascertain whether such mortgage is subject to the provisions of that law since it is one of the mortgages which was filed subsequent to the date of rejection of the affidavit by the recording officer and therefore one of the mortgages upon which a refund is being granted herein.

Hillcrest Park, Inc. is not entitled to a refund of the tax paid on the recording of the six mortgages in which it was not a party. The mortgagors by the terms of the subscription and purchase agreements were the real payors of the tax and no assignment of their rights to the tax appears in the record. Even if there were such an assignment the mortgages were not supplemental mortgages, since the mortgages were not substituted as new obligors for the old obligors of the mortgages executed to finance the construction of the condominium to come within the holding in Suffolk County Federal Sav. and Loan Ass'n v. Bragalini, 1958, 5 A. D. 2d 641, 174 N. Y. S. 2d 395, appeal denied, 6 A. D. 2d 951, 176 N. Y. S. 2d 946, reversed 5 N. Y. 2d 579, 186 N. Y. S. 2d 602, 159 N. E. 2d 164. Furthermore, no statement of facts under oath was filed claiming an exemption of such mortgages as supplemental mortgages pursuant to the provisions of section 255 of the Tax Law.

Section 339-ee of the Real Property Law which provides for a credit against the mortgage tax that would otherwise be payable on the purchase money mortgage does not apply to the mortgages involved in the petitioner's application. All of the mortgages involved herein were recorded prior to July 1, 1966, the effective date of the statute, and prior to November 3, 1966, the effective date of section 402.1 of the Tax Department's regulations, which provides for credit against mortgage tax on the first sale condominium units.

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For the reasons stated above, I approve of the proposed determination granting a refund of \$291.00 and otherwise denying the taxpayer's application for refund.

Kindly return the file after disposition.

/s/

E. H. BEST

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Counsel

FVD:lb  
Enc.

Juen 13, 1968

6-14-68

STATE OF NEW YORK

STATE TAX COMMISSION

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IN THE MATTER

OF

MORTGAGES EXECUTED BY HILLCREST PARK, INC. TO  
WESTCHESTER FEDERAL SAVINGS AND LOAN ASSOCIATION, :  
ROBERT AND MARY WISKER TO WESTCHESTER FEDERAL :  
SAVINGS AND LOAN ASSOCIATION, RUDOLPH AND GERTRUDE :  
BRAUTIGAN TO WESTCHESTER FEDERAL SAVINGS AND LOAN :  
ASSOCIATION, AARON AND GLORIA BLOCK TO WESTCHESTER :  
FEDERAL SAVINGS AND LOAN ASSOCIATION, HERBERT AND :  
LILLIAN WRABEL TO WESTCHESTER FEDERAL SAVINGS AND :  
LOAN ASSOCIATION, KURT AND MARGARETE GLASMANN TO :  
WESTCHESTER FEDERAL SAVINGS AND LOAN ASSOCIATION, :  
FRITZ AND INGE ALTROFER TO WESTCHESTER FEDERAL :  
SAVINGS AND LOAN ASSOCIATION :  
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The petitioner, Hillcrest Park, Inc., having filed a petition for review of determinations of the recording officer of Westchester County imposing mortgage recording taxes totaling \$3,888.00 upon mortgages hereinafter set forth in the findings of fact executed by Hillcrest Park, Inc. to Westchester Federal Savings and Loan Association, Robert and Mary Wisker to Westchester Federal Savings and Loan Association, Rudolph and Gertrude Brautigan to Westchester Federal Savings and Loan Association, Aaron and Gloria Block to Westchester Federal Savings and Loan Association, Herbert and Lillian Wrabel to Westchester Federal Savings and Loan Association, Kurt and Margarete Glasmann to Westchester Federal Savings and Loan Association, Fritz and Inge Altrofer, to Westchester Federal Savings and Loan Association, and application having been made for refund of the \$3,888.00, the amount of the mortgage recording tax paid to the recording officer of Westchester County on the recording of the mortgages, and hearings having been held before Samuel Lorvan, Hearing Officer of the Department of Taxation and Finance at the office of the State Tax Commission, State Campus, Albany, New York, on June 1, 1967 and before Francis V. Dow, Hearing Officer of the Department

of Taxation and Finance at the Westchester County Office Building, 148 Martine Avenue, White Plains, New York on January 16, 1968, at which hearing the petitioner was represented by Levin, Kreis, Ruskin & Gyory (Richard Gyory, Esq., of Counsel) and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That Hillcrest Park, Inc. is a domestic corporation; that it constructed a condominium; that the condominium consisted of two groups of buildings hereinafter referred to as "Group I" and "Group II"; that Group I consisted of three buildings known as "A", "B" and "C"; that Group II consisted of five buildings known as buildings "I", "J", "K", "P" and "O".

(2) That the construction of the condominium was financed through the Westchester Federal Savings and Loan Association; that in connection with the construction of Group I, Hillcrest Park, Inc. executed and delivered three mortgages to the Westchester Federal Savings and Loan Association (hereinafter referred to as mortgages "1", "2" and "3") as follows: Mortgage 1 is dated March 13, 1964, secured an indebtedness of \$60,000.00 and was recorded in the office of the Westchester County Clerk on March 17, 1964 in liber 6660 of mortgages at page 475 on which a mortgage recording tax of \$300.00 was paid; Mortgage 2 is dated October 2, 1964, secured \$22,630.00 and was recorded in the office of the Westchester County Clerk on October 7, 1964 in liber 6744 of mortgages at page 99 on which a mortgage recording tax of \$113.00 was paid and which mortgage consolidated the lien of Mortgage 1; Mortgage 3 is dated October 2, 1964, secured \$307,910.00 and was recorded simultaneously with Mortgage 2 in the office of the Westchester County Clerk on October 7, 1964 in liber 6744 of mortgages at page 99 on which a mortgage recording tax of \$1,539.50 was paid and which mortgage



(3)

consolidated the lien of Mortgages 1 and 2.

(3) That Mortgage 3 contained the following provisions:

"It is understood and agreed by and between the parties hereto that the buildings constructed or to be constructed under this agreement are to be built in accordance with the Condominium concept of ownership and in order to more fully carry out the intentions of the parties hereto, the borrower will within thirty (30) days from the date hereof, cause to be filed in the proper office a Declaration of Intent submitting the premises herein described to Condominium form of ownership pursuant to Article 9B of the Real Property Law.

"Upon the completion of the buildings erected or about to be erected upon the premises covered and affected by this mortgage intended to be submitted under the provisions of the Condominium Act, this mortgage shall be divided into twenty-four (24) separate mortgages, each to cover a unit of the premises herein described, in such sums as may be agreed upon between the mortgagor and the mortgagee, but such mortgages shall not exceed in the aggregate the sum hereby secured, and without creating any new indebtedness thereby.

"This mortgage and the twenty-three other mortgages executed by the mortgagor covering the individual units within the condominium regime are and will be given to replace and in substitution of this mortgage but shall not exceed in the aggregate the sum hereby secured, made by the mortgagor to the mortgagee, said blanket mortgage being the same indebtedness secured hereby and by said mortgages of even date herewith."

(4) That two buildings and loan agreements executed by Hillcrest Park, Inc. with Westchester Federal Savings and Loan Association were filed in the office of the Westchester County Clerk; that one agreement was dated March 13, 1964 and refers to the advancement of a loan of \$60,000.00; that the second agreement is dated October 2, 1964 and refers to the advancement of a loan of \$390,540.00 and contains the same provisions as those set forth in finding of fact No. 3.

(5) That to finance the construction of condominium units in Group II, Hillcrest Park, Inc. executed and delivered a mortgage to the Westchester Federal Savings and Loan Association

(4)

dated December 31, 1964, secured an indebtedness of \$496,615.00 and was recorded in the office of the Westchester County Clerk on January 5, 1965 in liber 6779 at page 43 on which a mortgage recording tax of \$2,483.00 was paid; that the mortgage contained the following provisions:

"This mortgage is a building loan mortgage made between the parties hereto to secure advances as will more fully appear by a Building Loan Agreement, bearing even date herewith, the provisions and covenants of which are made a part hereof, the said Agreement being filed in the office of the Clerk of the County of Westchester simultaneously with the recording of this mortgage.

"It is understood and agreed by and between the parties hereto that the buildings constructed or to be constructed as referred to in the Building Loan Agreement made between the parties hereto and intended to be filed simultaneously with this Agreement are to be built in accordance with the Condominium concept of ownership pursuant to Article 9B of the Real Property Law (Condominium Group #2)."

(6) That a building and loan agreement executed by Hillcrest Park, Inc. with the Westchester Federal Savings and Loan Association was filed in the office of the Westchester County Clerk on January 5, 1965; that the agreement was dated December 31, 1964 and refers to the advancement of a loan in the sum of \$496,615.00; that the building and loan agreement contained the following provisions:

"It is understood and agreed by and between the parties hereto that the buildings constructed or to be constructed under this Agreement are to be built in accordance with the Condominium concept of ownership and in order to more fully carry out the intentions of the parties hereto, the borrower will within thirty (30) days from the date hereof, cause to be filed in the proper office a Declaration of Intent submitting the premises herein described to Condominium form of ownership pursuant to Article 9B of the Real Property Law (Condominium Group #2).

(5)

"Upon the completion of the buildings erected or about to be erected upon the premises covered and affected by this mortgage intended to be submitted under the provisions of the Condominium Act, this mortgage shall be divided into thirty-one separate mortgages, each to cover a unit of the premises herein described, in such sums as may be agreed upon between the mortgagor and the mortgagee, but such mortgages shall not exceed in the aggregate the sum hereby secured, and without creating any new indebtedness thereby.

"This mortgage and the thirty other mortgages executed by the mortgagor covering the individual units within the condominium regime are and will be given to replace and in substitution of this mortgage but shall not exceed in the aggregate the sum hereby secured, made by the mortgagor to the mortgagee, said blanket mortgage being the same indebtedness secured hereby and by said mortgages of even date herewith."

(7) That pursuant to the provisions set forth in the consolidating mortgage with respect to the Group I buildings (Finding of fact #3) and to similar provisions set forth in the mortgage and building and loan agreement made a part thereof with respect to the Group II buildings (findings of fact #5 and 6) the following forty-one (41) mortgages were executed by Hillcrest Park, Inc. to Westchester Federal Savings and Loan Association on condominium units in both Groups I and II on which mortgage recording taxes were paid on recording at the office of Westchester County Clerk claiming as follows:

Group I

Building A

<u>Unit Number</u>	<u>Date of Execution</u>	<u>Date of Recording</u>	<u>Book &amp; Page of Record</u>	<u>Amount of Mortgage</u>	<u>Amount of Tax Collected</u>
Unit # 3	8-31-65	9-2-65	6875-5	\$15,290	\$ 76.50
4	6-15-65	6-17-65	6837-184	17,800	89.00
5	7-22-65	7-26-65	6855-370	16,190	81.00

Building B

Unit # 2	2-2-65	2-8-65	6791-309	15,000	75.00
3	2-24-65	2-25-65	6796-231	15,500	77.50
4	2-24-65	2-25-65	6796-235	12,700	63.50
5	2-2-65	2-8-65	6791-313	16,300	81.50
6	2-15-65	2-17-65	6794-140	15,700	78.50
7	2-2-65	2-8-65	6791-317	16,400	82.00

Building C

<u>Unit Number</u>	<u>Date of Execution</u>	<u>Date of Recording</u>	<u>Book &amp; Page of Record</u>	<u>Amount of Mortgage</u>	<u>Amount of Tax Collected</u>
Unit # 1	2-5-65	2-8-65	6791-321	\$16,100	\$ 80.50
4	2-5-65	2-8-65	6791-325	15,000	75.00
5	2-15-65	2-17-65	6794-136	14,000	70.00
6	6-15-65	6-17-65	6837-188	15,290	76.50
7	2-5-65	2-8-65	6791-329	12,000	60.00
				<b>TOTAL</b>	<b>\$1,066.50</b>

Group IIBuilding I

Unit # 1	8-10-65	8-11-65	6864-200	16,500	82.50
2	7-22-65	7-29-65	6857-357	14,200	71.00
3	7-16-65	7-26-65	6855-374	14,300	71.50
4	8-10-65	8-11-65	6864-205	15,290	76.50
6	7-22-65	7-26-65	6855-379	6,990	35.00
8	7-22-65	7-26-65	6855-383	15,200	76.00
9	8-10-65	8-11-65	6864-209	17,000	85.00

Building J

Unit # 2	8-3-65	8-5-65	6861-273	14,990	75.00
3	7-16-65	7-26-65	6855-387	15,000	75.00
4	8-3-65	8-5-65	6861-278	15,600	78.00
5	8-6-65	8-9-65	6863-6	17,000	85.00

Building K

Unit # 1	8-5-65	8-9-65	6862-496	17,000	85.00
2	7-27-65	7-29-65	6857-361	16,100	80.50
3	8-23-65	8-24-65	6870-1	16,675	83.50
4	7-22-65	7-26-65	6855-391	17,600	88.00

Building O

Unit # 1	7-16-65	7-26-65	6855-395	16,000	80.00
2	7-27-65	7-29-65	6857-365	11,000	55.00
3	7-27-65	7-29-65	6857-369	15,200	76.00
4	7-27-65	7-29-65	6857-373	15,200	76.00
6	7-27-65	7-29-65	6857-377	14,500	72.50

Building P

Unit # 1	7-29-65	8-3-65	6859-463	16,000	80.00
2	7-22-65	7-26-65	6855-399	14,000	70.00
3	7-29-65	8-3-65	6859-467	15,000	75.00
4	8-6-65	8-9-65	6863-1	15,290	76.50
5	8-3-65	8-5-65	6861-288	15,500	77.50
6	8-3-65	8-5-65	6861-283	14,200	71.00
7	8-5-65	8-6-65	6862-192	16,425	82.00
				<b>TOTAL</b>	<b>\$2,039.00</b>

(7)

(8) That all of the aforesaid mortgages listed in finding of fact #7 were supplemental mortgages which were recorded pursuant to a provision or covenant existing in the original mortgages; that all such supplemental mortgages were recorded between February 8, 1965 and September 2, 1965; that no statement under oath of the facts on which a claim for exemption of mortgage recording taxes was based was ever filed with the recording officer upon the recording of such supplemental mortgages as required by section 255 of the Tax Law, nor was any statement of facts under oath ever tendered to the recording officer upon the recording of such mortgages.

(9) That pursuant to the provisions set forth in the consolidating mortgage with respect to the Group I buildings (finding of fact #3) and to similar provisions set forth in the mortgage and building and loan agreement made a part thereof with respect to the Group II buildings (finding of facts #5 and 6) four (4) other supplemental mortgages were executed by Hillcrest Park, Inc. to Westchester Federal Savings and Loan Association on condominium units in both Groups I and II on which mortgage recording taxes were paid on recording at the office of Westchester County claiming as follows:

Group I

Building A

<u>Unit Number</u>	<u>Date of Execution</u>	<u>Date of Recording</u>	<u>Book &amp; Page of Record</u>	<u>Amount of Mortgage</u>	<u>Amount of Tax Collected</u>
Unit # 1	9-24-65	10-18-65	6894-308	\$16,715	\$ 83.50
2	6-22-66	7-1-66	6994-301	14,000	70.00

Group II

Building I

Unit # 5	11-3-65	11-5-65	6904-42	14,000	70.00
7	10-26-65	10-27-65	6899-431	13,500	<u>67.50</u>
				TOTAL	\$ 291.00

(10) That on September 29, 1965, the mortgage of Hillcrest Park, Inc. to Westchester Federal Savings and Loan Association covering Unit #1 in Building A in Group I together with a statement of facts under oath on which an exemption from mortgage recording tax was claimed under existing law pursuant to section 255 of the Tax Law was submitted to the County Clerk of Westchester County; that the statement of facts showed that the mortgage was exempt from tax; that the recording officer refused to record the mortgage and returned it to the petitioner together with the affidavit and a note to the effect that the mortgage and affidavit should be submitted to the New York State Department of Taxation and Finance in Albany, New York; that on October 18, 1965, the mortgage covering Unit #1 in Building A was again presented to the County Clerk of Westchester County without the affidavit; that Hillcrest Park, Inc. paid a mortgage recording tax of \$83.50, the amount demanded, and the mortgage was thereupon recorded.

(11) That subsequent to October 18, 1965, three other mortgages were submitted to the County Clerk of Westchester County for recording; that the mortgages covered Units #7 and 5 in Building I and Unit #2 in Building A, which mortgages are set forth in finding of facts #9; that no affidavits claiming an exemption of mortgage recording tax were submitted on the recording of any mortgage other than the mortgage of Hillcrest Park, Inc. to Westchester Federal Savings and Loan Association covering condominium Unit #1 in Building A; that mortgage recording tax in the sum of \$207.50 was collected on the recording of the three mortgages.

(12) That subscription and purchase agreements were entered into between Hillcrest Park, Inc. and purchasers of condominium units in Group I as follows:

<u>Date</u>	<u>Units</u>	<u>Purchaser</u>	<u>Price</u>
12/16/64	Bldg. C, # 8	Robert and Mary Wisker	\$17,990.00

<u>Date</u>	<u>Units</u>	<u>Purchaser</u>	<u>Price</u>
12/16/64	Bldg. B, # 9	Rudolph and Gertrude Brautigan	\$18,245.00
12/21/64	Bldg. B, # 8	Aaron and Gloria Block	17,990.00
12/22/64	Bldg. C, # 9	Herbert and Lillian Wrabel	18,990.00
12/24/64	Bldg. B, # 1	Kurt and Margarete Glasmann	19,890.00
1/18/65	Bldg. B, #10	Fritz and Inge Altrofer	18,990.00

That the subscription and purchase agreements provide that, "The Seller" (Hillcrest Park, Inc.) shall pay the following costs or fees: Title examination and title policy to insure the mortgagee; attorney's fees for drawing the mortgage instruments; mortgage and/or Federal taxes; recording fee of the mortgage instruments; survey; inspection and approval fees. The purchaser does hereby agree to pay to the Seller at the time of closing of title, the sum of \$250.00, plus 1% of the amount of the mortgage to cover all of the foregoing expenses, charges and fees advanced by the Seller in connection with the mortgage loan. The purchaser may apply for a mortgage with any other lending institution at his own cost and expense or may purchase the unit on an all cash basis. In either of these events, the purchase will pay to the Seller the sum of \$75.00 for the cost of the survey. In addition to the foregoing, the purchaser further agrees to apportion with the Seller and pay such taxes, water rates and insurance premiums on existing policies as may be determined to be due at the time of the closing of title. The purchaser shall also make the usual and/or required adjustments with and prepayments to the lending institution.

(13) That subsequently mortgages were executed and delivered to Westchester Federal Savings and Loan Association which were recorded in the office of the County Clerk of Westchester County and on which mortgage recording tax was paid as follows:

Mortgagor:	Robert & Mary Wisker
Amount of Mortgage:	\$16,175.00
Premises:	Building C, Unit 8
Date of Execution:	1/27/65
Date of Recording:	1/28/65
Amount of Tax Collected:	\$81.00

<u>Date</u>	<u>Units</u>	<u>Purchaser</u>	<u>Price</u>
12/16/64	Bldg. B, # 9	Rudolph and Gertrude Brautigan	\$18,245.00
12/21/64	Bldg. B, # 8	Aaron and Gloria Block	17,990.00
12/22/64	Bldg. C, # 9	Herbert and Lillian Wrabel	18,990.00
12/24/64	Bldg. B, # 1	Kurt and Margarete Glasmann	19,890.00
1/18/65	Bldg. B, #10	Fritz and Inge Altrofer	18,990.00

That the subscription and purchase agreements provide that:

"The Seller (Hillcrest Park, Inc.) shall pay the following costs or fees: Title examination and title policy to insure the mortgagee; attorney's fees for drawing the mortgage instruments; mortgage and/or federal taxes; recording fee of the mortgage instruments; survey; inspection and approval fees. The purchaser does hereby agree to pay to the Seller at the time of closing of title, the sum of \$250.00, plus 1% of the amount of the mortgage to cover all of the foregoing expenses, charges and fees advanced by the Seller in connection with the mortgage loan. The purchaser may apply for a mortgage with any other lending institution at his own cost and expense or may purchase the unit on an all cash basis. In either of these events, the purchaser will pay to the Seller the sum of \$75.00 for the cost of the survey. In addition to the foregoing, the purchaser further agrees to apportion with the Seller and pay such taxes, water rates and insurance premiums on existing policies as may be determined to be due at the time of the closing of title. The purchaser shall also make the usual and/or required adjustments with and prepayments to the lending institution."

(13) That subsequently purchase money mortgages were executed by each of the aforesaid purchasers to Westchester Federal Savings and Loan Association which were recorded in the office of the County Clerk of Westchester County and on which mortgage recording tax was paid as follows:

Mortgagor:	Robert and Mary Wisker
Amount of Mortgage:	\$16,175.00
Premises:	Building C, Unit 8
Date of Execution:	1/27/65
Date of Recording:	1/28/65
Amount of Tax Collected:	\$81.00



(10)

Mortgagor:	Rudolph & Gertrude Brautigan
Amount of Mortgage:	\$16,400.00
Premises:	Building B, Unit 9
Date of Execution:	1/27/65
Date of Recording:	1/28/65
Amount of Tax Collected:	\$82.00

Mortgagor:	Aaron & Gloria Block
Amount of Mortgage:	\$13,700.00
Premises:	Building B, Unit 8
Date of Execution:	1/28/65
Date of Recording:	2/11/65
Amount of Tax Collected:	\$68.50

Mortgagor:	Herbert & Lillian Wrabel
Amount of Mortgage:	\$17,090.00
Premises:	Building C, Unit 9
Date of Execution:	1/27/65
Date of Recording:	1/28/65
Amount of Tax Collected:	\$85.50

Mortgagor:	Kurt & Margarete Glasmann
Amount of Mortgage:	\$17,900.00
Premises:	Building B, Unit 1
Date of Execution:	1/28/65
Date of Recording:	2/2/65
Amount of Tax Collected:	\$89.50

Mortgagor:	Fritz & Inge Altrofer
Amount of Mortgage:	\$17,000.00
Premises:	Building B, Unit 10
Date of Execution:	1/28/65
Date of Recording:	2/2/65
Amount of Tax Collected:	\$85.00

**TOTAL TAX COLLECTED: \$491.50**

(14) That all of the aforesaid six purchase-money mortgages were recorded between January 28, 1965 and February 2, 1965; that at the time of recording no statement under oath of any facts claiming such mortgages to be supplemental mortgages pursuant to section 255 of the Tax Law was ever filed with the recording officer.

(15) That each of the mortgages on individual condominium units as set forth in findings of fact Nos. 7, 9 and 13 contained a provision that each mortgage was executed pursuant to section 9B of the Real Property Law as amended, known as "The Condominium Act" and the mortgage tax was paid on the construction loan and the aggregate amount to be advanced on the units included in the

condominium group does not exceed the amount set forth and referred to in the building loan, and the mortgage tax, if requested on the mortgage, is paid under protest.

(16) That section 339-ee of the Real Property Law was amended by Chapter 388 of the Laws of 1962 by adding to such section a subdivision 2 thereof effective July 1, 1966 which provided for the allowance of a credit against the mortgage recording tax on purchase money mortgages on the first conveyance of each condominium unit; that all the aforesaid supplemental mortgages and purchase money mortgages (except one aforesaid supplemental mortgage recorded on July 1, 1966, see finding of fact No. 9), were recorded prior to the effective date of such legislation.

Based upon the foregoing facts and all the evidence presented herein, the State Tax Commission hereby

**DETERMINES:**

(A) That the forty-one supplemental mortgages set forth in finding of fact No. 7 were recorded without the filing simultaneously with such recording a statement of facts under oath as required by section 255 of the Tax Law; that accordingly no refund of mortgage recording taxes paid on the recording of the forty-one supplemental mortgages can be made, and the application for refund of such taxes is hereby denied.

(B) That the six mortgages made by parties other than Hillcrest Park, Inc. (finding of fact No. 13) were purchase money mortgages and not supplemental mortgages within the intent and meaning of section 255 of the Tax Law; that in any event no statement under oath was filed at the time of recording of such mortgages claiming such mortgages to be exempt under section 255 of the Tax Law; that further Hillcrest Park, Inc. has failed to

establish that it is the one entitled to a refund of mortgage recording taxes or that there has been any assignment of rights of refund to it; accordingly the application for refund of mortgage recording taxes with respect to such units is hereby denied.

(C) That all of the aforesaid mortgages considered in determinations (A) and (B) above were recorded prior to the effective date of subdivision 2 of section 339-ee of the Real Property Law allowing a credit on condominium unit mortgages and accordingly cannot come under the provisions of said law.

(D) That the recording officer erroneously refused to accept the affidavit which was filed simultaneously with the supplemental mortgage which was offered for recording on September 29, 1965 covering Unit 1, Building 8 in Group I (finding of fact No. 9); that in view of such refusal to accept a valid statement of oath which was tendered together with the mortgage, the filing of such statements with the recording officer with respect to the remaining three units covered in finding of fact No. 9, where the statement of facts under oath would have been substantially similar to the statement of facts which was rejected, constitutes a justifiable reason for failing to file the statement of facts under oath required to be filed under section 255 of the Tax Law; that accordingly the amount of \$291.00 the mortgage paid on the recording of such four mortgages should be refunded and is hereby

O R D E R E D

(1) That the recording officer of the County of Westchester be and hereby is authorized and directed to deduct the sum of two hundred ninety one dollars (\$291.00) from mortgage recording tax monies in his hands or which shall come to his hands and to refund said amount to Hillcrest Park, Inc.

(13)

(2) That two certified copies of this order be mailed to the recording officer of Westchester County, one of which he is directed to file with the records of his office and the other with the treasurer of Westchester County as a warrant for the disbursement.

Dated: June 19 , 1968 .

**STATE TAX COMMISSION**

/s/ by JOSEPH H. MURPHY  
**PRESIDENT**

/s/ A. BRUCE MANLEY  
**COMMISSIONER**

/s/ SAMUEL E. LEPLER  
**COMMISSIONER**

## BUREAU OF LAW

## MEMORANDUM

TO: The State Tax Commission

FROM: E. H. Best, Counsel

SUBJECT: Application of Manhattan College for  
Refund of Mortgage Recording Taxes

The file of the above entitled matter containing the report and recommendation of the hearing officer and proposed order was submitted to the Law Bureau for review.

Manhattan College purchased certain real property in the City of New York from the Federal Housing Administration for \$871,000 of which \$71,000 was paid in cash and \$800,000 by purchase money mortgage to the Secretary of Housing and Urban Development. On recording of the mortgage the Register of the City of New York demanded mortgage recording tax of \$4,000 which was paid by the purchaser. The United States had acquired title to the real property from the New York Teachers Retirement Board who had held a mortgage on the real property, insured by the Federal Housing Administration. The mortgagor had defaulted, and on foreclosure the Teachers Retirement Board acquired title. Under the Federal Housing Administration insurance, the loss was paid to the Teachers Retirement Board and the real property conveyed to the United States.

Manhattan College contends that the State may not impose a recording tax on a mortgage to an agency of the United States unless Congress has waived immunity and that immunity has not been waived.

The Register of the City of New York contends that the sale to Manhattan College was a proprietary act not in pursuit of a governmental function, not immune from taxation by the State of New York; and that immunity has, nevertheless, been waived by enactment of 12 U.S.C.A. 1714.

The Federal Housing Administration, now a unit of the Department of Housing and Urban Renewal, was created by enactment of 12 U.S.C.A. 1702, under the National Housing Act. It is empowered by subchapter II (12 U.S.C.A. 1709) to insure mortgages; and under 12 U.S.C.A. 1710, to acquire title to the mortgaged property on default by the mortgagor, and to sell for cash or credit the real properties so acquired.

12 U.S.C.A. 1714 of subchapter II, titled, "Taxation" reads as follows:

"Nothing in this subchapter shall be construed to exempt any real property acquired and held by the commissioner under this subchapter from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed."

The issues raised by the application are (1) whether the activities of the Federal Housing Administration of insuring mortgages and disposing of real property acquired in the course of its mortgage insurance program constitute non-governmental functions subject to State and local taxation, and (2) whether Congress has waived immunity from State and local mortgage recording taxes by enactment of 12 U.S.C.A. 1714.

The constitutional exercise of Federal powers are governmental and not proprietary, Federal Land Bank v. Bismarck Lumber Company, 314 U.S. 95. Consequently, the states are powerless to tax the operation of laws enacted by Congress to execute the powers of the United States, McGulloch v. Maryland, 17 U.S. 316. The Federal Housing Administration, a Federal Agency, created under the National Housing Act, for the purpose set forth in the act, is therefore engaged in governmental functions when it sells real property and takes back a mortgage pursuant to the authority contained in 12 U.S.C.A. 1710. Similar cases have arisen with respect to Home Owners Loan Corporation, Federal Land Banks, Small Business Administration, Public Housing Administration, Reconstruction Finance Corporation and under the Bankhead-Jones Farm Tenant Act (7 U.S.C.A. 1001 et seq.), and mortgages to such agencies of the United States are exempt from recording taxes, Pittman v. NOLC, 308 U.S. 21, Federal Land Bank of New Orleans v. Crotland, 261 U.S. 374, Laurens F. S. & L. v. South Carolina Tax Com., 365 U.S. 517, Opinion of Deputy Commissioner and Counsel Kassell dated October 11, 1954 in relation to Public Housing Administration mortgages, Determinations of the State Tax Commission dated December 2, 1966 in relation to Small Business Administration mortgages (Matters of Brady, et al.) and Opinion of Edward H. Best, Counsel relating thereto, 1956 Informal Opinions of the Attorney General 26, 1938 Opinions of Attorney General 200, 1934 Opinions of the Attorney General 189.

Section 252 of Article II of the Tax Law was amended by Chapter 785 of the Laws of 1933 to exempt from mortgage recording taxes mortgages transferred, assigned or made to Home Owners Loan

Corporation or to a Federal Land Bank or Federal Home Loan Bank, thereby creating an inference that other Federal agencies might not be entitled to such exemption. However, the amendment was enacted over the objections contained in the opinions of Deputy Commissioner and Counsel Seth T. Cole, Deputy Commissioner and Director of Mortgage Tax Edward C. Sturges and Commissioner Mark Graves that the change was unnecessary, such mortgages made to Federal agencies being exempt under existing law, citing McGulloch v. Maryland and Federal Land Bank v. Grosland.

Accordingly, I am of the opinion that this sale of real property by the Federal Housing Administration to Manhattan College was in pursuit of a governmental function, and that the mortgage made to the Secretary of Housing and Urban Development as an incident of such sale is exempt from mortgage recording taxes, unless the United States has waived its immunity from such taxation.

The only manner in which a state may tax a Federal instrumentality is by the consent of Congress, United States v. County of Allegheny, 322 U.S. 174; "(T)he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.", McGulloch v. Maryland, 17 U.S. 316. A waiver of immunity granted by Congress with respect to Federal instrumentalities is a gratuity to the state, Maricopa County v. Valley National Bank, 318 U.S. 357. It would thus appear that a waiver of immunity from state and local taxation must be a definite act of consent, and may not be inferred.

The statute here involved, 12 U.S.C.A. 1714, waives immunity from taxation by a state or locality of "real property" acquired and held by the Federal Housing Administration and then only "to the same extent, according to its value, as other real property is taxed." Similar language is contained in 12 U.S.C.A. 1463 and in Pittman v. HOLC, 308 U.S. 21, was held not to constitute a waiver of immunity with respect to a mortgage recording tax. A similar statute, 7 U.S.C.A. 1024, as it then existed, under the Bankhead-Jones Farm Tenant Act, was interpreted likewise, 1946 Informal Opinions of the Attorney General 26, 1938 Opinions of the Attorney General 200.

Dime Savings Bank v. Beecher, 23 AD 2d 297, app. dis. 17 N.Y. 2d 725, cited in the memorandum of the City Register for the proposition that "Our courts consider mortgages to be interests in real property." must be distinguished on its facts, as inapplicable to the issue of claimed waiver of immunity for mortgage recording taxes. In the Dime case the issue involved a claim of

priority by the United States, based on a judgment resulting from foreclosure of a mortgage insured by the Federal Housing Administration. The lien of local real estate taxes was given priority, on the authority of Vandemark v. Schoonmaker, 9 Hun. 16 and Rohrbach v. Germania, 62 N.Y. 47. In Vandemark the issue involved an application made by a judgment creditor, to enjoin waste, addressed to the equitable discretion of the court. The Rohrbach case was concerned with what constituted an insurable interest under a fire insurance policy. Neither of these two cases, nor the Dime case can be held to be authority for extending the waiver of immunity from real estate taxes as granted by Congress in 12 U.S.C.A. 1714 so as to include mortgage recording taxes.

For the reasons stated hereinabove I am of the opinion that the mortgage recording tax of \$4,000 paid on the recording of the mortgage made by Manhattan College to the Secretary of Housing and Urban Development was erroneously collected; that the application of Manhattan College for refund of such tax paid should be granted, and I concur in the recommendation of the Hearing Officer that the proposed order should be adopted.

/s/

E. H. BEST

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Counsel

AR:jmm  
March 1, 1968

3-5-68



STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE  
BEFORE THE STATE TAX COMMISSION

Case No. \_\_\_\_\_:

In the Matter of the Mortgage executed by \_\_\_\_\_:

MANHATTAN COLLEGE \_\_\_\_\_:

to \_\_\_\_\_:

ROBERT C. WEAVER, AS SECRETARY OF  
HOUSING AND URBAN DEVELOPMENT \_\_\_\_\_:

ORDER

A petition having been filed by Manhattan College for review of the determination of the recording officer of Bronx County imposing mortgage recording tax in the amount of Four Thousand Dollars, (\$4,000), on the mortgage dated January 4, 1967, executed by Manhattan College to Robert C. Weaver, as Secretary of Housing and Urban Development, recorded in the office of said recording officer on January 6, 1967, in Book 168 of Records, page 250, and

APPLICATION having also been made for refund of Four Thousand Dollars, (\$4,000), mortgage recording tax paid said recording officer at recording of said instrument;

AND HEARING having been held before Samuel Lorvan, Hearing Officer, designated as such by this Commission, on June 6, 1967, at the office of the State Tax Commission at the State Office Building, 80 Centre Street, New York, N. Y., and adjourned hearing having been set down for December 7, 1967, and the applicant having appeared by its attorneys, Broderick, Galway & Vaccaro, Esqs., Andrew V. Galway, Esq., of counsel; FHA appeared by Samuel Lent, Esq., Regional Attorney and the City of New York appeared by

J. Lee Ranken, Esq., its Corporation Counsel, Samuel K. Handel, Esq., Special Assistant Corporation Counsel, of counsel; and a report having been made by said Hearing Officer

NOW THEREFORE after examination of the record, the proofs and various documents submitted in the proceeding and the report of the hearing officer, and after due deliberation, it is

DETERMINED BY THE COMMISSION

1. That said mortgage was not subject to the mortgage recording tax imposed by Article Eleven of the Tax Law.
2. That the recording officer of Bronx County erroneously collected the sum of Four Thousand Dollars, (\$4,000), as mortgage recording tax thereon.
3. That the determination of the recording officer be and the same hereby is cancelled and annulled.

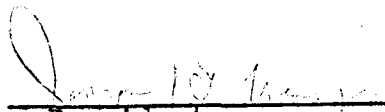
O R D E R E D

(1) That G. Michael Morris, recording officer of Bronx County be, and he hereby is authorized and directed to deduct the sum of Four Thousand Dollars, (\$4,000), from mortgage tax moneys in his hands or which shall come to his hands and to refund said amount to Manhattan College.

(2) That two certified copies of this order be mailed to the recording officer of Bronx County, one of which he is directed to file with the records of his office and the other with the treasurer of the City of New York as a warrant for the disbursement.

ADOPTED MARCH 18, 1968

STATE TAX COMMISSION

  
President

  
Commissioner

  
Commissioner

STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE  
BEFORE THE STATE TAX COMMISSION

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In the Matter of the Mortgage executed by	:	
MANHATTAN COLLEGE	:	<u>REPORT AND</u>
to	:	<u>RECOMMENDATIONS</u>
ROBERT C. WEAVER, AS SECRETARY OF	:	
HOUSING AND URBAN DEVELOPMENT	:	

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This is an application by Manhattan College for refund of mortgage recording tax of Four Thousand Dollars, (\$4,000), paid to the recording officer of Bronx County on January 6, 1967, upon the recording of the mortgage dated January 4, 1967, executed by the college to Robert C. Weaver, as Secretary of Housing and Urban Development, (hereinafter called "FHA"), (No. 3).

Pursuant to notice served on the college, FHA, and the City of New York, hearing was held before the undersigned as Hearing Officer on June 6, 1967, (Nos. 13-18, 21), and notice was sent to said parties of adjourned hearing on December 7, 1967, (Nos. 33, 34). On the basis of the proofs submitted at the hearing, upon examination of the exhibits and related documentary evidence, I find:

1. On January 4, 1967, the college executed to FHA a mortgage in the principal sum of \$800,000 secured by certain real property in the County of Bronx, City of New York. Said mortgage was recorded in the office of the Register of the City of New York, County of Bronx, on January 6, 1967, in Book 168 of Records, page 250. Mortgage recording tax of \$4,000 was paid at recording and entered under mortgage Serial Number BJ-4373, (Nos. 2, 6).

Said real property had previously been owned by FHA and had been sold to the college for the sum of \$871,000, of which the college paid to FHA cash to the extent of \$71,000 and the mortgage for \$800,000 secured the balance of purchase money therefor, (No. 4).

2. The mortgage, at recording, constituted property of the United States government and of its agency, the Department of Housing and Urban Development.

3. Property of the United States government or of an agency thereof cannot be subjected to a State imposed tax, such as the Mortgage Recording Tax, unless immunity from taxation has been waived by Congress.

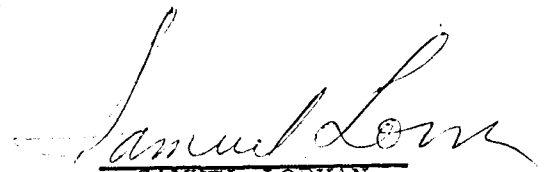
4. In the statutes relating to property of the United States government held by its agency Federal Housing Administration, it is provided:

"Nothing in this subchapter shall be construed to exempt any real property acquired and held by the Commissioner under this subchapter from taxation by any State or political subdivision thereof, to the same extent, according to its value as other real property is taxed." (USCA Tit. 12 Sec. 1714).

5. Federal waiver of immunity from taxation of its real property owned in the name of FHA does not constitute waiver of immunity of a mortgage held by such agency because a mortgage in this State does not constitute real property.

I recommend that order be adopted by the Commission determining that tax was erroneously collected by the recording officer and granting the application for refund.

Dated January 22, 1968

  
SAMUEL LORVAN  
Hearing Officer