



## Mortgages – an Overview

Fern Epstein, Principal  
[fepstein@horizonlandservices.com](mailto:fepstein@horizonlandservices.com)  
© 2008 Horizon Land Services LLC

A mortgage is a loan secured by real property with a corresponding right to foreclose on the collateral by the mortgagee (lender) and a right to redeem by the mortgagor (borrower). In today's market mortgages vary in terms of interest rates, amortization schedules, length of loan, and origination fees to procure the mortgage. Most mortgages are issued subject to the type of property being financed, the condition of the property and the intended usage.

Many mortgage products/programs are set up to accommodate the borrower to supplement his down payment on property using a formula that involves a loan to value ratio. With real property values recently topping in the market, the traditional "80/20" loan to value ratio may be beyond the ability of many prospective homebuyers. In such cases, second mortgages have become more prevalent as a way to cover the gap between the purchase money mortgage and the down payment.

Historically a purchase money mortgage was defined as a mortgage executed by the purchaser to the outgoing seller. The modern definition of a purchase money mortgage includes any mortgage executed at the time real property is being bought to secure an unpaid balance of the purchase price. The identity of the mortgagee is no longer a relevant consideration in determining whether a mortgage is, in fact, a purchase money mortgage. Whether a mortgage constitutes a purchase money mortgage is an important consideration since a purchase money mortgagee enjoys priority over prior judgments indexed against the buyer.

A Building Loan Mortgage or a Construction Loan Mortgage is used to finance the construction of improvements or building(s) on a property. Typically, the construction loan is refinanced into a permanent loan after the building is completed. One key feature of these types of mortgages is that the loan is advanced in phases as the work is completed. As one phase of the project is complete, another disbursement of loan proceeds is given to the borrower to continue work. The title premium to insure this type of mortgage is higher as we are asked to run a continuation or update of title prior to each loan disbursement. This process enables the lender to compel the borrower to clear any new title issues that potentially have priority over the mortgage.

A Gap Mortgage is common in commercial properties, and used in when an existing mortgage is being consolidated, extended, and modified by agreement to be filed, commonly called a Consolidation, Extension and Modification Agreement (CEMA). Another way to define it is an interim loan used to finance the difference between the principal loan and the maximum permanent financing that has been committed.

It should be noted that when new agreements are being recorded for existing mortgages, such as in the case of Consolidation Agreements, Spreader Agreements and Severance Agreements, a Section 255 Affidavit, pursuant to the provisions of Section 255, Article II of the Tax Law of the State of New York, is filed with the Agreement which states that the filing of the Agreement does not create or secure any new or further indebtedness or obligation other than the principal indebtedness secured by the

mortgage, and that there have been no readvances on the mortgage, and requesting that the Agreement tendered for recording be declared exempt from taxation.

In commercial properties, the lien of an existing mortgage can be split, severed and spread to create more than one lien on more than one property. The result of this split and severance creates a "Substitute Mortgage". This mortgage is then recorded in the county where the property is located. No new mortgage tax is paid as the full mortgage tax was already paid for the existing loan and there is no new indebtedness being created.

In the case of Spreader Agreements, the New York State Department of Taxation and Finance released a Mortgage Recording Tax Memo (TSB-M-04(9)R) in 2004 analyzing the recent amendment to Section 255 of the Tax Law. In effect, the circumstances where a Spreader Agreement can be utilized to avoid the payment of additional mortgage tax have been narrowed. Horizon Land Services will be happy to forward a copy of this Memorandum upon request.

Another type of mortgage, a Credit Line Mortgage is extended to a borrower to be used as and when needed up to a maximum amount. When recording this particular type of mortgage, mortgage tax is paid on the whole amount of the loan. Another term for this type of mortgage is a Home Equity Mortgage.

In the case where a lender is issuing a new mortgage that is to have priority over another mortgage already on the property, a Subordination Agreement is entered into between the existing lender and the new lender in which the existing lender agrees to subordinate its lien to the new mortgage being given.

A relatively new product in the mortgage market is the Reverse Mortgage. This is a federal regulated tax-exempt mortgage specifically designed for persons over the age of 62. What makes this mortgage unique is that typically there are no monthly payments due. The principal balance is due upon the death of the owners, sale of the residence and/or when the owners move permanently out of the home.

To record mortgages where new indebtedness is being created, appropriate mortgage tax must be paid in the county where the real property is located. Outside of New York State, another term for a mortgage is a Deed of Trust. Other states differ from New York State in that mortgage-recording tax may not be a requirement.