

PUBLICATION

Maryland Changes Requirements for Payment of Recordation Tax on Indemnity Mortgages

Authors: Walter R. Kirkman

May 22, 2023

In good news for commercial real estate lenders and their customers in Maryland, Governor Wes Moore will allow HB 371, which provides recordation tax relief in certain real estate financing transactions using indemnity mortgages, also known as indemnity deeds of trust (IDOT), to become law without his signature.

Many loans secured by real estate in Maryland are documented using an IDOT structure. Under this structure, a lender makes a loan to a borrower that is guaranteed by a guarantor/owner. The guarantor, in turn, secures its guaranteed obligations by giving a deed of trust on its real property. The guarantor's deed of trust is an "indemnity deed of trust" because it secures a contingent liability of the guarantor.

Based on the contingent nature of the obligations secured by the IDOT, for many years, Maryland did not require payment of recordation tax on an IDOT at the time of recording the instrument in the land records office. Instead, collection of recordation tax was deferred until a default on the loan by the borrower, at which time the guarantor's contingent obligation becomes a current, direct (i.e., non-contingent) liability.

That practice changed in July 2012 when legislation took effect that limited the recordation tax deferral for IDOTs to transactions, where the IDOT secured a guarantee of repayment of a loan amount of less than \$1,000,000. The 2012 legislation, combined with aggressive efforts of Maryland counties to collect recordation taxes on the original principal amount of certain IDOT amendments, led to an outcry from lenders and guarantors forced to deal with these sweeping changes to established Maryland lending practices. In response, the Maryland General Assembly revisited IDOT recordation tax questions the following year and increased the threshold for deferral of recordation taxes from \$1,000,000 to \$3,000,000 effective July 1, 2013.

In the face of increasing construction costs and real property values, the General Assembly, in its 2023 session, again increased the threshold for IDOT recordation tax deferral from \$3,000,000 to \$12,500,000, effective July 1, 2024. As was the case with the 2013 legislation, the latest increased deferral threshold applies to a single loan or a series of loans that are part of the same transaction.

The new law also requires the designated collector of recordation tax in each county to provide an annual report to the Senate Budget and Taxation Committee and the House Ways and Means Committee including (i) the number of IDOTs recorded in the county for which recordation taxes were deferred, (ii) the amount of debt secured by each IDOT for which recordation taxes were deferred, and (iii) the amount of recordation tax revenue forgone due to the IDOT recordation tax deferral.

The changes coming on July 1, 2024 should benefit lenders and their customers by increasing the number of real estate financing transactions that would be eligible for the recordation tax deferral.

Our Financial Services Transactions Group will continue to monitor any new developments regarding the use of IDOTs in real estate financing transactions.

