



## **First American Title Insurance Company of New York CURRENT DEVELOPMENTS**

**Adverse Possession** –The Court of Appeals, in its decision in *Walling v. Przybylo*, dated June 13, 2006 and reported at 7 N.Y. 3d 228, held that "an adverse possessor's actual knowledge of the true owner [of real property] is not fatal to an adverse possession claim". Chapter 269 of the Laws of 2008, amending various Sections of the Real Property Actions and Proceedings Law ("RPAPL") and adding RPAPL Section 543, was enacted in response to that holding. According to Governor Paterson's Approval Memorandum, Chapter 269 requires "an adverse possessor to have a reasonable basis for believing that the property belongs to the possessor". Under Chapter 269, a person or entity is an "adverse possessor" of real property when the person or entity occupies another's property "with or without knowledge of the other's superior ownership rights, in a manner that would give the owner a cause of action for ejectment". Further, to establish title by adverse possession, the occupancy must be "adverse, under claim of right, open and notorious, continuous, exclusive, and actual". A "claim of right" is defined as being "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be"; but "a claim of right shall not be required if the owner or owners of the real property throughout the statutory period cannot be ascertained in the records of the [recording office where the real property is situated] and located by reasonable means".

Deemed permissive and not adverse under Section 543 are de minimus non-structural encroachments, such as fences, hedges, shrubbery, plantings, sheds and non-structural walls, and acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property.

RPAPL Section 522 ("Essentials of adverse possession under claim of title not written"), re-captioned "Essentials of adverse possession not under written instrument or judgment", has been amended to provide that land is deemed to be possessed and occupied "where there have been acts sufficiently open to put a reasonably diligent owner on notice", replacing the requirement that land has "been reasonably cultivated or improved". The other "essential of adverse possession" under Section 522 was amended to read "[w]here it has been protected by a substantial enclosure, except as provided in" Section 543(1).

Chapter 269 is effective as of July 7, 2008, and it applies to claims filed on or after that date.

**Adverse Possession** – A fire escape and an exhaust duct extended from Plaintiff's property onto the Defendant's adjoining land. Plaintiff claimed that it had adversely possessed the land under those protrusions. The Supreme Court, New York County, granted the Defendant's motion for summary judgment dismissing the complaint. The encroachments did not meet the requirements for adverse possession under RPAPL Section 522 [as it read until July 7, 2008, the effective date of Chapter 269 of the Laws of 2008]. The land was not "usually cultivated or improved" by the Plaintiff or "protected by a substantial inclosure". Further, the Plaintiff did not assert a claim of right to the air space into which it encroached, and air and light from an adjacent property cannot be the basis of a claim of adverse possession. 136 West 46<sup>th</sup> LLC v. Extell West 45<sup>th</sup> LLC, decided July 22, 2008, was reported in the New York Law Journal on July 31, 2008.

**Brokers/Affidavit of Entitlement** – Under Real Property Law ("RPL") Section 294-b ("Recording brokers affidavit of entitlement to commission for completed brokerage services"), a duly licensed real estate broker asserting entitlement to a commission for producing a person or entity who purchases or leases real property may file an affidavit of entitlement to a commission with the recording officer of the county in which any of the real property in question is located. The filing of the affidavit does not invalidate the transfer or lease of real property, does not create a lien, and shall be discharged after one year. Section 294-b has been amended by Chapter 436 of the Laws of 2008, effective January 1, 2009. First, the scope of an affidavit of entitlement has been expanded to include a claim for a commission in connection with the conveyance of an interest in a cooperative unit. Second, the affidavit of entitlement, while still not a lien, will be recorded in the "lien docket". Third, when the subject property is a one-to-four family dwelling, an individual condominium unit or an individual cooperative apartment, used or intended to be used, wholly or partially, as a residence, and the broker's commission is not paid at closing, "the lesser of the net proceeds of the sale or the amount of the unpaid portion of the compensation agreed to in such written contract [the brokerage agreement] shall be deposited by the seller... with the recording officer in whose office the affidavit was recorded...until the rights of the seller and broker to such monies has been determined by order of a court of competent jurisdiction...", provided that (i) the brokerage contract includes a notice, as required by Chapter 436, (ii) the affidavit has been recorded, and (iii) the broker serves a copy of the affidavit on the seller prior to closing, as required by the statute. The failure to deposit monies with the recording officer does not "create a lien or encumbrance against any real property" and does not invalidate "any transfer of real property".

**Condominiums** – Notwithstanding that zoning approval for a condominium townhouse project was conditioned on all units being owner-occupied and not rented, the Offering Plan for the condominium stated that the units could be rented. Plaintiffs, the purchasers of individual units, commenced an action against the Sponsor and its Members to recover damages for common law fraud and breach of contract. The Defendants' motion to dismiss, on the ground that the Plaintiffs were

seeking to prosecute private causes of action under the Martin Act (General Business Law, Article 23-A, "Fraudulent practices in respect to stocks, bonds and other securities") the enforcement of which is vested exclusively in the State's Attorney General, was granted by the Supreme Court, Suffolk County. The Appellate Division, Second Department, however, reversed the holding of the lower court. According to the Appellate Division, "the plaintiffs' common-law fraud and breach of contract causes of action are not preempted because they rest upon allegations that would support a Martin Act violation". *Caboara v. Babylon Cove Development, LLC*, decided July 15, 2008, is reported at 2008 WL 2747188.

**Land Under Water** – The owner of land under a navigable body of tidal water in Brooklyn, within part of the Henry Street Basin (the "Basin"), erected a fence on the bulkhead on one side of the Basin separating the Basin from a public park owned by the City of New York. In an action by the City, the Supreme Court, Kings County, ordered that the fence be removed and the bulkhead be restored to its original condition within ninety days of service of a copy of the Order with notice of entry, unless other arrangements, approved by the State's Department of Environmental Conservation, were made to ensure that the City had access to the Basin. The Court held that the fence unreasonably interfered with the riparian rights of the City as owner of property abutting a navigable tidal waterway, and that the fence was a public nuisance as it "significantly and unreasonably restricts the common use of the waterfront and does not serve the public good". The Court also ruled that the fence was constructed without the special permit required by the Waterfront and Related Property Rules and Regulations of the City of New York. 66 RCNY Section 2-03(a) ("Improvement and Alteration of [Waterfront] Property and Marginal Streets") provides that "[n]o person shall erect...any construction or obstacle of any kind on or about any wharf property...without first obtaining a written permit from the Commissioner" of Small Business Services. The Defendant alleged that the fence was needed to prevent trespassing and vandalism on its property but the Court found these claims were not supported by the evidence. The Defendant also alleged that the fence safeguarded neighborhood children from what would otherwise be an "attractive nuisance" on its property, but the Court determined that trespassing could be prevented by alternative means. *City of New York v. Gowanus Industrial Park, Inc.*, decided June 27, 2008, is reported at 20 Misc. 3d 1110 and 2008 WL 2572853.

**Mortgage Foreclosures** – On August 5, 2008 Governor Paterson signed into law Chapter 472 of the Laws of 2008. Its "Purpose", as stated in the State Senate Introducer's Memorandum of Support for Senate Bill 8143-A, is to "address the mortgage foreclosure crisis in the State by: (1) providing additional protections and foreclosure prevention opportunities for homeowners at risk of losing their homes; (2) strengthening the Banking Law to prevent similar crises from developing in the future; (3) establishing standards for lenders and mortgage brokers to prevent borrowers from being placed into unaffordable home loans; (4) registering and regulating mortgage loan servicers to enhance loan servicing standards in the state; and (5) defining the crime of residential mortgage fraud and establishing strict

criminal penalties to deter those who may engage in such activity". Senate Bill 8143-A can be obtained at <http://assembly.state.ny.us/leg/?bn=S08143>. Among other provisions, the new law includes the following:

Chapter Section 1 amends the notice ("Help for Homeowners in Foreclosure") required by RPAPL Section 1303 ("Foreclosures; required notices") to be delivered with the summons and complaint sent to the mortgagor in connection with the foreclosure of property improved by an owner-occupied one-to-four family dwelling. This change applies to actions commenced on or after September 1, 2008.

Chapter Section 2, adding RPAPL Section 1304 ("Required prior notices") effective September 1, 2008, mandates that a statutory form of notice be given to the borrower at least 90 days before a legal action, including a mortgage foreclosure, is commenced when the loan is a "high-cost home loan" (as defined in Banking Law Section 6-L), or either a "subprime home loan" or a "non-traditional home loan", as defined in Section 1304.

Chapter Section 3 adds new Civil Practice Law and Rules Rule 3408 ("Mandatory settlement conference in residential foreclosure actions") for "high-cost home loan[s] consummated between January 1, 2003 and September 1, 2008", a "subprime loan" or a "non-traditional home loan". This appears to be effective immediately. Under Chapter Section 3-a, for a foreclosure initiated prior to September 1, 2008 in which a "final order of judgment" has not yet been issued, the defendant, if a resident of the property being foreclosed, is to be afforded the opportunity to request a settlement conference when the loan is a "subprime home loan" or a "high-cost home loan".

Chapter Section 4, amending Banking Law Section 6-L ("High-cost home loans") provides that no "high-cost home loan" consummated on or after September 1, 2008 can include negative amortization, a prepayment penalty, an "abusive yield spread premium", or a "teaser rate". Real estate taxes and insurance must be escrowed on a "high-cost home loan" made after July 1, 2010.

Chapter Section 5 adds new Banking Law Section 6-M ("Subprime home loans"), defining and setting forth requirements for the making of "subprime mortgage loans" consummated on and after September 1, 2008. According to Section 6-M(13), "[i]n any action by a lender or assignee to enforce a loan against a borrower in default more than sixty days or in foreclosure, a borrower may assert as a defense, any violation of this section".

Chapter Section 6 adds new Banking Law Section 590-b ("Responsibilities") setting forth certain requirements for lenders and mortgage brokers in their soliciting, placing, processing and arranging of home loans, and in dealing with appraisers. It applies to loans consummated on and after September 1, 2008.



Chapter Section 17 amends RPAPL Section 1302 ("Foreclosure of high-cost home loans") to extend its application to "subprime home loans". It requires that the complaint in a mortgage foreclosure affirmatively allege that (a) "at the time the proceeding is commenced" the plaintiff "is the owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the subject mortgage and note" and (b) the plaintiff has complied with Banking Law Section 595-a, and the rules and regulations promulgated thereunder, Banking Law Sections 6-L or 6-M, and RPAPL Section 1304. Section 17 applies to actions commenced on or after September 1, 2008.

Under RPAPL 1302(2), as amended, "[i]t shall be a defense to an action to foreclose a mortgage for a high-cost home loan or subprime home loan that the terms of the home loan or the actions of the lender violate any provision of section six-L or six-M of the Banking Law" or RPAPL Section 1304.

Chapter Section 19 adds Article 187 ("Residential Mortgage Fraud") to the State's Penal Law, effective November 1, 2008. Chapter Section 26 adds new RPL Section 265-b ("Distressed Property Consulting Contracts") effective November 1, 2008.

Mortgage Foreclosure/Truth-In-Lending Act ("TILA") – Borrower commenced an action for rescission under the TILA of a mortgage being foreclosed by the Defendant-assignee. She claimed that since the Defendant-Mortgagee did not deliver certain disclosures three days before closing she could rescind the loan. 15 U.S.C. Section 1635 affords the borrower of a loan secured by property used as his or her principal residence the right to rescind until midnight of the third business day following the earlier of the consummation of the transaction or the delivery of the material disclosure and rescission forms; that right may be extended to a date three years from closing, or until the property is sold, whichever first occurs, if certain material disclosures or a notice of the right to rescind are not delivered to the borrower. The mortgage closing took place on May 11, 2006, and Plaintiff forwarded a notice of rescission to the mortgagee and the assignee's counsel on February 13, 2008 and an additional notice to the assignee on February 14, 2008. Judge Scheindlin of the United States District Court for the Southern District of New York granted the Defendant-lenders' motion to dismiss for the failure to state a valid cause of action under the TILA. Only failure to provide the disclosures and the notice extends the rescission period, and Plaintiff received them at closing. *Fiorenza v. Fremont Investment & Loan*, decided June 20, 2008, is reported at 2008 WL 2517139.

NYC Recordings/Tax Lot Subdivisions – As reported in Current Developments issued October 6, 2005, the New York City Register no longer accepts for recording a deed to a part of a tax lot without the prior completion of a tax lot subdivision, subject to a limited number of exceptions. For example, there need not be a prior tax lot subdivision, and the City Register will accept a deed to a part of a tax lot, when the City of New York, or any of its agencies, is the grantor. A tax lot

subdivision has not been required when a deed to a part of a tax lot is executed by a referee in a foreclosure. In addition, no tax lot subdivision has been required when a deed conveys part of a tax lot consisting of either the volume of air space located above a horizontal plane or the land located only below a horizontal plane. The City Register recently informed First American that a tax lot subdivision will be required before a deed to the volume of air space located above a horizontal plane or the land located only below a horizontal plane will be recorded. This requirement will take effect for all such deeds submitted for recording on and after September 1, 2008.

**NYC/Surveyor Fees** – Certain fees were increased by the Office of the City Surveyor effective July 1, 2008. The charge to certify a tax block and lot on a tax map was increased from \$4.50 to \$11.50; the charge to finalize a tax lot was increased from \$4.50 to \$70 per tax lot; and the charge for a tentative tax lot number was increased from \$2.25 to \$9.25 per tax lot. There is no longer a fee, however, to obtain a copy of a tax map.

**Notice of Pendency** – Plaintiffs, NYCTL 1998-1 Trust and the Bank of New York as collateral agent and custodian, moved for an Order extending a notice of pendency in an action to foreclose a tax lien certificate against premises in Kings County. The lis pendens was filed on September 10, 1999, had expired on September 10, 2002, had not been extended. The Supreme Court, Kings County, denied the motion. Under Civil Practice Law and Rules, Section 6513 ("Duration of notice of pendency"), an extension of a notice of pendency must be requested of the Court prior to its expiration. NYCTL 1998-1 Trust v. Kling, decided June 11, 2008, was reported in the New York Law Journal on June 23, 2008.

**Title Insurance/NYS Banking Department** – On July 9, 2008, Richard H. Neiman, Superintendent of Banks, New York State Banking Department, issued a letter captioned "Statutory Prohibitions Against 'Tying' Title Insurance to Mortgage Financing". It states, in part, that "New York Banking Law Section 595-a precludes a mortgage banker or a mortgage broker from requiring a borrower to purchase title insurance from a specific title company, agency or agent as a condition for securing a mortgage commitment. Likewise, Section 2503(a)(2) of the Insurance Law imposes the same restrictions on banks, trust companies, savings banks, savings and loan associations and national banks. Please be advised that we intend to expand our examination process to identify and follow up on any referrals to determine the proper enforcement action".

**Transfer Tax/New York State** – The New York State Department of Taxation and Finance issued an Advisory Opinion dated June 17, 2008 on the application of the State's Real Estate Transfer Tax to the reconstitution as a business corporation of a limited-profit housing company owning a residential cooperative building operated on a not-for-profit basis. The company was formed under Article II ("Limited Profit Housing Companies") of the Private Housing Finance Law, known generally as the "Mitchell-Lama Law", which was enacted in 1955 to induce private real estate developers to build and operate low and middle-income housing in the State.

The Article II entity intends to withdraw from the Mitchell-Lama Program, satisfy all existing mortgages, dissolve, and, instead of recording a deed, file an amendment to its existing certificate of incorporation to reconstitute as a corporation subject to the Business Corporation Law. According to the Advisory Opinion, the conversion from a limited profit housing company to a private housing corporation is subject to transfer tax, and the mere change of identity or form of ownership or organization exemption from transfer tax does not apply to a conveyance to a cooperative housing corporation. Consideration includes cash received by the Article II entity-Sponsor under the Offering Plan filed to convert the building to private ownership, the amount of any liens and encumbrances on the property, and the fair market value of the shares in the cooperative housing corporation after reconstitution. In addition, the issuance of shares in the reconstituted entity will be transfer taxable, subject to application of the mere change exemption or, when the mere change exemption does not apply, a credit for a proportionate part of the tax paid on the conveyance to the cooperative corporation. When the consideration is \$1,000,000 or more, and the mere change exemption does not apply, the issuance of shares in connection with a cooperative unit may also be subject to the State's Mansion Tax. Lastly, the surrender of shares in the Article II entity by a shareholder who did not become a shareholder of the reconstituted entity is transfer taxable, computed on the cash payment received. TSB-A-08(3)R (Petition No. M080313A) is posted at [http://www.tax.state.ny.us/pdf/advisory\\_opinions/real\\_estate/a08\\_3r.pdf](http://www.tax.state.ny.us/pdf/advisory_opinions/real_estate/a08_3r.pdf)

**Transfer Tax/Peconic Bay Region (Suffolk County)** - Article 31-D of New York State's Tax Law ("Tax on Real Estate Transfers in the Peconic Bay Region"), has been amended by Chapter 349 of the Laws of 2008, signed into law and effective on July 21, 2008. An amended Peconic Bay Region Community Preservation Fund transfer tax return ("Return"), which must be printed and filed on 8 ½ by 14 paper, is at <http://www.co.suffolk.ny.us/upload/countyclerk/pdfs/revisedcpf072908.pdf>

New subdivisions 4 and 5 have been added to Tax Law Section 1449-ee ("Exemptions"), providing an exemption on the purchase of "primary residential property" in the Towns of Southampton, East Hampton and Shelter Island by one or more persons, each of whom is a "first-time homebuyer". For the exemption to apply, the purchase price of the property must be within 120% of certain "purchase price limits" and the buyer's "household income" must not exceed certain "income limits", as set forth in amended Section 1449-ee. This exemption is not available in the Towns of Riverhead and Southold. The exemption must be approved by the applicable Town on forms to be issued. Line "m. Conveyance of real property as a primary residence where the grantee is a first-time homebuyer" on Part II ("Explanation of Exemption") of the Return must be checked when the exemption is claimed, and a copy of the Town approved application must be affixed to the Return.

Another exemption, applicable in all Towns subject to the Peconic Bay Region transfer tax, is in new paragraph "M" of subdivision 2 of Tax Law Section 1449-ee.

**"M. Conveyances of real property to any tax exempt corporation, incorporated pursuant to the Not-For-Profit Corporation Law or the Private Housing Finance Law, where such conveyance is for the purposes of providing affordable housing opportunities. For the purposes of this paragraph, 'affordable housing' shall mean housing opportunities exclusively for Town residents of the Towns whose income is at or below the median income for the Town".**

**Return Part II, line "n. Conveyance of real property to a tax exempt, not-for-profit corporation for the purpose of providing affordable housing", will need to be checked to claim this exemption.**

**Transfer Tax/REITS: The New York State and New York City transfer tax rate reductions applicable to conveyances of real property to existing REITS have been extended by Chapter 416 of the Laws of 2008 to all such conveyances occurring before September 1, 2011.**

**Transfer Tax/Town of Northeast – Chapter 333 of the Laws of 2008 authorizes the Town Board of the Town of Northeast in Dutchess County to establish a Community Preservation Fund. To provide a source of revenue for the Fund, the Act adds Article 31-A-3 ("Tax on Real Estate Transfers in the Town of Northeast") to the Tax Law, authorizing the Town, subject to approval by referendum, to adopt a Local Law imposing a transfer tax of up to two percent (2%) of consideration, payable by the grantee, on the conveyance of real property in the Town or an interest therein. Among the exemptions to be applied is "[a]n exemption from the tax which is equal to the median sales price of residential real property within the applicable county, as determined by the Office of Real Property Services pursuant to Section 425 of the Real Property Tax Law..." A Return will be required to be filed, and any tax due paid, to record an instrument conveying real property or an interest therein within the Town.**

**Michael J. Berey, General Counsel  
No. 105. August 15, 2008  
[mberey@firstam.com](mailto:mberey@firstam.com)**