First American Title Insurance Company of New York
CURRENT DEVELOPMENTS

A continuing series of bulletins issued by email to clients of First American

Condominiums - In an action for personal injuries sustained in a tree-well within the sidewalk adjoining a condominium, the Appellate Division, Second Department held that accident occurred within an area for which the Board of Managers was obligated by its By-Laws to maintain liability insurance. The By-Laws required the Board to maintain insurance with respect to the "property" and for "improvements" erected on the Land; it defined "property" to include "appurtenances pertaining to" the land and building. The tree-well area of the sidewalk was held to be an "appurtenance" and an "improvement" on the Land. It was asserted that the Board was not required to procure liability insurance for accidents occurring on the sidewalk since it is public property. Jasinski v. The City of New York, decided January 8, 2002, is reported at 735 NYS 2d 126.

Contracts of Sale - Before the closing date under the contract of sale, the purchasers, responding to the sellers' request for a one-month adjournment, declared that the sellers had breached the contract and the time to close was of the essence. The purchasers refused to close at another time and the sellers retained the down payment as liquidated damages. The Appellate Division, Second Department, held that either party to a contract of sale may declare time is of the essence once the contract closing date has passed. The purchasers declared time was of the essence prior to the closing date and refused to close. Thus, the sellers were entitled to retain the down payment. Baltic v. Rossi, decided December 24, 2001, is reported at 735 NYS 2d 148.

Encroachments - New York State's General City Law, Town Law and Village Law, and New York City's Administrative Code allow in certain circumstances for the front or exterior wall of a building to encroach onto a public street. The right to maintain the encroachment is governed generally by the extent of the encroachment and the date on which is building was erected.

Chapter 490 of the Laws of 2001, "an act to amend the general city law, the town law, and the village law, in relation to walls encroaching upon streets", effective November 21, 2001, amends existing laws to also provide that front or exterior wall encroachments onto a public street or highway in a city *outside of New York City*, or in a town or village may be affirmatively authorized by the applicable local legislative body, town board or village board of trustees.

In cities with a population of less than one million persons and in towns and villages, the owner of real property on which the front or exterior wall of a building

encroaches on a public street or highway may request the local legislative body, town board or village board of trustees, as applicable, to authorize that the encroachment be maintained "during the time such wall is in existence". If the legislative body of the city, the town board, or village board of trustees determines, following a public hearing, that the encroachment does not interfere or impede the right of the public to use the street or highway, the property owner may be granted a license to maintain the wall so long as it exists. The municipality has the right to revoke the license, and order the encroachment to be removed if (i) the local legislative body, town board, or village board of trustees determines that due to an improvement being made upon the street or highway the encroaching wall will impede, interfere with or obstruct traffic or the use of the street or highway, or (ii) the encroaching building is abandoned or in a state of disrepair.

Joint Tenancy - Two persons, who later married and then divorced, took title to the shares of stock attributable to a cooperative unit in Manhattan as joint tenants. In a declaratory action claiming title based on an allegation of adverse possession, the Supreme Court, New York County, held that the joint tenancy became a tenancy in common on their divorce. A motion for summary judgment was denied due to an issue as to whether possession by the party claiming title was sufficiently "hostile" for the twenty years required for a tenant in common to establish adverse possession under Real Property Law Section 541. David v. Abramson was reported in the New York Law Journal on January 11, 2002.

Mechanics Liens - The November 28, 2001 issue of Current Developments included a summary of a decision of the Supreme Court, New York County, in which Justice Lehner ordered the discharge of a mechanics lien filed by a corporation dissolved prior to its having performed work on the ground that the lien was not filed for the purpose of winding up the affairs of the dissolved corporation. [See http://www.titlelaw-newyork.com/Mans/Current39.htm]. In Matter of New Jersey Window Sale, Inc. v. Precision Specialist Metal Sales, Inc., reported in the New York Law Journal on March 21, 2002, Justice Lehner "recalled" his decision, and denied the motion to discharge the lien, holding it to be "retroactively validated" by the corporation's being reinstated in New Jersey and qualified to do business in New York.

Mortgages - A satisfaction of an existing mortgage was sent to the new lender's attorney without any instructions to hold the document in escrow. At the closing for the new mortgage, an assignment was executed to the plaintiff. The satisfaction from the first lender was then recorded. The prior mortgagee not receiving the full amount due it, a court order was obtained (prior to recording of the assignment) annulling the satisfaction, reinstating the mortgage, and directing the execution of a new note and mortgage for the balance due, which documents were executed. In an action brought to foreclose the mortgage held by the assignee, the Supreme Court, Westchester County, held that said mortgage had priority since the assignee had no knowledge of any wrongdoing or neglect when it took its mortgage by assignment.

Bankers Trust Company of California, N.A. v. Sciarpelletti was reported in the New York Law Journal on March 20, 2002.

Mortgage Recording Tax and Real Estate Transfer Tax – The New York State Department of Taxation and Finance has reported that the interest rate to be assessed or paid, as the case may be, for the second quarter of calendar year 2002 on late payments, underpayments, overpayments or refunds of the mortgage recording tax and the real estate transfer tax will be 6%, compounded daily. The interest rates are published on the Internet at http://www.tax.state.ny.us/taxnews/int_0202.htm.

New York City - In an Article 78 proceeding brought against the City of New York, the Supreme Court, New York County, held that the City's Uniform Land Use Review Procedure ("ULURP") was required prior to approval of an agreement entered into between the City, various railroad companies (including the New York Central), and private landowners providing for the demolition of the "Highline", the 1.45 mile long, unused elevated railway on the west side of Manhattan between 34th Street and Gansevoort Street. The Highline runs over or through privately owned land, two City owned properties, and streets and sidewalks pursuant to easements in favor of the railroad companies. (Petitioners' contend the Highline should be developed as public space). The court held that ULURP applies to the Agreement since the acquisition and extinguishment of the railroad easement over public space (two City owned properties, streets and sidewalks) is the "acquisition by the City of real property" and involves "a change in the City Map" under City Charter Sections 197-c(a)(1) and (11). The New York City Council v. City of New York was reported in the New York Law Journal on March 18, 2002.

Notice of Pendency - The New York State Court of Appeals, responding to a question certified to it by the Appellate Division, First Department, in connection with litigation to compel an accounting of the administration of assets, including real property, owned by an estate, held that an expired notice of pendency cannot be refilled as to the same action.. An extension must be requested prior to expiration of the prior notice under CPLR Section 6513. The Court referred to this as the "no second chance rule" and also held that it applies equally to canceled lis pendens. Matter of Walter Sakow, decided March 21, 2002, is on the Internet at http://www.courts.state.ny.us/ctapps/decisions/27opn02.pdf. [Note: The Second Department has held as an exception to this rule of general application, that a plaintiff may file successive notice of pendency in a mortgage foreclosure. a lis pendens may be filed prior to entry of final judgment even when the original lis pendens has been canceled. See Slutsky v. Blooming Grove Inn, Inc., 542 NYS 2d 721 (1989) and Robbins v. Goldstein, 320 NYS 2d 553 (1971).]

Rights of Reverter - The Garden City Company ("Company") claimed, inter alia, that as the successor by assignment to the reversionary interest in certain deeds the property reverted to it on a violation of the use restrictions in the deeds providing that the property was to be used for religious and educational purposes and could not be conveyed. The Appellate Division, Second Department, affirming the order of the Supreme Court, Nassau County, granting summary judgment and dismissing the Company's claim, held that the deeds did not contain a reversionary interest as

there was no language providing for the automatic termination of the owner's interest if the restrictions were violated At most, the deeds reserved a right of reentry, not assignable at common law. An assignment of a right of reentry to the Company would therefore be void. In Re Incorporated Village of Garden City, decided December 17, 2001, is reported at 734 NYS 2d 225.

Rule Against Perpetuities - The Supreme Court, Madison County, in what it termed a case of first impression in New York State held that a *profit a prendre,* in this case the right to take gravel from a parcel of land so long as the defendant was able to mine quantities of gravel sufficient to satisfy its or state standards, was not subject to the Rules Against Perpetuities. The court noted the interest in question did not impose an absolute restraint on the alienation of the land as evidenced by the plaintiff's having acquired the land twenty years after the defendant obtained its right to remove the gravel. Otis Marshall Farms, Inc. v. Snyder Construction Company, Inc., decided December 24, 2001, is reported at 735 NYS 2d 374.

Title Policy Endorsements – Effective February 11, 2002, the Environmental Protection Lien Endorsement (For Mortgages Made to the State of New York or a Public Benefit Corporation thereof and Federal Government Agencies) has been revised to delete the note at the foot of the endorsements stating that it "(m)ay be used for Residential, Hospitals and Nursing Homes". Consistent with the other Environmental Protection Lien endorsements available in New York, this endorsement can be issued with a mortgage policy regardless of the type of property involved.

The Environmental Protection Lien Endorsement (New York City Only) was also amended to delete from the exclusions to coverage reference to Chapter 6 ("New York city hazardous substances emergency response law") of the Administrative Code of the City of New York.

The Title Insurance Rate Service Association ("TIRSA") has adopted effective February 11, with minor, non-substantive changes, and the State Insurance Department has approved, issuance of the new American Land Title Association Owner's and Loan policy leasehold endorsements. They are to be used in New York instead of the prior TIRSA leasehold endorsements. Among the new features of the revised endorsements, an insured suffering a loss may be able to recover the value of any Tenant Leasehold Improvements (as defined) exiting on the date the Tenant is evicted from the premises, and the coinsurance provisions of an Owner's Policy do not apply to valuation of the insured leasehold estate. There continues to be no separate charge for the issuance of a Leasehold Endorsement.

***"Talkline-The Stoler Report"* - First American Vice-President Michael Stoler's radio show will broadcast on WMCA 570 AM at 11PM. On April 24, Michael Stoler will host a discussion on The State of the Hospitality Industry in Metro New York: An Owner's Perspective. His guests will be Henry Kallan, Principal of The Elysee, The Library, The Casablanca and The Girafee Hotel; Simon Elias, President of GAMA Holdings and Principal of The Flatotel; Michael Pomeranc, Principal of the**

Pomeranc Group; Shimmie Horn, Principal of The Iroquois New York, The LeMarquis, The Belleclaire and The W-J Hotel; and Sean Hennessey, Director, Global hospitality and Leisure Industry Services, PriceWaterhouseCoopers LLP.

Other programs scheduled include Residential Apartment Developments in New Jersey on May 1, Financing in Light of the Recession, Enron, K-Mart, Global Crossing and the Financial Markets on May 8, and Residential and Commercial Mortgage Financing in the Metropolitan New York Area on May 15. See http://www.firstamny.com/pages/thestolerreport/thestolerreport.html.

Tax Sales - The Appellate Division, Second Department, reversing an order of the Supreme Court, Nassau County, granted a motion for a preliminary injunction and enjoined the tax sale purchaser from taking possession of the plaintiff's real property. According to the Appellate Division, that Village of Massapequa Park did not provide the plaintiff with actual notice of the date, time and place of the tax lien sale was a denial of due process, notwithstanding that he received notice of the sale by publication, and he also received letters noting his tax defaults and his right to redeem. Szal v. Pearson, decided December 31, 2001, is reported at 735 NYS 2d 200.

Tax Sales - The Appellate Division, Second Department, affirmed the order of the Supreme Court, Orange County, granting summary judgment in a quiet title action brought by the tax sale purchaser and dismissed the third-party complaint of the former property owner alleging lack of adequate notice of the tax sale proceeding. The County had sent notice of the tax foreclosure to the owner at the address listed on the deed. The County was not required to further investigate her address when the foreclosure notice was returned as undeliverable. Payment of prior taxes by checks listing the taxpayer's new address was not tantamount to a request to change her address for all property-related matters. Kennedy v. Mossafa, decided February 4, 2002, is reported at 737 NYS 2d 373.

Tax Sales - The Appellate Division, Third Department, affirmed an order of the Supreme Court, Greene County, denying a summary judgment motion by Greene County in an action to set aside a tax sale deed. The plaintiff, a son of the property owner and a devisee of the property under her estate, had requested of the county in writing that that tax bills be sent to his address. His father, who resided in White Plains before his decease, later requested that tax bills be sent to him. Notices of the tax sale sent to the property address and to his father were returned unclaimed. The court held that the return of the notices issued should have alerted the county to the possibility of inadequate notice and that notice should have been mailed to the plaintiff as he had requested. The lack of notice to him constituted constitutionally inadequate notice of the sale. Prisco v. County of Greene, decided December 6, 2001, is reported at 734 NYS 2d 280.

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