First American Title Insurance Company of New York
CURRENT DEVELOPMENTS

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

Cellular Towers – Justice Colabella, of the Supreme Court, Westchester County, in a Decision issued June 28, 2002, held that the City of New Rochelle has jurisdiction to regulate the placement of two cellular towers on property in the City owned by New York State and under the jurisdiction of the State Department of Transportation. This Decision reverses the Court's Decision of November 9, 2001 holding that the cell towers were exempt from local zoning. A Notice of Appeal has been filed by the DOT. Crown Communications New York v. City of New Rochelle, Index No. 7863/01.

Construction Contracts Act – The Construction Contracts Act was signed into law by Governor Pataki on July 18, 2002 as Chapter 127 of the Laws of 2002. The Act, new Article 35-e of the General Business Law, sets forth "default standards for the payment of bills on construction contracts and in those situations where payments are not made within time periods established in such contracts, authorize(s) remedies including reasonable interest payments and circumstances for stop work provisions". The new law is effective January 14, 2003 and applies to private construction contracts for project costing $250,000 or more which are entered into on or after that date, unless the contract is part of a construction project for which a permit has been issued and work has begun prior to the effective date. It does not apply to contracts made or awarded by a governmental entity or public corporation or to projects involving certain types of residential property.

The Act, on the Internet at http://assembly.state.ny.us/leg/?bn=S07724&sh=t, provides, for example, that invoices are to be approved or disapproved within 12 business days. An invoice is to be paid within thirty days of approval or within seven days after a lender advances funds for payment. Interest on unpaid amounts, and on retainage not released within 30 days after final approval of the work, is to be paid by an owner to a contractor, or by a contractor to a subcontractor, as the case may be, at the rate of 1% per month or fraction of a month, or at a higher rate consistent with the contract terms.

The provisions of the Act may be modified by Agreement, except for provisions relating to the payment of interest on amounts due a subcontractor and to the suspension of performance under a contact. In addition, an agreement that makes the contract (other than a contact with a material supplier) subject to the laws of another state or requires any dispute resolution arising from the contract to be performed in another state is void.

Contracts of Sale – A title report for property under contract disclosed that part of the land which was unimproved lay in the bed of a mapped, but unopened street. The buyer purported to cancel the contract and brought an action for a refund of its down payment. According to the Appellate Division, Second Department, upholding an order of the Supreme Court, Queens County, granting the seller's motion to dismiss and cross-motion for damages, the buyer had no right to cancel the contract. The contract provided that the buyer was to take subject to restrictions of record so long as they were not violated by the present use of the property. Stathakis v. Poon, decided June 17, 2002, is reported at 744 NYS 2d 473.

Cooperatives – The Appellate Division, Second Department, modifying the lower court and granted summary judgment to a cooperative board in an action for ejectment of a proprietary lessee and possession of his apartment. At a special meeting, the holder of 75% of the outstanding shares in the co-op passed a resolution directing the Board to terminate the defendant's proprietary lease due to his "objectionable" conduct" in violation of the terms of the lease. While RPAPL Section 711(1) provides that a landlord may terminate a tenancy on establishing to a court that at tenant is "objectionable", the "business judgment rule in Levandusky v. One Fifth Avenue Apt. Corp. (75 NY2d 530) precludes judicial inquiry into lawful actions taken by a cooperative board. 40 West 67th Street v. Pullman, decided May 23, 2002, is reported at 742 NYS2d 264.

Cooperative Conversions – The July 17, 2002 issue of Current Developments reported the case of 511 West 232nd Owners Corp. v. Jennifer Realty Co, (2002 N.Y. LEXIS 1579) in which the New York State Court of Appeals held that a complaint alleging that the sponsor of non-eviction plan breached its contracts with the tenant-owners and a cooperative board to dispose of all of its shares within a reasonable time so as to enable creation of a viable cooperative pleaded a valid cause of action. The Supreme Court, Westchester County, in an action brought by a cooperative corporation to compel a sponsor to sell its remaining apartments, has held that the corporation lacks standing to prosecute the action, and it dismissed the action without prejudice to the timely commencement of a new action by proper plaintiffs. According to the Court, the claims asserted can be pleaded by individual purchasers who relied on claimed misrepresentations in purchasing their apartments. In Jennifer Realty, plaintiffs included a number of proprietary lessees. Michelangelo Apt. Inc. v. 687 Associates was reported in the New York Law Journal on August 28, 2002.

Creditors' Rights – Following entry of an arbitration award in favor of petitioner against respondent's husband, but prior to entry of a judgment thereon, respondent and her husband refinanced a mortgage on the home they owned by the entirities. The funds disbursed on refinancing were made payable to respondent and deposited into her personal account. The Supreme Court, Rockland County, held that the petitioner was entitled to one-half of the monies obtained from the refinancing. The conveyance of funds to respondent by petitioner without consideration was a

fraudulent transfer under Debtor and Creditor Law Sections 273-a and 276. The funds were reachable by a creditor of one of the spouses notwithstanding that the origin of the money had been real property owned as tenants by the entirety. Shashoua v. Rozner was reported in the New York Law Journal on June 4, 2002.

Mechanics Liens – The case of Zimmerman v. Carlson was reported in the May 28, 2002 issue of Current Developments. The Supreme Court, Suffolk County, held that the restoration of property by adjoining land owners, which work was required of the property owner by the State Department of Environmental Conservation, did not support the filing of mechanics liens since the work was not consented to by the property owner. The vacating of the mechanics liens was affirmed by the Appellate Division, Second Department, in Zimmerman v. Carlson, decided April 29, 2002, and reported at 741 NYS2d 118.

Mortgage Foreclosure – The plaintiff in a foreclosure action was the FDIC, as Receiver of Community National Bank and Trust. The motion for a deficiency judgment was brought by National Collectors and Liquidators, LP ("National") as assignee of the mortgage. National did not receive an assignment of the note or of the personal guarantees. The Supreme Court, Richmond County, held that a deficiency judgment could be enforced by the FDIC against the mortgagor. National would not, however, be awarded a deficiency judgment against the guarantors since no assignment of the note or of the personal guarantees was made to it. The court noted that the assignment of a mortgage without an assignment of the debt is a nullity. The case also holds that a judgment of foreclosure cannot be amended after sale to include a deficiency judgment. Federal Deposit Insurance Corp. v. Robin Construction Corp. was reported in the New York Law Journal on August 13, 2002.

Mortgage Foreclosure – The Supreme Court, Westchester County, denied a motion by the purchaser at a foreclosure sale for issuance of a writ of assistance under RPAPL Section 221 to enable it to take possession from an occupant of the property who received a ten-day notice to quit with a certified copy of the referee's deed by substituted service. According to RPAPL Section 713(5), a proceeding to recover possession may be instituted after a ten-day notice to quit has been served after a foreclosure sale and a certified copy of the deed has been "exhibited" to the person in possession. A deed is not "exhibited" (that is, actually presented) to an occupant who receives substituted service. Colony Mortgage Bankers v. Mercado was reported in the New York Law Journal on August 28, 2002.

Mortgage Recording Tax and Real Estate Transfer Tax – The New York State Department of Taxation and Finance has reported that the interest rate on refunds and late payments and assessments for the fourth quarter of calendar year 2002 will be 6% compounded daily. The interest rates are published by the Department on the Internet at http://www.tax.state.ny.us/taxnews/int0802.htm.

The Department has also announced that the interest rate on underpayments of the mortgage recording tax and the State's real estate transfer tax will be increased

effective April 1, 2003 to be the sum of the federal short-term rate plus five percentage points. The underpayment rate up to and including March 31, 2003 is being computed as the sum of the federal short-term rate plus three percentage points. Other taxes are also impacted by change in the underpayment rate. The interest rate on underpayments of the State's estate tax is, for example, being increased two percentage points to the sum of the federal short-term rate plus four percentage points. TSB-M-02(6)M, issued August 28, 2002, is on the internet at http://www.tax.state.ny.us/PDF/memos/multitax/M02_6m.pdf.

Mortgage Recording Tax and Real Estate Transfer Tax – The New York State Department of Taxation and Finance issued an Advisory Opinion on "cost-plus sale" financing introduced by the HSBC Mortgage Corporation (USA) ("HSBC"). Under this program HSBC takes an assignment of a contract of sale entered into by the purchaser, but directs the seller to deliver a deed to the purchaser. HSBC pays the balance of the purchase price by funds provided by or loaned to the purchaser. The amount financed ("Base Amount") and an agreed-upon return to HSBC ("Profit Amount") are secured by a mortgage to HSBC which provides that the Base Amount is the maximum amount secured. The Advisory concludes that the deed to the purchaser is the only instrument subject to state transfer tax. The other transfers and agreements, including the assignment of the contract, are entered into solely to effectuate financing of the purchase. In addition, mortgage tax is payable on only the Base Amount. TSB-A-02(4)R, issued July 26, 2002, is on the Internet at http://www.tax.state.ny.us/pdf/Advisory_Opinions/Real_Estate/A02_4r.pdf.

Mortgages – The United States District Court, for the Eastern District of New York, granted summary judgment on a claim for the imposition of an equitable mortgage where the signature and notary pages of the actual mortgage were missing and the mortgage consequently had not been recorded. The court did not find credible the mortgagors claim that although they received proceeds used to pay off existing debt they did not intend to enter into a loan transaction. Allen v. Union Federal Mortgage Corp. was reported in the New York Law Journal on July 16, 2002.

New Jersey Private Well Testing Act - The Private Well Testing Act, N.J.S.A. 58:12A-26 became effective in New Jersey on September 14, 2002. Every contract for the sale of (a) real property for which the potable water supply is a private well located on the property or (b) other real property the potable water supply for which is a well that has less than 15 service connections or that does not regularly serve an average of 25 individuals daily at least 60 days each year is required to include a provision requiring the testing of the water supply. A closing is not to occur unless the buyer and seller both receive and review a copy of the water test results and certify they have reviewed the water test results. Information on the Act, including a copy of the Act and Private Well Testing Act Rules (N.J. A.C. 7:9E), has been posted to the Internet by New Jersey's Department of Environmental Protection at http://www.state.nj.us/dep/pwta.

New York City Real Property Transfer Tax – The United States District Court, for the Southern District of New York, reversing a Bankruptcy Court decision, held that 11 USC Section 1146(c), which exempts from tax a transfer made "under a plan confirmed" does not exempt a deed made pursuant to a Bankruptcy Court Order from the City's transfer tax when the transfer occurred prior to drafting of a plan of reorganization. That the Bankruptcy Court required the Debtor to deposit a sum of money into escrow on the possibility that there would not be a confirmed plan is insufficient. The Court did not decide whether Section 1146(c) exempts from taxation a transfer that occurs after a plan has been introduced but not yet confirmed. (No draft plan or reorganization existed as of the date of the oral argument of this appeal). New York City Department of Finance v. 310 Associates L.P. was reported in the New York Law Journal on September 12, 2002. [2002 U.S. Dist. LEXIS 15701]

New York City Recordings - Effective January 1, 2003, pursuant to Chapter 259 of the Laws of 2002, the City of New York will require the filing of State Board of Real Property Services Form RP-5217 in addition to the City's Real Property Transfer Tax Return ("NYC-RPT"). The City will not charge its $25.00 RPT filing fee but will charge $25.00 to file Form RP-5217. The City's Department of Finance will determine if a RP-517 will be required in connection with a non-deed transfer, such as the transfer of a controlling interests, the granting of a leasehold or an easement. It will also determine if the City will require payment of the $25.00 NYC-RPT filing fee if a RP-517 is not required for a non-deed transfer.

Non-Judicial Foreclosures – At its Annual Meeting concluding August 2, the National Conference of Commissioners on Uniform State Laws approved its Uniform Nonjudicial Foreclosure Act providing for the foreclosure of a "security instrument" without a judicial proceeding. It contemplates foreclosures by means of either an auction sale, a negotiated sale to a third party purchaser, or by an appraisal, which latter procedure would transfer title directly to the foreclosing creditor mortgagee or its nominee as if there was being delivered a deed in lieu of foreclosure. The NCUSL WEB Site is at www.nccusl.org.

Restrictive Covenants – The Supreme Court, Westchester County, held that a restrictive covenant providing that no "trade or business or any kind whatsoever shall…be maintained or permitted", and identifying a "business" as including the "operation or maintenance of a school, hotel or boarding or lodging house", did not prohibit a business use of a passive office nature. The defendant was using his residence for a business involving the telephone, facsimile, electronic mailing and in-house administration. 9394 LLC v. Farris was reported in the New York Law Journal on September 3, 2002.

Restrictive Covenants – A Homeowner's Association and the owners of a house in a residential development of 66 lots brought an action to enforce a restrictive covenant contained in deeds from a common grantor prohibiting construction of "any building intended for the occupation of more than one family or household".

The defendant had poured the foundation for a six story building which was to contain 15 residential apartments and medical offices when an preliminary injunction was issued. In this case, the Supreme Court, Queens County, granted the plaintiffs' motion for summary judgment, holding that plaintiffs, as owners of the land within the development could enforce the covenant since it was imposed as part of a scheme intended for their common benefit. (The Court noted that an apartment house had already been erected on a different parcel in violation of the covenant without neighborhood opposition). Kew Forest Neighborhood Association Inc v. Lieberman was reported in the New York Law Journal on August 14, 2002.

Title Insurance – The Appellate Division, Third Department, upheld an Order of the Supreme Court, St. Lawrence County, denying an insured Owner's motion for a summary judgment that its title policy provided coverage for an easement granted by the insured deed over an adjacent parking lot. After the conveyance, it was determined that the easement was over property not owned by the grantor. While the easement was not included in the Schedule A description of the property insured, the insured deed was referenced in the policy and no Schedule B exception was taken for maintenance obligations under the easement grant. Whether the easement was intended to be insured could not be determined by the Court without resort to extrinsic evidence. Aubuchon Realty Company, Inc. v. Fidelity National Title Insurance Company of New York, decided June 13, 2002, is reported at 743 NYS2d 626.

In a related case, the Appellate Division, Third Department, held that the plaintiff did not acquire easement by prescription over the adjoining property since it did not establish, by clear and convincing evidence, adverse, open, notorious, continued and uninterrupted use of the parking lot for the ten year prescriptive period. Aubuchon Realty Company, Inc. v. Cohen, decided May 16, 2002, is reported at 742 NYS2d 421.

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