First American Title Insurance Company of New York
CURRENT DEVELOPMENTS

ACRIS – E-Tax Forms, the completion of forms on-line on the New York City Department of Finance's Automated City Register Information System WEB Site (http://nyc.gov/html/dof/html/acris.html), is now required for transfers in the Counties of the Bronx, Brooklyn, Manhattan and Queens. Notwithstanding prior information issued by the Department of Finance to the New York State Land Title Association, as reported in Current Developments issued June 28, 2004, E-Tax forms is required for pre-July 5 transfers submitted to the Register's office after July 5. Contact the Department of Finance's ACRIS Help Desk at 212-487-6300 or mberey@firstam.com for further information when documents relating to transfers prior to July 5 are not being processed by a title insurance company or agent.

Carbon Monoxide Detectors – On May 5, 2004, Mayor Blumberg signed Local Law 7 of 2004, amending the Administrative Code of the City of New York to require the installation of carbon monoxide detecting devices in buildings within occupancy groups J-1, J-2 and J-3 where a fossil-fuel furnace or boiler is located, in every dwelling unit in a building in close proximity to a source of carbon monoxide, and in buildings classified in occupancy groups G and H-2. (Group G concerns Garages and Gasoline Stations, Group H-2 certain Hotels, and Group J Theatres). It also amended the Administrative Code as to the installation and maintenance of carbon monoxide detecting devices in Class A and Class B multiple dwellings and in private dwellings. The Local Law is effective 180 days from the date of enactment. It is at http://www.nyccouncil.info/pdf_files/bills/law04007.pdf.

Contracts of Sale – Current Developments dated September 25, 2003 reported on Uzan v. 845 UN Limited Partnership in which the plaintiffs, who had defaulted on their purchase of four condominium units, sued to recover contract down payments of 25% of the purchase price. The Supreme Court, New York County, granted the defendant-sponsor partial summary judgment allowing it to retain the initial 10% down payments, but the Court withheld decision on whether retaining the balance of the deposits under the contracts was enforceable under New York law applicable to liquidated damages. The Appellate Division, First Department, granted the sponsor's motion for summary judgment and dismissed the complaint, holding that the plaintiffs forfeited all rights to the entire contract deposits. The purchase agreements were executed by parties of equal bargaining power following lengthy negotiations. The Court also noted that it is customary for pre-construction luxury condominiums in New York City to price the risk of default at 25% of the purchase

price. The decision of the Appellate Division on June 15, 2004 is reported at 2004 N.Y. App. Div. LEXIS 8362.

Contracts of Sale/Marketability – Under a provision in a standard residential contract of sale, title was to be conveyed subject to encroachments of stoop, areas, cellar steps, trim and cornices upon the street or highway. Under a paragraph in a Rider to the contract the property was to be sold subject to any state of facts an accurate survey would disclose, provided that such facts did not render title unmarketable. Any conflict between the standard provisions of the contract and the Rider was to be resolved in favor of the Rider. A survey disclosed that a leader, vent pipes and window guards of the building on the property also encroached on the street. The Supreme Court, New York County, held that the contract provisions were not inconsistent; title was to be conveyed subject to the encroachments enumerated in the contract and, as to the three types of encroachments disclosed by the survey not agreed to be taken subject to, since the building is covered by the Landmarks Protection laws the purchaser's risk as to them is negligible. The Court therefore concluded that the seller was able to convey marketable title, subject to the encroachments that were waived. AXYS LLC v. Ng was reported in the New York Law Journal on June 16, 2004.

Eminent Domain/$1.00 Compensation Clause – The City of New York moved for an Order awarding the condemnee $1.00 for the taking of a portion of the property within the bed of a mapped street. A deed from the City in the chain of title to the property limited an award to $1.00 if the City acquired by condemnation or otherwise any portion of the premises conveyed lying "within the bed of any street, avenue, parkway, expressway, park, public place or catch-basin…(as) shown on the then present City Map". The City condemned the property for "the conveyance and storage of stormwater". The Supreme Court, Kings County, issued the Order, holding that while "the City has acquired the claimant's property for a different purpose than originally planned, it has acquired it for the legitimate public purpose of the preservation of wetlands, and the dollar clause remains applicable". Matter of Richmond Creek Staten Island Bluebelt System was reported on June 22, 2004 in the New York Law Journal.

Eminent Domain - The City of Syracuse Industrial Development Agency appealed from an Order of the Supreme Court, Onondaga County, directing that upon filing of the acquisition map the IDA would have title to and the possession of the property in question, subject to the condemnee's continuing right to reenter the premises to comply with a DEC order to clean up contamination. The Appellate Division, Fourth Department, held that the Court did not have the authority to grant, sua sponte, an easement right. According to the Appellate Division, "(i)t is for the condemnor to delineate the scope of the acquisition, subject only to its obligation to pay just compensation". Matter of Syracuse Industrial Development Agency v. ExxonMobil Oil Corporation, decided March 19, 2004, is reported at 774 N.Y.S. 2d 242.

Homeowners' Associations – The Supreme Court, Sullivan County, denied a motion for an order to vacate a Real Property Law Section 339-z condominium common charge lien filed by a property owners' association against a single-family home within the development. The subdivision's governing documents authorize the enforcement of a lien for unpaid charges and recording of a lien for unpaid charges by the property owners' association in the County Clerk's office has been an accepted practice for many years. Emerald Green Property Owners Association Inc. v. Fischer was reported in the New York Law Journal on May 26, 2004.

Mechanics Liens – Under Lien Law, Section 10 a mechanics lien for work done on a single family dwelling is to be filed within four months of the last date on which materials for an improvement were furnished. In Griffin v. Ward Lumber Co. Inc. the Notice of Lien was received at the St. Lawrence County Clerk three days prior to the last date on which the Lien could be filed; but the Clerk filed the Lien two days after expiration of the four month period. The Civil Court, Kings County, denied a motion for the discharge of the mechanics lien. Since no intervening lienors would be adversely affected, the timely delivery of the notice for filing substantially complied with the Lien Law which "should be liberally construed so as to secure its beneficial interests and purposes". This case, decided April 22, 2004, is reported at 775 N.Y.S. 2d 824.

Mechanics Liens – A subcontractor sued the condominium sponsor and the Board of Managers for work done in connection with the conversion of the building, claiming that the amount due it should be paid by the Board from common charges under the trust fund provisions of New York's Condominium Act. Under Real Property Law Section 339-l "all common charges received and to be received by the board of managers, and the right to receive such funds, shall constitute trust funds for the purpose of paying the cost of such labor or materials performed or furnished at the express request or with the consent of the manager, managing agent or board of managers". The Supreme Court, New York County, granted the defendants' motions for summary judgment and dismissed the complaint. According to the Court, absent contrary provisions in the offering plan, Section 339-1 should generally be applied where the "express request" or "consent" [for labor to be done or materials to be furnished]… is provided by a board selected by the unit holders." Northeast Restoration Corp. v. K & J Construction Co., L.P., decided May 4, 2004, is reported at 776 N.Y.S.2d 780.

Modern Abstract – Modern Abstract Corporation, recognized since 1984 as the leader in New York City for cooperative lien searches, has been purchased by the First American Title Insurance Company of New York and is now located at 633 Third Avenue, New York, New York 10017. Eva-Marie Davis, who will continue as President of Modern Abstract Corporation, will also introduce to the real estate community First American's Eagle 9™ UCC Residential Cooperative Interest Insurance Policy, services for UCC filings and the completion of Transfer Tax forms for cooperative unit transfers in ACRIS. For further information contact Eva Davis at 212-334-1181 or by email to emdavis@modernabstract.com.

Mortgage Electronic Registration Systems, Inc. ("MERS") – Current Developments dated May 29, 2001 reported that the Suffolk County Clerk was not accepting mortgages executed to MERS as the mortgagee or as the mortgagee's nominee where it holds no legal interest in the mortgage. The Appellate Division, Second Department in 2002 granted a preliminary injunction to compel the Clerk to record and index MERS instruments pending a determination of the respective rights and obligations of MERS and the County Clerk. (Merscorp, Inc. v. Romaine, 743 N.Y.S. 2d 562). The Supreme Court, Suffolk County, has held that the Suffolk County Clerk is required to record a mortgage executed to MERS as nominee for a named lender and to index such a mortgages under MERS "as nominee for lender" as the mortgagee of record. The Clerk was also directed to record discharges of such MERS mortgages so long as they were not assigned within MERS. It also appears from the decision that the Clerk is not required to record satisfactions of mortgages initially executed to MERS that were assigned within the MERS system, satisfactions of mortgages assigned to MERS, or assignments from MERS to a non-MERS participating lender. MERSCORP, Inc. v. Romaine was reported in the New York Law Journal on June 17, 2004.

Mortgage Foreclosure – Current Developments dated October 28, 2003 reported on the decision of the Appellate Division, First Department, in Bank of New York v. Love (763 N.Y.S. 2d 553). In that decision, the Court ordered a new foreclosure sale since the Terms of Sale deviated from the foreclosure judgment on whether the purchaser or the Referee was to pay the outstanding real estate taxes. The judgment, in accordance with RPAPL Section 1354(2), provided that the referee was to pay the taxes from the proceeds of the sale. The Terms of Sale required the successful bidder to pay any outstanding taxes. The assignees of the successful bidder sought an order compelling the Referee to transfer the property without requiring that they pay the open real estate taxes. The Appellate Division has recalled and vacated its earlier ruling, now holding that the terms of a judgment of foreclosure and sale control and, accordingly, the Referee can not require the purchasers to pay the real estate taxes without receiving a credit. The Bank of New York v. Love, decided January 6, 2004, is reported at 772 N.Y.S. 2d 645.

Not-for-Profit Corporation – The Supreme Court, Saratoga County, denied a petition by a not-for-profit organization (opposed by the State Attorney General) to sell its real property at auction for a price not less than $650,000.00. It held that a firm sale contract is required for a sale to be approved. In Re Society for the Prevention of Cruelty to Animals of Upstate New York, Inc., decided November 24, 2003, is reported at 773 N.Y.S. 2d 789.

Not-For-Profit Corporations – The sale of the assets of a hospital, a Type B New York Not-For-Profit Corporation, to a developer was denied by the Supreme Court, New York County. The purchaser thereupon sued for reimbursement of its out-of-pocket expenses under the terms of the contract. The Supreme Court held that the disapproval of the sale render the entire contract inoperative including the reimbursement provision, and the Appellate Division, First Department, affirmed.

The Court of Appeals, reversed and remanded the case to the Supreme Court for further proceedings, holding that Section 511's requirement for judicial approval applies to the contract as a whole and not only to the sale of assets. According to the Court, a "termination payment clause or similar damage or reimbursement provision in a sales transaction of this kind should be reviewed under the N-PCL 511 standard of fairness, reasonableness and furtherance of corporate purpose". 64th Associates, L.L.C. v. Manhattan Eye, Ear and Throat Hospital, decided June 8, 2004, is reported at 2004 N.Y. LEXIS 1379 and on the Court of Appeals Website at address http://www.courts.state.ny.us/ctapps/decisions/jun04/80opn04.pdf

Partnerships – The general partners of a limited partnership sold the building owned by the partnership to an entity controlled by the son of the general partners for a price alleged to be below fair market value. The limited partners brought an action against the general partners for breach of fiduciary duty. The Appellate Division, Third Department, held that the sale was permitted since under the partnership agreement the limited partners consented to any sale "on such terms and conditions as may be determined by the General Partners…notwithstanding that any party hereto may have an interest therein". Carella v. Scholet, decided March 25, 2004, is reported at 773 N.Y.S. 2d 763.

Pending Legislation – Under Part A of Assembly Bill 11372 being considered in Albany, Tax Law Section 255(1)(a) would be amended to provide that mortgage recording tax would be payable on the recording of a spreading agreement or an additional mortgage imposing a lien on real property in New York City not originally covered by or described in the recorded primary mortgage. Mortgage tax would not be due on the recording of such an instrument when the other property is owned by the mortgagor of the real property subject to the recorded primary mortgage unless the other property was acquired to avoid or evade payment of the tax. There would be a presumption that transfers of either the original property or the other property to "related parties" within a twelve month period was undertaken to evade payment of mortgage tax. This Bill, on the Internet at http://assembly.state.ny.us/leg/?bn=A11372, would be effective as to mortgages recorded on and after the ninetieth day after enactment.

Pending Legislation - Part J of Senate Bill 6057A/Assembly Bill 9557A would amend Real Property Law Section 333 (1-e) to increase the filing fee for the State Board of Real Property Services Real Property Transfer Report, known generally as the Equalization and Assessment Forms RP-5217 and RP-5217NYC. When the property being transferred is a "Qualifying residential property" or a "Qualifying farm property" the filing fee will increase from $50.00 to $75.00. The filing fee for the transfer of any other type of property will increase from $50.00 to $165.00. "Qualifying residential property" will include property classified on the latest final assessment roll as a one-to-three family house, a rural residence, a residential condominium, or a one-to-three family residential property newly constructed on vacant land. A "Qualifying farm property" will include property classified as

agricultural on the latest final assessment roll. This Bill is on the Internet at http://assembly.state.ny.us/leg/?bn=A09557&sh=t.

Pending Legislation - Senate Bill 5991-A/Assembly Bill 9612A amends the CPLR by adding Section 6516 to enable successive notices of pendency to be filed in a foreclosure action to enable compliance with RPAPL Section 1331, notwithstanding that a previously filed lis pendens has expired under CPLR Section 6513 or has become ineffective for the failure to serve a summons within the time limited by CPRL Section 6512. RPAPL Section 1331 requires that the plaintiff in a foreclosure file a notice of pendency at least twenty days before the court renders a judgment of foreclosure and sale. This change in the law will be effective on enactment and apply to all actions pending on or after its effective date. It will not apply to mechanics liens foreclosures. Section 6516 will also not apply to a notice of pendency pursuant to RPAPL Section 1403 ("Notice of Pendency of Non-Judicial Proceeding for Foreclosure by Power of Sale"). This Bill is in response to the 2002 holding of the Appellate Division, First Department in Campbell v. Smith (747 N.Y.S. 2d 18), later recalled, vacated and re-determined by the First Department (2003 N.Y. App. Div. LEXIS 10580), in which the Court first held that a mortgage foreclosure may not continue when the notice of pendency filed under the CPLR has expired without being renewed. The Assembly Bill is at http://assembly.state.ny.us/leg/?bn=A09612.

Restrictive Covenants – Plaintiff appealed from a judgment of the Supreme Court, Chautauqua County, holding that the plaintiff's residence violated a restrictive covenant that "only one single family dwelling not more than one and one-half stories in height…shall be placed on any lot". The Appellate Division, Fourth Department, reversed and entered a judgment that the plaintiff's residence did not violate the height covenant. Since the words "not more than one and one-half stories in height" are ambiguous they would not be enforced. Ludwig v. Chautauqua Shores Improvement Association, Inc., decided March 19, 2004, is reported at 774 N.Y.S. 2d 240.

"The Stoler Report: Real Estate Trends in the Tri-State Region" – New York's only television talk show on real estate trends in the tri-state region, hosted by First American Vice-President Michael Stoler, airs on CUNY TV, Channel 75. "State of Residential Housing –Tri State Area" will be rebroadcast on July 13 at 5 AM and on July 15 at Midnight. "West Side – Commercial – Residential" will be rebroadcast on July 26 at 10 AM. "Commercial and Residential Development in Lower Manhattan" will be rebroadcast on July 26 at 4 PM. "Commercial Office Buildings in New York City" will be rebroadcast on July 26 at 10 PM. Live broadcasts and later Web Casts of programs are on the Internet at http://www.stolerrport.com. Michael Stoler also authors the "Commercial Real Estate" column in the New York Sun each Thursday.

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