



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

**Carbon Monoxide Detectors** - Local Law 7 of 2004 amended the New York City Administrative Code to require the installation of carbon monoxide detectors in buildings within certain occupancy groups. The Law goes into effect on November 1. Regulations issued by the Department of Buildings and the Department of Housing Preservation and Development, a Time Extension Request Form, and other information on compliance with the new requirements can be found on the Internet at [http://www.nyc.gov/html/dob/html/code\\_update.html](http://www.nyc.gov/html/dob/html/code_update.html).

**Escrows** - A contract vendee made only the first of two down-payments and did not appear at the closing. After the down-payment was made, but prior to the date when his defaults could be cured, the vendee was arrested and an action was brought against him and his related entities by the Securities and Exchange Commission for securities fraud. The United States District Court for the Southern District issued an order freezing his assets. It also issued a preliminary injunction giving the Court exclusive jurisdiction over the Defendants' assets and restrained others from taking any action seeking to affect the Defendants' assets. The seller moved to modify the Order to exclude the down-payment from the receivership so that it could retain it as contract damages but the District Court denied the motion. The time to cure the contract defaults had not expired when the restraining order was entered. Therefore, the vendee retained legal title to the down-payment and those funds are receivership property. Securities and Exchange Commission v. Ashbury Capital Partners, L.P. was reported in the New York Law Journal on September 22, 2004.

**Mortgage Foreclosure** – The Appellate Division, Second Department, affirmed the ruling of the Supreme Court, Suffolk County, denying the appellants' motion to vacate and set aside a foreclosure sale on the ground that they had not received notice of the sale which took place after their default under a forbearance agreement. Since the appellants had not appeared in the action they were not entitled to notice of the sale, and the forbearance agreement did not provide for them to receive notice. Execution of the agreement was not an appearance in the action. Olympia Mortgage Corp. v. Ramirez, decided July 12, 2004, is reported at 780 N.Y.S. 2d 611.

**Mortgage Foreclosure** - The wife of the record owner of property in Queens County moved to vacate a judgment of foreclosure and sale based on her having filed a voluntary bankruptcy petition prior to the foreclosure sale. The Appellate Term, First Department, denied the motion holding that the sale was not conducted in

violation of a bankruptcy stay since she had no vested legal or equitable interest in the property when the bankruptcy petition was filed. That the property may have been “marital property” under Section 236 of the Domestic Relations Law, potentially subject to equitable distribution, does not mean it was property of the bankruptcy estate. *Chase Manhattan Mortgage Corporation v. Nieves*, decided October 5, 2004, is reported at 2004 N.Y. Misc. LEXIS 1666 and was reported in the *New York Law Journal* on October 19, 2004.

**Mortgage Recording Tax** - Columbia, Delaware, Lewis and Sullivan Counties have elected to increase the mortgage recording tax imposed on mortgages recorded in whole or in part in each of their respective counties effective November 1, 2004. Columbia County has imposed a county mortgage recording tax of \$.50 for a new tax rate of \$1.25 per each \$100.00 and each remaining major fraction thereof of principal indebtedness secured. Delaware County has imposed the additional mortgage recording tax under Tax Law Section 253-2(a) of \$.25 for a new tax rate of \$1.00 per each \$100.00 and each remaining major fraction thereof of principal indebtedness secured. Lewis County and Sullivan County have each imposed a county mortgage recording tax of \$.25 and the new tax rate in those Counties will be \$1.00 per each \$100.00 and each remaining major fraction thereof of principal indebtedness secured. A bill authorizing the County Legislature of Genesee County to impose a county mortgage recording tax of \$.25, for a new tax rate of \$1.25 per each \$100.00 and each remaining major fraction thereof of principal indebtedness secured, has passed in the State Legislature and been sent to the Governor for signature. These county taxes will sunset after three years subject to extension by the respective county legislatures.

**New York City Real Property Transfer Tax (“RPTT”)** - The New York City Department of Finance (“Department”) deems the transfer of more than one condominium or cooperative unit between the same parties to be a “bulk sale” and applies the commercial RPTT rates instead of the lower residential rates. For a discussion of the application of the transfer tax to multiple units and exceptions allowed by the Department see “New York City Transfer Tax on Multiple Residential Cooperatives and Condominiums” posted on the Internet at <http://www.titlelaw-newyork.com/MultipleUnits.pdf>

Matter of the Petition of Cambridge Leasing Corporation involved the transfer between the same parties by a single deed of three condominium units in a building in Manhattan, two of the units being contiguous, physically combined residential units and the third unit being a Maid’s Room located a number of floors below. The Chief Administrative Law Judge of the New York City Tax Appeals Tribunal’s Administrative Law Judge Division held, contrary to the position of the Department, that the sale of these multiple individual residential condominium units is a sale of residential property subject to the lower residential RPTT rates. The Judge further found that even if the transfer was subject to the commercial rates, the sale was not a bulk sale since the Maid’s Room was an “integral part” part of the same residence as the combined apartments which, the ruling indicates the

Department acknowledged, are a single residence for the RPTT. The Cambridge Determination, (TAT(H) 03-11(RP)), dated September 28, 2004, can be obtained at <http://www.titlelaw-newyork.com/Cambridge.pdf>.

The Department has informally advised that it will appeal this Ruling and, pending the outcome of the appeal, it will continue to apply the commercial rates to transfers between the same parties of multiple residential condominium units and cooperative apartments.

**New York City Real Property Transfer Tax** - Since August 28, 1997, pursuant to Chapter 314 of the Laws of 1997, a continuing lien deduction from consideration for pre-existing mortgages has been allowed in computing the RPTT if the property being transferred is a one-to-three family house, a residential cooperative or condominium unit, or an economic interest in such property. Subsection (k) of 19 RCNY Section 23-03, added to the City's Administrative Code in August 1999, provides that the continuing lien deduction will be disallowed when a mortgage has been materially altered or has been placed on a property in connection with or in anticipation of a transfer, as provided in Subsection (k). An Administrative Law Judge of the New York City Tax Appeals Tribunal's Administrative Law Judge Division has upheld the authority of the City to issue this regulation and to apply it retroactively to transfers that took place in this matter between August 1998 and April 1999. Matter of the Petitions of M.S.B. Development Company Inc., Determination TAT(H)00-34 (RP), et al., was issued July 30, 2004.

**New York City Real Property Transfer Tax** - A shareholder of the property owning entity entered into a Subscription Agreement to purchase shares of stock to be allocated to a loft apartment and receive a proprietary lease on conversion to cooperative ownership. Subsequently, he assigned his rights under the Subscription Agreement. In a Ruling dated August 9, 2004, the Department of Finance determined that transfer tax would be computed on the consideration paid by the Assignee rather than on the amount payable under the Subscription Agreement. The Assignor was effectively the owner of the apartment and, therefore, the Assumption Agreement executed with the assignee was a contract of sale rather than an assignment. FLR No. 044824-021 can be obtained on the Internet at <http://www.titlelaw-newyork.com/FLR044824021.pdf>.

**Nonresident Estimated Income Tax** - Part H of Chapter 60 of the Laws of 2004 amended Tax Law Sections 631 ("New York source income of a nonresident individual") and 633 ("Estimated tax on sale or transfer of real property by nonresident") to require the payment of estimated income tax on the gain, if any, realized by the non-resident transferor of a cooperative unit on the transfer of the unit on and after November 18, 2004.

The New York State Department of Taxation and Finance has posted to its WEB Site new Form IT-2664, the "Nonresident Cooperative Unit Estimated Income Tax Payment Form", which form recites that it is "valid for sales or transfers (date of

conveyance) after November 17, 2004 but before January 1, 2005". Also posted to the Site are "Instructions for Form IT-2664" (IT-2664-I) and a Memo (TSB-M-04(5)I ) of the Technical Services Division of the Department's Office of Tax Policy Analysis titled "New York Personal Income Tax Treatment and Estimated Tax Requirement for Sales, Conveyances or Other Dispositions of Shares of Stock in a Cooperative Housing Corporation by Nonresidents". The Form, Instructions and Memo are at [http://www.tax.state.ny.us/forms/form\\_number\\_order\\_income.htm](http://www.tax.state.ny.us/forms/form_number_order_income.htm).

**Notice of Pendency** – The Appellate Division, Fourth Department, has held that in a mortgage foreclosure a second notice of Pendency can be filed after the expiration or cancellation of the original lis pendens. *Atlantic Mortgage & Investment Corp. v. Wynn*, decided June 14, 2004, is reported at 778 N.Y.S. 2d 638.

**Real Estate Taxes** - Petitioner took title to property in Bronx County at a foreclosure sale "subject to" unpaid taxes and made tax payments under a prior In Rem Installment Agreement entered into between the foreclosing mortgagee and the City of New York. According to the Agreement, after thirty-two installment payments the balance "shall be paid in a lump sum, or in additional installments...as may be agreed to by the Bureau of City Collections". Petitioner did not make all of the installment payments or the "lump sum" payment, and it made no other arrangement to settle the arrears. The Department of Finance then listed the property for a tax lien sale and Petitioner commenced an Article 78 proceeding seeking to enjoin the sale. The Supreme Court, New York County, enjoined the City from selling or foreclosing on the tax liens against the property, finding that the Installment Agreement's requirement that the balance of principal and accrued interest be paid in a lump sum after the making of the installment payments was ambiguous and had to be construed against the City as drafter of the Agreement. The Appellate Division, First Department, reversed, holding that the lower court could only stop the sale of the tax liens if the taxes and interest had been paid in full. *In Re Delafield 246 Corp. v. The City of New York*, decided October 12, 2004, is reported at 2004 N.Y. App. Div. LEXIS 11823.

**Restrictive Covenants** – Neighboring property owners brought suit to enforce a restrictive covenant prohibiting "manufactory, trade or business of any kind whatsoever" at defendants' residence. Defendants' home was being used for telephone, fax and e-mail communications in connection with their business but there was no business traffic at the property. The Supreme Court, Westchester County, granted the defendant's motion for summary judgment and dismissed the complaint. The Appellate Division, Second Department, affirmed, finding that "neither the letter nor the spirit of the covenant is offended so long as the defendants' business-related activities remain subordinate to the primary use of the Premises as defendants' residence , and provided further that such activities are not readily discernible by other residents" in the community. *9394 LLC v. Farris*, decided September 27, 2004, is reported at 2004 N.Y. App. Div. LEXIS 11050.

**“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. “The State of The Commercial Office Marketplace: Industry Leaders’ Perspective”, initially broadcast on October 25, will be re-broadcast on October 30 at 5 PM, October 31 at 8:30 AM, November 3 at 11PM, November 9 at Midnight, November 11 at 1 AM, November 13 at 5 PM, November 16 at 5AM, November 17 at 2AM, November 21 at Midnight, November 23 at 1AM and November 24 at 11PM. Michael Stoler’s guests will be David Greenbaum, President, Vornado Office, Eric Hadar, President, Allied Partners, Inc., Woody Heller, Executive Managing Director, Capital Transactions, Studley, Gentry Ashmore Hoyt, Managing Director, Shorenstein Company LLC, Shobi Kahn, Senior Vice-President, Investments, Equity Office Property Trust, and Steve Wechsler, Principal, Tishman Speyer Properties. Web Casts are on the Internet at <http://www.stolerrport.com>

**Title Insurance** – Plaintiff title agency issued an owner’s title insurance policy without an exception for outstanding tax liens. On discovery of its error, the agent paid the outstanding amounts, had the tax liens discharged, and sued the sellers as subrogee of the purchaser’s rights to recover the amounts paid under the contract of sale which provided that errors and omissions in the adjustment of taxes were to be corrected post-closing. The Supreme Court, Rockland County, denied the plaintiff’s motion for summary judgment and granted the defendant-sellers’ cross-motion for summary judgment dismissing the complaint. The Appellate Division, Second Department, reversed and remanded for entry of a judgment in favor of the plaintiff. National Granite Title Insurance Agency, Inc. v. Cadlerock Properties Joint Venture, L.P., decided March 1, 2004, is reported at 773 N.Y.S. 2d 86.

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