First American Title Insurance Company of New York
CURRENT DEVELOPMENTS

CERCLA – Under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") (42 U.S.C. Section 9601), persons and businesses may be strictly liable for the remediation of hazardous substances at property currently owned or operated by them or at property they previously owned or operated when hazardous substances were disposed of. CERCLA, as amended by the Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. 107-118, 115 Stat, 2356), also provides that persons and businesses purchasing commercial property or any property that will be used for commercial or public purposes may seek to claim protection from CERCLA liability for the release or threatened release of hazardous substances after conducting all "appropriate inquiries" prior to or on the date on which the property is acquired. On November 1, 2005, at 70 Fed. Reg. 66070, the Environmental Protection Agency published a final rule establishing federal requirements and standards for conducting "appropriate inquiries" into the previous ownership and uses of a property for the purposes of qualifying for landowner liability protection under CERCLA. The new rule, effective November 1, 2006, is published at 40 CFR Part 312.

Condominiums – An action was brought to determine whether the roof of a garage condominium unit was a part of the unit or a part of the common elements of the condominium. As a common element, the residential unit owners would be responsible for 98% of the cost of the replacement of the roof and the garage unit owner would be responsible for 2% of the cost. If a part of the garage unit, the garage unit owner would be responsible for the entire cost. The Supreme Court, New York County, found that under the Declaration, By-Laws and Offering Plan the garage roof was a common element. Further, the Condominium Act (Real Property Law ("RPL") Article 9-B) does not prohibit the roof from being deemed a common element even though it does not benefit the residential units. Accordingly, the Court granted the garage unit owner's motion to dismiss the complaint except for the cause of action to determine if the residential units, having a 95% interest in the common elements, should be charged with the payment of 98% of the cost of maintaining the common elements. Under RPL Section 339-m, common expenses can be charged to unit owners according to their interests in the common elements or be "specially allocated and apportioned based on special or exclusive use or availability of exclusive control of particular units or common areas by particular unit owners." Royal York Owners Corp. v. Royal York Associates, L.P., decided June 9, 2005, is reported at 8 Misc. 3d 1002A and at 2005 N.Y. Misc. LEXIS 1174.

Condominiums – An action was brought as a consequence of injuries suffered when a parapet-chain wall fence on the roof of a building in condominium ownership fell and struck two pedestrians. Since the damages suffered may have exceeded the insurance carried by the Board of Managers of the Condominium, each of the unit owners was made a Defendant in the action. The Supreme Court, New York County, denied the Unit Owners' motions to dismiss the complaint and the cross-claims against them. The Appellate Division, Second Department, reversed the lower court's order and granted the motions and cross-motions. According to the Appellate Division, the common elements were solely under the control of the Board of Managers and "in the absence of...control by the individual unit owners over that component of the common elements alleged to be defective...the individual defendants cannot be held answerable in damages". Pekelnaya v. Allyn, decided October 25, 2005, is reported at 2005 N.Y. App. Div. LEXIS 11286.

Entireties – Property owned as tenants by the entirety was conveyed by the wife to her mother in 1985. The grantor-spouse died in 1998, survived by her husband who died later that year. The grantee entered a claim against the Estate of her daughter for the costs she incurred to maintain the property from the date of the death of her daughter to the date of the sale of the property to a third-party in 2003. The Administrator of the daughter's Estate petitioned to determine the validity of the mother's claim. The Surrogate's Court, Richmond County, held that since the deed from the daughter to her mother did not affect the title of the husband, and the husband became the owner of all interests in the property on the death of his wife, there was no claim against the daughter's Estate. Matter of Estate of Jones was reported in the New York Law Journal on August 17, 2005.

Indian Lands – The United States District Court for the Northern District of New York held that Madison County, in New York, could not foreclose real estate tax liens on property owned by the Oneida Indian Nation (the "Nation"). The Nation had not waived its sovereign immunity with regard to its real property and Congress had not abrogated that immunity. The Federal Nonintercourse Act (25 U.S.C. Section 177) prohibits the "purchase, grant, lease, or other conveyance" of land from "any Indian nation or tribe of Indians" unless approved by Congress and Congress has not authorized suits against Indian Tribes to enforce real estate taxes. The Court also held that since the properties in question were located within the Nation's reservation they were exempt from taxation. In addition, the County had not provided timely notice of the two-year redemption period under Real Property Tax Law Section 1110. According to the District Court, the County "must find an alternate method to satisfy the Nation's debts to the County". Oneida Indian Nation of New York v. Madison County, decided October 27, 2005, is reported at 2005 U.S. Dist. LEXIS 25287.

Land Surveys – Chapter 730 of the Laws of 2005 amended Education Law Section 7209 to provide that "any person [other than a licensed surveyor or a person acting at his or her direction replacing a substandard marker with an upgraded marker] who knowingly damages, destroys, disturbs, removes, resets, or replaces any

boundary marker placed on any tract of land by a licensed land surveyor, or by any person at the direction of a licensed land surveyor, for the purpose of designating any point, course or line in the boundary of such tract of land in which he or she has no legal interest" is subject to a civil fine up to $500 and is liable for the cost of reestablishing the boundary marker. This change in the law took effect October 11, 2005.

Life Estates – In 1998 the Plaintiff transferred title to his home for no consideration to his son, the Defendant. The transfer tax returns identified the conveyance as a gift. Both parties continued to reside in the house. In 2001 the Plaintiff commenced an action to have the property re-conveyed to him, alleging that title was held by the Defendant as a constructive trust for the Plaintiff's benefit or, alternatively, for a determination that the Plaintiff has a life estate in the property. Finding the absence of an express promise between the parties to support a constructive trust, the Supreme Court, Suffolk County, held that the parties intended that the Plaintiff retain a life estate with the Defendant being a vested remainderman. Sekelsky v. Sekelsky was reported in the New York Law Journal on October 24, 2005.

Mechanic's Liens – Petitioners, owners of a cooperative unit in a cooperative apartment building, brought an Order to Show Cause seeking the discharge of a mechanic's lien filed against the building which identified the owner of the property as the cooperative corporation and the property subject to the lien as "300 West 108th Street-13C/13E Newman" (the Petitioners' last name and unit). Since the mechanics lien was filed more than four months after completion of the work in their apartment. Petitioners claimed it was not timely filed. Under Lien Law Section 10 a mechanic's lien must be filed within four months of the completion of work on real property improved or to be improved by a single family dwelling, and within eight months after the completion of work at any other type of property. Noting that a mechanic's lien is enforceable against a cooperative corporation only where it has affirmatively consented to work authorized by the tenant shareholder, the Supreme Court, New York County, held that the Petitioners did not have standing to challenge a mechanic's lien filed only against the cooperative corporation. The Court did not therefore decide whether the lien was filed in a timely manner or if the cooperative corporation consented to the work. Newman v. Valmar Electric Co., decided August 2, 2005, is reported at 801 N.Y.S. 2d 731.

Mortgage Foreclosure – The Supreme Court, Queens County, issued an Order setting aside a foreclosure sale and affording the Defendant an opportunity to redeem the property within twenty days of service of the Court's order with notice of entry. The Defendant tendered the principal and interest outstanding on the loan, but not the amount representing the Plaintiff's costs and disbursements in the action. The Court denied the Plaintiff's motion to hold the Defendant in default of its Order, holding that the Defendant made a "good faith" tender of sufficient funds to redeem the property. This ruling of the Supreme Court was, however, reversed by the Appellate Division, Second Department. According to the Court, "to present a viable defense of sufficient tender in a mortgage foreclosure action, the mortgagor

must show that he or she has tendered an amount that includes the principal of the mortgage debt and any costs of the foreclosure action to which the mortgagee is entitled". Astoria Federal Savings & Loan Association v. Nong Yam Trakansook, decided May 16, 2005, is reported at 796 N.Y.S. 2d 365.

Mortgage Recording Tax/New York State Transfer Tax - New York State's Office of Tax Policy Analysis's Annual Statistical Report of 2004-2005 New York State Tax Collections is published at www.tax.state.ny.us/statistics/stat_fy_collections.htm. According to the Report, the New York State Real Estate Transfer Tax collected in Fiscal Year 2005 was $729,740,514. Mortgage Recording Tax collected in Fiscal Year 2005 was $2,714,336,897, $1,602,167,143 of which was collected in connection with mortgages recorded in New York City. The State's Fiscal Year is April 1 - March 31.

Mortgage Recording Tax/Aggregation - Mortgages securing less than $500,000 are subject to mortgage recording tax at the rate of $2.05 for each $100.00 of principal indebtedness secured; mortgages on one-to-three family dwellings securing $500,000 or more are taxed at the rate of $2.175 for each $100.00 of principal indebtedness secured; all other mortgages securing $500,000 or more are taxed at the rate of $2.80 per $100 of principal indebtedness secured. Under a Regulation of the New York State Department of Taxation and Finance published at 20 NYCRR 642.4, mortgages recorded in the City of New York which are part of the same or related transactions made by the same or related mortgagors are to be aggregated to determine the mortgage tax rate to be applied to each of the aggregated mortgages. If mortgages secure in the aggregate $500,000 or more, ACRIS will compute mortgage tax at the higher applicable rate. (The rate increase effective June 1, 2005 only applies to the aggregated mortgage recorded on or after that date. See http://www.tax.state.ny.us/pdf/memos/mortgage/m05_4r.pdf).

As reported in Current Developments issued April 18, 2005, the New York City Register advised a committee of the New York State Land Title Association that a mortgage will not be aggregated by her offices if an affidavit is provided stating that the earlier recorded mortgage has been paid off and the recording of a satisfaction is pending. Affidavits approved by the Register's Office accompany this Bulletin.

New York City – In 1980 Gulf & Western donated the building at 2 Columbus Circle, in Manhattan, to The City of New York. The deed required the building to be used as a public facility for 30 years; if the building was to be used for another purpose title would automatically revert to Gulf & Western, or its successors and assigns. The City's interest in the property was a fee on limitation subject to a reverter. In 1996 Defendant New York City Economic Development Corporation ("EDC") purchased the reverter interest.

The City of New York intended to sell the building without competitive bidding to the EDC, which would resell it to the Museum of Arts and Design. Plaintiffs claimed that the proposed sale violated the Gift and Loan clause of the New York State

Constitution, City Charter Sections 383 and 384 (requiring the sale of City owned property at public auction) and the public trust doctrine.

The Supreme Court, New York County, dismissed the complaint. First, although funds were earmarked in the City's budget for the Museum, and the Gift and Loan Clause of the state constitution prohibits a municipality from expending money for the benefit of a private person or entity unless the expenditure is in furtherance of a public purpose, "the law has long recognized that public support of the arts serves a public or municipal purpose".

Second, Section 384(b)(4) of the City Charter ("Charter") allows the sale of City owned property to a local development company (such as the EDC) without public bidding if the property is not "inalienable" and the appropriate Borough Board consents to the sale, which consent was obtained. Under Charter Section 383 "inalienable" property includes specific types of property not here applicable "and all other public places". Under Charter Section 202(b) a building is accepted by the City as a "public place" if it is "within the lines of a...public place on the City Map". There being no evidence that the City accepted the building as a public place, the building was not "inalienable" property and could be sold to the EDC.

Third, although under the common law the public use of a building may establish that it is held in trust for the benefit of the public, requiring the state legislature to authorize the sale of the building for a private use, this does not apply to donated property subject to a possibility of reverter. When the property reverts to the donor it can be used for any purpose. Landmark West ! v. City of New York, decided September 1, 2005, is reported at 2005 N.Y. Misc. LEXIS 1853.

<u>New York City Real Estate Taxes</u> – The first half 2005-2006 real estate tax bills applied the 2004-2005 real estate tax rates. The 2005-2006 real estate tax rates were recently set by the City Council. Accordingly, the Department of Finance has adjusted the real estate taxes payable in the second half of current fiscal year 2005-2006 to account for the new tax rates. The increase in tax applicable to the 1st half of the tax year is payable as part of the 2nd half tax bill due January 1, 2005 and equally as between the 3rd and 4th tax quarter tax bills payable January 1, 2006 and April 1, 2006 for taxpayers making quarterly payments.

The rate for each $100 of assessed valuation for fiscal year 2005-2006 was changed for Class One from 15.094 to 15.746; for Class Two from 12.216 to 12.396; for Class Three from 12.553 to 12.309; and for Class Four from 11.558 to 11.306. Class One generally includes one-to-three family residential real property, small stores and offices with one or two apartments attached, vacant land zoned for residential use, and most condominiums that are not more than three stories. Class Two includes all other real property that is primarily residential, such as cooperative buildings. Class Three includes utility real property. Class Four includes all commercial and industrial real property not within the other three tax classes.

New York State Real Estate Transfer Tax – Under Tax Law Section 1401(e) and regulations of the New York State Department of Taxation and Finance ("Department") at 20 NYCRR Section 575.7(a), unless the tenant under a lease or sublease has an option to purchase the lease or sublease is not a conveyance subject to the State's Transfer Tax unless (i) the sum of the term of the lease including options for renewal exceed 49 years, (ii) substantial capital improvements are to be made by or for the benefit of the lessee, and (iii) the lease is for all or substantially all of the premises constituting the real property, substantially all being defined to mean 90% or more of the total rentable space, exclusive of common areas. Where a lease is of vacant land only, any portion of the land constitutes all or substantially all of the premises.

The Department has issued Advisory Opinion TSB-A-05(1)R dated September 27, 2005 concerning the application of these rules to a lease of space in a shopping center. First, and for shopping centers only, in determining whether such leased property constitutes all or substantially all of the premises it is appropriate to compare on a case by case basis the total area leased to the total rentable area within the shopping center whether the new store is to be built on vacant land, in an existing shopping center or in a shopping center to be constructed. Second, when a lease provide that the tenant's obligations are contingent upon the occurrence of certain events (such as the satisfactory completion of environmental reviews and feasibility studies for the purpose of obtaining necessary permits and approvals) and, during that period, the tenant's rights of access are otherwise limited, the lease is not a taxable transfer until the tenant has "use and occupancy" of the property. Third, a tenant has "use and occupancy" of space in a shopping center on commencement of construction when the tenant is responsible for the construction; when the landlord is responsible for construction "use and occupancy" begins when the store is complete and the tenant occupies the new building. Fourth, when a lease with a remaining term of less than 49 years is extended to a date less than 49 years in the future the lease is not subject to tax, even when the expired term and the new term together exceeds 49 years. Further, a lease with a term of less than 49 years, including extensions and renewals, is not subject to transfer tax when the tenant holds a right of first refusal. The Advisory Opinion is posted on the WEB at www.tax.state.ny.us/pdf/advisory_opinions/real_estate/a05_1r.pdf.

Party Walls – Plaintiff, the owner of a townhouse in Manhattan, brought an Order to Show Cause against the owner of the adjoining townhouse and the contractor working on that building seeking a preliminary injunction restraining the Defendants from continuing construction which he alleged encroached on his property. Beams were being placed in a common wall above the roof of the Plaintiff's building to add a floor to the Defendant-property owner's building and beams were being inserted into a second common wall to house an elevator. The Supreme Court, New York County, declined to issue a preliminary injunction. The Court held that the walls in question were party walls in which both parties had easements; although the beams and construction materials might extend beyond the boundary line there was no contention that the beams and materials extended out of

the wall onto Plaintiff's property. The Court scheduled a hearing to determine if the construction had caused or would cause actual damage to the Plaintiff's building. Gordon v. Park Mad 74 Realty LLC, decided June 9, 2005, is reported at 801 N.Y.S. 2d 777.

Tax Sales – The County of Tioga sent notices of the In Rem tax foreclosure of certain property for unpaid real estate taxes to the person listed on the tax rolls as the owner of the property. The notices were sent to that person's address listed on the tax rolls by both certified and ordinary mail. The notices by certified mail were returned marked "unclaimed", but the notices sent by ordinary mail were not returned. After the County acquired title to the property the owner commenced a proceeding to set aside the tax deed and to enable him to redeem the property, claiming that he did not request that his address for notice be changed to that listed on the tax rolls. The Supreme Court, Tioga County, held that the County had satisfied the notice requirements and due process and dismissed the petition. The Appellate Division, 3rd Department, however, reversed the lower court's ruling, holding the County should have conducted a reasonable search of the public record for a proper address on receiving back the certified mail marked "unclaimed". The Court of Appeals reversed the Appellate Division's Order, holding that the notice given satisfied due process. Since none of the notices sent by first class mail were returned, the County reasonably believed that the property owner was attempting to avoid notice by ignoring the notices sent by certified mail. The taxpayer was responsible for updating his address on the tax rolls. Harner v. County of Tioga, decided June 30, 2005, is reported at 800 N.Y.S. 2d 112.

"The Stoler Report: Real Estate Trends in the Tri-State Region" – New York's only television 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 program "Residential Developers Forum", first broadcast on November 28, will be re-broadcast on December 3 at 5 PM, December 4 at 8:30 AM, December 7 at 12 Midnight, December 10 at 4PM, December 14 at 7AM, 1 PM and 11PM, December 17 at 2PM, December 20 at 2AM, and December 22 at 11PM. Michael Stoler's guests are Matthew Adell, President, Adellco LLC, Martin Dunn, President, Dunn Development, Dennis Herman, President, L & M Equity Participants, Damon Pazzaglini, Partner, Sidney Fetner Associates, and Adam Weinstein, President, The Phipps Houses Group. WEB Casts are at http://www.stolerreport.com.

The officers and employees of First American wish you health and prosperity in the New Year.

Michael J. Berey
Senior Underwriting Counsel
No. 82, December 2, 2005
mberey@firstam.com

Affidavit Claiming Exemption from Mortgage Tax Aggregation
When Mortgagor/Borrower is a Business Entity

State of)
County of) ss:

_____, being duly sworn, deposes and states that:

1. I am _____ of_____(insert capacity of person signing and the name of the entity), a/the mortgagor/borrower of the mortgage dated _____ ("New Mortgage") in the principal amount of _____ made to _____ (insert name of mortgagee/lender of New Mortgage) on property with the address of _____ (the "Property"), identified on the tax map of the City of New York as _____ County, Block _____ Lot _____. Said mortgage is being submitted for recording in the Office of the City Register, City of New York, in _____ County.

2. Within the last twelve months there was recorded against the Property a mortgage dated _____ ("Prior Mortgage") in the principal amount of _____ made by the mortgagor of the New Mortgage or a "related" mortgagor/borrower, as defined in Tax Law § 253-a(2)(b) (see below definition), to _____(insert name of mortgagee/lender of Prior Mortgage), which Prior Mortgage was recorded on _____ as CRFN _____.

3. The Prior Mortgage has been paid and satisfied and a Satisfaction of the Prior Mortgage has been requested for recording in the Office of the Register, _____ County and are therefore not part of the same or related transaction.

4. Affiant therefore respectfully requests that the New Mortgage and Prior Mortgage not be subject to aggregation for purposes of determining the applicable rate of mortgage recording tax.

_____

Sworn to before me this
_____ day of _____ , 200__

"Related" Mortgagors as defined by Tax Law § 253-a(2)(b)

The term related, when used with reference to mortgagors, shall include but not be limited to:

(i) members of a family, including spouses, ancestors, lineal descendants, and brothers and sisters (whether by whole or half blood);

(ii) a shareholder and a corporation where more than 50% of the value of the outstanding stock of such corporation is owned or controlled directly or indirectly by such shareholder;

(iii) a partner and a partnership where more than 50% of the capital or profits in such partnership is owned or controlled directly or indirectly by such partner;

(iv) a beneficiary and a trust where more than fifty percent of the beneficial interest in such trust is owned or controlled directly or indirectly by such beneficiary;

(v) two or more corporations, partnerships, associations, or trusts, or any combination thereof, which are owned or controlled, either directly or indirectly, by the same person, corporation or other entity, or interests; and

(vi) a grantor of a trust and the trust.

Affidavit Claiming Exemption from Mortgage Tax Aggregation When Mortgagor/Borrower is an Individual

State of)
County of) ss:

_____, being duly sworn, deposes and states that:

1. I am a/the mortgagor/borrower of the mortgage dated _____ ("New Mortgage") in the principal amount of _____ made to _____ (insert name of mortgagee/lender of New Mortgage) on property with the address of _____ (the "Property"), identified on the tax map of the City of New York as _____ County, Block _____ Lot _____. Said mortgage is being submitted for recording in the Office of the City Register, City of New York, in _____ County.

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(iii) a partner and a partnership where more than 50% of the capital or profits in such partnership is owned or controlled directly or indirectly by such partner;

(iv) a beneficiary and a trust where more than fifty percent of the beneficial interest in such trust is owned or controlled directly or indirectly by such beneficiary;

(v) two or more corporations, partnerships, associations, or trusts, or any combination thereof, which are owned or controlled, either directly or indirectly, by the same person, corporation or other entity, or interests; and

(vi) a grantor of a trust and the trust.