



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

Affordable Housing - On August 17, 2005 the New York City Council, overriding the Mayor's veto, enacted Local Law 79 of 2005, adding Chapter 9 ("Right of First Refusal and First Opportunity to Purchase") to Title 26 of the City's Administrative Code. The provisions of the Local Law, which has been referred to as the "Tenant Empowerment Act", went into effect on November 15, 2005. A copy of the Local Law can be located on the City Council's Web Site, <http://webdocs.nycouncil.info>, by entering the number of the Local Law and its year of enactment. The purpose of the Local Law is to maintain multi-family rental housing which is "assisted rental housing" as "affordable housing" when the owner of the property intends to prepay subsidized mortgages on the property or to opt out of federal rent subsidy programs and thereby be able to charge market rents.

The Local Law defines "assisted rental housing" to be a privately owned multiple dwelling in which the majority of dwelling units are subject to governmental eligibility restrictions and in which the rents are controlled, regulated or assisted by the government pursuant to a regulatory agreement or rental assistance agreement. Specifically included within the definition of "assisted rental housing" is property (i) owned by a Limited-Profit Housing Company under Article II of New York State's Private Housing Finance Law ("PHFL"), first occupied on or after January 1, 1974, (ii) owned by a Limited Dividend Housing Company under Article IV of the PHFL, first occupied on or after January 1, 1974, (iii) receiving rental assistance provided under Section 8 of the National Housing Act of 1937, or (iv) having the benefit of certain housing programs under specified Sections of the National Housing Act. Property with assisted rental housing which is owned by a PHFL Article II entity is commonly known as Mitchell-Lama housing.

Under the Local Law, when the owner of such rental assisted housing intends to effectuate a "conversion" (defined below), a "tenant association" or a "qualified entity" will be afforded a "first opportunity to purchase" and a "right of first refusal" to purchase the property. To exercise a "first opportunity to purchase", the tenant association or qualified entity will be required to purchase the property at or below its appraised value before the conversion. To exercise a "right of first refusal", the tenant association or qualified entity will be required to purchase the property at the higher of its appraised value or the amount offered by a bona fide purchaser. A "tenant association" is defined to be an association formed by at least 60% of the tenants in residence. A "qualified entity" is defined to be a person or entity experienced in the management of affordable housing, designated by at least

60% of the tenants in residence to act on their behalf, and approved by HPD, which obligates itself, and its successors in interest, to continue operating the property as affordable housing.

A “conversion”, which triggers the rights of the tenant association or qualified entity under the Local Law, includes the “transfer of title, leasing, intention to sell or lease, mortgage pre-payment, withdrawal from an assisted housing program, decision not to extend or renew participation in the [rental assistance] program or any action taken by the owners that would result in the termination of participation by the owner in the assisted rental housing program”.

The Real Estate Board of New York, Inc. has commenced an action in the Supreme Court, New York County, against the New York City Council, The City of New York and New York City's Department of Housing Preservation and Development to have the Local Law declared invalid, alleging that the Law conflicts with state and federal statutes and is unconstitutional.

Contracts of Sale – Under a contract for the sale of a one-family residence the premises were to be delivered vacant at closing, or the Seller could elect to deliver title and pay a per diem until vacant possession was delivered. The evening before closing the Purchaser inspected the premises and observed that an illegal tenant was still in possession. Purchaser's counsel faxed a letter to Seller's counsel stating that the closing would be canceled if the tenant was in the premises at closing. The Purchaser did not appear at the closing, the Seller canceled the contract and refunded the down-payment, and the Purchaser sued for specific performance. The Supreme Court, Bronx County, held that the Seller was in default and directed him to appear for a closing on a date to be scheduled by the Purchaser, no earlier than 30 days after service of the judgment with notice of entry. According to the Court, since the contract did not provide that the closing date was "time of the essence", and since the Seller did not exercise its option to close and pay a per diem, the Purchaser was entitled to a reasonable adjournment of the closing. The Seller's action in canceling the contract was a material breach entitling the Purchaser to the remedy of specific performance. *Rivera-Ramos v. Welsh*, decided January 4, 2006, is reported at 2006 WL 66468 (N.Y. Sup.).

Cooperative Units - July 1, 2001 was the effective date of the revision to Article 9 dealing with "Secured Transactions" ("Revised Article 9") under New York's Uniform Commercial Code. To initially perfect a Security Interest in a Cooperative Interest under Revised Article 9, or to continue after June 30, 2006 the effectiveness of a Security Interest in a Cooperative Interest previously perfected under former Article 9, the following procedures need to be followed:

1. A UCC-1 filed on or after July 1, 2001 needs to comply with the requirements of Revised Article 9 for a Cooperative Interest, and a Cooperative Addendum should be filed with the UCC-1. If a Cooperative Addendum was not filed with the UCC-1

it should be filed prior to the expiration of the five year period for which a UCC-1 filed alone is effective.

2. When the Security Interest in a Cooperative Interest was perfected by filing before July 1, 2001, either a UCC Financing Statement Amendment (Form UCC3) filed as a Continuation (a "Continuation Statement"), which provides perfection of the Security Interest for only five years, or a Cooperative Addendum, which provides perfection of the Security Interest for fifty years, needs to be filed prior to July 1, 2006. The filing of a Cooperative Addendum for fifty year perfection is the preferred alternative.

A UCC-3 Financing Statement Amendment for a "Collateral Change" should also be filed if the existing UCC-1 does not meet the requirements for a financing statement on a Cooperative Interest. For example, Box "8" on the Financing Statement Amendment may need to be checked to "add" collateral by setting forth the address and block and lot of the real property owned by the cooperative corporation and the name of the cooperative corporation as the Record Owner of the real property.

3. Where a Security Interest in the shares of stock and a proprietary lease representing ownership of a cooperative unit was perfected by possession only before October 1, 1988, a UCC-1 needs to be filed before July 1, 2006, preferably with a Cooperative Addendum. The Security Interest in the Cooperative Interest will then be perfected under Revised Article 9 for fifty years.

For further information contact Eva-Marie Davis of Modern Abstract Corporation, at 212-880-0720.

Land Use – Current Developments issued on December 27, 2004 reported on the decision of the Second Circuit Court of Appeals in Westchester Day School v. Village of Mamaroneck (386 F. 3d 183). In that case, the Zoning Board of the Village of Mamaroneck, in Westchester County, denied the Plaintiff's application to modify its special permit to enable improvements to be made to its existing buildings and to construct a new building on its property. Plaintiff, which operates a religious day school on its property, brought an action alleging that the Village violated the Religious Land Use and Institutionalized Persons Act of 2000 (the "Act") which provides, in part, at 42 U.S.C. Section 2000cc(a)(1), that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person...unless the government demonstrates that imposition of the burden...(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that governmental interest". The United States District Court for the Southern District of New York had granted the Plaintiff summary judgment and ordered the Defendants to approve the application. The Circuit Court vacated the judgment, holding that there were issues of fact to be determined, and remanded the case for further proceeding.

On remand, following a trial, the District Court issued a mandatory injunction ordering the Village of Mamaroneck's Zoning Board of Appeals to approve the Plaintiff's amended application for a special permit. The Court concluded that the Zoning Board's "denial of the Application was so contrary to the evidence and to the equities as to be arbitrary and capricious, and...defendants have substantially burdened [Plaintiff's] religious exercise without a compelling governmental interest exercised in the least restrictive means, in violation of the [Act]". Westchester Day School v. Village of Mamaroneck, decided March 2, 2006, is reported at 417 F. Supp. 2d 477. This decision has been appealed to the Second Circuit Court of Appeals.

Leases – Plaintiff law firm exercised an option to lease an additional floor in the building it occupied but was unable to take possession of the space for eighteen months, since the Defendant did not vacate the premises until after an Order of ejectment obtained by the building's owner was affirmed on appeal. Plaintiff commenced an action to recover damages on the grounds of tortious interference with contract, unjust enrichment and trespass. A prior Order of the Supreme Court, New York County, dismissed the actions for tortious interference and unjust enrichment, but sustained the cause of action for trespass. The Supreme Court granted the Plaintiff's motion for summary judgment on the issue of liability; the question of damages is to be determined at trial. According to The Wall Street Journal on February 22, 2006, the Defendant has filed an appeal. Kronish Lieb Weiner & Hellman, LLP v. Tahari, Ltd. was reported in the New York Law Journal on January 23, 2006.

Marketability of Title – The Administrator of the Estate of the record owner asserted that she was not required to complete a sale of real property since federal tax liens filed against the decedent rendered title unmarketable. The Supreme Court, New York County, directed that the property be conveyed; under the contract of sale, liens which could be discharged by the payment of money were not objections to title. The Court also ordered the Administrator to indemnify the Plaintiff-Purchaser against claims that might be asserted against the property based on the federal tax liens. The Appellate Division, First Department affirmed, holding that under the contract the liens did not render title to the property unmarketable. New York Property Holding Corp. v. Rosa, decided February 7, 2006, is reported at 2006 WL 279065 (N.Y.A.D. 1st Dept.).

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 charged for the second quarter of calendar year 2006 on late payments and assessments of mortgage recording tax and real estate transfer tax will be 9% per annum compounded daily. The interest rate to be paid on refunds of these taxes will be 6% per annum compounded daily. The interest rates are published at http://www.tax.state.ny.us/taxnews/int_curr.htm.

Mortgage Foreclosure/Mechanic's Liens – The Supreme Court, Bronx County, held that the holder of a mechanic's lien which expired prior to the foreclosure sale is not entitled to surplus monies arising from a foreclosure sale. According to the Court, on expiration of the period for which a mechanic's lien is effective the mechanic's lienor was an unsecured creditor and "only those with vested interests in the property prior to [the] foreclosure sale may assert claims to the fund". *Mortgage Lenders Network USA Inc. v. Martinez* was reported in the New York Law Journal on April 11, 2006.

Notice of Pendency – Under Civil Practice Law and Rules ("CPLR") Section 6513 ("Duration of Notice of Pendency") a notice of pendency may be extended upon motion on notice to the opposing party if the Order extending the notice is filed, recorded and indexed before expiration of the existing notice. (See *In re Sakow*, 97 N.Y. 2d 436). Plaintiff had obtained an ex parte Order, extending the effectiveness of the notice of pendency until an application on notice to extend the lis pendens for an additional three years could be heard. The Plaintiff then moved on notice for an Order extending the notice of pendency, but the Supreme Court, Queens County, denied its application. The interim Order extending the time of the notice was not filed, recorded or indexed before the lis pendens expired. Further, according to the Court, "by using an order to show cause containing an ex-parte extension, plaintiff failed to timely comply with CPLR 6513". *RKO Properties Ltd. v. Boymelgreen*, decided March 2, 2006, is reported at 2006 WL 758545 (N.Y. Sup.).

Restrictive Covenants – Plaintiff, a not-for-profit homeowners association, sought to enjoin the use of the basement and first floor of a brownstone townhouse by several dentists. It claimed that such a use violated an 1868 restrictive covenant prohibiting a "noxious or dangerous trade or business" or "any establishment, business or occupation known as nuisances in the law or which may be dangerous or offensive to the neighboring inhabitants", and applicable zoning regulations requiring residential use. The Supreme Court, New York County, dismissed the action, holding that the professional medical practice was not a noxious, dangerous or offensive trade or business, noting that "(t)he law has long favored free and unencumbered use of real property, and covenants restricting the use of land are strictly construed against those seeking their enforcement". The Court also held that the use in question is allowed under New York City's Zoning Resolution's "home occupation exception", allowing in a residentially zoned area commercial professional offices not occupying more than 25% of the total floor area of a building. *East Sixties Property Owners Association v. Cohane*, decided February 3, 2006, is reported at 11 Misc. 3d 1065(A), 2006 WL 687742 (N.Y. Sup.).

"The Stoler Report: Real Estate Trends in the Tri-State Region" – New York's 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 April 24 will be re-broadcast on May 3 at 7 AM and 1 PM, May 6 at 4 PM, May 9 at 2 AM, May 10 at 11 PM, May 17 at 10 AM and 3 PM, May 18 at 11 PM and May 24 at 7 AM and 1 PM. Michael Stoler's guests are Joel Brietkopf, Partner, Alchemy Properties, Inc.; Harold Fetner, President, Sydney Fetner Associates; Veronica Hackett, Managing Director, The Clarett Group; Fred Harris, Senior Vice-President, AvalonBay Communities; Thomas Lydon, President, The City Investment Fund, L.P.; and Robert Vahradian, President, Allied Partners Inc. WEB Casts are at <http://www.stolerreport.com> and www.cuny.tv.

Michael Stoler also hosts "Building New York", a half-hour talk show on CUNY-TV airing each week on Mondays at 9 AM and 10 PM, Tuesdays at 10:30 PM, Saturdays at Midnight, and Sundays at 10:30 AM. Upcoming broadcasts include Norman Sturner and Neil Siderow, Principals, Murray Hill Properties, the week of May 1, Shaya Boymelgreen, Principal, Leviev Boymelgreen, the week of May 8, Douglas Durst, President, The Durst Organization, the week of May 18, Larry Silverstein, President, The Silverstein Organization, the week of May 22, and Kenneth Horn, President, Alchemy Properties the week of May 29. These programs can be viewed at www.buildingny.org and www.newyorkrealestatetv.com .

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