CB Title
Title Insurance Services
New York New Jersey Nationwide

140 Mountain Avenue – Suite 101
Springfield, NJ 07081
Tel: 973-921-0990
Fax: 973-921-0902

Date: **August 3, 2005**

To: **All Clients and Friends**

From: **Cliff Bernstein**

Re: **Current Developments**

TITLE INSURANCE BULLETIN –NEW YORK
CURRENT DEVELOPMENTS

Adverse Possession - Plaintiffs sued for damages alleged to have resulted from the Defendants' demolition of a structure adjoining their building. They alleged that the removal of a wall of the Defendants' building rendered their building unusable since the now exposed wall of Plaintiffs' building was unfinished and not weatherproof. The claimed that they had a prescriptive easement in their building's use of the wall to protect their building's exterior wall from the elements. The Supreme Court, Washington County, granted the Defendants' motion for summary judgment, and the Appellate Division, Third Department, affirmed. Finding no adverse use of the wall, the Appellate Division held that the passive use of the wall of the adjoining building as a shield against the elements did not result in a prescriptive easement. Wade v. Village of Whitehall, decided by the Appellate Division on April 14, 2005, is reported at 793 N.Y.S. 2d 251.

Cooperatives – Plaintiffs, purchasers from the sponsor, brought an action for a declaration that they were the holder of unsold shares exempt from restrictions on subletting applicable to residential tenants. The Defendant cooperative corporation claimed that the Plaintiffs were not holders of unsold shares because neither they nor the Sponsor complied with regulations issued by the Attorney General at 13 NYCRR Part 18. The Supreme Court, New York County, granted the Defendant's motion for summary judgment, and the Appellate Division, First Department, affirmed. The Court of Appeals, reversing the Order of the Appellate Division and remanding the case for further proceedings, held that "… whether plaintiffs are holders of unsold shares should be determined solely by applying ordinary contract principles to interpret the terms of the documents defining their contractual relationship with the cooperative corporation", such as the Defendant's certificate of incorporation and by-laws, and the proprietary lease. Part 18 applies to disclosures in the sale of an apartment to the public. Kralik v. 239 East 79th Street Owners Corp., decided June 16, 2005, is reported at 2005 N.Y. LEXIS 1261.

Due on Sale – A Mezzanine Loan Agreement required payment of a "supplemental exit fee" if certain properties in California were sold above a given price. A holder of a portion of the debt sought to recover the "exit fee". Applying New York law, as provided in the Loan Agreement, the United States District Court for the Southern District of New York held that neither the transfer of title without consideration to other single purpose entities "compromised of the same parties", nor the payment of consideration for the transfer of controlling interests in the property-owning entities through an initial public offering, constituted a sale of the property for consideration under the Loan Agreement, notwithstanding that the ownership of the entities holding title had substantially changed through the IPO. The Court granted the Defendants' motion for summary judgment. Anthracite Capital, Inc. v. MP-555 West Fifth Mezzanine, LLC, decided May 17, 2005 is reported at 2005 U.S. Dist. LEXIS 9179.

Foreign Sovereign Immunities Act – The City of New York, in seeking declaratory judgments in actions consolidated for determining motions to dismiss by the United States District Court for the Southern District of New York, argued that it had valid tax liens for unpaid real estate taxes against two properties in Manhattan, one owned by the Permanent Mission of India to the United Nations and the other owned by the Principal Resident Representative of the Mongolian People's Republic to the United Nations. It asserted that under Real Property Tax Law, Section 418 ("Foreign Governments") real estate taxes are due on those portions of the buildings used as residences for staff below the rank of ambassador. Defendants moved to dismiss the Complaint on the ground that they are immune from suit under the Foreign Sovereign Immunities Act (28 U.S.C. Section 1604). The Court denied the Defendants' motions holding it had jurisdiction under the Act to determine the validity of the liens. Whether the properties in question are immune from taxation was not determined. City of New York v. The Permanent Mission of India to the United Nations was reported in the New York Law Journal on July 15, 2005.

Homeowner Association ("HOA") – Plaintiff, the Board of Directors of an HOA, commenced an action against a homeowner to recover unpaid HOA dues. Defendant filed a motion to dismiss on the ground that his home was not part of the HOA; the HOA's Declaration was dated after the Defendant took title and recorded after the deed to him was recorded. The Civil Court, Richmond County, held the Defendant to be a member of the HOA and scheduled a trial to determine the amount due and owing Plaintiff for common charges, assessments, late fees and attorneys' fees. According to the Court, the Declaration for an HOA is effective when its filing with the New York State Department of Law is approved, not on recording, and Defendant, having had actual knowledge of the Declaration prior to taking title, is responsible for his proportionate share of maintenance costs. Board of Directors of Millennium Homeowners Association v. Bosco was reported in the New York Law Journal on June 8, 2005.

Indian Land Claims – **Shinnecocks** – In June 2005 a lawsuit was filed in the United States District Court for the Eastern District of New York by the Shinnecock Indian Nation (the "Nation") against the State of New York, George E. Pataki, individually and as Governor, the County of Suffolk, the Town of Southampton, the Trustees of the Proprietors of the Common and Undivided Lands of the Town of Southampton, in the Town of Southampton ("Trustees"), the Trustees of the Freeholders and Commonality of the Town of Southampton, and eleven other corporate Defendants.

The Complaint alleges that property owned by the Nation in what is now the Town of Southampton was unlawfully conveyed in 1859 to the Trustees in violation of the federal Indian Non-Intercourse Act in effect in 1859 and the conveyance was therefore *void ab initio*. The Action seeks, among other relief, a declaration that the Nation has possessory rights to the lands in question (the "Subject Lands") a declaration that the interest of the Defendants in the Subject Lands is null and void, an order restoring the Nation to possession of those portions of the Subject Lands to which the Defendants claim title, and damages.

- **Onondagas** – In March 2005 a lawsuit was commenced in the United States District Court for the Northern District of New York by the Onondaga Nation (the "Onondagas") against the State of New York, Governor Pataki, Onondaga County, The City of Syracuse, and five other corporate defendants. The Complaint filed in this Action alleges that property owned by the Onondagas and the Haudenosaunee, a confederacy, originally, of five Indian nations including the Onondagas, was unlawfully acquired by the State of New York in violation of the federal Indian Trade and Intercourse Acts, the United States Constitution, The Treaty of Fort Stanwick in 1784 and the Treaty of Canandaigua of 1794. The Action seeks a declaratory judgment holding that conveyances made by the Nation to the State of New York under six treaties entered into in the late 1700s and early 180s are null and void and that the land in question remains the property of the Onondagas and the Haudenosaunee.

Impacted by this case is a strip of land from ten to more that forty miles in width running from the St. Lawrence River on the north along the east side of Lake Ontario to the Pennsylvania border on the south. Properties in portions of each of the counties of Broome, Cayuga, Chenango, Cortland, Jefferson, Lewis, Madison, Onondaga, Oswego, Tompkins, and Tioga are impacted. The area in question includes the cities of Binghamton, Cortland, Fulton, Syracuse, Oswego and Watertown.

- **Cayugas** – In 1980 the Cayuga Indian Nation of New York (together with the Seneca – Cayuga Tribe of Oklahoma and the United States of America, as Plaintiff-Intervenors) commenced an Action against the State of New York, Cayuga County, and other defendants, to reclaim 64,015 acres of land ceded to New York State by Treaties entered into in 1795 and 1807. Plaintiffs claimed that the treaties violated the 1790 Indian Trade and Intercourse Act which required that the federal government approve sales of tribal land. The United States District Court for the Northern District of New York held that the Treaties were invalid as they were not ratified by the federal government, and in 2001 the Court awarded damages of $247,911,999.42. The Second Circuit Court of Appeals has reversed the judgment of the District Court, holding (relying in part on the United States Supreme Court's decision in City of Sherrill v. Oneida Indian Nation, 161 L Ed. 2d 386, 125 S. CT. 1478 (2005)) that the Plaintiffs' possessory land claim, and the damage remedy, are barred by laches and has dismissed the Plaintiffs' claims. Cayuga Indian Nation of New York v. George Pataki, as Governor of New York, decided June 28, 2005, is reported at 2005 U.S. App. LEXIS 12764.

Mortgage Foreclosure – Authority for the foreclosure of a mortgage by the exercise of a power of sale under Article 14 of the Real Property Actions and Proceedings Law ("RPAPL") was extended from July 1, 2005 until July 1, 2009 by Chapter 123 of the Laws of 2005. The Chapter

also amends RPAPL Section 1402 to require a copy of the notice of pendency in the action to foreclose, together with a notice of intention to foreclose, be sent to the mortgagor, the obligor (if other than the mortgagor), and any other person or entity whose lien is to be cut-off as subordinate, "not less than ten days prior to the first service of the notice of sale". The statute continues to require also that such notice be provided "not less than ten days" after the lis pendens is filed.

New York City/Condemnation Clause – A deed in 1966 from the City of New York included a so-called dollar condemnation clause, which provided that compensation to an owner of the property would be limited to one dollar in the event the City acquired by condemnation any part of the property lying within the bed of a street on the then-present City Map. In 1992 the property was conveyed to the claimant and in 1994 the City condemned the property. The Order of the Supreme Court, Richmond County, holding that the condemnation award as to that part of the property lying within the bed of a mapped street was limited to one dollar, was affirmed by the Appellate Division, Second Department, in Matter of City of New York v. Packtor, decided June 6, 2005 and reported at 796 N.Y.S. 2d 412.

New York City Department of Finance Memoranda on Real Estate Taxes – The New York City Department of Finance ("Department") has issued Finance Memorandum 05-5 ("Finance Policy Relating to the Revocation of Real Property Tax Exemptions"), dated July 12, 2005, setting forth its "policy for revoking real property tax exemptions when a property owner is no longer eligible to receive an exemption". According to the Memorandum, with the exception of the removal of a School Tax Relief ("STAR") Exemption and the revocation of a Construction Exemption, "(w)hen an owner is no longer eligible to receive an exemption, full (non-reduced) taxes will be reinstated the first day of the following [tax] quarter". In addition, when "a property is no longer eligible to receive an exemption, and Finance becomes aware of this more than six years later, full taxes will be reinstated only up to six years retroactively", unless "a property owner is deemed to have acted in a fraudulent manner or has intentionally avoided notifying the City or State of a property sale or change in the status of a property that effects its eligibility for exemption benefits". In that situation, taxes will be reinstated retroactively to the date on which the property become ineligible for its exemption and interest will be applied retroactively to the reinstated taxes. (When a property is sold or otherwise becomes ineligible for the STAR Exemption, the exemption remains in effect for the remainder of the then current fiscal year, or until the end of the following fiscal year if the property is sold or otherwise becomes ineligible for the Exemption between January 5 and June 30).

- The Department has also issued Finance Memorandum 05-4 ("Finance Policy Relating to Real Property Tax Interest and Billing Legislation Enacted June 6, 2005") outlining major provisions of Local Law 62 of 2005 ("A Local Law to amend the New York city charter and the administrative code of the city of New York, in relation to the payment of real property taxes and related charges".) Under Local Law 62 for any type of property with an assessed valuation of $80,000 or less real estate taxes are required to be paid quarterly within fifteen days of the due date; real estate taxes for any type of property with an assessed valuation of over $80,000 are required to be paid semi-annually with no grace period. (The assessed valuation above which real estate taxes were paid semi-annually had been $40,000). The Local Law also deals with, and the Memorandum also discusses, how the interest rate on delinquent payments is

determined, discounts available for the advance payment of all annual property taxes, and the procedure to be followed before interest is charged on a late payment of real estate taxes when a payment erroneously posted to an account is removed. Starting July 1, 2005 delinquent taxes will accrue interest at 9% for property assessed at $80,000 or less and 18% for property assessed at over $80,000.

See http://www.nyc.gov/html/dof/html/pub/pub_guidance_memoranda.shtml.

New York City Real Property Transfer Tax ("RPTT") – Notwithstanding the Ruling of the Chief Administrative Law Judge of the New York City Tax Appeals Tribunal on Matter of the Petition of Cambridge Leasing Corp. (TAT(H) 03-11(RP)) ("Cambridge"), and similar rulings of other Administrative Law Judges on the Tribunal, New York City's Department of Finance ("Department"), pending the outcome of the appeal in Cambridge, continues to take the position that a bulk sale of condominium units and cooperative apartments is generally subject to the higher, commercial transfer tax rates. The Judge in Cambridge ruled that the sale of multiple individual residential condominium units between the same parties is subject to the lower RPTT rates.

In certain situations, as provided in Department Finance Memorandum 00-6, June 19, 2000 (the "Memorandum"), where Units have been physically combined, a combined Unit may be considered an individual Unit subject to the lower, residential transfer tax rates. The Department will accept the "issuance of a revised certificate of occupancy, a letter of completion from the Building Department or a revised tax lot designation reflecting the joining of two or more apartments or units" as evidence the Units have been combined at the time of sale. Further, according to the Memorandum, "absence of any of these documents will not be determinative".

Department Ruling FLR-054831-021, dated June 9, 2005, concluded that a transfer in 2005 by a single deed of three physically combined condominium units for a consideration in excess of $500,000 is subject to the residential transfer tax rate of 1.425%, instead of the commercial transfer tax rate of 2.625%. Although no revised certificate of occupancy or Building Department letter of completion was issued, and there was no revised tax lot, the Department relied on the following factors, which, it pointed out in the Ruling, occurred "well in advance of the transfer of the Units": (i) in 2003 the Department of Buildings issued a work permit for the "combination of 3 apartments into 1 apartment"; (ii) evidence was submitted that extensive work was done to combine and remodel the Units for two years following their acquisition by the Seller at the Seller's expense; and (iii) the contract of sale and the deed described the Units as a single unit. The Ruling also notes the submission to the Department of photographs taken at the time of the conveyance showing the combined Units with connecting staircases. The Ruling is at http://www.nyc.gov/html/dof/html/pub/pub_guidance_letterrulings_rptt.shtml.

Recording Act – Before it executed the mortgage being foreclosed, the mortgagor conveyed the property to a bona fide purchaser. The deed and the purchase money mortgage the new owner made to an institutional lender were recorded after the mortgage being foreclosed was recorded. The Supreme Court, Nassau County, granted the foreclosing lender's motion for summary judgment, holding that its mortgage was protected by the Recording Act (Real Property Law, Section 291). Distinguishing between a forgery, for which the Recording Act affords no

protection, and fraud (as in this case), the Court declined to subordinate the mortgage being foreclosed to the deed and the purchase money mortgage. According to the Court, "where the prior conduct was fraudulent it must be shown that the subsequent grantee who recorded first knew or should have known of the fraud" but, in this case, "a good faith lender for value recorded its mortgage first and lacked notice of facts which placed it under a duty to make further inquiry…". Washington Mutual Bank v. Peak Health Club was reported June 28, 2005 in the New York Law Journal.

Restrictive Covenants – Plaintiff, a law firm leasing four floors in an office building in Manhattan, filed a motion to enjoin the landlord from converting a number of floors in the building to residential use. The Plaintiff alleged that residential use was not allowed in the building under a section in its lease dealing with rent escalation providing that the building "will be run as a first-class office building". Noting that the restriction did not appear in the lease's section on permitted uses of the premises, the Supreme Court, New York County, denied the motion for an injunction. Insofar as sufficient evidence was not produced to establish that a restrictive use was intended, the text in the lease was deemed descriptive of the use of the premises and not a limitation on its use. The Court indicated that the Plaintiff could apply to enjoin any aspect of the conversion to residential use which it believed would violate any specific portion of its lease. Hawkins, Delafield & Wood v. RBNB 67 Wall Street Owner LLC, decided March 18, 2005, is reported at 794 N.Y.S. 888.

Right of First Refusal – The Plaintiff-Tenant's lease provided that "in the event of a sale to a third party (not an asset transfer in the family) you [the tenant] will have the *last right of refusal* to beat the terms and price by 3 percent of any bona fide offer" (Emphasis added). Plaintiff was advised of successive offers to purchase the property received by the Defendant-Lessor beginning at $1,000,000 and increasing to $3,000,000 and exercised its last right of refusal for each offer other than the last offer, proof as to which was requested but not received. Plaintiff sued for specific performance to purchase the property for $2,700,000, based on the next to last offer received by the Defendant. The Appellate Division, affirming the Order of the Supreme Court, New York County, granting Defendants' motion to dismiss the complaint, held that Plaintiff was not entitled to specific performance as the offer on which the lawsuit was brought was not the last offer. The Court, however, granted Plaintiff leave to amend its complaint to plead a cause of action for breach of the implied covenant of good faith and fair dealing with respect to the $3,000,000 offer (as to which Plaintiff would be required to pay $3,090,000), and for specific performance with respect to that offer. Jeremy's Ale House Also Inc. v. the Joselyn Luchnick Irrevocable Trust was reported in the New York Law Journal on July 12, 2005.

Streets – In contemplation of the subdivision of a property into four parcels, the property owners recorded an agreement for the creation of a private roadway within the subdivision over which the lot owners would have an easement and right of way for ingress and egress and the installation and maintenance of utilities. Deeds in the chain of title to each subdivided lot transferred to the grantees "all right, title and interest, if any… in and to any streets and roads abutting the above described premises to the center lines thereof". Plaintiff, the owner of one of the lots, commenced an Action against the other lot owners to determine the rights in the road. The Supreme Court, Nassau County, held that the Plaintiff had no right to use the road for parking. The Appellate Division, Second Department, modifying the Order of the lower court,

held that the Plaintiff, as fee owner of the roadway to the extent it abutted her property to the center line thereof, had the right to use the road for parking so long as the use did not interfere with ingress and egress by the Defendants. Minassian v. Temares, decided by the Appellate Division on March 28, 2005 is reported at 795 N.Y.S. 2d 50.

Yonkers Mortgage Recording Tax – Chapter 172 of the Laws of 2005, enacted July 12, 2005, has extended the authority of the City of Yonkers to adopt local laws imposing a mortgage tax of $0.50 for each $100 and each remaining major fraction of principal debt secured by a mortgage on real property within the City from September 1, 2005 to August 31, 2007. The total rate of mortgage recording tax in the City of Yonkers continues, therefore, to be $1.80 for each $100 of principal indebtedness.

This bulletin is sent courtesy of CB Title Agency of New York, LLC and First American Title Insurance Company of New York