First American Title Insurance Company of New York
CURRENT DEVELOPMENTS

Deeds – The Plaintiff claimed that the deed to it transferred under the "appurtenance clause" the right to use parking spaces on adjoining land leased by the Defendant-Grantor. There was no express leasehold assignment. The Supreme Court, Nassau County, granted summary judgment to Defendant and dismissed the complaint. The intention of the parties as stated in the contract was to convey "parking areas...located on the Property", and "appurtenances" passes only "such incorporeal easements or rights or privileges as are strictly necessary and essential to the proper enjoyment of the estate granted". Riark, LLC v. DaCosto, decided March 1, 2007, is reported at 2007 WL 702760.

Easements – Plaintiffs sought an Order terminating an easement for ingress and egress in the deed to the Defendants' predecessors in title, due to the Defendants' alleged misuse and overburdening of the easement. The Supreme Court, Bronx County, granted the Defendants' motion for summary judgment. The misuse or overuse of an easement can be enjoined; but an easement created by grant can only by extinguished by abandonment, conveyance, condemnation or adverse possession, none of which was applicable. McIntyre v. Estate of Keller, decided January 18, 2007, is reported at 828 N.Y.S. 2d 798.

Electronic Commerce – Plaintiff brought an Action to foreclose its mortgage, claiming that the Defendant had failed to make his mortgage payments. The payments were to be made by electronic fund transfers from the Defendant's account, but payments were not debited due to a malfunction or technical problem in the payment process administered by Plaintiff or the entity handling its electronic payment program. The Supreme Court, New York County, held that as funds were available in the Defendant's account to cover the payments which were not made, the Defendant did not default, and the Court granted summary judgment dismissing the complaint. The Court also held that the Defendant was not entitled to damages under Section 1693h ("Liability of financial institutions") of the Electronic Funds Transfer Act (15 USC Section 1693). The EFTA allows for damages to be awarded due to a "financial institution's failure to make an electronic funds transfer....when properly instructed to do so by the consumer" unless "its action or failure to act resulted from...a technical malfunction which was known to the consumer at the time he attempted to initiate an electronic fund transfer or, in the case of a preauthorized transfer, at the time such transfer should have occurred". Household Finance Realty Corp. of New York v. Dunlap, decided March 5, 2007, is reported at 2007 WL 656297.

Entireties - Referee Lonschein, appointed by the Supreme Court, Queens County, held that the title to real property held by tenants by the entirety became the sole property of one of them on the death of the other, notwithstanding that they were not married and the property was specifically devised to the Decedent's brother. According to authority cited by the Court, "'[w]here persons live as husband and wife and are reputed as such, a presumption arises that they have been legally married and this presumption can only be rebutted by the most cogent and satisfactory evidence'". The Court found that "[t]he documentary evidence which supports the existence of a marriage...is strong, persuasive and compelling". Bethea-Rowlett v. Sanders, decided January 22, 2007, was reported in the New York Law Journal on February 7, 2007.

Equitable Subrogation – A purchaser of real property in Brooklyn (the "Second Grantee") executed a purchase money mortgage in favor of Plaintiff Ohio Savings Bank (the "Bank"). The Bank foreclosed its mortgage, was the successful bidder, and received the Referee's deed. The Bank then discovered that a deed to another party (the "First Grantee") was recorded two months before the deed to the Second Grantee and the Bank's mortgage were executed. Since proceeds of the Bank's mortgage were used to pay off a mortgage on record (the "Indymac Mortgage") when the First Grantee took title, and the Bank had no actual knowledge of the deed to the First Grantee when the mortgage to the Bank was executed, the Supreme Court, Kings County, held that the Bank was entitled to an equitable mortgage to the extent of funds that it advanced to satisfy the Indymac Mortgage. According to the Court, "subrogation erases the lender's mistake in failing to discover intervening liens, and grants him the benefit of having obtained an assignment of the senior lien that he caused to be discharged". Ohio Savings Bank v. First Island Realty Corp., decided March 2, 2007, is reported at 2007 WL 656313.

Leases – The tenant of the basement and ground floor of a building in Manhattan which it leased as a restaurant installed and stored equipment in an adjoining vault under a revocable license in the lease. The property owner served upon the tenant a notice to vacate the vault. The Civil Court, City of New York, held that since the cost associated with moving the equipment in the vault would be prohibitive, the tenant's use of the space was "appurtenant" to the lease and the license was improperly revoked. According to the Court, "[a]n appurtenance is a right and privilege which is essential or reasonably necessary to the full beneficial use and enjoyment of the leased property" and "may not be revoked or otherwise terminated until the lease ends". Blenheim LLC v. Il Posto LLC, decided November 24, 2006, is reported at 2006 WL 3757539.

Lien Law – An Action was commenced by a Subcontractor to foreclose mechanic's liens filed against Condominium Units sold in a newly constructed building. Since each deed to a Unit purchaser contained a "trust fund" provision under Lien Law Section 13(5) ("Priority of liens"), and the deeds from the Developer were recorded prior to the filing of the mechanic's liens, the Supreme Court, New York County, held that the mechanic's liens were invalid and ordered that they be discharged of

record. The Court also dismissed causes of action against the Developer and related Defendants claiming breach of contract and asserting claims based upon quantum meruit and unjust enrichment. They were not parties to the Subcontractor's contract with the General Contractor, and the Subcontractor's sole remedy is a claim for breach of that contract. A & V 425 LLC Contracting Co. v. RFD 55th Street LLC, decided January 23, 2007, is reported at 2007 WL 150905.

Lien Law – Petitioners, owners of a cooperative apartment consisting of two floors in a building in Manhattan, sought an Order discharging a mechanic's lien filed against the building naming them as Owners. They claimed that the lien should be discharged since it was not filed within four months of the date on which the last item of work was performed or material was furnished, as required by Lien Law Section 10 ("Filing of Notices of Lien") for property improved by a single-family dwelling. The lienor contended that the work was performed in two units and, as it worked on a multiple dwelling, it had eight months to file its lien under Section 10. The Supreme Court, New York County, held that work was done on only one unit and discharged the mechanic's lien. Matter of Abbott v. Teamwork Contracting Inc., decided January 8, 2007, was reported in the New York Law Journal on January 24, 2007.

Mortgage Foreclosure – A temporary restraining order, staying transfer of the deed "without prejudice to the defendants' right of redemption", was issued by the Supreme Court, Kings County the day before the foreclosure sale but not served on the bidders at the foreclosure sale. A lower court Order vacating the sale was reversed by the Appellate Division, Second Department. According to the Court, "[t]o bind bidders at a foreclosure sale to such a condition [preserving the Defendants' right of redemption] when they have not been notified of it would inhibit the bidding process..." In addition, there having been five bankruptcy petitions filed by the Defendants and three judgments of foreclosure and sale, the Appellate Division noted that "the equities did not favor the defendants, whose 'manipulation and gaming of the system' (citation omitted) had gone on for years". Norwest Mortgage, Inc. v. Brown, decided December 19, 2006, is reported at 830 N.Y.S. 2d 158.

Mortgage Recording Tax/New York State Transfer Tax – The New York State Department of Taxation and Finance has announced that the interest rate to be charged for the period April 1, 2007–June 30, 2007 on late payments and assessments of mortgage recording tax and the State's Real Estate Transfer Tax will be 10% per annum compounded daily. The interest rate to be paid on refunds of those taxes will be 7% per annum compounded daily. The interest rates are published at http://www.tax.state.ny.us/press/2007/int0207.htm.

Mortgage Recording Tax/New York State Transfer Tax - New York State's Office of Tax Policy Analysis' Annual Statistical Report of 2005-2006 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 2005-2006 was $938,144,770. Mortgage Recording Tax collected in Fiscal Year 2005-2006 was $2,322,205,258, of which $2,119,930,626 was collected in connection with mortgages recorded in New York City. The State's Fiscal Year is April 1-March 31.

Mortgages – In refinancing their existing home equity mortgage, the Claimants had to pay an "Early Closure Fee" under a provision in the mortgage requiring them to reimburse the lender's closing costs if the credit line was terminated within the first thirty-six months. The mortgage also allowed for prepayment at any time without penalty. Justice Straniere of the Civil Court, Richmond County, ordered that the lender reimburse the closing costs the Claimants were required to pay to refinance, holding that the payment of those amounts was a prepayment penalty. The Court also held that the lender had engaged in a deceptive business practice in violation of General Business Law, Section 349 ("Deceptive acts and practices unlawful"). Bonior v. Citibank, N.A., decided December 7, 2006, is reported at 2006 WL 3859121.

New York City Real Property Transfer Tax – The Department of Finance has held in a Letter Ruling dated November 30, 2006 that the transfer of real property from a limited profit housing company formed under the New York State Private Housing Finance Law to a cooperative corporation formed under the Business Corporation Law is not exempt from tax as a mere change of identity even to the extent that the existing shareholders become shareholders of the new entity. The exemption does not apply to transfers to a cooperative corporation; consideration is deemed to be the fair market value of the real property conveyed. The exchange of stock by a shareholder in the PHFL entity for stock in the new corporation is, however, exempt as a mere change since the shareholder's beneficial interest in the underlying real property remains the same. FLR No. 064851-021 can be obtained at http://www.nyc.gov/html/dof/html/pub/pub_guidance_letterrulings_rptt.shtml.

New York State Real Estate Transfer Tax – Citing privacy concerns, a representative of the New York Department of Taxation and Finance (the "Department") advised this author in early March 2007 that the Department was not returning to title companies and their agents a copy of any Combined Real Estate Transfer Tax Return (TP-584) submitted to it in connection with the payment of the New York State Transfer Tax prior to recording. A copy of Form TP-584, receipted for payment, is necessary to enable an instrument to be recorded when prepayment of the tax has been made.

The matter was then discussed among representatives of the New York State Land Title Association and the Department. It was agreed that any Form TP-584 received by the Department in March with prepayment of the State's Real Estate Transfer Tax and, if applicable, the Mansion Tax (collectively, "State Transfer Taxes") would be processed and a receipted copy Form TP-584 would be returned to the title company or agent submitting Form TP-584 to enable recording. However, in the future, a receipted Form TP-584 will only be returned to the submitting title

company or agent if it is accompanied by a written authorization to do so, executed by the parties who executed the instrument intended to be recorded. An acceptable form of authorization was agreed upon.

This is generally not an issue when the property being transferred is in the City of New York as, in those instances, prepayment of State Transfer Taxes may be made to the City's Department of Finance.

On March 30, the Department issued revised Forms TP-584 and TP-584-REIT (Combined Real Estate Transfer Tax Return, Credit Line Mortgage Certificate for Real Estate Investment Trust Transfers) with print dates of (3/07). The Department advised Recording Officers that "the modifications are minor and you may continue to accept Form TP-584 with a print date of (11/04) and Form TP-584-REIT with a print date of (4/06)". These Forms can be obtained on the Department's website at http://www.tax.state.ny.us/forms/form_number_order_st_y.htm.

The (3/07) versions of Forms TP-584 and TP-584-REIT add a certification above the signature lines for the grantor and/or the grantee to authorize the Department to send a receipted copy to the person who submitted it to the Department. By the terms of the certification, the undersigned does "authorize the person(s) submitting such form on their behalf to receive a copy for purposes of recording the deed or other instrument effecting the conveyance".

The Department has also advised the New York State Land Title Association as follows:

> **"When submitting a version of the Form TP-584 or Form TP-584-REIT with a print date prior to (3/07), attach a statement on company letterhead authorizing the Tax Department to return a receipted copy to the grantor's or grantee's authorized representative for purposes of recording the deed or other instrument effecting the transfer of real property. The statement must be signed by either the grantor or grantee. Please submit copies of the aforementioned forms in duplicate and enclose a self-addressed postage paid return envelope for mailing of the return receipt.**
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> **When submitting Form TP-584 or Form TP-584-REIT with a print date of (3/07) or later, a statement authorizing the Tax Department to return a receipted copy to the grantor's or grantee's authorized representative *is not required.* Please submit copies of the aforementioned forms in duplicate and enclose a self-addressed postage paid return envelope for mailing of the return receipt."**

Accordingly, when submitting a signed Form TP-584 or Form TP-584 –REIT with a print date of (3/07) or later (as the Forms may be further revised) to the Department

with prepayment of the State Transfer Taxes, a separate, written statement authorizing the receipted Form to be returned to the title company or the agent which submitted the Form is not required.

However, if the Form TP-584 or the Form TP-584-REIT being submitted with prepayment of State Transfer Taxes is the earlier accepted version, the agreed upon written statement referenced above, signed by either or both of the grantor or the grantee, authorizing the Department to return the receipted Form to the person designated, must be submitted to the Department to obtain the receipted Form for recording.

New York State Real Estate Transfer Tax – In an Advisory Opinion (Petition No. M060622A) the Technical Services Division of New York State's Department of Taxation and Finance held that the conveyance by Petitioner of real property to the Brooklyn Bridge Park Development Corporation, a subsidiary of the State's Urban Development Corporation d/b/a Empire State Development Corporation, coupled with the leaseback of the property to Petitioner, and the Petitioner or its successor in interest's repurchase of fee title for $1.00 and any amounts due under the Lease pursuant to an option to purchase contained therein, was a financing not subject to the State's Transfer Tax. "[T]he reconveyance of the fee interest at the end of the lease represents the satisfaction of the instrument securing the debt or obligation". This assumes, however, that there is no change in beneficial interests in the Lessee; "To the extent there is a change in beneficial interest in connection with the Lease or Reconveyance, the real estate transfer tax will apply". TSB-A-06(3)R, dated November 30, 2006, is posted on the Department's website at http://www.tax.state.ny.us/pdf/advisory_opinions/real_estate/a06_3r.pdf.

Recording Act – The Grantee of a deed to land in Kings County subject to a tax lien foreclosure moved for leave to intervene in the Action and for an order vacating the judgment of foreclosure and sale, claiming that he was unaware of the tax lien sale since he was not named and served as a party defendant. Naming the grantee as a Defendant in the Action and service upon the Grantee would have been necessary if the deed to him was recorded prior to the filing of the lis pendens to foreclose. The deed was delivered to the City Register on June 23, 2004 and recorded on July 12, 2004 at 3:27 pm. The lis pendens filed to foreclose the tax lien was filed on July 12, 2004 at 1:50 pm, before the deed was recorded. The Supreme Court, Kings County, vacated the judgment, granted leave to intervene, included the Grantee as a party Defendant, and stayed the Referee from delivering a deed pending a further Order of the Court. The Court held that the deed was recorded when it was delivered to the City Register's Office for recording, which was prior to the filing of the lis pendens. According to Real Property Law Section 317 ("Order of Recording"), "[e]very instrument, entitled to be recorded, must be recorded by the recording officer in the order and as of the time of its delivery to him therefor, and is considered recorded from the time of such delivery". NYCTL 1998-1 Trust v. Ibrahiem, decided January 24, 2007, is reported at 2007 WL 188558.

Restrictive Covenants – A property in Manhattan was conveyed by The City of New York as an Urban Development Action Area Project ("UDAAP") under the Urban Area Action Area Act (General Municipal Law, Article 16). The deed to the Grantee-Sponsor recited that "the project to be undertaken by Sponsor ('Project') consists solely of the rehabilitation or conservation of existing private or multiple dwellings or the construction of one to four unit dwellings without any change in land use permitted by existing zoning". The deed also required the Grantee to remedy all building violations of record within six months. The Grantee did not correct the violations and sold the property to a Developer which allegedly planned to demolish the existing building and replace it with a high rise "sliver" apartment building.

The adjoining owner brought an Action against the Grantee, the City, and the Developer, seeking, among other relief, a declaratory judgment that the new owner was bound by the restrictions in the City's deed. The City cross-claimed, seeking an Order enjoining the use of the property except in compliance with the restrictions in its deed. The Supreme Court, New York County, holding that the restrictions run with the land, granted the Plaintiff's and the City's motions for summary judgment. The Appellate Division reversed the lower court's ruling, holding that the original parties to the deed did not intend that the covenant run with the land and that the covenant did not run with the land since it did not "touch and concern the land". The Court of Appeals reversed and reinstated the Order and Judgment of the Supreme Court. The Court of Appeals held that since the property was sold as an accelerated UDAAP it remained subject to restrictions in the General Municipal Law set forth in the deed. Further, the Habendum clause in the deed from the City stated that the "covenants set forth in this Deed shall run with the land and... shall inure to the benefit of the City and shall bind and be enforceable against Sponsor and its successors and assigns".

The Court of Appeals noted that the land use restrictions could expire by their own terms on completion of the Project, or they might be extinguished in an action brought by the current or a future owner under Real Property Actions and Proceedings Law, Section 1951 ("Extinguishment of non-substantial restrictions on the use of land"). 328 Owners Corp. v. 330 West 86 Oaks Corp., decided April 3, 2007, is reported at 2007 WL 966648.

Title Insurance – The Owner's policy of title insurance issued to the Plaintiff did not include an exception for the appointment of a 7-A Administrator under Article 7-A of the Real Property Actions and Proceedings Law ("Special Proceedings by Tenants of Dwellings in the City of New York and the Counties of Nassau, Suffolk, Rockland and Westchester for Judgment Directing Deposit of Rents and the Use Thereof for the Purpose of Remedying Conditions Dangerous to Life, Health or Safety"). The Insured brought an Action seeking to recover for damages under the title policy. The Supreme Court, Kings County, granted the Defendant title insurer summary judgment and dismissed the Action. The Court held that a 7-A Administrator's appointment is not an encumbrance on title, does not have to be

disclosed in a title report, and does not affect the marketability of title. According to the Court, "[t]he appointment of a 7-A Administrator deals with a statutory managing agent, changed with the duty to collect rents and improve the property. It is not a judicial lien charging the land with a debt. The appointment of a 7-A Administrator is not a 'defect in or lien or encumbrance on the title'". Furthermore, rights of the 7-A Administrator were excepted from coverage under the title policy's exception for "rights of ... persons in possession, if any".

The lis pendens in the Action to appoint the 7-A Administrator expired in 2001, before the title policy was issued; the Court held that the title report did not have to list an expired notice of pendency.

The Court also found that although the Plaintiff became aware of the 7-A Administrator in July 2004 it first notified the title insurer of its claim in February 2006, after the Plaintiff lost the property in an In Rem tax foreclosure. This delay did not give the title insurer or its agent "a meaningful opportunity to investigate, litigate or defend". Zev Cohen LLC v. Fidelity National Title Insurance Company, decided March 12, 2007, was reported in the New York Law Journal on April 4, 2007.

Transfer Tax/Town of Warwick, Orange County – Current Developments issued on December 20, 2006 reported that a Community Preservation Fund Real Estate Transfer Tax of 0.75% of consideration, payable by the Grantor, was to take effect in the Town of Warwick on April 1, 2007. The Return issued for the Town of Warwick Community Preservation Fund (CPF) Transfer Tax can be obtained at http://www.titlelaw-newyork.com/Forms/Warwick.pdf.

Trespass – The City Court, City of New Rochelle, awarded judgment to the Plaintiff in an Action to recover expenses incurred in removing debris from a tree on the Plaintiff's land which fell onto Defendant's property during a storm. The Defendant returned the tree debris to the Plaintiff's property. According to the Court, "absent actual or constructive notice of a tree's disease or defect, the tree's owner is not responsible for damage caused when his or her tree falls onto an adjacent property due to wind, storm or other natural causes". There being no evidence that the Plaintiff had actual or constructive notice that the tree was defective before it fell, the Defendant was responsible for removal of the debris and was a trespasser onto the Plaintiff's property. The Court also noted that the Defendant received insurance proceeds to pay for the tree's removal. Premium Point Park Association v. Lanza, decided January 8, 2007, is reported at 2007 WL 64244.

Zoning – In 1975, as part of a re-zoning, certain properties in Brooklyn were sold to IBM subject to a Restrictive Declaration providing that the parcels "shall be developed and used only as an accessory parking lot for a manufacturing facility to be developed by IBM on the adjacent parcel of land bounded by Walworth Street, Dekalb Avenue, [and] Nostrand Avenue". The Restrictive Declaration also stated that it could only be canceled with the approval of the City Planning Commission

and the Board of Estimate, the successor to which is the City Council. Notwithstanding that the IBM plant ceased to exist in 1993, and IBM has sold off its interests in the area in question, the City Council denied the Petitioners' application to cancel the Restrictive Declaration and their application for a re-zoning, the approval of which would have enabled construction of a residential development. Petitioners brought an Article 78 proceeding seeking, among other relief, an Order declaring the Restrictive Declaration null and void as an impermissible taking, and a Judgment setting aside the City Council's denial of the re-zoning. The Supreme Court, Kings County, upheld the City Council's denial of the re-zoning application because existing zoning did not deprive Petitioners of reasonable use of the property, but it also held that the Restrictive Declaration was invalid and directed that it be canceled by the City Council. The Restrictive Declaration constituted a regulatory taking because it denied Petitioners any economically viable use of their land and it was also invalid as an impermissible restriction based on the identity of the owner. "A declaration which restricts property based on the identity of the owners is not valid..." Middleland, Inc. v. The City Council of the City of New York, decided December 22, 2006, is reported at 2006 WL 3956610.

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