



First American Title Insurance Company of New York CURRENT DEVELOPMENTS

Environmental Conservation Law ("ECL") – Chapter 521 of the Laws of 2008, signed into law by Governor Paterson on September 4, 2008, adds Section 27-2405 ("Tenant notification of indoor air contamination") to the ECL Under this Section, the owner of real property, or its agent, to whom indoor air contamination "test results" have been provided by an "issuer", is required to "provide a fact sheet [prepared by the Department of Health] and timely notice of any public meetings required to be held to discuss such results to all tenants and occupants and upon request such test results and any closure letter, within fifteen days of receipt of such results". Section 27-2405 is effective December 3, 2008.

"Test results" include "the results of any tests conducted on indoor air, subslab air, ambient air, subslab groundwater samples, and subslab soil samples". An "issuer" includes (i) a person subject to an order issued pursuant to (i) ECL Title 13 ("Inactive Hazardous Waste Disposal Sites"), Navigation Law Article 12 ("Oil Spill Prevention Control and Compensation"), or Title 12-A of Article 13 of the Public Health Law ("Inactive Hazardous Waste Disposal Sites"), (ii) a "participant", as defined in subdivision 1 of ECL Section 27-1405, subject to an agreement entered into pursuant to ECL Title 14 ("Brownfield Cleanup Program"), (iii) a municipality subject to a contract entered into pursuant to Title 5 of ECL Article 56 ("Environmental Restoration Program"), or (iv) New York State's Department of Environmental Conservation.

Section 27-2405 also requires the owner, or its agent, of a property subject to controls for the mitigation of indoor air contamination or as to which there is monitoring pursuant to an ongoing remedial program, to provide a fact sheet prepared by the Department of Health and, on request, any test results and closure letter, as to indoor air contamination at the property it has received to any prospective tenant before a lease or rental agreement is executed. The rental or lease agreement is to contain the following text on its first page, in at least twelve point bold face type:

"NOTIFICATION OF TEST RESULTS. The property has been tested for contamination of indoor air; test results and additional information are available upon request".

Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA") – Under FIRPTA, as amended, the purchaser of a United States Real Property Interest ("USRPI") from a foreign person is to withhold 10% of the sales price and remit the same to the Internal Revenue Service within ten days of the date of the transfer. One of the exemptions from this requirement is when the transferor furnishes to the transferee its affidavit stating, under penalty of perjury, the transferor's United States taxpayer identification number and that the transferor is not a foreign person. The withholding provisions are set forth at 26 USCA Section 1445 ("Withholding of tax on dispositions of United States real property interests").

Section 1445 has been amended effective July 30, 2008. New subsection (b)(9) provides that a non-foreign person affidavit can be furnished by the transferor of a USRPI to a "qualified substitute", provided that "the qualified substitute furnishes a statement to the transferee stating, under penalty of perjury, that the qualified substitute has such affidavit in his possession". Under amended subsection (f)(5), a "qualified substitute" includes "the person (including any attorney or title company) responsible for closing the transaction, other than the transferor's agent" and "the transferee's agent".

Mortgage Foreclosure – After the Plaintiff-lender commenced a mortgage foreclosure, the Defendants, not represented by Counsel, entered into negotiations to modify the terms of the loan. During negotiations, the Defendants' time to answer expired and, without the Defendants' knowledge, the Plaintiff obtained an *ex parte* default judgment. The Plaintiff denied the Defendants' request to modify the loan and obtained a judgment of foreclosure and sale. The Defendants, having engaged Counsel, moved to vacate the Order granting the default judgment. The Supreme Court, Richmond County, granted the motion, finding that since the Defendants were involved in settlement negotiations their failure to answer the complaint was reasonable and the Defendants had asserted meritorious defenses, including allegations of fraud, misrepresentation and predatory lending. The Defendants were given thirty days from entry of the Order to serve and file an answer to the complaint. *Deutsche Bank National Trust Company, as Trustee v. Miele*, decided September 5, 2008, is reported at 2008 WL 4274488.

Mortgage Recording Tax – Form MT-15 ("Mortgage Recording Tax") is used to compute New York State's mortgage recording tax on a mortgage encumbering property in more than one locality when different rates of mortgage recording tax apply. A revised Form MT-15 ("Mortgage Recording Tax Return"), effective October 1, 2008, reflecting the increase in the mortgage tax rate in Warren County from 1% to 1.25%, has been issued by the New York State Department of Taxation and Finance. Revised Form MT-15, with Instructions, has been posted at http://www.tax.state.ny.us/forms/form_number_order_mt_pt.htm.

Mortgage Recording Tax/New York State Transfer Tax - New York State's Office of Tax Policy Analysis in the State's Department of Taxation and Finance has posted at http://www.tax.state.ny.us/statistics/stat_fy_collections.htm its Annual Statistical Report of New York State Tax Collections for the State's fiscal year 2007-

2008 (April 1, 2007-March 31, 2008). According to the Report, the New York State Real Estate Transfer Tax collected in fiscal year 2007-2008 was \$1,020,669,027. Mortgage Recording Tax collected statewide in fiscal year 2007-2008 was \$2,847,971,912. Of the total amount of mortgage recording tax collected in fiscal year 2007-2008, \$1,965,545,198 related to mortgages recorded in New York City.

Mortgage Recording Tax/New York State Transfer Tax – The Taxpayer Guidance Division of the Office of Tax Policy Analysis in New York State's Department of Taxation and Finance has issued a TSB-M dated August 27, 2008 regarding all taxes administered by the Department, captioned "Changes in Procedures for Obtaining Guidance from the Tax Department". It announces that "[t]he procedures for review and issuance of Advisory Opinions have been streamlined to improve timeliness and...help protect taxpayer confidentiality". All Advisory Opinions will be redacted prior to publication and, according to this memorandum,

"Advisory Opinions will be issued to any person or entity that is, or may be, subject to a tax or liability under the Tax Law, or claiming exemption from a tax or liability under the Tax Law. In addition, Advisory Opinions will be issued to any person or entity that is, or may be, subject to filing or registration requirements under the Tax Law, or claiming exemption from filing or registration requirements under the Tax Law. Effective August 8, 2008, *Advisory Opinions will no longer be accepted from any person or entity acting on behalf of unidentified persons or entities*". (Emphasis added)

The Taxpayer Guidance Division will issue non-binding "Tax Guidance Bulletins", each explaining the application of provisions of the Tax Law. Tax Guidance Bulletins will be posted on the Department's website. However, requests for what is termed an "Advice of Counsel", from the Department's Office of Counsel, and Formal Opinions of Counsel, typically issued as TSB-Ms, will no longer be issued. See http://www.tax.state.ny.us/pdf/memos/multitax/m08_10c_5i_5m_3r_8s.pdf.

Recording Charges – Under subparagraph "a" of paragraph 4 of subdivision (a) [now subparagraph a(1)] of Civil Practice Law and Rules ("CPLR") Section 8021 ("County clerks other than as clerks of court"), the charge to record, enter, index and endorse a certificate on an instrument is \$5.00. A recording officer can charge \$3.00 for each page or portion of a page and \$.50 for each additional town, city block or other index in which the instrument is to be indexed. On an assignment of more than one mortgage or the "release" of more than one lease, there is an additional fee of \$3.00 for each mortgage assigned or lease "released" in excess of one.

Chapter 288 of the Laws of 2008 signed into law by Governor Paterson on July 7, 2008, amended subdivision (a) of CPLR Section 8021. It renumbered the existing subparagraph "a" as subparagraph "a(1)" and added subparagraph "a(2)", which reads, in part, as follows:

"(2) Notwithstanding clause one of this subparagraph, any county may opt by county law to increase the fee for recording, entering, indexing and endorsing a certificate on any instrument from five dollars to twenty dollars and, in addition thereto, increase from three dollars to five dollars for each page or portion of a page. Such increase shall take effect thirty days after the county enacts such fees. For the purpose of determining the appropriate recording fee, the fee for any cover page shall be deemed an additional page of the instrument..."

Local Laws have been enacted pursuant to Chapter 288 in a number of Counties. Increases in recording charges took effect in Columbia County on September 15, 2008, in Essex and Warren Counties on September 18, 2008, in Clinton, Franklin and Rockland Counties on October 1, 2008, in Nassau County on October 4, 2008, in Putnam County on October 6, 2008, and in Tompkins County on October 8, 2008. Increases will take effect in Suffolk County on October 16, 2008 and in Ulster County on November 3, 2008.

Title Insurance – The New York State Insurance Department has approved revisions to the Title Insurance Rate Service Association, Inc. ("TIRSA") Rate Manual effective November 1, 2008. The New York Standard Endorsements for the ALTA 2006 Owner's and Loan Policies have been amended, a standard form of Co-Insurance Endorsement, also commonly known as a "me-too" endorsement, has been approved, and a technical correction has been made to the Waiver of Arbitration Endorsement.

Covered Risk 2(c) of the 2006 ALTA Owner's and Loan Policies insures against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of "[a]ny encroachment, encumbrance violation, variation, or adverse circumstances affecting the Title that would be disclosed by an accurate and complete survey of the Land. The term 'encroachment' includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land".

The Standard New York Endorsements in effect until November 1 delete this Covered Risk in its entirety for the Owner's Policy and delete it for the Loan Policy "if the Land is improved by other than a 1-4 family dwelling or is vacant land". The revised Standard Endorsements no longer delete or limit the scope of Covered Risk 2(c).

The New York Standard Endorsements for the Loan Policy will no longer amend the mechanic's lien coverage in the Policy's Covered Risk 11. Under Covered Risk 11, the Loan Policy insures against loss or damage sustained or incurred by the insured by reason of:

"The lack of priority of the lien of the Insured Mortgage upon the Title

(a) as security for each and every advance of proceeds of the loan secured by the Insured Mortgage over any statutory lien for services, labor, or material arising from construction of an improvement or work related to the Land when the improvement or work is either

(i) contracted for or commenced on or before Date of Policy; or

(ii) contracted for, commenced, or continued after Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on Date of Policy to advance;"

In addition, TIRSA Rate Manual Section 1(K) has been amended as follows:

"(K) A policy other than a mortgage policy shall be issued only in the name of the present owner(s) of the insured estate *and, if the present owner of the insured estate is acting as nominee pursuant to a written agreement, the principal on whose behalf the nominee holds title, 'as their interests may appear', provided that the principal holds no other estate or interest in the land.* No [additional] *other* party holding a separate estate or interest may be named as an insured 'as its interest may appear'". (Changed text is in italics; deleted text is in brackets)

Transfer Tax/Peconic Bay Region (Suffolk County) – Current Developments dated August 15, 2008 reported that Article 31-D of New York State's Tax Law ("Tax on Real Estate Transfers in the Peconic Bay Region") was amended by Chapter 349 of the Laws of 2008 effective on July 21, 2008. Chapter 349 added new subdivisions 4 and 5 to Tax Law Section 1449-ee ("Exemptions") allowing an exemption from the Peconic Bay Region Transfer Tax on the purchase of "primary residential property" in the Towns of Southampton, East Hampton and Shelter Island by one or more persons, each of whom is a "first-time homebuyer". To obtain the exemption, the purchase price of the property must be within 120% of certain "purchase price limits" and the buyer's "household income" must not exceed certain "income limits", as set forth in amended Section 1449-ee. An "Application" for a First Time Homebuyer's Exemption has been issued by each of the three Towns. The Application for the Town of Southampton is on the Town's Web Site at <http://www.town.southampton.ny.us/listing.ihtml?myid=2259&id=170&cat=Land%20Management>.

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