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To: All Clients and Friends

From: Cliff Bernstein

Re: Current Developments

TITLE INSURANCE BULLETIN – NEW YORK
CURRENT DEVELOPMENTS

Affordable Housing – Tivoli Towers in Brooklyn was built by and has been owned since 1972 by Tivoli Towers Housing Co. ("Tivoli"), a limited profit housing company formed under Article II of New York State's Private Housing Finance Law ("PHFL") (the "Mitchell-Lama Law"), to provide low and moderate income housing. Under Section 35(2) of the PHFL, a housing company aided by a loan made after May 1, 1959 may dissolve without consent of the supervising governmental agency after twenty years from the date of occupancy by paying the remaining principal and interest on the property's mortgage loans; however, under regulations of New York City's Department of Housing Preservation and Development ("HPD") HPD must issue a Letter of No Objection in order for an Article II entity to file a Certificate of Dissolution.

The deed from the City of New York to Tivoli contains a restrictive covenant that Tivoli is "to devote the land to the uses specified in the plan for the area approved by the Board of Estimate for a period of fifty years". It also requires that any change in use be approved by the City. HPD denied a request for a change in the property's use, and an Article 78 proceeding was brought by the contract vendees of Tivoli's stock for a mandatory injunction directing HPD to issue a Letter of No Objection. They claimed that a Letter of No Objection should issue since the restrictive covenant in the deed only requires residential use at the property for fifty years, not the maintenance of affordable housing.

The Supreme Court, New York County, denied the Petition and dismissed the proceeding. According to the Court, "(t)he dissolution of the project and the conversion of the property to unregulated housing units will affect the use of the parcel", and to do so requires the consent of HPD. Not issuing a Letter of No Objection was a proper exercise of HPD's discretion.

Petitioners also argued that the restrictive covenant violated the Rule Against Perpetuities under Estates, Powers and Trusts Law Section 9-1.1 because it "does not define a definite period from which the fifty years starts…". The Court held that the restrictive covenant did not violate the Rule, which applies when an "estate in property" does not vest within twenty-one years after one or more lives in being at the creation of the estate. The restrictive covenant was not an "estate in property". Matter of Tivoli Stock LLC v. NYC Department of Housing Preservation and Development, decided November 14, 2006, was reported in the New York Law Journal on November 29, 2006.

Bankruptcy – The United State Bankruptcy Court for the Eastern District of New York granted a mortgagee's motion for relief from the automatic stay to enable it to foreclose on property owned by the Chapter 13 Debtor. Under Bankruptcy Code Section 362(d)(1) the Court "shall" lift the automatic stay "for cause". According to the Court, "the Debtor's failure to pay in excess of $50,000 of post-petition mortgage payments over an eleven month period constitutes more than ample cause to lift the automatic stay in a Chapter 13 case". A stay of the Order pending an appeal was denied, the Court finding there was no likelihood of success on the merits of the appeal and a stay pending appeal in this case would not further "the public interest in the integrity of the bankruptcy process". In Re: Uvaydov, decided October 17, 2006, is reported at 2006 WL 2975442 (Bankr. E.D.N.Y.).

Condominiums – Plaintiff sued to recover her down payment under a contract of sale for the purchase of a condominium unit in Manhattan. She alleged that she was not required to complete the purchase when the title company would not insure title to the unit, since the condominium's Board of Managers would not waive its right of first refusal to purchase the Unit, or provide other documents unless Plaintiff paid two years of common charges in advance. The Supreme Court, New York County ordered that the down payment be returned. The Plaintiff, not being obligated to pay common charges in advance, had not breached the contract of sale, and the Seller was not able to deliver an "insurable title" as required by the contract. Lisenenkov v. Kaszirer, decided October 17, 2006, is reported at 2006 WL 2969665 (N.Y. Sup.).

Confessions of Judgments/Fraud – An Action was commenced by the Guardian of the minor children of herself and her late husband for an Order to sell the infants' interest in the marital home. Petitioner moved to vacate a confession of judgment signed by her husband in favor of his mother, executed when the husband was filing for divorce, and to have it removed as a lien. The Surrogate's Court, Richmond County, vacated the judgment. If found that the "circumstances surrounding the confession of judgment herein are replete with 'badges of fraud'… [creating] a lien on the marital home, which could have been a valid target for equitable distribution, at a time when decedent was without other resources". Further, the husband had not executed an affidavit under CPLR Section 3218 ("Judgment by confession"), containing a concise statement as to how the debt arose, to enable the confession of judgment to be enforced without an action. Matter of the Guardianship of Jonathan Boudreau, decided on October 24, 2006, is reported at 13 Misc. 3d 1227(A) and 2006 WL 3025616 (N.Y. Sur.).

Contracts of Sale – Subdivision "3" has been added by Chapter 163 of the Laws of 2006 to Real Property Law Section 242 ("Disclosure prior to the sale of real property") effective January 1,

2007. It provides that "(a)ny person, firm, company, partnership or corporation offering to sell real property on which uncapped natural gas wells are situated, and of which such person, firm, company, partnership or corporation has actual knowledge, shall inform any purchaser of the existence of these wells prior to entering into a contract for the sale/purchase of such property".

Contracts of Sale – A contract of sale for fire damaged property provided that the Seller was not required to cure violations and the Purchaser could make repairs to the property prior to closing only with the Seller's consent. When the Supreme Court, Queens County, issued an order directing the Buildings Department to demolish part of the building, the Purchaser refused to repair the building until title was transferred to him. The Seller paid for repairs and refused to deliver title until it was reimbursed by the Purchaser. The Purchaser commenced an action for specific performance at the contract price. The Supreme Court, Queens County, directed that the Seller return the down payment with interest, and the decision was affirmed by the Appellate Division, Second Department. According to the Appellate Division, "the Supreme Court providently exercised its discretion in determining that an award of specific performance would have resulted in undue hardship or injustice to the Seller". The Purchaser sought to compel the conveyance of a renovated property at the original price and the contract did not require the Seller to absorb the cost of repairs. Marinoff v. Natty Realty Corp., decided November 28, 2006, is reported at 2006 WL 3439402 (N.Y.A.D. 2 Dept.).

Easements – A landlocked parcel, having no means of access to a public street, may have the benefit of an easement by necessity for access over an adjoining property if the parcels had been owned by the same person, there was an absolute necessity for the easement when common ownership ceased, and the absolute necessity continued. Plaintiff, the owner of a landlocked parcel (Parcel A) without access to a public street, moved for an Order enjoining the owners of two adjoining lots fronting on public streets, Parcels B and C, from blocking easements Plaintiff claimed were established by adverse possession or necessity. The Court dismissed the adverse possession claims, due to the absence of ten years of hostile use, and dismissed the claim of an easement of necessity over Parcel B on finding that the owner of Parcel A also owned Parcel C when the common owner of the three properties conveyed Parcel B. The Court did find that Parcel A had an easement by necessity over Parcel C but denied the motion as to Parcel C, finding that injunctive relief was not appropriate and Plaintiff could be adequately compensated by monetary damages. Parcel C is improved by an attached multiple dwelling which would have to be demolished for Parcel A to have access to the public street, and Parcel A is not a buildable lot under Section 27-291 of the Administrative Code of the City of New York, which requires that a parcel, to be built upon, have at least 8% of its total perimeter fronting directly on a street or at least 30 feet of frontage on a street. Damages, measured as the diminution in value of the property caused by the loss of the easement, would be determined at trial. Hosssain v. A to Z Properties, decided October 19, 2006, is reported at 2006 WL 2988443 (N.Y. Sup.).

Indian Land Claims/Shinnecocks – A lawsuit was filed in the United State 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 (the "Trustees"), the Trustees of the Freeholders and Commonality of the Town of Southampton, and eleven other, corporate

Defendants. The Nation alleged that property owned by the Nation in the Town of Southampton was unlawfully conveyed in 1859 to the Trustees in violation of the federal Indian Non-Intercourse Act then in effect. The Action sought a declaration that the Nation has possessory rights in the lands in question (the "Subject Lands"), a declaration that the Subject Lands were conveyed in violation of federal law, a declaration that the interests 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.

The case has been dismissed by the District Court. Relying on the holdings of the United States Supreme Court in City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) and of the Second Circuit Court of Appeals in Cayuga Indian Nation of New York v. Pataki, 413 F. 3d 206 (2005), the District Court held that the Plaintiff's claims were barred by equitable considerations, including the defense of laches. According to the Court, "…the wrongs about which the Shinnecocks complain are grave, but they are also not of recent vintage, and the disruptive nature of the claims that seek to redress these wrongs tips the equity scale in favor of dismissal". Shinnecock Indian Nation v. The State of New York, decided November 28, 2006, is reported at 2006 WL 3501099 (E.D.N.Y.). An article in Newsday on December 6, 2006 reported that the Shinnecock Board of Trustees has announced its intention to appeal this ruling.

Mechanics' Liens – Under Lien Law Section 44-b ("Necessary parties; lien against public or private improvement"), as enacted in 2004, neither the State of New York or a public corporation shall be a necessary party in an action to enforce a mechanics' lien on a public improvement when the contractor or subcontractor executes a bond or undertaking under Lien Law Section 21(5) ("Discharge of lien for public improvement"). Section 44-b was amended by Chapter 490 of the Laws of 2006 to provide, in the case of a private improvement, that an owner shall not be a necessary party to enforce a mechanics' lien when a contractor or subcontractor executes a bond or undertaking under Lien Law Section 19(4) ("Discharge of lien for private improvement").

Mortgage Assignments – The Sales Agreement for the transfer of a note and mortgage, and the Assignment Agreement, stated that tax arrears of $83,168.58 had been paid by the Assignor "to cure tax arrears for the years 2002 and 2003". After closing the Plaintiffs, who were the assignees of the Assignment Agreement, discovered and paid an additional $38,740.56 in real estate taxes for 2002 and 2003. They sued, claiming breach of contract, and sought money damages. The Supreme Court, Nassau County, granted Defendant's motion for summary judgment. According to the Court, even assuming that the Defendant intentionally misstated the taxes, of which there was no proof, the Plaintiffs had the "duty to make a diligent search of the public record to determine the amount of taxes at the time of the transfer". The Court noted that under the Sales Agreement the mortgage was sold "as is" and subject "to all existing liens, claims and encumbrances, if any" and expressly excluded any representations as to "the asset's freedom from liens and encumbrances, in whole or in part". Home Sales realty v. Unity Bank, decided November 17, 2006, was reported in the New York Law Journal on December 5, 2006.

Mortgage Electronic Registration Systems, Inc. ("MERS") – the Suffolk County Clerk in 2001 was not recording mortgages executed to MERS as the mortgages, or as a mortgagee's nominee, because MERS has no legal interest in the mortgage. A decision of the Supreme Court, Suffolk County in 2004 held that the Clerk must record a mortgage executed to MERS as

nominee for a named lender, and to index such a mortgage under MERS "as nominee for lender". The Supreme Court directed the Clerk to record discharges of such mortgages so long as they were not assigned within the MERS system. The Appellate Division, Second Department's decision in Merscorp, Inc. v. Romaine, reported at 808 N.Y.S. 2d 307 (2005), held that "the Clerk has a statutory duty that is ministerial in nature to record a written conveyance [executed by MERS as nominee or as the mortgage of record] if it is duly acknowledged and accompanied by the proper fee". The ruling of the Appellate Division has been affirmed by the Court of Appeals. According to the Court of Appeals, the Clerk is required to record and index mortgages, assignments of mortgages and discharges of mortgages naming MERS as the mortgagee or as a mortgagee's nominee. Merscorp, Inc. v. Romaine, decided December 19, 2006, is reported at 2006 WL 3716017 and is on the Court of Appeals' website at www.nycourts.gov/ctapps/decisions/dec06/179opn06.pdf.

Mortgage Recording Tax – Form MT-15 ("Mortgage Recording Tax") is used to compute New York State's mortgage recording tax when a mortgage encumbers property in more than one locality and different rates of mortgage recording tax apply. A revised Form MT-15 ("Mortgage Recording Tax Return") has been issued by the New York State Department of Taxation and Finance reflecting the increases in the mortgage recording tax rates for Essex and Schoharie Counties, which were effective November 1, 2006. Form MT-15 with Instructions can be found on the WEB at www.tax.state.ny.us/forms/form_number_order_mt_pt.htm.

Mortgage Recording Tax – The Technical Services Division, Office of Tax Policy Analysis, of the New York State Department of Taxation and Finance has issued an Advisory Opinion for mortgages to be executed by lessees on leaseholds granted to them by The Port Authority of New York and New Jersey ("Port Authority") at the site of the World Trade Center. The leasehold mortgages will be exempt from mortgage recording tax if the Port Authority, as the mortgagee or a co-mortgagee of the mortgages, is the party presenting the mortgages for recording, notwithstanding that upon recording the Port Authority will assign the mortgages to the true lenders who will at the time of the assignment or thereafter fund the mortgages. Since the Port Authority is an instrumentality of the State of New York, the mortgages are exempt from mortgage recording tax so long as the Port Authority is the party that presents the mortgage for recording. Any increase in the principal amount secured after the assignments from the Port Authority will, however, be subject to tax TSB-A-06(2)R, at www.tax.state.ny.us/pdf/advisory_opinions/mortgage/a06_2r.pdf, was issued October 31, 2006.

Mortgage Recording Tax and Real Estate Transfer Tax – The New York State Department of Taxation and Finance has announced that the interest rate to be charged for the first quarter of calendar year 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 rates are published at www.tax.state.ny.us/taxnews/int_curr.htm.

Notice of Pendency/Recording Act – Plaintiffs entered into contracts to purchase two properties from the Defendant-Seller, which contracts were not recorded. There being a disagreement over terms of the contract and no closing taking place, the Purchaser commended an action for specific performance, filing a lis pendens on each property. Before the notices of pendency were filed, the Seller conveyed the properties to anther purchaser, also a Defendant in this case, the

deeds to who were recorded after the notices of pendency were filed. The Supreme Court, Nassau County, enjoined the Defendant-Purchaser from leasing, renting or otherwise encumbering the property during the pendency of the Action, finding that since the notices of pendency were filed before the deeds were recorded the Defendant-Purchaser was not a good faith purchaser without notice of the Plaintiff's interest in the property. The Appellate Division, 2nd Department, reversed, holding that as between two buyers contracting for the same property, priority is given to the buyer whose conveyance or contract is first duly recorded. That the lis pendens were filed before the deed were recorded "does not negate [the Purchaser's] status as a bona fide purchaser without notice…". Avila v. Arsada Corp., decided November 21, 2006, is reported at 2006 WL 3378439 (N.Y.A.D. 2 Dept.).

Suffolk County Real Estate Taxes – The Suffolk County Treasurer issued a bulletin on November 27 advising that information as to the payment of Suffolk County real estate taxes will not be available to the public on January 3, 4 and 5, 2007, due to its MUNI Tax History System being shut down to enable system upgrades. It is expected that tax payment information will again be available on Monday, January 8, 2007.

Transfer Tax/Town of Warwick, Orange County – A Community Preservation Fund Real Estate Transfer Tax of 0.75% of consideration on the transfer of real property or an interest therein in the Town of Warwick, when the amount of consideration exceeds $500.00, was enacted by the Warwick Town Board as Local Law 6 of 2006 and approved by Public Referendum on November 7, 2006. Revenue from the Transfer Tax is to be dedicated to a Town of Warwick Community Preservation Fund, established by Local Law 4 of 2006 of the Town of Warwick.

On the conveyance of improved real property or an interest therein the first $100,000 of consideration is exempt. On the conveyance of unimproved real property or an interest therein the first $50,000 of consideration is exempt. The Transfer Tax is payable by the Grantee; however, if the Grantee has failed to pay the Tax or is exempt from paying the Tax the Grantor is required to pay the Tax. A conveyance after 4/1/2007 made pursuant to a contract executed prior to that date is exempt, "provided that the date of execution of such contract is confirmed by independent evidence such as recording of the contract, payment of a deposit, or other facts and circumstances as determined by the County Treasurer". A return with payment of any tax due will be required to be filed with either the County Treasurer or the County Clerk for Conveyances on or after 4/1/2007. Local Law 6 can be obtained at www.titlelaw-newyork.com/warwick.pdf.

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