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To: All Clients and Friends

From: Cliff Bernstein

Re: Current Developments

TITLE INSURANCE BULLETIN – NEW YORK
CURRENT DEVELOPMENTS

Affordable Housing – Local Law 79 of 2005 added Chapter 9 ("Right of First Refusal and First Opportunity to Purchase") to Title 26 of New York City's Administrative Code effective November 15, 2005. The purpose of the Local Law was 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 or to opt out of federal rent subsidy programs n order to be able to charge market rents.

Under the Local Law, before there is a "conversion" of "assisted rental housing" (which includes a "transfer of title, leasing, intention to sell or lease, mortgage prepayment, withdrawal from an assisted housing program, decision not to extend or renew participation in the [rental assistance] program or any action taken by the owner that would result in the termination of participation by the owner in the assisted rental housing program"), a "tenant association" or a "qualified entity" is afforded a "first opportunity to purchase" and a "right of first refusal" to purchase.

"Assisted rental housing" includes 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 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 prior to January 1, 1974, (ii) owned by a Limited Dividend Housing company under Article IV of the PHFL, first occupied prior to January 1, 1974, (iii) receiving rental assistance provided under Section 8 of the United States 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.

The Real Estate Board of New York, Inc. 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. Justice Shafer, of the Supreme Court, New York County, in a decision dated April 11, 2007, held that Local Law 79 is void as preempted by state and federal law. The Court enjoined the The City of New York, its Department of Housing Preservation and Development, and the City Council from enforcing Local Law 79. Real Estate Board of New York Inc. v. City Council of the City of New York, decided April 11, 2007, was reported in the New York Law Journal on April 30, 2007.

Indian Land Claims/The Oneida Indian Nation – Three Oneida Indian tribal groups brought an action to recover approximately 250,000 acres of land in the Counties of Oneida and Madison, alleging that the lands were transferred in 1788 to the State of New York in violation of the Indian Trade and Intercourse Act, the Treaty of Canandaigua, and federal common law. In 2002 the District Court issued an Order dismissing the Defendants' laches defense (194 F. Supp. 2d at 124), but due to subsequent rulings of the United States Supreme Court in City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 and the Second Circuit Court of Appeals in Cayuga Indian Nation of New York v. Pataki, 413 F.3d 266, the District Court was asked to reconsider its prior decision. In doing so, the District Court dismissed the Plaintiffs' possessory land claims on the grounds of laches. According to the Court, "…the Second Circuit's *Cayuga* decision holds that equity bars the Oneidas' attempts to vindicate their rights to the lands promised to them by the United States and the State because of the disruption that would be caused to Defendants' expectations and those innocent third parties who now reside [on] related lands". The Court's Order further permits the Plaintiffs to seek to have the agreements transferring the land to the State of New York reformed and revised and to receive fair compensation. The Oneida Indian Nation of New York v. The State of New York decided May 21, 2007, is reported at 2007 WL 1500489.

Mortgage Electronic Registration System, Inc. ("MERS") – Information was received in early May 2007 that the Westchester County Clerk ("Clerk") was rejecting any mortgage consolidation agreement in which the signing mortgagee was MERS, as nominee, unless the consolidation agreement was also executed by the lender named in the mortgages of record. The Clerk had before then been accepting mortgage consolidations executed by MERS, as nominee, without the signature of the named lender. Advice has been received that the Clerk has reversed his position, and his office is accepting consolidation agreements signed only by MERS, provided it is recited that MERS is the nominee for the entity recited in the mortgages being consolidated as the lender.

Mortgage Foreclosure – Property owned by a husband and wife as tenants by the entirety was mortgaged by the husband to secure his note for $20,000. The mortgage was foreclosed and a referee's deed was delivered to the Defendants, the assignees of the mortgage. The wife, now divorced and still living in the property with her children, moved for an Order vacating the judgment of foreclosure and sale, revoking the sale and setting aside the referee's deed on the grounds that although she was a necessary party to the foreclosure she was not named as a party

defendant or served. Noting that the property was now worth approximately $800,000, the Supreme Court, Kings County, granted the requested relief. According to the Court, "…justice and fairness calls for a determination that weighs in on the side of the resident home owner…If this sale is not vacated, [the Defendants] may well receive an undeserved windfall at the expense of the home-owner resident who…had no notice of the original foreclosure action and who has been in continued occupancy…Had she received proper notice, she may well have been able to take steps to avoid this outcome…". Mercaldo v. Navarro, decided May 11, 2007, is reported at 2007 WL 13946554.

New York State Real Estate Transfer Tax – On April 12, 2007 the New York State Department of Taxation and Finance ("Department") issued an Advisory Opinion (TSB-A-07(1)R) taking the position that the following conveyance, leaseback and reversion of title are exempt from transfer tax as "conveyances to effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership…" under Tax Law Section 1405(b) ["Exemptions"].

Petitioner, the property owner, intends to convert the property into two condominium units, a "Landlord's Unit" and a "Channel 13 Unit" (the "Unit"), which Unit is currently leased to WNET/Channel 13. The Unit would be conveyed to The Trust for Cultural Resources of the City of New York ("Trust") and net leased back to the Petitioner for an annual rent of $10.00. The Petitioner would then sublease the Unit back to WNET/Channel 13. Title to the Unit would revert to Petitioner on the earliest of the fourth anniversary on the conveyance to the Trust or the occurrence of an event contained in the deed. At all times Petitioner will be responsible for the indebtedness secured by mortgages on the Unit (to which the Trust took "subject to"), and for all expenses associated with the Unit. In addition, Petitioner will remain the beneficial owner of the Unit for federal, state and local income tax purposes, and the Trust would have no maintenance obligations. Since all the benefits and burdens of ownership remain with Petitioner, the transfers would be exempt. The Opinion can be obtained on the Department's Web Site at http://www.tax.state.ny.us/pdf/advisory_opinions/real_estate/a07_1r.pdf.

New York State Real Estate Transfer Tax – On April 30, 2007 the Department issued an Advisory Opinion (TSB-A-06(3.1)R) taking the position that the transfer of real property in Kings County from Petitioner to the Brooklyn Bridge Park Development Corporation ("BBPDC"), a subsidiary of the New York State Urban Development Corporation d/b/a Empire State Development Corporation, the execution of a ground lease by BBPDC to Petitioner, and the exercise by Petitioner of an option to repurchase fee title on the expiration or termination of the ground lease for $1.00 is a single financing transaction which is not subject to the transfer tax. If, however, the lease is granted or assigned to an entity that does not have the same beneficial interests as Petitioner, or the purchase option is exercised by an entity which does not have the same beneficial interest as Petitioner, a transfer tax would be due. The Advisory Opinion amends TSB-A-06(3)R) dated November 30, 2006. The Opinion can be obtained on the Department's Web Site at http://www.tax.state.ny.us/pdf/advisory_opinions/real_estate/a06_3_1r.pdf.

New York State Real Estate Transfer Tax – On May 16, 2007 the Department issued an Advisory Opinion (TSB-A-07(2)R) taking the position that the ground lease of less than 50% of

the total rentable space, exclusive of common areas, in an existing shopping center, on which leased land a new building and parking is to be constructed, is not subject to the transfer tax because the leased land is not substantially all of the premises constituting the real property. Tax Law Section 1401(c) provides that a lease for a term of 49 years, taking into account any options for renewal, on which substantial capital improvements are to be made for the benefit of a lessee, is subject to tax if the lease is for "substantially all of the premises constituting real property". Under Section 575.7(a)(3) of the Real Estate Transfer Tax Regulations, "[s]ubstantially all means ninety percent or more of the total rentable space of the premises". The Advisory Opinion notes the "unique nature of shopping center lease arrangements" and cautions that this ruling does not apply to a lease for property not located in a shopping center, to which Section 575.7(a)(3) of the Real Estate Transfer Tax Regulations applies, and that this ruling does not apply when a lease contains an option to purchase. The Opinion can be obtained at http://www.tax.state.ny.us/pdf/advisory_opinions/real_estate/a07_2r.pdf.

Religious Corporations – The Plaintiff, a Religious Corporation, moved for an Order setting aside the 1994 sale of its property pursuant to an Order of the Supreme Court, Kings County, approved by the Attorney General's Office. It claimed that certain requirements for a valid transfer of its property under the Religious Corporations Law, the Not-for-Profit Corporations Law, and its constitution and By-Laws were not satisfied. It was alleged, for example, that members of the Plaintiff were not given notice of a meeting to approve the sale and were not given an opportunity to vote on the sale. There having been two subsequent court-authorized transfers of the premises by Religious Corporations, the Supreme Court, Kings County, granted the current owner's motion to dismiss the Complaint, and it vacated the notice of pendency. According to the Court, citing a ruling of the Appellate Division, Second Department, in another case, "were the plaintiffs in this case to prevail, it would render unstable the title to any parcel of real property in New York State that had been previously owned by a religious or not-for-profit corporation, even if its conveyance had been accomplished pursuant to a court order". The Court noted that the "plaintiff's remedy is to sue the [Plaintiff's] allegedly misbehaving corporate officers". Congregation Beth Hamedrash Hagodel of Mapleton Park Jewish Center Inc. v. Perr, decided April 23, 2007, was reported in the New York Law Journal on May 23, 2007.

Tenancy by the Entirety – Real property was sold by a husband and wife holding title as tenants by the entirety. Following the sale the husband died. One-half of the sale proceeds were distributed to the wife; the disposition of the other one-half was in question. If those funds did not belong to the wife as the surviving tenant by the entirety, they would be an asset of the decedent's estate, subject to the possible claims of creditors. According to the Surrogate's Court, Dutchess County, the tenancy by the entirety terminated when the deed was delivered and the grantors then became owners of the proceeds of the sale as tenants in common. Accordingly, the other one-half of the proceeds was an asset of the decedent's estate. Matter of Schmitt, decided May 1, 2007, is reported at 2007 WL 1248199.

Transfer Tax/Town of Red Hook, Dutchess County – A Real Estate Transfer Tax of two percent of consideration on the transfer of real property or an interest therein in the Town of Red Hook takes effect on August 1, 2007 pursuant to Local Law 1 of 2007 of Town of Red Hook. Revenue from the Transfer Tax is to be dedicated to the Town of Red Hook Community Preservation Fund. The Transfer Tax is payable by the Grantee; however, if the Grantee has

failed to pay the Tax or is exempt the Grantor is required to pay the Tax. A conveyance made on or after August 1, 2007 made pursuant to a binding contract executed prior to that date is not subject to the Tax, "provided that the date of execution of such contract is confirmed by independent evidence such as the 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 Commissioner of Finance of the County of Dutchess or the County Clerk. Local Law 1 can be obtained at https://www.cbtitlegroup.com/documents/Red_Hook.pdf.

Exemptions are listed in Section 57-12 ("Exemptions from tax") of the Local Law. In addition, Section 57-13 ("Additional exemption") provides for "an exemption of an amount equal to the median sales price of residential real property within the County of Dutchess, as determined by the Office of Real Property Services pursuant to Section 425 of the Real Property Tax Law…"

Westchester County - The Private Well-Water Testing Law, enacted by the Westchester County Board of Legislators on May 21, 2007 as Local Law 7 of 2007, effective on November 19, 2007, applies to the sale or lease of any real property the potable water supply for which is a "private well", defined as "an individual water supply system, a private water supply or private water system as defined in Article VII of the Westchester County Sanitary Code".

On execution of a contract of sale, a seller is required to cause a water test to be conducted. In the event the test discloses a "primary parameter water test failure with respect to the reported presence of any primary parameter", the seller may correct the condition or cancel the contract, or the purchaser may agree in writing to correct the condition after dosing. In the latter instance, the purchaser must correct the condition within sixty days of closing or as soon as practicable.

A lessor is required to test the water supply within twelve months after the effective date of Local Law 7 or, if the property is leased after the effective date, within twelve months from the date on which the property becomes subject to a lease, and at least every five years thereafter. If a water test discloses a "primary parameter water test failure", the owner of the property is required to provide potable water until the condition is corrected.

According to Local Law Section 707.06(A)(3), [s]hould the lessor refrain from performing the obligations created by this Chapter, the lessee, in the event the property is rented, upon prior written notice to the lessor, may, at the lessee's personal expense, remediate the condition and obtain [a] subsequent test of the water and set off the cost of such remediation and subsequent water test by a reduction in rent until the cost is covered by such rental reduction".

Local Law 7 does "not apply to real property where the potable water supply has five (5) or more service connections or regularly serves an average of twenty-five (25) or more individuals for at least sixty (60) days out of the year".

Local Law can be obtained at https://www.cbtitlegroup.com/documents/WestchesterLL7.pdf. Regulations are to be issued by the County Department of Health at least 90 days prior to the effective date.

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