CB Title

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

Date: **November 5, 2007**

To: **All Clients and Friends**

From: **Cliff Bernstein**

Re: **Current Developments**

TITLE INSURANCE BULLETIN – NEW YORK
CURRENT DEVELOPMENTS

Contracts of Sale/Statute of Frauds - Plaintiff brought an Action for specific performance of an agreement to sell real property alleged to have been reached in an exchange of emails between principals of the Plaintiff-Buyer and the Defendant-Seller. The Defendant moved to dismiss the complaint for failure to comply with New York's Statute of Frauds (General Obligations Law Section 5-703, "Conveyances and contracts concerning real property required to be in writing"), subsection (2) of which states that "[a] contract…for the sale, of any real property or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized in writing". The Supreme Court, Queens County, granted the motion to dismiss, holding that the recognition of electronic communications as an exception to the requirement of a writing under GOL Section 5-701 ("Agreements to be in writing") applies only to a "qualified financial contract" (as defined in that Section), not to contracts and conveyances concerning real property. Vista Developers Corp. v. VFP Realty LLC, decided October 8, 2007, is reported at 2007 WL 2982259.

Home Equity Theft Prevention Act - The "Home Equity Theft Protection Act" effective February 1, 2007, in addition to amending Banking Law Section 595-a ("Regulation of mortgage brokers, mortgage bankers and exempt organizations") and adding Section 265-A ("Home Equity Theft Prevention") to the Real Property Actions and Proceedings Law ("RPAPL"), added Section 1303 ("Foreclosures; required notices") to the RPAPL. Section 1303 requiring the plaintiff in a mortgage foreclosure to deliver with the summons and complaint a notice, on a separate page in bold, fourteen-point type printed on colored paper that is a color other than that of the paper on which the summons and complaint are printed, captioned (in bold twenty-point type) "Help for Homeowners in Foreclosure", containing text set forth in the Act. Chapter 154 of the Laws of 2007 limits this requirement to mortgage foreclosures involving residential real property consisting of owner-occupied one-to-four family dwellings.

The Supreme Court, Suffolk County, has denied with leave to renew a foreclosing Plaintiffs Motion for an Order of Reference due to its failure to comply with RPAPL Section 1303 in an

Action commenced after the effective date of the Act. The Court also denied the Motion due to the failure to submit "...proof of the facts constituting the claim, the default and the amount due…" as required by CPLR Section 3215(f) ("Default judgment") and, as noted in this Bulletin under "Mortgage Foreclosures/Standing", the Plaintiffs lack of standing. Countrywide Home Loans, Inc. v. Taylor, decided September 20, 2007, is reported at 2007 WL 2744892.

Land Use – In the case of Westchester Day School v. Village of Mamaroneck (386 F.3d 183) (September 27, 2004 decision of the Second Circuit Court of Appeals), the Zoning Board of the Village of Mamaroneck, in Westchester County, denied the Plaintiffs application to modify its special permit to enable improvements to be made to its existing buildings and to construct a new building on its property. Plaintiff, which operates a religious day school on its property, brought an action alleging that the Village violated the Religious Land Use and Institutionalized Persons Act of 2000 (the "Act") which provides, in part, at 42 U.S.C. Section 2000cc(a)(1), that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person...unless the government demonstrates that imposition of the burden...(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that governmental interest". The United States District Court for the Southern District of New York had granted the Plaintiff summary judgment and ordered the Defendants to approve the application. The Circuit Court vacated the judgment, holding that there were issues of fact to be determined, and remanded the case for further proceeding.

On remand, following a trial, the District Court, on March 2, 2006 (417 F. Supp. 2d 477) issued a mandatory injunction ordering the Village of Mamaroneck's Zoning Board of Appeals to approve the Plaintiff's amended application for a special permit. The Court concluded that the Zoning Board's "denial of the Application was so contrary to the evidence and to the equities as to be arbitrary and capricious, and…defendants have substantially burdened [Plaintiff's] religious exercise without a compelling governmental interest exercised in the least restrictive means, in violation of the [Act]". The judgment of the District Court has been affirmed by the Second Circuit Court of Appeals in a decision on October 17, 2007, reported at 2007 WL 3011061. In its ruling, the Court of Appeals also upheld the constitutionality of the Act

Mortgage Foreclosure/Standing - On November 21, 2006, the Plaintiff commenced an Action to foreclose a mortgage executed to MERS as nominee for Lehman Brothers Bank, FSB. The Supreme Court, Kings County, granted the Defendant's motion to dismiss the complaint for lack of standing and vacated the notice of pendency in the Action since the note and mortgage were assigned by MERS to the Plaintiff on November 29, 2006. According to the Court, "[a]bsent a valid assignment of both the note and mortgage at the time the foreclosure action is commenced, a plaintiff does not have standing to maintain the action". Plaintiff had been servicing the mortgage before it was assigned by MERS. Aurora Loan Services v. Grant, decided August 29, 2007, is reported at 2007 WL 2768915.

Similarly, the Supreme Court, Suffolk County, in Countrywide Home Loans, Inc. v. Taylor, discussed above, held that the Plaintiff lacked standing because the mortgage was assigned to it after the date on which the notice of pendency and complaint were filed, notwithstanding that the assignment recited that it was "deemed effective" as of a date before the Action was commenced.

Mortgage Recording Tax/Dutchess County - Pursuant to the authority of Chapter 558 of the Laws of 2007, the Dutchess County Legislature has passed a Local Law effective November 1, 2007 imposing a mortgage recording tax of $.25 for each $100 and each remaining major fraction thereof of principal indebtedness secured by a mortgage on real property located within Dutchess County. Accordingly, the total mortgage recording tax rate in Dutchess County on mortgages recorded on and after November 1, 2007 has increased from $1.05 to $1.30 for each one hundred dollars of principal indebtedness.

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"), effective November 1, 2007, has been issued by the New York State Department of Taxation and Finance. It sets forth the mortgage recording tax rates in effect in each County as of November 1. Revised Form MT-15, with Instructions, will be posted at http://www.tax.state.ny.us/forms/form_number_order_mt_pt.htm.

New York City/Automated City Register Information System ("ACRIS") - The City Register has announced the following changes to the recording process being made in ACRIS Release 4.0 for documents first submitted on or after December 3, 2007. As stated in the announcement:

- All documents within a transaction (which contains both accepted and rejected documents) will be returned to the "Presenter" parties of the transaction - as happens today.
- The accepted documents in the transaction will remain locked in ACRIS, and their status will show as "Accepted". No changes can be made to the accepted documents and should [they] not be returned to the City Register.
- The documents cannot be deleted or re-sequenced in the transaction.
- Once the necessary corrections have been made to the rejected documents, return only the rejected documents to the City Register.
- Only the resubmitted rejected documents will be scanned and re-examined.
- When these resubmitted rejected documents have been accepted by the City Register the entire transaction will be recorded.
- The resubmitted documents will be mailed to the "Return To" parties with recording and endorsement pages for all of the documents in the transaction, and a letter summarizing the returned information for all of the documents in the transaction.
- An email will be sent to the ACRIS customer who created the Cover Pages notifying them [the customer] that the transaction has been recorded.
- The "Presenter" party can then return the accepted documents to the "Return To" party.

For further information go to http://www.nyc.gov/html/dof/html/jump/acris.shtml

New York City/Condominiums - The Department of Finance has instituted a "Document Review Process for New Condominiums and Amendments". This procedure requires an architect, an engineer and an attorney to certify on a "Condominium Review - Architect,

Engineer and Attorney Certification" that certain information "is in agreement" in each of the Offering Plan, the Condominium Declaration, the Architect's Report and the Floor Plans. The form also requires them to identify the page numbers where the information can be found. According to the "Overview" issued by the Department, "[t]he new Condominium Review Process Architect, Engineer and Attorney Certification will assure consistency, eliminate errors and the possibility of delay in the approval of submissions". According to the City Register, this Process will not be required until late December, but "attorneys can start submitting their condo filings [using this Process] the beginning of November". Although not yet available on the Department's website, the Overview and a copy of the Certification can be obtained at http://www.titlelaw-newyork.com/CondoReview.pdf.

New York City/Water Billing - A press release, captioned "DEP Releases Report by Booz Allen Hamilton [BAH] on Bureau of Customer Services" [BCS], was issued by the Department of Environmental Protection on October 22, 2007. It states that new collection and enforcement strategies are being implemented at the suggestion of BAH, including a new "Payment Incentive Program".

> "Implementing a Payment Incentive Program. DEP has begun sending payment incentive offers to more than 8,000 residential accounts, informing them that their late payment charges will be eliminated if they settle their accounts immediately. Those who do not settle their accounts within 90 days will be scheduled for service termination. The Payment Incentive Program will afford customers with outstanding accounts receivable and a history of billing disputes an opportunity to settle their accounts and avoid serious collection actions. DEP will conduct extensive outreach in conjunction with the Payment Incentive Program to ensure all eligible customers are aware of this one-time opportunity".

The other "strategies" noted in the press release, are "Comprehensively overhauling the dispute resolution process", "Terminating the service of chronically delinquent residential and commercial customers", "Providing more accurate billing information to customers", and "Transforming the organizational structure of BCS to increase efficiency and standardize operational procedures". The press release is posted at http://www.nyc.gov/html/dep/html/press_releases/07-34pr.shtml. See http://www.nyc.gov/html/dep/pdf/bah_reports/BAH_report_full.pdf for the BAH Report.

New York State Transfer Tax - The New York State Department of Taxation and Finance has advised that the following address is to be used when sending to the Department a Real Estate Transfer Tax ("RETT") return using the United States Postal Service: NYS Tax Department, RETT Return Processing, PO Box 5045, Albany, NY 12205-5045. The following address is to be used if the RETT is sent to the Department by a private delivery service: NYS Tax Department / Misc. Tax / RETT Unit, Building 8, Room 657, W.A. Harriman Campus, Albany, NY 12227.

The Department cautions that "[i]f, however, at a later date, you need to establish the date you filed your return or paid your tax, you cannot use the date recorded by a private delivery service unless you used a delivery service that has been designated by the U.S. Secretary of the Treasury

or the Commissioner of Taxation and Finance. Currently designated delivery services are listed in Publication 55, Designated Private Delivery Services". Publication 55 can be obtained at http://www.tax.state.ny.us/pdf/publications/general/pub55_105.pdf.

Title Insurance - The trial court held that an adjoining owner had acquired title by adverse possession to one of two parcels which were a part of the insured premises. The title insurer, having defended its Insureds for seven years, declined to appeal, and tendered to its Insureds, the Plaintiffs in this Action, an amount representing the diminution in the value of the parcel lost by adverse possession. The Insureds, however, appealed the lower court's decision to the Second Department, which held that the adjoining owner had acquired title to both parcels by adverse possession. The Plaintiffs then sued the title insurer to recover the value of both parcels and the costs of the appeal. The title insurer's motion to dismiss was denied. According to the Supreme Court, Kings County, "the duty to defend [under a title policy] includes the duty to appeal where there are reasonable grounds to do so". The Insureds' position that the adjoining owners did not occupy the parcels under a claim of right, an unsettled area of the law when the appeal was brought, was then a reasonable basis to appeal. Schneider v. Commonwealth Land Title Insurance Company, decided September 11, 2007, is reported at 2007 WL 2628782.

Transfer Tax/Town of Fishkill - Chapter 544 of the Laws of 2007, signed into law on August 15, 2007 and effective the 90th day after its enactment, authorizes the Town of Fishkill, in Dutchess County, to pass a Local Law establishing a Community Preservation Fund and imposing a transfer tax of up to 2% of consideration on the transfer of real property or an interest therein when the property is located in whole or in part in the Town. The transfer tax will be payable by the grantee. Among exemptions from tax is an exemption "equal to the median sales price of residential real property within the applicable county, as determined by the office of real property services pursuant to RPTL Section 425…" New Article 31-A-2 ("Tax on Real Estate Transfers in the Town of Fishkill") was added to the Tax Law by Chapter 544. See http://assembly.state.ny.us/leg/?bn=S04829&sh=t for a copy of Chapter 544.

Zoning Lots - In June 1996, Plaintiff 402 West 38th Street Corp. ("402 West") and Defendant 485-497 Ninth Avenue Partners, LLC ("Partners") entered into a Zoning Lot and Development Agreement ("ZLDA") providing that 402 West could expand the zoning lot consisting of properties owned by 402 West and Partners to include other property. Further, under the ZLDA, if Partners did not execute a Declaration of Restrictions expanding the zoning lot when requested to do so by 402 West, 402 West was granted a power of attorney to sign on Partners' behalf. 402 West, in negotiations with the Port Authority of New York and New Jersey ("PA") to jointly develop their properties, forwarded to Partners for signature a new Declaration of Restrictions, expanding the zoning lot to also include property of the PA. Partners refused to execute the Declaration because there was no development agreement between 402 West and PA and PA had not consented to a zoning lot merger. 402 West brought an Action to determine its rights under the ZLDA.

The Supreme Court, New York County, held that 402 West was entitled without Partners' consent to expand the existing zoning lot to include the zoning lot consisting of the PA's adjoining property. The Court ordered that 402 West was authorized to execute the agreement as Partners' attorney-in-fact under the power of attorney in the ZLDA if Partners did not sign the

Declaration of Restrictions within ten days of service upon it of the Court's Order with Notice of Entry.

The ZLDA also provided for a three-foot setback from the north wall of Partners' property and a right of way over 402 West's property to meet Fire Department and Building Code requirements. The plans for 402 West's building, however, contemplated a three foot alley between Partners' building and 402 West's new building with a wall two to three inches in depth along Ninth Avenue containing a door leading to the alley, to meet a zoning requirement that there be continuous frontage on Ninth Avenue. The Court held that the proposed wall would violate the setback requirement. According to the Court, "the more specific right of a three foot setback given to 485 Ninth takes precedence over 402 West's more general rights to develop the parcel". The Court also held that the alley would not comply with the requirement for a right of way benefiting Partners' property. 402 West 38th Street Corp. v. 485-497 Ninth Avenue Partners, LLC, decided August 28, 2007, is reported at 16 Misc. 3d 1131 and 2007 WL 2429695.

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