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To: All Clients and Friends

From: Cliff Bernstein

Re: Current Developments

TITLE INSURANCE BULLETIN – NEW YORK
CURRENT DEVELOPMENTS

Adjoining Parcels – Under Section 27-1031 (b)(1) of New York City's Administrative Code ("Code"), located in Article 4 ("Excavation Operations") of the Building Code, "[w]hen an excavation is carried to a depth more than ten feet below the legally established curb level, the person who causes such excavation to be made shall, at all times and at his or her own expense, preserve and protect from injury any adjoining structures…". Under Code Section 27-724 ("Construction required for or affecting the support of adjacent properties or buildings"), "[e]xcept in cases where a proposed excavation will extend less than ten feet below the legally established grade, all underpinning operations…or other construction or excavations required for or affecting the support of adjacent properties or buildings shall be subject to controlled inspection. The details of underpinning…or other constructions required for the support of adjacent properties or buildings shall be shown on the plans…approved by the architect or engineer who prepared the plans". Further, Code Section 27-723 ("Subgrade for footings…") provides that "[t]he soil material directly underlying footings…shall be inspected by an architect or engineer immediately prior to the construction of the footings. If such inspection indicates that the soil conditions do not conform to those assumed for the purpose of design and described on the plans…remedial measures shall be adopted, as required. A copy of a report or reports on such inspection or inspections describing the conditions found and any necessary modification of the design, and bearing the signature of the architect or engineer making the inspections, shall be filed with the commissioner".

The owner of a property in Brooklyn sued the adjoining property owner and its architect for damage to the building on the Plaintiff's property which was alleged to have occurred by reason of the construction of a new building on the adjoining lot. Although the plans for the new building called for its footings to be at the same depth as those of the Plaintiff's building, the excavation for the foundation of the new building was more than ten feet below the curb level and below the level of the footings of the Plaintiff's building, resulting in damage to the Plaintiff's building.

The architect moved for summary judgment to dismiss the case as to him on the ground that he

owed no duty to the Plaintiff, but the motion was denied by the Supreme Court, Kings County. According to the Court, the architect owed a duty to adjacent owners for any injury suffered as a result of his improper certifications to the Buildings Department and for the failure to provide necessary underpinning. "Where a regulation imposes a duty for the benefit of an adjacent property owner, that owner may maintain an action against a party that does not comply with the regulation". 27 Jefferson Avenue, Inc. v. Emergi, decided November 19, 2007, is reported at 2007 WL 4105751.

Affordable Housing – 9 NYCRR 2502.3(b) ("Unique or Peculiar Circumstances") of New York State's Department of Housing and Community Renewal ("DHCR") regulations for the Emergency Tenant Protection Act ("ETPA") provides that "[t]he landlord or tenant of a housing accommodation described in Section 2501.1 ["Initial legal regulated rents for housing accommodations"] of this Title may, within 60 days of the local effective date of the act or the commencement of the first tenancy thereafter, file an application…to adjust the initial legal regulated rent on the grounds that the presence of *unique or peculiar circumstances* materially affecting the legal regulated rent has resulted in a rent which is substantially different from the rents generally prevailing in the same area for substantially similar housing accommodations". (Emphasis added). Applications had been filed with the DHCR for initial rent adjustments on the ground that the decision to withdraw from the Mitchell-Lama program (Private Housing Finance Law ("PHFL"), Article II), thereby foregoing the benefits of below market financing and substantial tax exemptions under the program, qualified as "unique and peculiar circumstances".

Paragraph (4), added to 9 NYCRR 2502(b), effective November 21, 2007, provides, in part, that "[p]revious regulation of the rent for the housing accommodation under PHFL or any other State or Federal law shall not in and of itself constitute a unique and peculiar circumstance within the meaning of this subdivision".

In addition, subdivision (f) has also been added to 9 NYCRR 2522.3 ("Fair Market Rent Appeal") of the Rent Stabilization Code effective November 21, 2007, paragraph (f)(1) of which provides that "…the landlord or tenant of a housing accommodation made subject to this code by the ETPA may, within 60 days, of the date the housing accommodation becomes subject to the ETPA or the commencement of the first tenancy thereafter, file an application…to adjust the initial legal regulated rent on the grounds that the presence of unique or peculiar circumstances materially affecting the legal regulated rent has resulted in a rent which is substantially different from the rents generally prevailing in the same area for substantially similar housing accommodations". Paragraph (f)(4) of this new subdivision contains the same new, limiting text in 9 NYCRR 2501(b)(4).

These changes will impact apartments in housing developments exiting either Mitchell-Lama or the Limited Dividend Housing program (PHFL Article IV), which units would thereafter fall under the jurisdiction of either the ETPA or Rent Stabilization.

Contracts of Sale – The contract of sale entered into with the successful purchaser at a Court ordered auction sale of a two story residential building in Queens County provided that the closing take place within 30 days of auction. The closing did not take place because the contract

vendee alleged that there were problems with title and with the condition of the property. Three to four months after the contract was entered into, the City of New York demolished the second story of the building pursuant to two unsafe building proceedings, and the vendee moved for a reduction in the purchase price due to the resulting diminution in the property's value. The Supreme Court, Queens County, denied the motion. It held the vendee in breach of the contract for failing to close as required, and that the vendee was subject to damages in the amount of the down payment unless the closing took place within ten days of service upon the vendee of a copy of the Court's Order. The Court noted that the vendee ordered a title report more than thirty days after the auction, and that escrow could have been held in connection with the title issues. Matter of Brownlee, decided October 25, 2007, is reported at 17 Misc.3d 1119 and at 2007 WL 3118857.

Ethics Opinion 817 – On November 2, 2007 the Committee on Professional Ethics of the New York State Bar Association issued Opinion 817 concerning whether an attorney's participation in a residential closing with a "seller's concession" and a "grossed up" sales price violates New York's Code of Professional Responsibility. The facts considered by the Opinion are that the agreed sales price is increased by 3% to cover the purchaser's closing costs and the seller grants the purchaser a "seller's concession" in the same amount. The purchaser obtains a mortgage based upon the increased amount. According to the Opinion:

> "…We hold that a lawyer may not ethically participate in such a 'gross up' of the actual purchase price and concomitant seller's concession unless there is neither deception nor misrepresentation at work in the transaction and its predictable consequences. At a minimum this means that the gross-up (and not merely the grossed-up purchase price) must be disclosed in the transaction documents. We are persuaded that merely reporting a 'seller's concession' may imply either that the seller has agreed to reduce the purchase price he or she would otherwise have obtained or that the reported sales price is the actual price of the property, less certain costs the seller has agreed to pay. If neither of these is the case, then reporting a concession, without more, is misleading under DR 1-102.
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> "On the facts presented here, and for the reasons above, we conclude that participation in such transactions is unethical unless there is no unlawful conduct, and there is full disclosure in the transaction documents of the substance and effect of the transaction".

Opinion 817 can be obtained at http://www.titlelaw_newyork.com/concessions.pdf.

Mortgage Foreclosure – In an Action to foreclose a first mortgage held by MERS, Defendants (the "Intervening Defendants") who had purchased the property at the foreclosure of the second mortgage raised as an affirmative defense that the first mortgage had been executed pursuant to a fraudulent power of attorney. The Supreme Court, Nassau County, denied the Intervening Defendants' motion for summary judgment and granted MERS' motion for summary judgment, holding that there was no triable issue of fact. Having purchased at a judicial sale expressly subject to prior liens, the Intervening Defendants were "equitably estopped from later challenging the validity of those liens even if the liens were concededly invalid". (The Court

noted that the Intervening defendant's bid was $362,000 on a property with an estimated value of $3,000,000). Mortgage Electronic registration Systems Inc. v. Darden, decided October 9, 2007, was reported in the New York Law Journal on October 31, 2007.

Mortgage Foreclosure/Kings County – On May 3, 2006, the Judges of a Supreme Court, Kings County, issued a standard form of Order of Reference and a standard form of Judgment of Foreclosure and Sale for mortgage foreclosures in that County. The form Judgment provided, in part, that "the closing of title shall take place…within forty-five days after such sale unless otherwise stipulated by all parties…Any delay or adjournment of the closing date beyond forty-five days may be stipulated among the parties, with the Referee's consent, up to ninety days from the date of sale, but any adjournment beyond ninety days may be set only with the approval of this Court".

Kings County Justice Herbert Kramer has, as to cases before him, issued a ruling further impacting the period in which title may close pursuant to a judgment of foreclosure. In Bardi v. Morgan, decided October 16, 2007 and reported at 2007 WL 3023001, Justice Kramer held that "[I]n any case where an auction sale has been scheduled more than one year after the entry of the judgment of foreclosure and sale, the Notice of Sale is invalid and the Clerk of this Court is directed to reject it, unless an amended and updated order of reference and a supplementary foreclosure judgment reflecting the corrected amount is provided".

Judge Kramer also held as follows:

1. "[B]id deposits which may constitute liquidated damages when a bidder defaults under the notice of sale provisions are intended to provide a set off against the damages incurred by the plaintiff in the form of additional legal fees, referee fees and the interest running on the mortgage debt from the time of the auction until declaration of default".
2. "[W]here the mortgagee is the purchaser, the mortgagee who has delayed the closing cannot continue to charge interest during the period that the closing is delayed".
3. "[T]he purchaser who does not timely close is chargeable with judgment interest on the bid amount [less the bidder's deposit] under CPLR 5001(a)(b) as well as under the Terms of Sale. In the instant matter, this statutory interest shall run from thirty days after the successful auction bid until the time the instant motion was made. However, where a foreclosure matter is governed by the current Kings County foreclosure order, interest chargeable to the successful bidder shall run from the 45th date after the auction absent a stipulated adjournment".

In this case, a judgment of foreclosure and sale was entered in 1996. There were four scheduled auction sales. The mortgagee, the successful bidder at the last auction on August 15, 2006, did not appear for closing, did not seek an adjournment, and was declared to be in default of the Terms of Sale which called for a closing on September 15, 2006.

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 January 1, 2008 – March 31, 2008 on late payments and assessments of mortgage recording tax and the State's Real Estate Transfer Tax will be 9% per annum compounded daily. The interest rate to

be paid on refunds of those taxes will be 6% per annum compounded daily. The interest rates are published at http://www.tax.state.ny.us/press/2007/int1107.htm.

Mortgage Recording Tax/New York State Transfer Tax – New York State's Office of Tax Policy Analysis' "Annual Statistical report" of 2006-2007 New York State Tax Collections is published at www.tax.state.ny.us/statistics/new_reports.htm. According to the Report, the New York State Real Estate Transfer Tax collected in Fiscal Year 2007 was $1,022,094,345. Mortgage Recording Tax collected in Fiscal Year 2007 was $3,361,560,219, of which $2,269,910,566 was collected on mortgages recorded in New York City. The State's Fiscal Year is April 1 – March 31.

Mortgage Recording Tax/Reverse Mortgages – New York State's Department of Taxation and Finance's Advisory Opinion (TSB-A-07(5)R), dated October 18, 2007, takes the position that a reverse mortgage executed under the United States Department of Housing and Urban Development's Home Equity Conversion Mortgage ("HECM") reverse mortgage loan program is exempt from mortgage recording tax under Tax Law Section 252-a.2 ("Other exemptions"). Section 252-a.2 exempts from tax a reverse mortgage conforming to the provisions of Real Property Law Section 280 or Section 280-a. The Advisory Opinion is posted at http://www.tax.state.ny.us/pdf/advisory_opinions/mortgage/a07_5r.pdf.

The Department issued a memorandum on October 20, 2007 to recording officers in connection with this Advisory Opinion, stating the following:

"As you know, pursuant to section 252-a.2 of the Tax Law, reverse mortgages that conform to the provisions of section 280 or 280-a of the Real Property Law that secure obligations of mortgagors or are exempt from those provisions pursuant to section 280(4) or 280-a(4) of the Real Property Law are exempt from the mortgage recording taxes imposed by Article 11 of the Tax Law. Section 252-a.2 of the Tax Law provides that to claim this exemption the lender should provide documentation to enable recording officers to affirmatively determine when a mortgage being presented for recording is a reverse mortgage conforming to section 280 or section 280-a of the Real Property Law and entitled to an exemption. Section 644.1(c)(2) of the Regulations outlines the contents required for an affidavit for a mortgage when an exemption is claimed pursuant to regulation section 644.1(b)(17) and applies to reverse mortgages 'which conform to the provisions of section 280 or section 280-a of the Real Property Law'.

However, the provisions of section 644.1(b)(17) and 644.1(c)(2) of the Regulations are silent with regard to a reverse mortgage that qualifies for exemption because it meets the federal requirements and is exempt from the provisions of section 280 or 280-a of the Real Property Law pursuant to section 280(4) or 280-a(4) of the Real Property Law, as would be the case with a HECM mortgage. Accordingly, pursuant to section 252-a.2 of the Tax Law, other documentation should be submitted to the recording officer to establish the exemption for a reverse mortgage that is exempt because it meets the federal requirements. In general, the following documentation is sufficient to establish the exemption:

1) an affidavit, signed by the mortgagee, affirming that the mortgage is a reverse mortgage that conforms to the applicable federal law and regulations under 12 USC §1715z-20 and,

therefore, is exempt pursuant to section 280(4) (or, if applicable, section 280a(4)) of the Real Property Law and exempt from the mortgage recording taxes pursuant to section 252-a.2 of the Tax Law, and

2) a second mortgage referencing the Home Equity Conversion Loan Agreement and naming the Secretary of Housing and Urban Development as mortgagee should be recorded at the same time the reverse mortgage is recorded.

Please note, for reverse mortgages that do not qualify under the federal program, the old affidavit required by sections 644.1(b)(17) and 644.1(c)(2) of the Regulations is necessary to support a claim for the reverse mortgage exemption".

New York City/Automated City Register Information System ("ACRIS") – Changes were made to the recording process by ACRIS Release 4.0 for documents first submitted on or after December 3, 2007. New features in ACRIS Release 4.0 include the following:

There is a screen in ACRIS 4.0 in which all cross-references to CRFNs, Doc IDs and the Reel and page numbers of prior recorded instruments, referenced within a document being recorded, must be validated in ACRIS. Also, when preparing e-tax forms, ACRIS will prompt the user to indicate whether or not ["Yes/No/Don't Know"] the purchaser(s) will reside at the property. If the purchaser will be in residence, entering "Yes" will enable forms to be printed to apply for personal real estate tax exemptions, such as the STAR exemption and the Veteran's or Senior Citizen exemptions. ACRIS will only require a response when the user indicates that the property is a 1-3 family dwelling, a residential condominium unit, a residential cooperative unit, a 1-3 family dwelling with an attached garage, or a 1-3 family dwelling with an office or store. Training material for the personal exemption component of ACRIS, issued by the Department is posted at http://www.titlelaw-newyork.com/ExemptionsInACRIS.pdf.

Notice of Pendency – Plaintiffs brought suit alleging that title to two single family homes in Suffolk County purchased by Defendant Ira Cohen was an asset of a partnership created by an oral agreement entered into between the Plaintiffs and Defendant Cohen. The Supreme Court, Suffolk County, denied Defendant Cohen's motion to dismiss the notice of pendency in the Action. It noted that a partnership may be created by an oral agreement and held that an action seeking a ruling that real property is a partnership asset is an action affecting title for which a lis pendens is properly filed.

The Court also granted the motion of Defendant MERS, holder of the purchase money mortgage executed by defendant Cohen, for summary judgment dismissing the Action against it. Although the notice of pendency was filed when the mortgage was executed, notices of pendency are indexed in Suffolk County against the name of the Defendant, not against the property. Accordingly, the mortgage was not subject to the rights of the Plaintiffs. Martin v. Cohen, decided October 5, 2007, is reported at 17 Misc. 3d 1116 and 2007 WL 3070779.

Recording Act – In 2000 the Plaintiffs' corporation acquired at a tax sale two vacant parcels of land ("Parcels B and E") in the Town of Wappinger, Dutchess County. Parcels B and E had been owned by the developers of the adjoining condominium development. In approving the

condominium project, the Town Planning Board designated Parcels B and E as "permanent open space", and the minutes of the Planning Board approving the subdivision noted "(t)hat no building permits will be issued for Parcels B and E, as indicated on the Subdivision Plat". The Plat approved in 1963 (the "1963 Plat") was filed in the Office of the Dutchess County Clerk. It identified Parcels B and E as being a "buffer" area and the words "open space" were noted on the parcels. In 2003 the Plaintiffs obtained a building permit for a home to be built on Parcel B but the Town, once the restrictions were brought to its attention, refused to issue a certificate of occupancy. The District Court held that the Plaintiffs were bona fide purchasers for value without notice of the restrictions prohibiting development and therefore owned the parcels free and clear of the restrictions; it ordered the Town to issue a certificate of occupancy if the home otherwise complied with the Town Code. According to the Court, the Plaintiffs were not bound by the notation on the 1963 Plat or the Planning Board Resolution, since neither document was "of record" as required by Section 291 of New York's Real Property Law ("Recording of conveyances"). The Town appealed and the Second Circuit Court of Appeals certified the following question to New York State's Court of Appeals: "Is an open space restriction imposed by a subdivision plat under New York Town Law Section 276 enforceable against a subsequent purchaser, and under what circumstances?"

The Court of Appeals in a ruling dated November 15, 2007 held that "[a]n open space restriction placed on a final plat pursuant to Town Law Section 276 ["Subdivision review, approval of plats…"], when filed in the Office of the County Clerk pursuant to Real Property Law Section 334 ["Maps to be filed…"] is enforceable against a subsequent purchaser". The Court noted that there is no statutory requirement that a plat be recorded in the chain of title and a search of the County Clerk's records would have disclosed the 1963 Plat. The Court further ruled that, in this case, the Town did not acquire an interest in real property, which would require the recording of a "conveyance" to be effective against subsequent purchasers. O'Mara v. Town of Wappinger is reported at 2007 WL 3375579.

Recordings/Westchester and Nassau Counties – The Westchester County Clerk has advised that effective January 1, 2008 separate checks must be submitted for the payment of each of the mortgage recording tax, the State transfer tax, and recording fees. Checks are to be made payable to "The Westchester County Clerk" in the exact amount due. According to the County Clerk, "[I]f your check is not in the exact amount due, your submission will be rejected".

The Nassau County Clerk has advised that, effective December 1, 2007, Section 255 "affidavits" must be submitted with a certified copy of a mortgage being recorded when the mortgage recording tax was paid in another county. "In past practice, we [the Nassau County Clerk] have accepted certified copies of a mortgage where tax is paid in another county, without affidavits".

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