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A Message from the Outgoing Chair

Dorothy Ferguson

What a pleasure to serve as Chair of the Real Property Law Section! At the beginning of my term, several Past Chairs predicted that I would find the experience very rewarding. They were right! The energy and enthusiasm of our members for the work of the Section is commendable and is consistently reflected in outstanding programs and publications that benefit all New York real estate practitioners.

Some of the highlights of the year include:

- **Current Legal Issues Affecting the Profession.** Our Section's Executive Committee and delegates to the NYSBA House of Delegates, Melvyn Mitzner, John Privitera, Robert Hoffman and Harry Meyer, have taken a very active role on the many important issues before the House this year, including issues relating to same-sex couples and pro bono service.

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A Message from the Incoming Chair

Joshua Stein

How can you stay current? How can you learn about legal trends and developments before they hit? What new legal headaches will affect your clients in the next 12 months? How do other real estate lawyers solve the problems that you worry about every day?

The Real Property Law Section wants to help you answer those questions. We do it primarily through about 20 substantive committees—all of which are very active, very focused on what's happening right now in real estate practice, and very open to new members.

With a few exceptions, each committee focuses on a particular area of real property law. Within that area, it offers continuing legal education programs, lunchtime speakers, and substantive updates to its members. Some committees also undertake special projects designed to help advance the state of the law and legal practice.

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- **Legislation.** This year has seen a major expansion in the Section's Legislation Committee's efforts to track and comment on bills and to propose new legislation. A major goal of the committee, now served by three co-chairs and expanded to over 50 members, is to keep all members of the Section current on proposed legislation affecting real property transactions.
- **Property Condition Disclosure Act ("PCDA").** In January 2004, the Section's Task Force on Disclosure sent a survey to approximately 80 bar associations throughout New York State, requesting feedback and comments on the Property Condition Disclosure Statement. In June 2004, the Task Force e-mailed a survey to 3,500 members of the Section. The result of each survey was mixed. During the year, the Task Force has met with the New York State Association of Realtors to review the status of the PCDA and to discuss possible revisions.
- **Unlawful Practice of Law.** One of the major issues being addressed by the Section is the unauthorized practice of real estate law adversely impacting the public. Our concern has recently increased due to a number of situations and practices brought to our attention concerning title companies, settlement agents and other non-lawyers that offer their services regarding certain aspects of real estate transactions. The Unlawful Practice of Law Committee will continue to monitor developments at the state and national levels.
- **Low Income and Affordable Housing.** In September 2004, this committee held its 1st Annual Upstate Affordable Housing Conference in Buffalo. Co-sponsored by the NYS Division of Housing and Community Renewal, The New York State Association for Affordable Housing and the University of Buffalo Law School, the conference attracted 172 attendees. The committee's 2nd annual conference is scheduled for September 22, 2005.

I've so enjoyed working with all of the members of the Executive Committee. They are true leaders, and their enthusiasm and dedication is exemplary. I especially want to recognize my fellow officers, Joshua Stein, Harry Meyer and Karl Holtzschue. Their support and involvement every step of the way made my role as Chair easy and just plain fun. The Section is in excellent financial shape, thanks in part to the efforts of Harry Meyer who has kept a strict watch on budget matters. I acknowledge Lori Nicoll and Kathy Heider at the State Bar for their helpfulness, guidance and expertise—often at a moment's notice. Thanks also to Ron Kennedy for his assistance with our legislative initiatives.

On a sad note, I mourn the passing this year of our dear friend and Past Chair of the Section, Tom Moonan. Long after his tenure as Chair ended, Tom continued to inspire many of us. I was fortunate to work with him on many real estate deals and learned a lot from him. Tom was warm, generous and positive, and I miss him as a friend, mentor and colleague.

I am delighted to pass the baton to incoming Chair Joshua Stein. Those of you who know Joshua will not be surprised to learn that he has many plans in place for the Section during the upcoming year. Please communicate to Joshua and the other officers—First Vice-Chair Harry Meyer, Second Vice-Chair Karl Holtzschue and Secretary Peter Coffey—your ideas and comments regarding Section activities. If you are not yet a committee member, I strongly urge you to join one or more of the Section's nineteen committees during the 2005–2006 year and take advantage of the many benefits available to you.

With very best wishes to all of you,

Dorothy H. Ferguson

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Collectively, the Section's committees give everyone in the Section a great opportunity to stay current, learn about the law, step back a bit from the day-to-day work of negotiating and closing deals (and resolving disputes), think about some bigger legal issues, and work with other real estate lawyers in a different context.

In my upcoming year as Chair of the Section, I plan to emphasize the activities of our committees. I also want to reach out to the Section's membership—that's you!—so people who might benefit from committee involvement have the opportunity and information they need to get involved.

Most of the remainder of this column describes, very specifically, what the Section's committees have been doing and some of their plans for the future. You will see that joining a committee for your practice area will give you a great technique to stay current and contribute to the development of New York real property law.

I've covered the committees in random order, except the first and the last. I've also included the e-mail addresses for each chair or co-chair of each committee. Full contact details for the committee chairs and co-chairs can be found in the last few pages of this and every issue of this *Journal*.

To join a committee, get in touch with one of the co-chairs of that committee. You can also send an e-mail to me at joshua.stein@lw.com. Technically, new committee members are either appointed or approved by the Chair of the Section. I cannot recall any case where someone who wanted to join a committee was not welcomed. Once you join, you will be added to the mailing lists for the committee and able to participate in whatever way you wish.

Legislation Committee. As the "main event" in the current lineup of Section committees, the Section has just finished restructuring and expanding our legislation committee, to try to give the Section a stronger voice in the legislative process.

Until not long ago, the legislators in Albany routinely proposed legislation that would affect real property law, but the state's real property bar often had nothing to say about it.

We decided we wanted the Section to hear about and help shape legislation affecting real property law before we found out about it in the newspapers. To try to get more involved in the legislative process, we appointed three new co-chairs of the committee as well as several dozen new committee members. This group has started to actively monitor and respond to legislation so the committee and the Section can contribute to the legislative process.

As its goal, the Legislation Committee wants to try to comment on a dozen or more pieces of legislation a year. Where appropriate, the committee will identify and express the views of the legal profession on new legislation, and try to work with (or against) other groups to assure that any new legislation is reasonable and practical, taking into account how real estate actually works in New York. We want to try to prevent well-meaning "improvements" that are proposed in a vacuum and enacted without regard to reality. In doing this, we try to help guide the logical and intelligent development of the law, rather than speak from a particular political perspective.

The committee meets quarterly by conference call, although active committee members communicate more often while the Legislature is in session.

The expanded Legislation Committee still seeks new members, both to help monitor legislation and perhaps to visit with legislators in Albany to express the Section's views and increase our involvement and visibility.

If you would like to join this committee and help improve real property legislation in New York, you should e-mail one of the committee co-chairs: Spencer Compton at shcompton@firstam.com or Ralph Habib at rhabib64@yahoo.com (if you want to review and comment on real property legislation); or Gary Litke at glitke@willkie.com (if you want to work directly with legislators and their staff in Albany).

Ethics and Professionalism. During the next year, the Section's committee on professionalism and ethics plans to sponsor three continuing legal education programs, devoted entirely to ethical issues and professionalism. Each will offer four hours of "ethics" credit.

The Albany program is penciled in for September 23, 2005. The two other programs, one in New York City and one near Buffalo, have yet to be scheduled.

Beyond the continuing legal education program, the professionalism committee deals with ethical issues as they arise in real estate practice. Committee members authored the New York State Bar Association's book entitled *Attorney Escrow Accounts*, and work on the second edition is under way.

If you would like to learn more about the Ethics and Professionalism Committee and its programs, or participate in one of the committee's upcoming continuing legal education programs, you should contact one of the co-chairs: Anne Copps at arcopps@nycap.rr.com or Alfred Tartaglia at atartagl@courts.state.ny.us.

Low Income and Affordable Housing. Last year, the Section's committee on low income and affordable housing

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The UCC Title Insurance Policy (First American's EAGLE 9™ Policies)

By John E. Blyth

UCC Title Insurance is a new form of title insurance which is currently being offered by only a few title insurance companies.[1] In 2001, coinciding with the effective date (in most jurisdictions) of Revised Article 9 of the Uniform Commercial Code, one of those companies, First American Title Insurance Company,[2] issued its UCC Insurance Policies:

(i) EAGLE™ UCC Insurance Policy for Lenders, which provides lenders with lien perfection and priority insurance for commercial loans secured by personal property as defined by the Uniform Commercial Code, as well as insurance against mis-indexed filings;

(ii) EAGLE™ UCC Insurance Policy for Buyers, which insures the lien status, as of the date of acquisition, of the assets of a seller acquired by a buyer, as well as tax liens and security interests of sellers through the immediate seller in the chain of ownership of the acquired assets;

(iii) the EAGLE ™ UCC Insurance Vacation Interest Policy, which when coupled with an inventory control system, insures the availability for sale of points in a non-deeded vacation interest program (time share); and

(iv) EAGLE™ UCC Residential Cooperative Interest Insurance Policy (New York Only), which, based upon New York's unique provisions to its Uniform Commercial Code, insures the ownership of the debtor's Cooperative Interest in a Cooperative Organization.

The form of the Policies follows the usual ALTA title insurance form. Copies of the Policies as well as of the Lenders Policy Order Form, Buyers Policy Order Form, General Required Documentation, and UCC Insurance Policy Rate Filing may be obtained from First American Title Insurance or any one of the title insurance companies listed in footnote 2.

The Policies have also been used by lenders in commercial loans involving mezzanine financing transactions,[3] in ordinary real estate secured transactions which also include personal property, and potentially in transfers by vendors of interests in installment land contracts.[4] The coverage can extend to any property included in Revised UCC Article 9: inventory, furniture, equipment, factoring, fixtures, general intangibles, investment property, crops, developer's rights, receivables, and retail transportation.

Users of these Policies may also outsource UCC searches, document preparation, as well as filing and tracking. The insurer claims that such outsourcing saves time and money for the parties to a particular transaction. The decision to obtain UCC Insurance will be the result of a cost/benefit analysis.[5]

Lenders concerned about defects in their security interests may take comfort from a UCC Insurance Policy which indemnifies the lender against loss due to defects in its security interest, its attachment, perfection and priority, and the cost of legal fees and expenses of defending the security interest.[6]

Subject to the familiar exceptions, exclusions, conditions, and legal, regulatory, or underwriting considerations, the coverage from the Policy includes forgery, fraud, undue influence and duress, incompetence or incapacity, and gap coverage.[7]

Endorsements are also available in the UCC Title Insurance setting. They include, but are not limited to, the agricultural lien endorsement, seller's lien endorsement, tax lien endorsement, patent endorsement, copyright endorsement, trademark endorsement, mezzanine endorsement,[8] and usury endorsement.

The brochures and the web site point out that this kind of insurance has proven to be a supplement to—and in many cases a viable and economical replacement for—legal opinion letters. Borrowers' counsel, who offer legal opinion letters to lenders, should not feel threatened by the possibility of UCC title insurance replacing the legal opinion letter. Borrowers' counsel in New York, for instance, while opining in the remedies opinion as to authority, execution and delivery of financing statements, routinely excerpt out of an opinion letter any opinion with respect to the attachment, creation, perfection or priority of any security interest in the collateral.[9] As a matter of customary practice, the remedies opinion in a real estate secured transaction (REST) legal opinion does not cover the creation, perfection and priority of security interests in the collateral. Opinions on the effectiveness of security interests are always given separately and not as a part of the remedies opinion. Even in those loans where personal property is a material part of the collateral or where certain licenses, permits and

other rights are essential for the operation of the real property, the opinion usually covers only certain matters relating to perfection by filing or possession and does not purport to cover all issues that may arise with respect to the attachment, creation, perfection and priority of security interests in such collateral.[10]

The title insurance offered by First American is issued on a nationwide basis and therefore the multijurisdictional issues facing lawyers under Revised Article 9 may be avoided. A New York attorney, for instance, will normally not want to give an opinion with respect to a California entity. UCC Title Insurance avoids that problem.[11]

It may also be noted that, in a real estate secured transaction opinion, a lawyer must be found to have acted negligently for liability to arise. That is not the case with UCC Title Insurance. If there is a mistake, the title insurance company defends and ultimately pays.

Endnotes

1. Some of the companies that have UCC Insurance Policies are: Chicago Title Insurance Company, Commonwealth Land Title Insurance Company, Fidelity National Title Insurance Company of New York, First American Title Insurance Company of New York, First Atlantic Title Insurance Corporation and Ticor Title Insurance Company.

2. See http://www.eagle9.com for the most immediate source of general information about these polices. For particular questions about these Policies, contact Jill C. Sharif, National Marketing Representative, First American Corporation, UCC Insurance Division, 101 Huntington Avenue, 13th Floor, Boston, MA 02199. Cell: (617) 721-7659; phone: (617) 772-9253; fax: (617) 247-8486; Toll-Free (800) 225-1546 x 253, jsharif@firstam.com. Much of the actual grunt work is actually done in California by John N. Noshita, Senior UCC Underwriting Officer, The First American Corporation UCC Division, 1 First American Way, Santa Ana, CA 92707, Ps: (714) 800-3565 and (800) 700-1191; F: (714) 800-4750, jnoshita@firstam.com.

   Additionally, for UCC Title Insurance, First American has a joint venture with Lawyers Title Insurance Corporation, LandAmerica UCC Insurance Division, 655 Third Avenue, New York, NY 10017, telephone (212) 949-0100, fax (212) 973-6204, UCCGuard@landam.com. For particular questions, contact David L. Wanetik, Esq., Vice President—UCC Insurance Division, 655 Third Avenue, New York, NY 10017. P: (212) 973-6212; F: (212) 973-6204.

3. *See* James D. Prendergast, *It Can Happen and It Does! The Cases for UCC Insurance—Part 1 of 2,* Commercial Law Newsletter, ABA Section of Business Law (March 2003). UCC Insurance does not usually insure that the debtor owns the personal property. In the case of mezzanine borrowing, however, UCC Insurance insures the actual ownership of the equity interests of the mezzanine borrowers. While the typical UCC insurance policy contains an exclusion from coverage that assumes that the debtor "has rights in the collateral" and does not insure that the debtor owns the computers in the warehouse, it does insure the security interest of the lender in whatever the debtor may own in the warehouse. In the typical mezzanine transaction, the lender to the property-owner borrower does not want a second encumbrance on the property. Therefore, to capture equity value given the loan-to-value ratio of the lender to the property owner, the mezzanine lender lends on this equity value to the equity holders of the owner borrower, the members of the property owner LLC, or the partners of the property-owner partnership. The loan is secured by the equity in the property-owner borrower.

   There is an interplay between Article 8 and Article 9 of the UCC. If the lender to the mezzanine borrower can attain the status of a "protected purchaser" under Article 8 (gives value, is unaware of adverse claims to the equity, and obtains a security interest in the investment property by control), then the UCC insurance company will remove the requirement that the debtor has rights in the equity collateral. This effectively insures that the mezzanine borrower "in fact" owns the equity interest in the property-owner borrower. The result is equity-title insurance. James D. Prendergast, *The Utility of UCC Insurance*, Vol. 59, No. 6, The Secured Lender 96 (November/December 2003).

   Joshua Stein, Esq. warns that the growth spurt in adopting such sophisticated financing instruments has moved more quickly than the legal instruments used to define them. In many cases, contract language has left lenders more exposed than they realize. Nobody has really learned much about any defects in mezzanine loan structuring, and there are a lot of unknowns right now. Joshua Stein, *Mezz Loans in a Distressed Market?*, www.theslatinreport.com, Tuesday, July 27, 2004.

4. *See* Dale A. Whitman, *Transfers by Vendors of Interests in Installment Land Contracts: The Impact of Revised Article 9 of the Uniform Commercial Code*, 38, No. 3, Real Property, Probate and Trust Journal 421 (Fall 2003).

5. *See* http://www.eagle9.com.

6. Brochure from First American EAGLE™ UCC Insurance Division, Metacomet Executive Office Park, 450 Veterans Memorial Parkway, East Providence, RI 02914-5342, (401) 434-1000, (877) 858-8099, http://www.eagle9.com, e-mail: neucc@firstam.com.

7. *Id*.

8. *See* John C. Murray, *Mezzanine Financing Endorsements to Title and UCC Insurance Policies,* Title Insurance 2003, Mastering Critical Issues Facing Buyers, Sellers & Lenders, 497 PLI/Real 677 (2003).

9. Footnote 9, *1998 Mortgage Loan Opinion Report*, Association of the Bar of the City of New York and New York State Bar Association (June 1, 1998), 26, No. 4 N.Y. Real Property Law Journal, Special Supplement (Fall 1998).

10. Footnote 16, *1998 Mortgage Loan Opinion Report*, Association of the Bar of the City of New York and New York State Bar Association (June 1, 1998), 26, No. 4 N.Y. Real Property Law Journal, Special Supplement (Fall 1998).

11. *See* James D. Prendergast, *Legal Opinions Under Revised Article 9 or How Do I Write a Delaware Law Opinion?*, 58, Number 6, The Secured Lender 20 (November/December 2002), reprinted on the First American web site.

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A Time-Saving Alternative to Complicated, Long-Winded Survey Certificates (With Form)

By Joshua Stein

With survey certificates, shorter can definitely be better.

This article considers national survey standards as developed by national title and surveying associations. Many states, including New York, have their own standards. Within New York, some counties have their own standards, or even multiple competing standards. Bar associations and other groups sometimes try to harmonize and combine the various competing survey standards. These efforts move slowly. This article does not attempt to consider any survey standards beyond the national ALTA/ACSM standards. The ideas in this article apply with equal force, however, to any other set of survey standards. The language of the proposed survey certificate would need to change to reflect whatever survey standards apply for a particular transaction.

ALMOST EVERY REAL ESTATE ACQUISITION, FINANCING, OR DEVELOPMENT TRANSACTION requires a surveyor to inspect and measure the real property, then draw a survey diagram and deliver a certificate to back it up. This package of information lets the parties and their counsel better understand the physical characteristics of the real property and identify issues that might impair its value. To some degree, a survey gives the players a substitute for visiting and inspecting the site.

Perhaps out of instinct, real estate lawyers who close significant commercial transactions sometimes try to develop comprehensive and thorough certificates for any surveyor to sign. These certificates often consist of a single, long paragraph that goes on for a page or more. This overwhelming block of type asks the surveyor to give as many factual assurances as possible about the real property.

Lawyers use long form survey certificates both to avoid leaving out something that others would have included and to try to include new improvements that others might not have imagined. Survey certificates of this type can, however, come as quite a burden to surveyors, many of whom operate relatively informal one-person shops. They have limited enthusiasm for huge blocks of single-spaced text whose length might better be measured with a ruler than by counting lines. The results: procrastination, negotiations, extra expense, and unnecessary excitement when the absence of a "satisfactory" survey certificate creates a last-minute emergency at closing.

USING INDUSTRY SURVEY STANDARDS • Lawyers can prevent this self-defeating process. The title insurance industry and the surveying profession have prescribed through reasonable standards exactly what a survey should show and exactly what assurances a surveyor should give his or her client. By relying on those standards as much as possible, a real estate lawyer can substantially trim back and simplify the required form of "surveyor certificate," yet obtain comfort entirely appropriate for the typical real estate loan or other transaction. The real estate lawyer can achieve all this with very little verbiage at all.

The industry-wide survey standards have been updated several times, most recently in 1999, as the combined work of the American Land Title Association ("ALTA"), the American Congress on Surveying and Mapping ("ACSM") and the National Society of Professional Surveyors ("NSPS"). The latest edition is called the *Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys* ("ALTA/ACSM Survey Standards"), and can be found online at www.acsm.net/99altawd97.doc.

Collectively, the authors of the ALTA/ACSM Survey Standards have identified and handled almost every issue that a typical lawyer's long-winded survey certificate would address. Moreover, the ALTA/ACSM Survey Standards add a level of precision otherwise absent from survey certificates, and also take into account the limitations, expectations, and practices of the surveying profession.

Use ALTA/ACSM Standards As Base

Using the ALTA/ACSM Survey Standards as a base, you can ask a surveyor to provide only an extremely minimal surveyor's certificate—sufficient merely to confirm that the surveyor complied with the applicable requirements of the ALTA/ACSM Standards and a few other matters. Such a certificate effectively incorporates by reference the ALTA/ACSM Standards, and hence practically forces the surveyor to show on the survey all matters

that should concern a lawyer and his or her client.

You must then confirm that someone looks at, and pays attention to, the survey and thinks about the information that the survey shows—a step in the closing process that should already happen anyway, but may not receive the emphasis it should if the attorneys and paralegals are devoting their efforts to fighting over surveyor certificates. If the attorneys and paralegals use a simplified form of survey certificate, though, they may find that they receive the survey itself sooner in the closing process and can devote their efforts to reviewing it rather than being distracted by the need to negotiate a survey certificate that really shouldn't need to be negotiated at all. You will discover any survey issues earlier in the process, and perhaps reduce delays and last-minute crises.

The ALTA/ACSM Standards define some optional items that a survey might or might not disclose, all listed in Table A of the Standards. In practice, any careful businessperson or real estate attorney will want the survey to cover almost all the Table A items. Appendix C at the end of this article indicates which Table A items you can usually omit, and why.

Appendix A: Minimalist Surveyor's Certificate

Appendix A offers an example of a minimalist surveyor's certificate, which should do the job for any real estate transaction requiring a survey and survey certificate, absent special and unusual circumstances. The sample certificate in Appendix A requires the surveyor to state that the survey complies with the ALTA/ACSM Standards and includes most of the optional items listed in Table A of those standards. If you obtain a surveyor's certificate in this form, you have covered all the bases that usually need to be covered, except anything site-specific or deal-specific.

Appendix B: Common but Unnecessary Language

To support that statement, Appendix B of this article includes (in the left-hand column) sample language extracted from many survey certificates that have crossed the author's desk or that the author has perpetrated for transactions. In each case, the language in the left-hand column is unnecessary because the ALTA/ACSM Survey Standards (including the specified Table A items) already cover exactly the same requirements—often with greater precision and detail than the language extracted in the left-hand column of Appendix B. The right-hand column of Appendix B demonstrates why the language in the left-hand column is unnecessary, by quoting the relevant requirements of the ALTA/ACSM Standards. In each case, the ALTA/ACSM Standards fully cover the same ground as the language in the left-hand column, often with greater detail and practical scope. Given this overlap, lawyers and their clients lose nothing by requiring only an extremely minimal form of surveyor's certificate, such as the one in Appendix A.

Appendix C: Non-Customary Assurances That Create Problems

The forms of surveyor certificate that lawyers create also often raise problems by asking the surveyor to provide assurances that are either irrelevant or outside the surveyor's expertise. Many of those are summarized in Appendix C. A surveyor does not usually expect to be responsible for these issues. If you ask the surveyor to assume that responsibility, the surveyor will likely object because the requirement is not standard for the market, at least as the surveyor understands the market. You can therefore streamline the survey process by not asking for these assurances. If you nevertheless intend to ask for them, you should do so early in the process and be ready for objections. If necessary, find someone else (such as local counsel, a title insurance company, or an engineer) to provide the desired comfort.

CONCLUSION • By using a minimal survey certificate like the one in Appendix A, and by limiting the surveyor's responsibilities to a set that is standard in the relevant market, you can assure that the survey certificate—a "routine" element of the closing process—stays routine and simple and does not produce negotiations, delays, or surprises. At the same time, the use of such a certificate will give your client all the comfort typically obtained from a survey and surveyor's certificate, assuming the property raises no special issues or concerns.

Appendix A

Minimal Survey Certificate

The undersigned (the "*Surveyor*"), a registered land surveyor in the state or commonwealth identified below Surveyor's signature, has prepared Surveyor's survey dated _____ (Job No. _____) (the "*Survey*") referring to:

(a) real property known as _____ (the "*Property*"); and

(b) _____ Title Insurance Company ("*Title Company*") Commitment No. _____ dated _____ for the Property.

Surveyor certifies to _____ ("*Borrower*"), _____ ("*Lender*"), and Title Company that Surveyor has surveyed the Property and:

- *(Compliance)* that the Survey—

(a) was made in accordance with "Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys," adopted by ALTA, ACSM and NSPS in 1999;

(b) includes Table A Items 2, 3, 4, 6, 7(a), 7(b)(1), 7(c), 8, 9, 10, 11(b), 12, 13, 14, 15, and 16; and

(c) is based upon measurements made in accordance with "Minimum Angle, Distance, and Closure Requirements for Survey Measurements Which Control Land Boundaries for ALTA/ACSM Land Title Surveys" and the Accuracy Standards adopted by ALTA, NSPS, and ACSM and in effect on the date of this certificate; and

(Author's Note: See Appendix C for an explanation of the Table A items referenced in (b) above, as well as for an explanation of why they can be omitted.)

- *(Acreage)* that the Property contains ___ acres (i.e., ___ square feet).

Borrower, Lender, Title Company, and their successors and assigns (including any trust, trustee, servicer, or rating agency for any securitization that includes Lender's loan or any interest in it) may rely on this Certificate.

Signature:
Name:
Date:
State or Commonwealth:
License Number:
Seal:

Appendix B

Common but Unnecessary Language in Surveyors' Certificates

COMMON LANGUAGE	UNNECESSARY BECAUSE THE ALTA/ACSM STANDARDS ALREADY REQUIRE THE FOLLOWING
I am a duly registered land surveyor of the state where the Premises are located.	**2.** The plat or map of such survey shall bear the name, address, telephone number, and signature of the professional land surveyor who made the survey, his or her official seal and registration number, the date the survey was completed and the dates of all revisions, and the caption "ALTA/ACSM Land Title Survey" with the certification set forth in paragraph 8.
This survey was actually made upon the ground on _____ (date). This survey has been prepared based upon field work conducted on the property shown hereon, performed by me or under by direct supervision on _____, _____;	**5.** The survey shall be performed on the ground[.]
The Survey correctly shows all exceptions in title commitment no. _____ issued, by _____ Title Insurance company on _____, with location and recording information, to the extent that such exceptions can be located on the Survey. The Survey accurately shows all easements affecting the Property. .	**5.(d)** The identifying titles of all recorded plats, filed maps, right-of-ways maps, or similar documents which the survey represents, wholly or in part, shall be shown with their appropriate recording data, filing dates and map numbers, and the lot, block, and section numbers or letters of the surveyed premises. For non-platted adjoining land, names and recording data identifying adjoining owners as they appear of record shall be shown. For platted adjoining land, the recording data of the subdivision plat shall be shown. The survey shall indicate platted setback or building restriction lines which have been recorded in subdivision plats or which appear in a Record Document which has been delivered to the surveyor. Contiguity, gores, and overlaps along the exterior boundaries of the surveyed premises, where ascertainable from field evidence or Record Documents, or interior to those exterior boundaries, shall be clearly indicated or noted. Where only a part of a recorded lot or parcel is included in the survey, the balance of the lot or parcel shall be indicated. **5.(h)** All easements evidenced by a Record Document which have been delivered to the surveyor shall be shown, both those burdening and those benefiting the property surveyed, indicating recording information. If such an easement cannot be located, a note to this effect shall be included. Observable evidence of easements and/or servitudes of all kinds, such as those created by roads; rights-of-way; water courses; drains; telephone, telegraph, or electric lines; water, sewer, oil or gas pipelines on or across the surveyed property and on adjoining properties if they appear to affect the surveyed property, shall be located and noted. If the surveyor has knowledge of any such easements and/or servitudes, not observable at the time the present survey is made, such lack of observable evidence shall be noted. Surface indications, if any, of underground easements and/or servitudes shall also be shown.
The survey shows all roads, streets, and highways abutting the Property.	**5.(c)** Measured and record distances from corners of parcels surveyed to the nearest right-of-way lines of streets in urban or

	suburban areas, together with recovered lot corners and evidence of lot corners, shall be noted. The distances to the nearest intersecting street shall be indicated and verified. Names and widths of streets and highways abutting the property surveyed and widths of rights-of-way shall be given. Any use contrary to the above shall be noted. Observable evidence of access (or lack thereof) to such abutting streets or highways shall be indicated. Observable evidence of private roads shall be so indicated. Streets abutting the premises, which have been described in Record Documents, but not physically opened, shall be shown and so noted. **[Table A] Item 10.** _____ Indication of access to a public way such as curb cuts and driveways.
The Survey shows all evidence of possession of the Property, including any squatters or presumptive easements.	**5.(f)** The character of any and all evidence of possession shall be stated and the location of such evidence carefully given in relation to both the measured boundary lines and those established by the record. An absence of notation on the survey shall be presumptive of no observable evidence of possession.
Except as the Survey shows: (a) no improvements on the Property encroach onto adjoining real property or any easement of which Surveyor has knowledge (or the Commitment discloses) burdening the Property; (b) no improvements on other real property encroach onto the Property;	**5.(i)** The character and location of all walls, buildings, fences, and other visible improvements within five feet of each side of the boundary lines shall be noted. Without expressing a legal opinion, physical evidence of all encroaching structural appurtenances and projections, such as fire escapes, bay windows, windows and doors that open out, flue pipes, stoops, eaves, cornices, areaways, steps, trim, etc., by or on adjoining property or on abutting streets, on any easement or over setback lines shown by Record Documents shall be indicated with the extent of such encroachment or projection. If the client wishes to have additional information with regard to appurtenances such as whether or not such appurtenances are independent, division, or party walls and are plumb, the client will assume the responsibility of obtaining such permissions as are necessary for the surveyor to enter upon the properties to make such determinations. **5.(j)** Driveways and alleys on or crossing the property must be shown. Where there is evidence of use by other than the occupants of the property, the surveyor must so indicate on the plat or map. Where driveways or alleys on adjoining properties encroach, in whole or in part, on the property being surveyed, the surveyor must so indicate on the plat or map with appropriate measurements.
The survey correctly shows the locations and dimensions of all boundaries of the property, and all visible buildings, structures and other improvements, building setback lines, party walls, ditches, flood plains, waterways, bodies of water, fences, easements as listed in said title commitment, rights-of-way, utilities serving said property, streets, alleys, roadways, curbs, gutters, driveways, curb cuts, parking stalls, loading docks, traveled ways, and other significant visible items located on, adjacent to, appurtenant to or which affects the subject property, and are discoverable upon visual inspection, or otherwise known to me.	**5.(a)** [The Survey shall include all] data necessary to indicate the mathematical dimensions and relationships of the boundary represented, with angles given directly or by bearings, and with the length and radius of each curve, together with elements necessary to mathematically define each curve. The point of beginning of the surveyor's description shall be shown as well as the remote point of beginning if different. A bearing base shall refer to some well-fixed bearing line, so that the bearings may be easily re-established. All bearings around the boundary shall read in a clockwise direction wherever possible. The North arrow shall be referenced to its bearing base and should that bearing base differ from record title, that difference shall be noted.

The Property forms a mathematically closed figure.	**5.(b)** When record bearings or angles or distances differ from measured bearings, angles of distances, both the record and measured bearings, angles, and distances shall be clearly indicated. If the record description fails to form a mathematically closed figure, the surveyor shall so indicate. **5.(d)** The identifying titles of all recorded plats, filed maps, right-of-way maps, or similar documents which the survey represents, wholly or in part, shall be shown with their appropriate recording data, filing dates and map numbers, and the lot, block, and section numbers or letters of the surveyed premises. For non-platted adjoining land, names and recording data identifying adjoining owners as they appear of record shall be shown. For platted adjoining land, the recording data of the subdivision plat shall be shown. The survey shall indicate platted setback or building restriction lines which have been recorded in subdivision plats or which appear in a Record Document which has been delivered to the surveyor. Contiguity, gores, and overlaps along the exterior boundaries of the surveyed premises, where ascertainable from field evidence or Record Documents, or interior to those exterior boundaries, shall be clearly indicated or noted. Where only a part of a recorded lot or parcel is included in the survey, the balance of the lot or parcel shall be indicated. **5.(g)** The location of all buildings upon the plot or parcel shall be shown and their locations defined by measurements perpendicular to the boundaries. If there are no buildings erected on the property being surveyed, the plat or map shall bear the statement, "No buildings." Proper street numbers shall be shown where available. **[Table A] Item 7.** _____ (a) Exterior dimensions of all buildings at ground level. _____ (b) Square footage of: ____ (1) exterior footprint of all buildings at ground level; ____ (2) gross floor area of all buildings; or ____ (3) other areas to be defined by the client _____ (c) Measured height of all buildings above grade at a defined location. If no defined location is provided, the point of measurement shall be shown. **[Table A] Item 8.** _____ Substantial, visible improvements (in addition to buildings) such as signs, parking areas or structures, swimming pools, etc. *See also 5(c) and 5(h) (above).*
The Survey correctly shows the location of all utility services for the Property.	**Item 11.** Location of utilities (representative examples of which are shown below) existing on or serving the surveyed property as determined by: _____(b) Observed evidence together with plans and markings provided by client, utility companies, and other appropriate sources (with reference as to the source of information) railroad tracks and sidings; manholes, catch basins, valve vaults or other surface indications of subterranean uses;

	wires and cables (including their function) crossing the surveyed premises, all poles on or within ten feet of the surveyed premises, and the dimensions of all crosswires or overhangs affecting the surveyed premises; and utility company installations on the surveyed premises.
No part of the Premises lies within any special flood hazard area (any area subject to special flood hazards as designated by the Federal Emergency Management Agency).	**[Table A] Item 3.** _____ Flood zone designation (with proper annotation based on Federal Flood Insurance Rate Maps or the state or local equivalent, by scaled map location and graphic plotting only). If the property resides in two or more zones, then the survey shall clearly display the limits of each zone by graphically transposing each zone line from the F.I.R.M. to the survey.
The survey correctly depicts the elevations and any pending or recent construction on the Property; and any visible evidence that the Property has been used as a solid waste dump, sump, or sanitary landfill.	**[Table A] Item 5.** _____ Contours and the datum of the elevations. **[Table A] Item 14.** _____ Observable evidence of earth-moving work, building construction or building additions within recent months. **[Table A] Item 16.** _____ Observable evidence of site use as a solid waste dump, sump or sanitary landfill.
The Survey correctly depicts all parking areas and correctly indicates the number of parking spaces on the Property.	**[Table A] Item 9.** _____ Parking areas and, if striped, the striping and the type (e.g., handicapped, motorcycle, regular, etc.) and number of parking spaces.

Appendix C

Unnecessary or Inappropriate Assurances in Surveyors' Certificates

COMMON LANGUAGE	INAPPROPRIATE OR UNNECESSARY BECAUSE
Monuments. The Survey complies with Table A, Item "1."	This would require the surveyor to install permanent "monuments" in the ground where they do not already exist. Such measures are unnecessary. In some states they may force the surveyor to prepare and record new plat maps.
Elevations. The Survey Complies with Table A, Item "5."	This would require the surveyor to measure and draw the elevations and slopes of the property. Under typical circumstances, such information is unnecessary.
Gross Floor Area. The Survey complies with Table A, Item "7(b)(2)."	This would require the surveyor to measure the gross floor area of the building, as opposed to just the exterior dimensions. Although interior measurements would create substantial additional work, they would typically not create substantial additional value to the surveyor's client.
Other Area Measurements. The Survey complies with Table A, Item "7(b)(3)."	This would require the surveyor to provide other measures as the client requests. This requirement would apply only in certain site-specific circumstances.
Utilities, Evidence of. The Survey complies with Table A, Item "11(a)."	Item 11(b) requires the surveyor to report utilities based on "visible evidence" and on other sources of information. Item 11(a) would limit the surveyor's responsibilities to "visible evidence" only.
Other Optional Items. The Survey complies with Table A, Item "17."	Item 17 provides for any site-specific survey requirements and will otherwise not apply.
Separate Lots. The Premises consist of one or more separate tax lot(s) and separate subdivided tract(s). No such lot or tract contains any real property not part of the Premises.	Surveyors often prefer to leave this issue to the Title Company to investigate.
State Standards. The Survey complies with the State's standards, if any, for surveyors and surveys.	Any registered surveyor must comply with applicable state standards.
Streets. All roads, streets, and highways shown on the Survey are completed and dedicated public streets and have been accepted for public maintenance.	An "ALTA/ACSM LAND TITLE SURVEY" does not require the surveyor to confirm existence of a dedicated roadway. Instead, the parties should request an Access Endorsement from the title company and let the title company make the determination.
Urban Standards. The survey was performed to the standards of an "urban" survey.	ALTA/ACSM Survey Standards no longer distinguish between "urban" and any other forms of survey. The distinction made sense when it was not always feasible to achieve a high level of accuracy in surveys. Today's surveying equipment allows high accuracy for all surveys.

Utilities. All utilities for operation of the Premises are available at the lot lines, enter the Premises through adjoining public streets, unless shown on the Survey, and do not run through or under any improvements not located on the Premises.	The "ALTA/ACSM LAND TITLE SURVEY" does not require the surveyor to verify that all utilities servicing the property are operational. The lender should obtain this confirmation from other sources.
Zoning. The Property complies with zoning.	Although surveyors sometimes are willing to perform that analysis, they more often regard it as the practice of law and refer the issue back to the lawyer or the title insurance company.

PRACTICE CHECKLIST FOR

Why Complicated and Long-Winded Survey Certificates Serve No Purpose (With Form)

Lawyers often want lengthy survey certificates that address a wide range of issues. Surveyors often balk at such certificates—and with good reason.

- To avoid needless delay and controversy, consider simply following industry standards. The American Land Title Association ("ALTA"), the American Congress on Surveying and Mapping ("ACSM") and the National Society of Professional Surveyors ("NSPS") have defined such standards in *Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys.* These are known in the industry as the "Survey Standards" and you can access them at www.acsm.net/99altawd97.doc.
- Consider using a short form of certificate that incorporates the ALTA/ACSM standards by reference. These standards typically require the surveyor to show on the survey all matters that should concern you and your client.
- The ALTA/ACSM standards define some optional items that a survey might or might not disclose. Consider including almost all these optional items.
- By following this approach, you can stick to a very limited and clean survey certificate, and keep the process simple and painless.

The author, a real estate and finance partner in the New York office of Latham & Watkins LLP and chair of the Real Property Law Section for the year beginning June 1, 2005, has written several books and over 125 articles on commercial real estate law and practice. He serves as Editor-in-Chief of the New York State Bar Association's *Commercial Leasing* book. ALI-ABA has just published his latest book, *A Guide to Ground Leases*. Reprints of some of his other publications appear at www.real-estate-law.com. **The author acknowledges with thanks the helpful comments of Jim Brown and Steve Rinehart at Bock & Clark Surveyors (www.1800surveys.com) and the editorial assistance of Christopher E. Delphin, a 2004 summer associate at Latham & Watkins LLP.**

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Valuation Date Changed to July 1 of Prior Year in Most Municipalities

By Stephen J. Harrison and James J. O'Keeffe

On December 8, 2004, Governor Pataki signed into law legislation changing the state's valuation date for those cities and towns using the standard assessment calendar (specifically, cities and towns having a March 1 taxable status date) to July 1 of the previous year.

The new amendment to Real Property Tax Law §§ 301, 302, 489-c and 489-cc takes effect with 2005 assessment rolls.

Until now, locally assessed property in cities and towns using the standard assessment calendar has been valued as of January 1. Special franchise property was valued and railroad ceilings calculated as of December 31 of the previous year for cities and towns, and as of December 31 of the previous second preceding year for villages and cities with fiscal dates early in the calendar year. The law change places special franchise assessments and railroad ceilings on the same valuation standard as locally assessed real property.

While most cities and towns use the standard RPTL calendar, some cities have charters that provide different dates. If the charters provide for a taxable status date of March 1, then those assessing units will use the prior July as their valuation date. For instance, Westchester and Erie Counties, because their special tax acts deviate from the RPTL calendar, have taxable status dates of May 1. Thus they are not affected by the amendment. Suffolk County also has a special tax act; however, because its taxable status date is March 1, the towns' valuation dates will become July 1 of the prior year.

The assessment calendar is the result of piecemeal legislation over the course of the past 100 years. Most recently, Chapter 379 of the Laws of 1984 included the creation of a "valuation date" distinct from the taxable status date. The memorandum of the then Counsel to the State Board of Equalization and Assessment noted the "decidedly nineteenth century ambiance" of the RPTL calendar. The addition of a separate valuation date was based upon "the fact that the assessor's judgment as to value is not and cannot be limited to information available on the taxable status date alone, but rather is based on market data which he (sic) has collected in the months preceding that date."

In the succeeding years, problems have arisen over how precisely this date is to be applied. In a complete reappraisal of a municipality, the valuation work may begin during the previous summer. The local assessor or reassessment contractor is often effectively cutting off valuation data sometime during that summer to begin the initial estimates of value and the review of those estimates.

Conversely, municipalities not implementing reassessments may be using valuation data right up to the preparation of the tentative assessment roll. In the volatile real estate market of recent years, this has meant neighboring towns may be measuring markets almost a year apart.

The new date addresses this issue by moving the valuation date back to the prior July 1, reflecting the de facto valuation date of many reassessments. This date provides a fixed transition date in the assessment calendar as soon as the current year's assessment roll is finalized (i.e., July 1, the valuation work for next year's roll can begin).

A similar concept to this recommendation is reflected in the calculation of the Residential Assessment Ratio (RAR). The sales used in the calculation of RARs are those from the completion of the prior year's roll to the completion of the roll of the year previous to the prior year (RPTL § 738). Thus, there already is some familiarity and experience in the assessment community in dealing with sales data from a July 1 to July 1 time period.

A July 1 valuation date also complements Office of Real Property Services' policy regarding assistance to reassessments. Sales up to July 1 would become available around September 1 and ORPS staff and local assessors could look at the same data to determine the proper use of the data in the particular reassessment activity and in the reassessment analysis for state aid and equalization studies.

"The change in valuation date allows the local governments sufficient time to complete their analysis and valuation of property," notes Dave Williams, ORPS Director of Regional Customer Service Delivery. "At the same time it allows ORPS and the local governments to better coordinate and reach mutually agreeable results."

Similarly, communities not in the aid program will now be aware of a major source of valuation data to assist in providing equitable assessments and determining the municipal level of assessment to be entered on the coming roll as required by RPTL § 502. All municipalities will know the data to be used in the equalization process for the coming roll.

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Mr. O'Keeffe graduated from Fordham University and Fordham Law School and was admitted to the State Bar in 1979.

Saving Your Development Project From the Endangered Species List

By Michael S. Fishman, CWB, PWS

Have you or your clients ever received one of those letters from a state or federal wildlife agency telling you that the property you were planning to subdivide or develop is home to a threatened or endangered species? Endangered species have stopped major dam projects, malls, and many other large-scale projects. What's to stop them from putting your project on a sort of endangered species list of its own?

In fact, very few development projects are ever significantly impacted by endangered species, and fewer still are stopped dead in their tracks. If appropriate environmental due diligence inquiries are made early in the planning process, the entire issue can usually be addressed with little or no impact to the proposed development. Even if you discover a rare plant or animal species on your site late in the game, something called the Informal Consultation Process can be used to manage and minimize the impacts to your project, as well as to endangered species. In some cases, it can make the difference between breaking ground and breaking the bank. The key to success is being proactive, and acting early in the planning process.

Understanding Terms

To follow the Informal Consultation Process, it helps to have some understanding of some simple terms relating to threatened and endangered species. It is important to understand first that there is an endangered species act at the federal government level (Endangered Species Act of 1973, or ESA), as well as an endangered species act at the state level (Article 11 of the New York State Environmental Conservation Law). Many of the terms used in both laws are similar. The two laws do differ, however, in how they address potential impacts to threatened or endangered species.

The ESA and Article 11 both provide protection to plant and animal species whose populations are in jeopardy of becoming extinct. In somewhat simplified terms, endangered species are those species that are imminently in jeopardy of becoming extinct, and threatened species are those that are imminently in jeopardy of becoming endangered. The ESA also defines candidate species as those for which sufficient information on vulnerability and threats is available to propose the species for listing, but for which listing is precluded by higher priorities. Candidate species receive no protection under the ESA. Article 11 defines such species as species of special concern that are similarly not afforded protection under Article 11.[1] Whereas the ESA requires the maintenance of a list of threatened and endangered species, Article 11 requires the maintenance of a list of special concern, threatened, and endangered species. Because of these lists, threatened or endangered species are commonly referred to as listed species. Another critical difference between the federal and state laws is that the ESA provides for permitting to impact listed species, whereas Article 11 does not.

"[V]ery few development projects are ever significantly impacted by endangered species, and fewer still are stopped dead in their tracks."

Both laws protect listed species by prohibiting the take of such species. Section 3 of the ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct." Portions of this definition are further defined under the Code of Federal Regulations.[2] "Harm" is further defined as, "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." "Harass" is further defined as, "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly impair normal behavioral patterns, including breeding, feeding or sheltering."

Take may also be broken down into purposeful take or incidental take. Purposeful take is the intentional take of a listed species—that is, conducting an activity whose primary purpose is the take of a listed species, such as collecting them. Incidental take is take that results from, but is not the purpose of, an otherwise lawful activity, such as land development or research. It is generally incidental take that we address in land development issues. The first step in addressing the potential for incidental take is called the informal consultation process.

Being Proactive: The Informal Consultation Process

The best time to determine whether listed species could be an issue in a proposed development is at the outset, when a site is first selected or proposed for development, not after final site plan approval. If the determination can be made before the land is actually purchased, even better. This can be arranged as a contingency of the

sales contract. The procedure used for finding out about listed species is often referred to as the informal consultation process. There is a Formal Consultation Process (two of them, actually) defined under Sections 7 and 10 of the ESA, but you won't get into those until the informal consultation process is complete, so they are beyond the scope of this article.

The informal consultation process consists of asking four questions:

1. Is the subject property within the known range of a threatened or endangered species?
2. Is there suitable habitat on the subject property for a threatened or endangered species?
3. Are there individual threatened or endangered species using the subject property?
4. Will the proposed land use have an adverse effect on the threatened or endangered species?

Only if the answers to all four questions are "yes" will you proceed to the Formal Consultation Processes defined under Sections 7 or 10 of the ESA.

The first question is simply answered by submitting written information requests to the regional U.S. Fish & Wildlife Service (USFWS) Field Office and to the New York State Natural Heritage Program (NHP). Responses from both agencies generally take about 30 days. If either agency does have a record of threatened or endangered species on or near the subject property, they may provide you with the name of the species and a general range of the area in which it may be found, but generally not a specific location. This is to prevent people from locating and disturbing listed species in the field. To determine whether a rare or protected species is located on the subject property, it will be necessary to proceed to the second question in the informal consultation process.

If USFWS and NHP have no records of protected species on or near the subject property, they will state that in a written response, and will usually indicate that an absence of records is not a substitute for individual site surveys. The second question in the informal consultation process comes in here as well.

The second question in the informal consultation process addresses whether the subject property contains appropriate habitat to support a listed species. This is determined by having a professional wildlife biologist or botanist inventory the property for habitats or vegetation cover types. This will determine whether the site provides appropriate habitat for listed species. If there is no suitable habitat for listed species on the site, this can be documented by the biologist to demonstrate to the USFWS and NYSDEC that the site cannot support the listed species. If the agencies concur with this finding, the process ends here, and the landowner may proceed with planning. If appropriate habitat for a listed species is found on the subject property, then it is time to proceed to the third question in the informal consultation process.

"The procedure used for finding out about listed species is often referred to as the informal consultation process."

The third question addresses whether individuals of a listed species use the site. This may be determined by having a professional wildlife biologist or botanist perform surveys for listed species on the subject property. Certain listed species require specialized surveys for which the USFWS has defined particular protocols. These include bog turtles (*Clemmys muhlenbergii*) and Indiana bat (*Myotis sodalis*), among others. Specialized skills and experience are often required for such surveys, so care must be taken in selecting a wildlife or botanical professional. Not all such professionals have the necessary skills and experience, and if they do not perform the surveys properly, their results may not be accepted by USFWS or the NYSDEC.

Finding no individuals of a listed species on or near the subject property is not necessarily conclusive evidence that they are not there, but is generally sufficient for the USFWS to issue an opinion that a proposed development project will have no adverse impact on the species, or that no take is likely to occur. This can vary depending on the nature of the proposed land use. If the USFWS or NYSDEC does determine that no adverse effects or take are likely, then the process ends here, and the landowner may proceed with planning their proposed land use. If any doubts remain on the part of the USFWS or NYSDEC, they may request that certain precautions be taken to prevent take. For example, they may require clearing of trees during the winter, when certain listed species may have migrated from the site to avoid the risk of incidental take. If individuals of a listed species are found on the site, then the process proceeds to the fourth question.

The fourth question addresses whether the proposed land use will have an adverse effect on a listed species, including the likelihood of take. Determination of adverse effects to a listed species should also be made by a professional wildlife or botanical scientist. They must take into consideration the nature of the land use and what changes to the landscape are proposed, as well as what landscape requirements the listed species has. They must also consider how well the listed species tolerates not only human disturbance, but also secondary disturbances that come with human presence, such as the use of vehicles, the presence of free-ranging pets, or the change of habitats or vegetation

cover types to pavement and buildings. If adverse impacts or take of the listed species are deemed likely, then you must proceed to the Formal Consultation Process defined under either sections 7 or 10 of the ESA. If, however, no adverse impacts to the listed species are anticipated from the proposed land use, then the process ends here with documentation of such a finding being submitted to the USFWS or the NYSDEC for their review and concurrence. If the agencies concur with this determination, then the landowner may proceed with planning the proposed development.

Why Bother?

The informal consultation process involves an investment of both effort and cost with no predictable outcome, so why bother? After all, what we don't know can't hurt us, right? Wrong. The ESA and Article 11 both provide for substantial penalties for incidental take of listed species. Not only are there fines involved, but discovery of listed species issued on a site late in the game can also stop a development project that is already under way. The informal consultation process is designed to avoid such difficulties and delays by discovering issues early in the planning process so that they can be resolved before there is a significant investment of time, money and effort on the part of a prospective developer. If the process steers the project into the Formal Consultation Process, the ESA provides legal protections for the landowner once a final determination under the Formal Consultation Process is made. In the long run, it is wiser to proceed with caution in planning a development project that may impact listed species. The key to a successful and smooth project planning process is to act early, and address the issues proactively. If you avoid or ignore the ESA and Article 11, you may literally "take" your chances!

Endnotes

1. 11 Environmental Conservation Law § 103 (E.C.L.)
2. 50 Code of Federal Regulations § 17.3 (C.F.R.)

Michael Fishman is a Certified Wildlife Biologist and certified Professional Wetland Scientist. He has worked with threatened and endangered species for more than 15 years as a researcher, government regulator, land manager, and consultant. He has worked with many listed species, including piping plovers, northern spotted owls, tiger salamanders, bog turtles, and Indiana bats. He is currently a Senior Project Manager with Stearns & Wheler, LLC, Environmental Engineers and Scientists in Cazenovia, NY, and works on wetlands and endangered species issues in development projects throughout New York, New England, and the Mid-Atlantic states.

Meter Tampering—Who's to Blame?

By Peter M. Ripin

Consider this scenario: Your company receives three consecutive months of significantly higher electric bills. You've conscientiously paid your utility bills for the past ten years but are concerned that this time there may be an error so you call Con Edison and ask them to investigate. Shortly thereafter, Con Edison's representatives appear at your facility, state that your meter has been tampered with and advise you that you owe hundreds of thousands of dollars for unmetered service and that unless this amount is paid immediately, your electricity will be turned off.

Sound far-fetched? In fact, this is almost exactly the situation which the Ambulatory Surgery Center of Brooklyn LLC (the "Center") faced after it called Con Edison to complain about three consecutive months of higher than average electric bills. In response, according to Con Edison, its representatives tested and inspected the Center's meter and concluded that it had been tampered with and was allegedly under-recording electrical usage by approximately 30 percent. Shortly thereafter, Con Edison's representatives appeared at the Center, removed and disassembled the meter, and after performing a quick calculation, presented the Center with a bill in the amount of $258,576, allegedly representing six years of unmetered electric service and late payment charges.[1] In addition, Con Edison stated that unless one-half of this amount was paid within two hours, the electricity would be turned off.

Rather than comply with this ultimatum, the Center filed a complaint with the New York State Public Service Commission ("PSC") which stayed any further action by Con Edison. Thereafter, the Center requested that the meter be independently tested at Con Edison's certified meter testing facility at Van Dam Street, Queens. Significantly, this "authoritative" testing contradicted Con Edison's previous field test results and confirmed that the meter was recording accurately. Notwithstanding these results, however, Con Edison refused to withdraw its claim of unmetered service, asserting that it had physical evidence that the meter had been tampered with and the Center had failed to explain an increase in electrical usage after Con Edison replaced the meter.

An informal hearing was held before the PSC which was attended by seven representatives from Con Edison. At the hearing, the Center asserted that Con Edison's claim of unmetered service was based upon an erroneous and nonsensical "fiction," i.e., that the Center's meter was under-recording electrical usage for a period of at least eight years until it somehow "miraculously" corrected itself a full four months before Con Edison ever inspected the meter. In addition, the Center asserted that Con Edison's own independent testing of the meter at its Van Dam facility confirmed that the meter was recording accurately.

In response, Con Edison asserted that the test results at its Van Dam facility were not as accurate as its field test results because the Van Dam test occurred two to three months after the meter was removed and the meter could have corrected itself while "bouncing around" in a truck.

The PSC concluded that Con Edison's claim was "not credible" and directed the utility to cancel all unmetered service and late payment charges.[2] In his decision, the hearing officer rejected Con Edison's assertion that the meter had corrected itself either at the Center's premises or while "bouncing around" in a truck. In addition, the hearing officer concluded that the testing of the meter at Con Edison's Van Dam facility provided the "definitive" results and that the field testing was erroneous.

The decision represents an important victory for all law-abiding utility customers. Although Con Edison has a duty and responsibility to pursue theft of service claims, this situation was the opposite of the "typical" tampering case in which Con Edison receives an anonymous tip that a meter has been tampered with, confirms that the meter is under-recording and "corrects" the situation by exchanging meters resulting in an increase in electrical consumption. Here, the customer requested that Con Edison test the meter after receiving higher electric bills; Con Edison's independent testing of the meter at its certified meter testing facility confirmed that the meter was recording accurately; and there was no correction after Con Edison exchanged meters—indeed, consumption actually decreased compared with the previous four months.

Needless to say, consumers should not be unfairly subjected to a claim of meter tampering when they lawfully exercise their right to challenge their utility bills. Fortunately, this decision confirms that Con Edison's actions are not immune from scrutiny and will not be upheld when they are shown to be clearly erroneous.[3]

Endnotes

1. Pursuant to the Public Service Commission's rules and regulations, six years is the maximum period in which Con Edison may assess unmetered service charges.
2. *See Ambulatory Surgery Center of Brooklyn LLC. v. Con Edison*, No. 301211 N.Y. Pub. Serv. Comm. (Feb. 28, 2005).
3. The author represented the Center in connection with this proceeding.

Peter M. Ripin is a partner with the law firm of Davidoff Malito & Hutcher LLP in New York City, where he practices in the areas of business litigation and dispute resolution. He may be reached at (212) 557-7200 and pmr@dmlegal.com.

Native Americans Cannot Regain Sovereignty over Former Tribal Lands by Purchase: A Big Victory for a Small City

By Tammy L. Cumo-Smith

New York State's smallest city won a big victory in its lengthy battle with the Oneida Native American Tribe over unpaid property taxes on lands bought by the tribe generations after the property had been sold to non-Native Americans and removed from the reservation boundaries.

I. Background

In *City of Sherrill v. Oneida Indian Nation of New York*,[1] the United States Supreme Court reversed two lower court decisions that had sided with the Oneida Nation's claim that repurchasing lands that were once part of the Oneida Native American Reservation restored those lands to the Oneida Nation's sovereignty, and thus rendered them exempt from real property taxes.

The Oneida Nation's aboriginal homeland consisted of about 6 million acres in central New York.[2] In an effort to protect Native American homelands, Congress passed the Nonintercourse Act,[3] prohibiting the purchase of Native American lands without the consent of Congress. In 1788, however, New York State, without federal supervision, entered into the Treaty of Fort Schuyler with the Oneida Nation whereby the Oneida Nation ceded all but 300,000 acres of their original reservation lands. In 1794, the federal government entered into the Treaty of Canandaigua with the Oneida Nation, guarantying the Oneida Nation's free use and enjoyment of the territory then remaining in the Oneida Nation's control. Notwithstanding the federal treaty, in the early 1800s, the federal government encouraged a policy of removing members of the Oneida Nation to the west to open the lands for white settlers. The parcels of real property at issue in *City of Sherrill* were sold by the Oneida Nation to an individual Oneida Nation member in 1805 and then sold again to a non-member in 1807.[4] The Oneida Nation repurchased these parcels in the late 1990s, such lands including a gas station, convenience store and textile factory.

> *"The Oneida Nation did not attempt to regain sovereignty over any of those lands until the* City of Sherrill *case."*

The history of the Oneida Nation's land claims stems back to the late 1700s, a time during which New York State purchased parcels of real property from the Oneida Nation that were once part of the Oneida Nation's original 6-million-acre reservation. According to the Oneida Nation, and confirmed by the Court in 1985, New York's purchase of the land violated federal law prohibiting such transactions without the consent of the federal government.[5] New York State purchased over 100,000 acres without federal consent. By 1838, the Oneida Nation had sold all but about 5,000 acres of their original reservation and by 1843, retained less than 1,000 acres in New York State. By 1920, the Oneida Nation retained just 32 acres of their original reservation.

In 1970, the Oneida Nation brought a test case claiming that the Nonintercourse Act had been violated and therefore the Oneida Nation's right to possession to their lands had not been terminated by the sales. They then sought monetary damages for the wrongs.[6] After a number of rounds in federal courts, the Supreme Court ordered damages of fair rental value reduced by set offs for the counties' good-faith improvements. This first case was a "test case," seeking rental for only the last few years prior to the case. After obtaining success in the test case, the Oneida Nation sought recovery for a period of 200 years of rental value of approximately 250,000 acres of land they claim was purchased illegally. In addition, they sought recovery of those lands and joined 20,000 private landowners as defendants, seeking ejectment as a remedy. The joinder of private landowners was not allowed on a combination of procedural grounds and practical concerns involved in actually restoring the Oneida Nation to the land. All of the claims that proceeded forward sought monetary damages. The Oneida Nation did not attempt to regain sovereignty over any of those lands until the *City of Sherrill* case.

II. *City of Sherrill*

All of this sets up the backdrop for the *City of Sherrill* litigation. The parcels of real property at issue in *City of Sherrill* were a portion of the properties once part of the Oneida Nation reservation but which were sold to non-Native Americans. The property had been on the local tax rolls for 150 to 200 years. When the Oneida Nation took fee ownership in the late 1990s, they claimed the property was once again under their sovereign control, was therefore tax exempt and refused to pay any real property taxes. The City of Sherrill tried to evict the Oneida Nation from those lands for failure to pay taxes.

The Oneida Nation counterclaimed seeking a declaration that the properties were not taxable and were once again under the Oneida Nation sovereign control.[7] The Northern District of New York agreed with the Oneida Nation, finding the property was not taxable, and the Second Circuit affirmed. The lower courts ruled that the properties fell under the definition of "Indian Country" and therefore could be restored to Oneida Nation sovereignty.[8]

The City of Sherrill appealed to the United States Supreme Court. One of the Oneida Nation's major arguments was "unification theory." Namely that once the Oneida Nation had both aboriginal title and fee title, they regained control of the land. Aboriginal title is title to land held by Native American Nations from the beginning, before Columbus' "discovery" and the influx of white settlers to American soil.[9] Native American Nations have "aboriginal title" to lands identified as part of their reservation under the various federal treaties and statutes. In *City of Sherrill*, the Oneida Nation claimed that once aboriginal title and fee title were held again by the Oneida Nation, their sovereignty over those lands was rekindled. The Court specifically rejected the unification theory. The Court found that the long-term, non-Native American ownership, development, and governance over the lands for some 200 years precluded the Oneida Nation from unilaterally claiming sovereignty over parcels re-purchased on the open market.[10]

Part of the Court's decision rested on the fact that the area in dispute is over 99 percent non-Native American in both population and in usage. These statistics lead to "justifiable expectations" of the people living in the area. In addition, the fact that the Oneida Nation waited until the area had become commercially developed and had silently acquiesced in New York's regulation and jurisdiction over the lands for hundreds of years led to the Court invoking the equitable principle of laches. The decision rested on several theories, one such theory being the acquiescence doctrine. Long acquiescence by one state in possession of territory by another and in the exercise of sovereignty over such territory is conclusive of the latter state's title and authority over the territory.[11] In addition, the Court concluded that allowing the Oneida Nation to unilaterally reassert sovereign control and remove property from local tax rolls would pave the way for the Oneida Nation to seek to free property from zoning laws and other regulations that protect all landowners in the area, cautioning that such a direction was a slippery slope.[12]

"The recent decision in City of Sherrill *may be a reaffirmation of the continued diminution of tribal sovereignty."*

How the Court came to its decision may not be as important as what it means. Some may see this case as another step in the Court's diminishing views on tribal sovereignty. In what has been referred to as the Marshall trilogy,[13] the effect on federal Native American law and Native American sovereignty over their land has evolved into the following principles: (a) Native Americans possess preexisting sovereignty via aboriginal status, (b) sovereignty is subject to diminution by federal but not state governments, and (c) limited sovereignty and dependency on federal government for protection imposes trust responsibility upon federal government.[14] Since the Marshall trilogy, a series of cases have eroded tribal sovereignty. In *Brendale v. Confederated Tribes & Banks of Yakima Indian Nations*,[15] the Court rejected the Native American's attempts to apply their own zoning laws to property owned by non-Native Americans on portions of the reservation that had not retained Native American character. The Court's decision implies that demographics of any given area could change the scope of sovereignty, at least in the context of land use. The recent decision in *City of Sherrill* may be a reaffirmation of the continued diminution of tribal sovereignty.

Though not discussed at length, another reason the Court rejected the Oneida Nation's attempts at unilaterally rekindling sovereign status over non-Native Americans land may be that Congress has already provided a procedure for acquisition of lands to become part of a Native American reservation. The Court said that applying for lands to be held in trust was the proper avenue to reestablish sovereignty over former tribal lands.[16] The provision in 25 U.S.C. § 465 allows the Secretary of the Interior to acquire an interest in real property for the purpose of providing land for Native Americans. Title to any lands so acquired is taken in the name of the United States and held in trust for the Native American tribe for which the land is acquired. The statute specifically provides that any such lands held in trust for the Native American tribes shall be exempt from state and local taxation.[17] The implementing regulations are found in 25 C.F.R. 151.1. The procedure for acquisition of land is set forth therein. The regulation specifically states that for the acquisition to come within 25 U.S.C. § 465, it must be approved by the Secretary of the Interior. The Native American tribe or member must make a written request for the acquisition, identify the parties involved, describe the property and set forth satisfactory evidence that the transaction falls within the requirements of 25 C.F.R. 151. The transaction must fit within one of the enumerated categories.[18] After receiving the written request, the Secretary must give state and local governments the opportunity to comment on the transaction's potential impact on regulatory authority, environmental impact, real property tax base and

special assessments.[19] This procedure is available and takes into account those equitable considerations and the effect on the community much in the same manner that the Court did during its analysis.

III. The Aftermath

As noted earlier, the Oneida Nation has been operating a gas station and convenience store on those properties at issue in *City of Sherrill*. The Oneida Nation was not paying real property taxes nor were they collecting and remitting sales tax generated on those properties. The case does not only affect the properties within the City of Sherrill, however. The Oneida Nation has approximately 17,000 acres of former reservation land in Madison and Oneida counties that will be impacted by the Court's ruling, including the Turning Stone Casino in Verona, New York, which is valued at approximately $384 million.[20]

In Madison County, it is estimated that the county was losing approximately $1 million dollars in real property taxes and $5 million dollars in sales tax revenue due to the Oneida Nation's claimed exemptions. In Oneida County, the annual tax shortfall is estimated at $500,000 for real property taxes and $3 million in sales tax revenue.[21]

Following the decision in *City of Sherrill*, Madison County is moving forward in attempts to foreclose on the $2.3 million in back taxes on Oneida Nation's properties in Madison County. The back taxes owed in Oneida County are over $4 million.[22]

There are approximately 275 Native American land areas in the United States that are recognized as reservations.[23] Of those, approximately 57 million acres of land are held in trust by the United States for the Native American tribes. The lands held in trust enjoy exemption from local taxes. The Bureau of Indian Affairs is responsible for the administration and management of the lands held in trust. There are 562 tribal governments recognized by the United States.[24] In the aftermath of the *City of Sherrill* decision, the Oneida Nation has officially applied under 25 U.S.C. § 465 to have off-reservation lands they have purchased put into federal tax-exempt trusts.[25] The New York State Senate passed a resolution recommending that the Department of the Interior reject the request to put off-reservation lands into trust.[26] The Bureau of Indian Affairs has said that evaluating the applications is a long process and a decision is not expected in the near future.[27] If the application is successful, the City of Sherrill as well as Oneida County and Madison County will be prohibited from taxing the property in the future, but there is no indication that any tax exemption will be retroactive and therefore, millions will still be owed by the Oneida Nation.

"There are approximately 275 Native American land areas in the United States that are recognized as reservations."

Also in the aftermath of the Court's decision, the Oneida Nation has petitioned the Court to reconsider the March ruling. The Court was scheduled to consider the petition on May 19, 2005. While both sides submitted their respective arguments, it is the Oneida Nation that must convince a majority of the nine Supreme Court Justices to win a new hearing.[28]

Historically, the Supreme Court grants very few petitions for rehearing. Even if the petition is denied, the Oneida Nation still has a chance that its application for transfer of off-reservation lands into federal tax-exempt trusts may be granted. In the event that too fails, the City of Sherrill and Madison and Oneida counties will have the right to assess and collect taxes against those properties held by the Oneida Nation within their jurisdictions. The potential increase in tax base for those jurisdictions is not to be overlooked. The taxes that can be assessed, both past due and future taxes, are far more than the "friendship gifts" and other non-tax contributions the Oneida Nation has paid to the local school districts and municipalities.[29] In addition to property taxes, the sales tax revenues attributable to the affected properties also will assist in the tax burden.[30] The ability to tax off-reservation Native American property will take the pressure off non-Native American taxpayers in the municipalities.

In addition, the effect of this case beyond Oneida County and Madison County is not to be overlooked. Approximately one dozen counties in New York State contain former reservation land that could be affected by the decision. There are a handful of land claims remaining unresolved. In addition to the Oneida Nation's claims from the 1970s and 1980s, in 1990, the Cayuga Indians of New York won its claim that the purchase of 64,000 acres of property from the tribe had violated the Non-intercourse Act.[31] In 1998, the Seneca Nation won in a similar suit.[32]

Further, taxation issues, in general, have become an integral part of the state's negotiations to settle the handful of Native American land claims still ongoing against New York. Governor Pataki's administration has used lucrative tax-exempt incentives and/or required concessions with respect to local taxation in negotiations to settle land claims with the Cayugas of New York, the Wisconsin Oneidas, the Seneca-Cayugas of Oklahoma and the Stockbridge-Munsee Bank of Mohicans of Wisconsin.[33] Those negotiations have also centered around the tribes getting land in the Catskills, to be recognized as Native American land and to operate casinos. At the time this article went to print, the propos-

al that originally would settle claims by providing land for five (5) tribes in the Catskills had been scaled down to just one (1) tribe. Official word from a spokesman for Governor Pataki said that in light of the *City of Sherrill* decision, the proposed settlements with five (5) tribes had to be reconsidered as it had "become clear that certain provisions of the Oneida and Cayuga settlements will not be supported by the local governments or by some in the state Legislature."[34]

It will be interesting to see if, as Pataki's spokesman indicated, this decision changes the way Native American land claims are handled and also if this case represents a trend of weakening, or at least limiting, Native American sovereignty by the United States Supreme Court.

Endnotes

1. 125 S. Ct. 1478 (2005).
2. *County of Oneida Nation v. Oneida Indian Nation*, 470 U.S. 226 (1985) (describing "aboriginal title" as those lands held by Native American nations and inhabited from "time immemorial" and recognizing aboriginal title in the Oneida Nation's ancient reservation lands).
3. 25 U.S.C. § 177 (stating that no purchase or conveyance of lands from any Native American nation or tribe is valid unless made by treaty or convention entered into pursuant to the Constitution).
4. *City of Sherrill v. Oneida Indian Nation of New York*, 125 S. Ct. 1478, 1480 (2005).
5. 25 U.S.C. § 177.
6. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).
7. The case involved several claims and counterclaims, all of which are not discussed here.
8. The definition of "Indian Country" is found in 18 U.S.C. § 1151 which deals solely with jurisdiction for criminal offenses.
9. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).
10. The Court invoked laches and other equitable principles and made note of the Oneida Nation's long delay in seeking relief and equitable principles.
11. *City of Sherrill*, 125 S. Ct. 1478 at 1492.
12. It is worth noting that the population of the area is approximately 99 percent non-Native American, a factor which certainly played a part in the Court's analysis.
13. *See Johnson v. McIntosh*, 21 U.S. 543 (1823); *Cherokee Nation v. State*, 30 U.S. 1 (1831); *Worcester v. State*, 31 U.S. 515 (1832).
14. Philip Prygoski, *From Marshall to Marshall The Supreme Court's Changing Stance on Tribal Sovereignty*, ABA Network *available at* http://www.abanet.org (last visited 5/5/05).
15. 492 U.S. 408 (1989).
16. *City of Sherrill*, 125 S. Ct. 1478, at 1494.
17. 25 U.S.C. § 465.
18. 25 C.F.R. 151.3. Categories include, without limitation, that the property is located within the exterior boundary or just adjacent to the existing reservation, that the property is already owned by the tribe, that the transaction is necessary to facilitate tribal self-determination, economic development or Native American housing.
19. 25 C.F. R. 151.9.
20. William Kates, *Indian Land Dispute Could Have Far-Reaching Effects*, DULUTH NEWS TRIBUNE.COM, January 8, 2005, *available at* http://www.duluthsuperior.com/mld/duluthsuperior/news/politics/10599257.htm (last visited 5/11/05).
21. Jacques Picard, *Word from the Supreme Court Expected Monday*, ONEIDA NATIONDISPATCH.COM, February 21, 2004 *available at* http://www.oneidadispatch.com/site/printerFriendly.cfr?brd-1709&dept_id=6844&new (last visited 4/12/05).
22. Glenn Coin, *Oneida Nations Offering Payments: Nations Suggests Non-tax Compensation. Madison County Pursues Foreclosure*, THE POST-STANDARD, April 30, 2005, *available at* http://www.syracuse.com/search/index.ssf?/base/news-)/1114850402205700.xml?syrnemad (last visited 5/10/05).
23. Bureau of Indian Affairs, U.S. Dept. of the Interior, Facts About American Indians Today, *available at* http://print.inforplease.com/ipa/A1092524 (last visited 5/4/05).
24. *New BIA Nominee Dave Anderson Promises Schumer that New York Will Have an Open Line of Communication with Him*, *available at* http://schumer.senate.gov/SchumerWebsite/pressroom/press_releases/PR02123.pf.html (last visited 5/6/05).
25. Peter Lyman and Erik Kriss, *Pataki on Federal Trusts*, THE POST-STANDARD, April 27, 2005, *available at* http://www.syracuse.com/search/index.ssf?/base/news-)/1114591548307570.xml?syrnesnys (last visited 5/10/05).
26. New York State Senate Resolution J1529 (Senators Meir and Nozzolio).
27. *See* Lyman and Kriss, *supra* note 25.
28. Glenn Coin, *Oneidas Seek Second Try at Supreme Court*, THE POST-STANDARD, May 4, 2005, *available at* http://www.syracuse.com/search/index.ssf?/base/news-0/111510949250950.xml?syrnemad (last visited 5/10/05).
29. *See* Coin, *supra* note 22.
30. *Verona Ends Property Tax Thanks to Court*, ROME NY SENTINEL ONLINE *available at* http://www.rny.com/archive/localnews/2005/may/03veronaendspropertytaxtha.html (last revised 5/11/05).
31. *Cayuga Indian Nation v. Cuomo*, 730 F. Supp. 485 (N.D.N.Y. 1990).
32. *Seneca Nation of Indians v. State of New York*, 26 F. Supp. 2d 555 (W.D.N.Y. 1998).
33. John Milgrim, *5-Casino Plan's Demise Hailed*, RECORDONLINE.COM, April 19, 2005, *available at* http://www.recordonline.com/cgi-bin/casino/display.cgi?link=http://www.recordonlin.com (last visited 5/11/05).
34. *Pataki Puts Land Claim Settlements on Hold*, ROLLING GOOD TIMES ONLINE *available at* http://www.rgtonline.com/Article.cfm?ArticleId=56313&CategoryName=Business (last visited 5/12/05).

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BERGMAN ON MORTGAGE FORECLOSURES: (Those Sneaky) Legal Fees Paid Under Protest

By Bruce J. Bergman

If a borrower ever insists on paying "under protest," counsel and client probably don't want to accept it. Here's an example of why.

The collection of legal fees in the foreclosure process should be a routine—if imperfect—pursuit. When borrowers desire to reinstate, they must pay the lender or servicer's legal costs. Likewise, upon satisfying the mortgage, there must be recompense for the legal expense incurred (assuming, of course, a proper legal fee provision is in the mortgage in the latter instance).

Once the judgment of foreclosure and sale has been issued, upon satisfaction, borrowers need pay only the legal fees adjudged due by the court. If there was a valid legal fee clause in the mortgage, the court is empowered to make an award, although sometimes the amount is pointedly ungenerous.[1]

But here is the scenario which gives pause. Prior to foreclosure judgment, borrower wants to save the property through refinance of the mortgage. Lender thereupon renders a payoff letter for all sums due on the mortgage, a portion of which is legal fees. (The mortgage says the legal fees in foreclosure should be "in a reasonable amount.") Borrower pays all. But the attorneys fees (paid directly to counsel) are remitted under protest.

Later, borrower sues, seeking a refund of legal fees paid. Lender's counsel moves to dismiss the action asserting that the borrower, having paid the sums, is barred from suing for recovery. Unfortunately, the court disagreed, finding a need for a hearing upon the reasonableness of those legal fees. [*1300 Avenue P Realty Corp. v. Stratigakis*, 186 Misc.2d 745, 720 N.Y.S.2d 725 (App. Term, 2d Dep't 2000)] Because borrower needed to preserve a closing to refinance, and paid under protest, there arose an issue of fact (the court said) as to whether the payment of attorney's fees was voluntary. So, the payment under protest did become a problem for the lender.

Maybe in the end this isn't something to worry much about. Mortgage lenders and servicers generally recognize that a payment made under protest is conditional and therefore should not be accepted. And typically they won't take it. But if the temptation of money in hand—combined with payment under protest—ever beckons, recall the danger of accepting the payment. The foreclosure might suddenly not be over after all.

Endnote

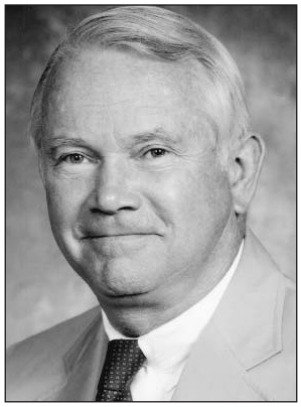
1. There is, of course, much more to the subject of legal fees in the mortgage foreclosure case. If this review raises other questions, attention is invited to 2 *Bergman on New York Mortgage Foreclosures*, Chap. 26, Legal Fees, Matthew Bender & Co., Inc. (rev. 2004)

Mr. Bergman, author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures* (Matthew Bender & Co., Inc., rev. 2004), is a partner with Berkman, Henoch, Peterson & Peddy, P.C., Garden City, NY; an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course; and a special lecturer on law at Hofstra Law School. He is also a member of the USFN and the American College of Real Estate Lawyers.

In Memoriam

Tom Moonan

(1933-2005)



I cannot believe that Tom Moonan is no longer with us. He was always so vibrant and exuding energy and personality.

I first met Tom at a New York State Land Title Association Convention—probably in the 1950s when I started attending as part of the then Title Guarantee group.

Tom was with his father, Tom Sr., the Moonan Family being the controlling, if not the sole owners of Monroe Title Insurance Corporation, then the dominant title company in much of western New York. The Moonans were a lively group, led by Tom Sr., who had an exuberant personality, which then young Tom shared. They were also excellent title professionals, with a most practical touch. Tom Jr. was then a member of one of Rochester's premier law firms; and I am sure that he, together with his father, produced the practical solution to deal with the potentially devastating title claims based upon the federal lawsuits by the Oneida Indian Nation, which threatened the land titles to a major part of western New York State, where a vast number of the titles had been insured by Monroe Title. They knew that these Indian Claims probably rendered all of those titles unmarketable; but they figured that between the interests of the State of New York, and the U.S. Congress, that some solution would eventually protect the titles of the innocent residents from these claims that originated 200 to 300 years ago. They constructed what became known as the "Indian Covenant" for their title policies, which required the insured to limit its title assurance obligations to any purchaser or mortgagee to availability of title insurance policy to be issued by any New York State licensed title insurance company, without any as to exception. If any alleged Indian rights or claims, and that they agreed that the title insurer upon application to it, that the title insurer would insure the new owner or mortgagee would insure with the same covenant in the new policies. Lenders and purchasers found this insurance to be acceptable, and real estate transactions continued, and still continue with the Indian Covenant in place in western New York.

James M. Pedowitz

* * *

Thomas P. Moonan, a long-time member of the Real Property Law Section of the New York State Bar Association, died on March 27, 2005. At the time of his death, Tom had completed his eighth year as President and Chief Executive of Monroe Title Insurance Corporation, a position he accepted after leaving an active law practice.

Tom was the quintessential real estate lawyer. A Harvard Law School graduate, during his distinguished career, he practiced real estate and banking law for a diverse and active clientele. His clients included major

banking institutions and shopping center developers. In that practice, Tom earned the reputation of being an astute, fair-minded and experienced practitioner, who brought to his practice innovative approaches to banking and real estate law colored by a quick Irish wit.

Tom was a past president of the New York State Land Title Association and a senior partner in the law firm of Harris Beach prior to accepting his position with Monroe Title Insurance Corporation. Tom's life was a full one, engaged in the love of his family (which included ten grandchildren), his profession and his golf score. It was only his golf score that needed improvement.

By Mitchell T. Williams

* * *

On Easter Sunday, March 27th, the legal and title insurance communities lost a brilliant colleague, strong leader and special friend with the sudden and unexpected passing of *Thomas P. Moonan*. However, friend and colleague don't even begin to adequately describe Tom. Tom was a gentleman in the true sense of the word, a caring and thoughtful person, a role model, a loving husband to his wife, Marie, a father to his three children and grandfather to his 10 grandchildren. He was the strong and dynamic President of his beloved Monroe Title Insurance Corporation family. In simple terms, Tom was a great human being.

Tom cared very much for the New York State Bar Real Property Law Section. He was instrumental in establishing and growing our Section, which is now the largest Section in the New York State Bar. Tom was one of the early Chairs of our Section and he continued to be supportive of the Section, attending the most recent Annual Meeting in New York City last January.

Tom was my mentor. Over 25 years ago, he encouraged me to become active in our Section and persuaded me to become a member of the Title and Transfer Committee. Following Tom's lead, I too eventually became a Chair of our Section.

Tom was a firm believer that it was important to become involved in Bar-related activities and to give back to our profession. Tom willingly gave of his time to Bar activities and was a frequent lecturer for our State Bar CLE Programs.

Tom also had a very distinguished legal career. He graduated from Harvard Law School in 1958 and was a partner in the Harris Beach firm until 1997, when he left to become the President of Monroe Title Insurance Corporation. Monroe Title had been founded by his father, Paul D. Moonan, in 1922. Under Tom's leadership, Monroe Title grew to 23 offices in upstate New York. Tom continued the high quality of service and loyalty to customers and employees which had been established by his father so many years ago. His leadership and enthusiasm were hallmarks of Tom's service as President. While at Monroe Title, Tom became very active in the New York State Land Title Association. In 2003–2004, he was elected President of the New York State Land Title Association. He was also a past President of the Title Insurance Rate Service Association, serving in that role from July 2000 through June 2001.

Tom was also a charter member of the American College of Real Estate Lawyers and had continued to be an active member of that organization.

We are all so very fortunate to have known Tom. We will miss his wisdom, kindness, integrity and sincerity but, most of all, we will miss his friendship and endearing sense of humor.

Maureen P. Lamb
Former Section Chair

* * *

Tom Moonan was descended from a long line of Irish Minnesota title examiners. He could examine titles with the best of them. He once remarked that if a person examines titles long enough, he or she would come to the conclusion that the earth is flat.

Tom Moonan was also a Harvard Law School graduate. He could negotiate and conclude shopping center reciprocal easement agreements for national developers with the best of them. He has been known, however, impishly to caution that if the parties did not do it right, the Little People he had seen lurking around might cause some unintended consequences.

Tom and I first met as associates at a Rochester law firm. He left to become a partner at another prominent Rochester law firm and proceeded to lead the pack in a very sophisticated real estate law practice. His secret was that he not only knew all of the rules but also that he had an uncommon ability to understand the transaction. With him, complicated issues became simple and understandable. His clients were well served and his opponents never believed that they had been treated unfairly. As one lawyer has said of Tom, there was not a mean bone in his body.

When the call came to take over the Presidency of Monroe Title Insurance Corporation, formerly known as Monroe Abstract and Title Insurance Corporation, he did it. He did it well, grew the company, and increased its bottom line. My hunch is that he would have preferred to remain a sophisticated real estate lawyer (not to imply that title insurance companies are not sophisticated).

Tom was an early Chair of the NYSBA Real Property Section and a founding member of the American College of Real Estate Lawyers. He was also a frequent lecturer and writer on the continuing legal education circuit. Whenever he spoke at a continuing legal education séance, he received the best grades from the attendees. He wrote the first chapter in Jim Pedowitz' book on *Real Estate Titles, The Nature of Title and Estates in New York*.

Tom helped and promoted the careers of many people, lawyers and non-lawyers. He recommended me for membership to the Executive Committee of the NYSBA Real Property Law Section and in the American College of Real Estate Lawyers. Standing in line today at the funeral parlor, many Monroe employees went out of their way to tell me what a positive influence he had been on their lives.

He loved golf. We wish him nothing but continued straight fairway shots.

John E. Blyth

When Lawyers Steal the Escrow
Letters to the Editor of *The New York Times*

On Sunday, June 5, 2005, the lead article on the first page of the Real Estate Section of *The New York Times* was "When Lawyers Steal the Escrow." It featured a description of the stealing of escrow funds by a Garden City lawyer, Jay W. Rosen. The article stated that 100 people had reported real estate thefts in 2004, according to the Lawyers' Fund for Client Protection. The following letters were sent to *The New York Times* in response.

June 8, 2005

Letters to the Editor
The New York Times
229 West 43rd St.
New York, NY 10036

Gentlemen/Ladies:

I am a Vice Chair of the Real Property Law Section of the New York State Bar Association. Your article, "When Lawyers Steal the Escrow" (Real Estate, June 5, 2005), gave a very misleading picture of the extent of mishandling of escrow deposits by lawyers in real estate transactions. The 100 escrow deposit thefts in 2004 are minuscule compared to the 331,848 deeds that were recorded in 2004 in downstate counties (where lawyers hold the escrow, according to the New York State Land Title Association). In 2004, the Annual Report of the Lawyers' Fund for Client Protection showed that the number of lawyers responsible for awards in over 22 years in real estate and all other categories involved less than one-third of one percent of the 215,000 lawyers registered in the state. Total client losses in all categories in 2004 were caused by 53 now suspended, disbarred or deceased lawyers, 26 of whom appeared for the first time in 2004. The outrageous Jay W. Rosen case you focused on is clearly an anomaly.

The legal profession should be congratulated for establishing and funding the Lawyers' Fund for Client Protection. What other profession provides such an effective means for clients to collect against the very few malefactors? Clients can best protect themselves by checking out their lawyers in advance, by checking the list of disciplined lawyers in the 2004 Annual Report on the Lawyers' Fund website, and by calling a local grievance committee, as suggested in your article.

Very truly yours,

Karl B. Holtzschue

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The above letter represents the personal views of the author. While many Section members have expressed agreement with those views, the letter was not intended to represent the official views of or action by the Real Property Law Section. The letter was published on page 11 of the Real Estate Section of *The New York Times* on Sunday, July 2, 2005, under the title "Escrow Account Thefts Are Rare."

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June 7, 2005

Editor
The New York Times
229 West 43rd Street
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Dear Editor:

Your article ("When Lawyers Steal the Escrow," Real Estate Section, June 5, 2005) created a misimpression of the handling of escrow deposits held by lawyers in real estate transactions resulting in theft. What you failed to mention is that of all the lawyers practicing in this state, 24 lawyers were the cause of all these claims.

While the number of offenders is small, we have zero tolerance for theft and such action invariably results in suspension or disbarment from the practice of law by the disciplinary authorities.

In order to protect clients from the results of the few lawyers who engage in this unethical conduct, the New York State Bar Association, the largest voluntary statewide organization of lawyers in the nation currently with 71,000 members, cooperated with the Governor, the Legislature, and the Unified Court System to create what today is known as the Lawyers' Fund for Client Protection. Its sole source of funding is the biennial registration fees paid to it by lawyers to compensate victims of misappropriation. I know of no other profession that operates such a program.

The system of lawyer ethics and discipline that we have in New York serves to preserve the integrity of the legal profession and our overall system of justice.

Sincerely,

A. Vincent Buzard

A. Vincent Buzard, President
New York State Bar Association

AVB/bgc

(Continued from page 107)

sponsored a major institute on legal trends and developments in this area. The seminar, which took place in Buffalo, was extremely well attended by attorneys from throughout the state and elsewhere. It covered a wide range of issues on how to structure, negotiate, and close low income and affordable housing projects, with a special emphasis on federal tax considerations.

Because the program was so successful, the committee plans to repeat it again this year and annually. The 2005 seminar will take place September 22, 2005, at the Buffalo Hyatt Regency. It will be co-sponsored by the New York State Division of Housing and Community Renewal, the New York State Association for Affordable Housing, and the University of Buffalo Law School.

If your practice involves low income and affordable housing in any way, this will be a "must attend" program for you, and a committee that you should seriously consider joining.

For details, contact either of the co-chairs: Brian Lawlor at blawlor@dhcr.state.ny.us or Richard Singer at rsinger90@aol.com.

Attorney Opinion Letters. For better or worse, any transactional real estate lawyer knows that legal opinions sometimes seem to be more important to a closing than the creditworthiness of the parties, the terms of the substantive documents, and any characteristics of the real property involved. For that reason, the Section has a committee devoted solely to the issues that arise in legal opinions.

In 1998, that committee published a model form of legal opinion for New York mortgage loan closings, which has become a well-respected resource in the area. The committee will soon revisit that model opinion and update it to reflect changes in the market and industry practices.

In the meantime, the committee has started work on its checklist of issues to consider when giving a mortgage loan opinion. The checklist will cover issues regarding good standing, due formation, due authorization, and other matters. It will be structured so as to work well with the committee's previously issued model opinion.

The committee is seeking attorneys who would like to get involved in the checklist project and, after that, the model opinion update project.

If you are interested, please communicate directly with Charles Russell at cwrussell@boylanbrown.com or David Zinberg at dzinberg@ingramllp.com.

Real Estate Financing. The Section's committee on real estate financing is chaired by Steve Alden at smalden@debevoise.com. The committee has focused in recent years on presentations about issues in "capital markets"-driven real estate financing, such as insurance, mezzanine financing, and rating agency requirements. That focus can be expected to continue.

The committee also tracks new case law developments affecting real estate financing, and will get involved in responding to legislation in the area. It meets about four times a year.

Condominiums and Cooperatives. The Section's committee on condominiums and cooperatives is one of the largest committees of the Section, with a roster of 220 members. The committee has for many years served as a forum and focus for attorneys who set up and administer condo and coop ownership structures. The meetings of this committee have traditionally been very well attended, because the speakers have been leaders of the condo and coop bar, as well as regulators who have spoken about their latest initiatives and new plans.

That tradition continues today under the leadership of David Berkey at dlb@gdblaw.com and Joe Walsh at joewalsh@spalaw.net.

The committee meets about quarterly, with a meeting scheduled for July 15, 2005, as part of the Section's annual summer meeting, and another one tentatively set for November 18, 2005. Other dates will be added and guest speakers announced in coming months.

The committee sponsors an annual continuing legal education program on "Advanced Topics in Condominiums and Cooperatives," which is usually very well attended.

Beyond its regular committee meetings and continuing legal education programs, the Condo and Coop Committee has also undertaken a handful of special projects to try to improve the practice of condo and coop law in New York.

A subcommittee has actively participated in the redrafting and modernization of the "standard" condo contract, a project that is just about complete at this point.

A subcommittee has been working on suggesting improvements to New York's condominium act, and anticipates submitting its final proposal in late 2005.

A subcommittee on liens on condominium units has been exploring the law in that area with a special emphasis on experience to date with the 2001 Revised UCC. The subcommittee is expected to issue a report by May 2006.

The Condo and Coop Committee recently formed two more subcommittees: one on low income and affordable housing, and another on senior residential facilities.

If you would like to participate in any of these projects or subcommittees or the committee's regular meetings, contact either of the committee chairs (whose e-mail addresses are listed above).

Landlord and Tenant Proceedings Committee. This committee meets three to five times a year, focusing on issues that arise in landlord-tenant disputes, both residential and commercial. Recent committee meetings have looked at the new lead paint law in New York City, disclosure requirements for New York City residential leases, and recent appellate decisions on lease enforcement. During the next year, the committee intends to put together a half-day or longer continuing legal education program on lease enforcement.

If you would like to join the committee, contact Edward Baer at ebaer@bbwg.com, or Edward Filemyr at filemyr@verizon.net.

Commercial Leasing. The Section's Commercial Leasing Committee meets four times a year, typically at the Penn Club in Manhattan with occasional meetings upstate. Recent speakers (including Pat Randolph and Joshua Stein) have discussed recent case law developments in commercial leasing. Other speakers have examined major recent leasing transactions, insurance requirements in leases, special issues in ground leasing, and a range of other commercial leasing topics.

The committee has invited Joel Binstok of York Consulting to speak in November 2005 on "lease audits" with an emphasis on operating expenses and language that landlords and tenants should include in their leases. The committee anticipates that CLE credit will be awarded for Joel's presentation.

To join the committee, you should contact either Brad Kaufman at bkaufman@seyfarth.com or Austin Hoffman at austinhoffman@pyramidmg.com.

The Commercial Leasing Committee has a very active subcommittee on "silent lease issues," chaired by Spencer Compton and Joshua Stein. That subcommittee has published the first and second edition of a tenant's checklist of so-called "silent lease issues" (which became more of a general checklist of points any tenant should consider raising in lease negotiations).

The subcommittee also published the first edition of a landlord's checklist, and is now slowly rethinking that checklist in preparing to publish a second edition. The "rethinking" process takes the form of a series of brown-bag brainstorming sessions every couple of months, in which the subcommittee talks about issues and recent developments within each category of issues in the checklist. Invariably everyone walks out of the meeting knowing something they didn't know when they walked in, and the subcommittee chairs have a couple more checklist categories to rewrite.

The so-called subcommittee actually consists of whomever received the invitation for that particular meeting and decided to attend. If you would like to receive those invitations and have a chance to join the subcommittee and learn something about commercial leasing, contact Spencer Compton at shcompton@firstam.com.

Computerization and Technology. The endless advances of computer technology change law practice every year, including real estate law practice. The Section's committee on computerization and technology has helped us respond to those new developments, such as by working with the City Register's office to comment on its ACRIS electronic recording system and helping the Section better use e-mail in communicating with its members.

The committee plans to put together a multi-speaker continuing legal education program on computerization and technology as part of the Association's January 2006 meeting. Speakers will cover privacy and privilege issues in electronic communications, the implications of electronic discovery, and other issues.

If you would like to participate in that CLE program or other committee activities, please contact Mike Berey at mberey@firstam.com or Jill Myers at jmyers@jmyerslaw.com.

Not-for-Profit Entities. New York has an extraordinary range of not-for-profit entities—universities, hospitals, foundations, charities, religious institutions, and so on. Many have substantial real estate holdings that raise a wide range of unusual issues. The Section's committee on not-for-profit entities tries to help Section members understand the special real property agendas of not-for-profit entities, and steer clear of the numerous pitfalls and minefields in this area.

Many not-for-profit entities have recently encountered problems and issues with real estate taxes, and the varying rules of tax assessors around the state. In an effort to understand those problems, solve some of them, and perhaps establish greater statewide uniformity, the committee is arranging breakfast or lunch meetings, which may be jointly sponsored with local bar associations statewide, with local tax assessors' offices from Rochester, Buffalo, Syracuse, Albany and New York City. Through those meetings, the committee will try to determine how these local assessors' offices approach assessment of real estate owned by not-for-profit entities. The committee will consider proposing changes as appropriate.

Within the last couple of years, the committee issued a draft "due diligence checklist" for real estate transactions involving not-for-profit entities. In 2006, the committee will revisit, update, complete, and republish that checklist.

The committee has identified the dissolution of not-for-profit entities as a common problem area, and is monitoring legislative proposals designed to streamline the dissolution process.

The committee meets about quarterly, with speakers from regulatory agencies, leading not-for-profit organiza-

tions, and the real estate bar. Meetings are tentatively scheduled for July 15 and September 9, 2005, and January 25 and April 14, 2006.

To learn more about the Not-for-Profit Entities Committee, contact Mindy Stern at mstern@schoeman.com, or Leon Sawyko at lsawyko@harrisbeach.com.

Title and Transfer Committee. The Section's Title and Transfer Committee generally meets in January at the Annual Meeting at the Marriott Marquis in New York City, and during the Summer Meeting (this year in Lake Placid). These meetings are sometimes held jointly with the Section's Title Insurance Committee.

The Title and Transfer Committee focuses on the mechanics and law governing the creation and transfer of interests in real property in New York, both residential and commercial. The meetings often include reports on recent important cases.

The committee participated very actively in New York's recent adoption of its "Property Condition Disclosure Act" ("PCDA"). More recently, the committee has started to consider whether to recommend that the Legislature revise, add, or eliminate some of the PCDA questions. The committee is working with the New York State Association of Realtors ("NYSAR") to try to develop joint recommendations for the 2006 legislative session. This effort follows a survey of local Bar Associations and Section members regarding the PCDA and their suggestions for revision.

Karl Holtzschue co-chaired the Title and Transfer Committee when it began its efforts on PCDA, and Karl will remain involved in PCDA developments. If you would like to participate in any possible revision and updating of the PCDA, you should contact Karl Holtzschue at kholtzschue@nyc.rr.com.

The Section's efforts on PCDA also included my own personal campaign—which ultimately failed—to translate the PCDA into understandable English. In revisiting the PCDA, the Section may try to revive my "Plain English" version of the statute and then modify it to reflect whatever changes are ultimately agreed upon, and submit it to the Legislature. Anyone who has a particular interest in "Plain English" drafting and would like to help me revive my personal "Plain English" campaign for the PCDA should contact me at joshua.stein@lw.com.

Other topics on the Title and Transfer Committee's agenda include completion of revised standards for title examination, the proposed title agent licensing legislation being promoted by the New York State Land Title Association, and the possibility of extending to the rest of the state the new restrictions on mortgage spreader agreements and wraparound mortgages that now apply only in New York City.

If you are interested in participating in the Title and Transfer Committee, you should contact either Joe DeSalvo at jdesalvo@firstam.com or Sam Tilton at stilton@woodsoviatt.com.

Continuing Legal Education Committee. Although many of the substantive committees sponsor their own continuing legal education programs, the Section also has a committee that organizes broader programs, typically targeted toward a particular experience level (beginning, intermediate, or advanced).

Within the next year, the committee plans to put together an advanced "institute" on real property law and practice, with nationally prominent speakers and two days of programs on the most pressing issues in the field. The program will probably take place at a major hotel in Manhattan. It will include breakout sessions, vendor booths, and other features to make it appeal to the most experienced real estate practitioners in the state.

Based on experience, the committee will also probably put together three or four other half-day or full-day continuing legal education programs during 2006, usually offered at multiple locations throughout the state.

If you would like to get involved in any of these—or other—real property continuing legal education programs, please contact Terry Gilbride at tgilbrid@hodgsonruss.com or Harold Lubell at halubell@bryancave.com.

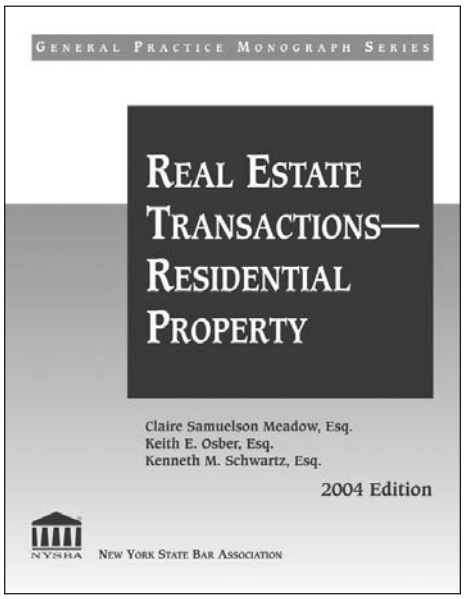
The preceding discussion should give you a good flavor of the tremendous range of activities underway in the Section's committees. The many New York real estate lawyers who have participated in the Section and its committees almost always say they feel they got more out of the process than they put in. I encourage you to consider getting involved in whichever committees and committee projects seem of special interest to you.

The broad scope of our committees' activities also tells you something about the previous leadership of our Section. In taking over the chair of the Section, I have the good fortune of following Dorothy Ferguson, Matthew Leeds, John Privitera, Mel Mitzner, and many others before them who have done a terrific job in building the Section, energizing our committees, and helping the Section do a great job of serving the needs of New York's real estate lawyers and the sound development of New York real property law.

I intend to build on the work of my predecessors, with a special focus on trying to bring more Section members into our activities, starting but not ending with our committees. If you would like to get involved, or if you have any suggestions for how the Section can better help you as a New York real estate practitioner, I will look forward to hearing from you.

Joshua Stein

Real Estate Transactions—Residential Property*



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Real Estate Transactions—Residential Property is a practical, step-by-step guide for attorneys representing residential real estate purchasers or sellers. This invaluable monograph covers sales of resale homes, newly constructed homes, condominium units and cooperative apartments.

Numerous practice guides and a comprehensive collection of forms developed for use in daily practice make *Real Estate Transactions—Residential Property* an excellent reference for new and experienced attorneys alike.

Section Committees & Chairs

The Real Property Law Section encourages members to participate in its programs and to volunteer to serve on the Committees listed below. Please contact the Section Officers or Committee Chairs for further information about the Committees.

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Publication of Articles

The *Journal* welcomes the submission of articles of timely interest to members of the Section in addition to comments and suggestions for future issues. Articles should be submitted to any one of the Co-Editors whose names and addresses appear on this page.

For ease of publication, articles should be submitted by e-mail to any one of the Co-Editors, or if e-mail is not available, on a 3½" floppy disk, preferably in Microsoft Word or WordPerfect. Accepted articles fall generally in the range of 7-18 typewritten, double-spaced pages. Please use endnotes in lieu of footnotes. Please also include one laser-printed copy. The Co-Editors request that all submissions for consideration to be published in this *Journal* use gender neutral terms where appropriate or, alternatively, the masculine and feminine forms may both be used. Please contact the Co-Editors regarding further requirements for the submission of articles.

Unless stated to the contrary, all published articles represent the viewpoint of the author and should not be regarded as representing the views of the Co-Editors, Board of Editors or the Section or substantive approval of the contents therein.

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