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A Message from the Section Chair

This is my first introductory message to our Section's *Journal*. It is being composed in the first couple of weeks after assuming the job. I have started to read my share of these in almost 30 years of contact with the Section (going back to law school and my first summer jobs!) to know enough to try to make this readable and short.

This Year's Themes

As you know, your Section performs myriad functions, broadly involving tracking cutting-edge developments in real property law and practice for the Bar and for the public. Typical efforts include informational and educational programs, interaction with public and professional groups, review of legislative proposals and initiation of legislation.

The membership should benefit from these efforts, and more people should want to be members.

Accordingly, two activities that the officers feel are especially important are:

(1) Dissemination to Section members of information and practice guides regarding important topics and developments in real estate law; and

(2) Increasing membership and broadening diversity within the ranks of the Section (ranging among men and women, attorneys of various ethnic backgrounds, rural and urban attorneys, younger and more established attorneys, and practitioners in practices and institutions of all sizes).

Committee Membership

Within those efforts, as always, the lifeblood of the Section is its committees, and the lifeblood of the committees is their members. All members are urged to establish contact with one or more committees in order to benefit from the work and work product of the committees. If possible, members should seek to get involved and contribute to the committees. There is a listing of committees and their chairs on pp. 81-82 of this *Journal*.

There will be an effort to have all committees maintain contact with their members and disseminate information and work product throughout the year.

In addition, because the Executive Committee receives so much information and discusses topics of current interest to all real estate lawyers, there will also be an effort to have minutes

Inside

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of various Executive Committee meetings made available on a regular basis for members.

Please Write

Your thoughts on these themes or on anything else would be very much appreciated. Please feel free to contact committee chairs directly or to contact me (my address is Bryan Cave LLP, 1290 Avenue of the Americas, New York, New York 10104, and my e-mail is mjleeds@bryancave.com).

Thanks

Obviously, communication, dissemination of information and recruitment should not be just be one-year programs. If they are worthwhile, they should be institutionalized and made regular practices for the Section.

For their energy and creativity in these and other efforts, the members should recognize the other current officers: First Vice-Chair Dorothy H. Ferguson from Rochester (whose special work planning Section activities over the past months will not be properly heralded publicly); Second Vice-Chair Joshua Stein, of Latham & Watkins LLP in New York City; and Secretary Harry G. Meyer of Hodgson Ross LLP in Buffalo.

Support continually comes from other members of the Executive Committee. In particular, the Executive Committee (and I, personally) must thank all former Section Chairs for their constant involvement, help and public-spirited professionalism. To go back only a little in time these people include: John J. Privitera, Melvyn Mitzner, James S. Grossman, Steven G. Horowitz, Lorraine Power Tharp, John G. Hall, T. Mary McDonald, William A. Colavito, Keith E. Osber, Maureen Pilato Lamb, Flora Schnall, John E. Blyth, Bernie Rifkin and my partner Harold A. Lubell.

Let's all have a great year.

Matthew J. Leeds
Bryan Cave LLP
New York City

All Transfers of Fee Interest Made on or After September 1, 2003 Must Comply with the Following Changed Procedures:

Pursuant to an amendment to the Tax Law, adding a new section 663, certain non-resident transferors must pay estimated personal income tax on the gain, if any, resulting from the sale or transfer of real property occurring on or after September 1, 2003. Proof of payment of this tax, or proof that the taxpayer is not subject to the tax, must be furnished in order to record the deed. A revised form TP-584 contains a new "Schedule D", certifying that the estimated tax does not have to be paid due to the fact that the transferor is a New York State resident (Part I) or that although the transferor is a non-resident (Part II) the transfer is exempt because either (a) the property was used exclusively as the transferors principal residence, (b) the transfer is a deed in lieu of foreclosure, to the mortgagee, with no additional consideration, or (c) the transferor or transferee is one of certain exempt entities. **This means that the transferor must sign the new TP-584 in two places.** Although pursuant to section 1409(b) of the Tax Law, a return will be accepted if only one of multiple transferors sign, **all transferors must sign schedule "D".** The new TP-584 may be used immediately; it **must** be used for transfers on or after September 1, 2003. If used before September 1, schedule "D" need not be completed.

If the transferor cannot establish an exemption pursuant to the provisions of the new TP-584, the transferor must complete a new form IT-2663 (Application for Certification for Recording of Deed), pay any estimated tax, and obtain a stamped Part IV of that form. **The stamped Part IV must be submitted with the deed to enable it to be recorded.** The Department of Taxation and Finance has indicated it needs a three-day turnaround time for these returns. Alternatively, the form may be walked through at any of the 12 offices of the Department listed on the instructions.

The new law applies only to transfers made by individuals, estates, or trusts, and does not apply to transfers made by any other entities, regardless of their residency status or the residency of their members, partners, or shareholders. It also does not apply to leasehold transfers, including co-op apartments and leasehold condominiums, nor does it apply to transfers of controlling interests in entities. If the subject transfer is one of these exempt categories, the schedule D of the TP-584 may be left blank.

The forms and instructions may be obtained online from the following sources:

http://www.tax.state.ny.us/pdf/2003/property/tp584_703.pdf

http://www.tax.state.ny.us/pdf/2003/property/tp584i_703.pdf

http://www.tax.state.ny.us/pdf/2003/inc/it2663_2003.pdf

http://www.tax.state.ny.us/pdf/2003/inc/it2663i_2003.pdf

—Michael J. Kelly
Vice President and Agency Counsel
Commonwealth Land Title

“A Little Learning Is a Dang’rous Thing; Drink Deep, or Taste Not the Pierian Spring”

(Alexander Pope, 1688-1744—”An Essay on Criticism”)

By Harry G. Meyer

Although most of us have dabbled at minor home maintenance or repairs (if only changing the proverbial light bulb, and it has been my experience that generally speaking it only takes one lawyer), most of us have the common sense to avoid more sophisticated tasks which are beyond the scope of our normal skills: An example that comes to mind was the rewiring of my main electrical panel: I hired an electrician for that.

I mention these comments because where we are reasonably familiar with something in our work experience, we may have a false sense of security that imaginary concepts known as “state lines” can be ignored.

Many New York lawyers who have long-standing relationships with loyal clients see those clients as they grow older gravitate increasingly to warmer climates, such as Florida, at least during the winter. In a common scenario, the legal counselor for a family now works with the second generation and has assisted, one way or another, in the transfer of command for operating and/or ownership of the family business. Also, as part of the relationship, the lawyer may well have arranged for local counsel in Florida to handle an acquisition of a second house which has now become the primary home with a shift of legal residence.

With a further passage of time and looking at the broader picture, the New York attorney may discuss the benefits of further estate planning with the clients (both generations). One potential recommendation may be to transfer title of the house in Florida to a trust with family ownership or to add other family members to title.

Since it is very easy to copy a prior deed or download a form from one of the title insurance companies and have a new deed typed, the lawyer in New York, as a convenience to long-time clients and established friends, may take care of the matter when the clients are “up North” for the summer.

The problem is that under the 1995 Florida constitutional amendment commonly known as the Save Our Homes (SOH) Amendment, residential real property which qualifies for a homestead tax exemption also receives the SOH benefit which limits the annual increase in the property’s assessed value to the *lower* of (i) 3%, *or* (ii) the percent change in the consumer price index for all urban consumers, U.S. city average, all items 1967=100 (CPI) until a transfer of ownership. All other real property is reassessed annually in Florida by the county tax assessor at fair market value. As many of you are aware, especially in south Florida, property value increases over the past decade have been substantially in excess of 10% per year.

Why is this important? In legal terms, the relatively simple act of preparing a deed from husband and wife to put title into an irrevocable family trust, or adding a son or daughter as a co-owner is considered a transfer which triggers a “change of ownership” for SOH purposes. The *Miami Business Journal* and some of the bar associations in Florida have begun to point out that in the unfortunate circumstance of a change of ownership, the first knowledge that the client may receive comes in the form of a shockingly higher real estate tax bill because the county tax assessor is allowed to reassess to current fair market value. Here is an example:

In 1994, a New York couple retired from their family business, moved to Florida and used their retirement funds to purchase a home for $400,000. Since 1995, the increase in the assessment on their home could never exceed 3% each year. Therefore, their assessment in 2003 could not be greater than $521,910. Home values have dramatically increased in south Florida, and a comparable house next door has recently sold for $1,500,000, and will be assessed at that fair market value. If there were no SOH Amendment, both of the residences would have been assessed in 2003 at fair market value. Instead, our former New York couple have a significantly lower adjusted assessment and a tax bill approximately one-third of their new neighbors as a result of the benefits of the SOH Amendment . . . that is, until they deed the property to an irrevocable trust or to a tenancy which includes their son or daughter. (While a transfer to an *owner’s* revocable trust may not be subject to readjustment, it should not be undertaken without prior review by qualified legal counsel.)

In some areas of Florida the tax increase following a change of ownership will be more than $15,000–20,000 per year. Unless the client was forewarned that a dramatic increase was one of the consequences of the transfer and agreed to it in advance, the likely reaction is to be substantially disappointed with the performance of the long-time attorney, coupled with a suggestion that it would be appropriate for the attorney to “take care of the matter.”

Practical advice: Consult with capable counsel where a property is located to avoid embarrassing yourself.

Harry G. Meyer is a partner at Hodgson Russ LLP in Buffalo, Co-Editor of the *Journal* and Secretary of the Real Property Section.

The Impact of New York's Impact Fee Jurisprudence

By Andrew G. Fiorella

Difficult and uncertain fiscal times again face New York State.[1] It is axiomatic that governmental spending cuts and increased property taxes, made to close pre-existing budget shortfalls, will substantially affect municipal capital improvement and infrastructure programs.[2] Combined with a perennial concern over urban and suburban "sprawl,"[3] the current budgetary climate will undoubtedly increase municipalities' interest in non-tax "revenue enhancements," which will certainly include attempts to impose impact fee exactions for real estate development.[4]

Although impact fees are now considered to be conceptually and legally distinct from property taxes,[5] in practice, the distinctions between the two species are likely to appear far less crisp to a developer.[6] Unlike other states, the legislature and courts of New York have not given broad discretion to municipalities to impose impact fees.[7] Instead the law has developed in particular legislatively chosen areas, perhaps from practical necessity. Although commentators have called for reform in New York's impact fee jurisprudence in the wake of long-standing Supreme Court decisions and legislative enactments in other states,[8] the law has remained relatively unchanged. Given the current forces at play, a brief review of the salient features of New York's impact fee jurisprudence, as well as the practices of a selection of other states, is useful in effectively counseling a client in its decision to pay—regardless of the objective fairness of the amount—or to challenge an impact fee assessment.

On a related practical point, the Second Department has held that in order to recover an improperly assessed impact fee, the developer must prove that it paid the fee involuntarily, even if the municipality's decision is later determined to be improper.[9] Citing *City of Rochester v. Chiarella*[10]—a property tax challenge—the Appellate Division held that only payments made involuntarily could be recovered and that a payment made under protest is an indication of involuntariness.[11] Consequently, from the moment an impact fee challenge is considered, counsel should advise a client to pay the assessment "under protest" or risk losing the ability to recover the fees in a later action.

Generally, it is advisable for a client to pay an impact fee for both legal and practical reasons. Legally, impact fees imposed according to predetermined statutory or common law formulae are difficult to challenge,[12] and are usually more equitable and predictable to a developer than available alternatives, which may include dedications of property or future special assessments.[13] Practically, in all but the most extreme cases, the monetary and political costs of challenging the fee—particularly when offset by the actual direct or indirect benefits received from the municipality—militates toward paying the fee.[14] However, federal and state laws impose restrictions on impact fees and may provide the basis for attacking a particular fee scheme or application.

This article begins by exploring the difficulties and confusion in the process of defining impact fees, and the role, if any, that a definition plays in a legal challenge. It then briefly reviews the state of federal constitutional takings jurisprudence, and the practical effects of a recent Internal Revenue Service Revenue Ruling on court challenges to impact fee assessments. Finally, this article outlines New York's impact fee jurisprudence by dividing a selection of cases into three groups based on the nature and difficulty of the putative challenge. The final section also outlines some successful challenges to—and the state constitutional, statutory, and common law limitations on—the imposition of municipal impact fees. This article does not address the mechanics of filing and pleading under CPLR article 78.

1. The Importance and Difficulty of Defining Impact Fees

Although impact fee challenges in New York differ from those in other states, a general understanding of the potential scope of an impact fee illuminates the various competing policy debates and clarifies the legal framework of specific challenges. It is possible to widen or narrow the definition of "impact fees" in a variety of ways; nevertheless, the core definition used in this article covers all fees paid as a condition for a municipality's approval of a particular building plan.[15] This core definition captures the mechanical essence of an impact fee but necessarily ignores the public policy implications of a particular choice of definitions. For example, impact fees can serve both as a kind of use-tax and as a method ancillary to zoning regulations in slowing commercial or residential development—particularly in high-growth areas.[16]

a. What Impact Fees Are

Impact fees serve different purposes in the various jurisdictions in which they have been authorized; and consequently have very different specific definitions. For example, compare Hawaii's dense and tightly focused statutory definition,

> "Impact fees" means the charges imposed upon a developer by a county or board to fund all or a portion of the public facility

> capital improvement costs required by the development from which it is collected, or to recoup the cost of existing public facility capital improvements made in anticipation of the needs of a development.[17]

with Wisconsin's terse and broadly applicable codification,

> "Impact fees" means cash contributions, contributions of land or interests in land or any other items of value that are imposed on a developer by a political subdivision under this section.[18]

Although not free of ambiguous terms, Hawaii's definition more clearly establishes the purposes for which a municipality may collect, and uses to which it may apply, an impact fee than does the Wisconsin definition. It is also clear from this comparison that Hawaii envisions only the payment of a fee and not the contribution of land or an interest in land as Wisconsin does.[19] Further, strictly speaking, Wisconsin's definition blurs the line between impact fees, which are usually cash payments, and other takings.[20] Consequently, even in New York, counsel for a developer considering a challenge to an impact fee should begin with the defined powers of a planning board to assess such fees.[21]

b. What Impact Fees Are Not

In considering definitions of impact fees, these exactions should be distinguished from all forms of property tax, including special assessments for three primary reasons. First, in the abstract, impact fees and property taxes cover different municipal expenses and, consequently, require different policy justifications.[22] Second, under state law, a municipality may have limited authority to assess either property taxes, impact fees, or both.[23] Third, a developer or a specific project may be property-tax exempt but not necessarily impact-fee exempt. Consequently, although it might not be necessary to consider impact fees *sui generis*, these fees are certainly not taxes or special assessments.

2. Impact Fees and Federal Law

Beyond simple definitional challenges, federal statutory and constitutional common law imposes limits on a municipality's ability, at the extreme, to impose impact fees, and also suggests that the most prudent course for a developer will often be to pay an impact fee. As a general rule, it will be difficult to prevail on federal constitutional challenges to municipal impact fees. For example, the New York Court of Appeals has held, in a position similar to that of most other jurisdictions including the federal government,[24] that, "[t]he exceedingly strong presumption of constitutionality applies not only to enactments of the Legislature but to ordinances of municipalities as well."[25] Nevertheless, the constitutional protections afforded an individual or developer are an important facet of a strategy to challenge an impact fee assessment.

a. Federal Constitutional Limitations

Although New York's impact fee jurisprudence has changed little with the developments in federal law,[26] federal constitutional limitations provide an important, albeit opaque, check on the otherwise broad power of a municipality to impose impact fees. A comprehensive review of the federal constitutional boundaries is beyond the scope of this article, and the exact contour of this boundary has spawned much legal scholarship.[27] This article will only highlight some important well-known background points of federal takings law applicable to the current discussion.

First in *Nollan v. California Coastal Commission*[28] and again in *Dolan v. City of Tigard*,[29] the Supreme Court has limited, under the Fifth and Fourteenth Amendments, the ability of states and municipalities to require the transfer of an interest in land to the public as a condition of issuing a building permit. In short, the *Nollan-Dolan* test requires that an exaction have both a rational nexus between a legitimate interest of the municipality and specific exaction, and a rough proportionality between the exaction and the burden caused by the development.

Although the Court has not addressed impact fees per se, three reasons support the extension of the Court's takings jurisprudence to cover monetary exactions. First, some states have codified restrictions on impact fees that incorporate limiting language similar to the Court's standards.[30] Second, impact fees have the same potential for abuse as any other taking.[31] Third, some state definitions of impact fees conflate land donation with payment in lieu, blurring any practical distinction between the two species of exaction.[32] Consequently, in the opinion of the author, if the Court takes an impact fee case in the future, it is likely to extend its interest exaction jurisprudence to all exactions.

Assuming, *arguendo*, that this branch of the Court's takings jurisprudence applies to impact fees,[33] it affords an owner or developer little protection from a well-conceived but unfair impact fee system because the Court's two-part test is reasonably easy to meet. The Court noted in both cases that even seemingly extreme exactions would pass a constitutional challenge.[34] The dedications in both *Nollan* and *Dolan* seem intuitively extreme, and therefore provide little useful guidance for determining what a permissible exaction might be.

b. Favorable Changes in Federal Tax Treatment of Impact Fees

The Internal Revenue Service (IRS) has recently changed its treatment of impact fees.[35] The change suggests that, beyond the local political costs of challenging an impact fee assessment, fewer clients should contemplate challenges to impact fee assessments because of the potential tax offsets.[36] Prior to Revenue Ruling 2002-9, the IRS considered impact fees to be intangible personal property not eligible for depreciation because the "value" of the fee had no determinable useful life.[37] This position almost exclusively affected the developers of rental and low-income properties,[38] making these projects less attractive for investors.[39] In February 2002, the IRS reversed its position and concluded that developers may capitalize impact fees and depreciate the expenses over the useful life of the building.[40] Of course, the availability of some tax relief for developers might derail any meaningful impact fee reform, if indeed such reform is necessary. Nevertheless, developers and their attorneys should include the availability of a tax offset for impact fees in any litigation decision.

3. Impact Fees and New York Law

Two general points about New York's approach to impact fees shape judicial inquiry into particular exactions and, necessarily, this discussion. First, municipalities in New York lack the inherent power to impose conditions on site plan approvals,[41] and such power will not be implied by the courts from the general authority to enact zoning regulations.[42] Second, no statute or regulation explicitly grants a county, city, or town the general power to assess impact fees, and the Court of Appeals has not squarely addressed the question of whether such powers are implied by overall statutory framework of the local and city laws.[43] Consequently, New York's impact fee jurisprudence necessarily matches the formalistic and compartmentalized statutory structure under which a municipality might base its actions.

As previously mentioned, New York impact fee jurisprudence has not changed significantly as a result of the introduction of the *Nollan-Dolan* test.[44] In part because New York has limited the application of impact fees to specific statutorily defined areas,[45] a New York municipality is less likely to run afoul of constitutional propriety than a municipality in another state with a more general grant of authority.[46] Given that the constitutional protections would, in any event, affect only the most extreme exactions and impact fees, developers in New York should typically seek relief exclusively under state law. Although somewhat more Byzantine than a state standard coextensive with the federal protections, New York's approach has struck a legislative balance between relatively unfettered local exaction power and entirely preventing a community from addressing local issues, while at the same time affording developers a reasonable degree of protection from overzealous local planning boards.

This section subdivides the case law interpreting specific applications of New York's approach into three broad conceptual categories that are arranged, with examples, in descending order based on the difficulty of a putative challenge. First, and least difficult, are challenges to local laws adopted in areas where state law expressly or impliedly preempts a municipality's power to act. Second are statutory interpretation or "as applied" challenges to particular instances of an otherwise permissible power authorized by the state. Third, and perhaps most difficult, are bootstrapping challenges to local laws that attempt to extend a permissible power to impose an impact fee in one sphere to a new, perhaps related, sphere.

a. Preemption Challenges: The Highway Cases

Although superficially limited to exactions for local road improvements, *Albany Area Builders Association v. Town of Guilderland*[47] remains the Court of Appeals' most definitive statement on impact fees and is an apt place to begin. The town of Guilderland, anticipating a long-term increase in population, enacted a transportation impact fee law, which required applicants for building permits to pay a fee proportionate to the increase in traffic created by the project. The city argued that general grants of authority in the state constitution[48] and the Municipal Home Rule Law[49] included the ability to assess the impact fees. Avoiding that thorny question, the Court of Appeals found that the legislature had entirely preempted local authority to impose a transportation impact fee through a statute limiting local highway taxes.[50] The Court held that the legislature had intended to limit all highway construction funding to the terms of the state's Highway Law,[51] which was a "comprehensive and detailed regulatory scheme in the field of highway funding, preempting local legislation on that subject."[52]

Guilderland is important not only for its overt reasoning but also for its implications. First, the Court specifically avoided the larger question of powers implied by other statutory grants of general power, including the Municipal Home Rule Law.[53] Not surprisingly, the Court would be reluctant to make such changes by judicial fiat. Second, although undoubtedly cognizant of the federal standard, the Court did not cite or discuss *Nollan*, suggesting that New York's jurisprudence independently satisfies the federal constitutional standard.[54] Clearly, even under the more restrictive *Nollan-Dolan* test, New York's tightly controlled statutory framework will likely preclude a facial constitutional challenge. *Guilderland* simultaneously underscores the necessarily limited protection afforded by federal takings jurisprudence and the potentially fertile state law grounds available for challenges.

Although not based on *Guilderland*, the more recent case of *Sepco Ventures, Ltd. v. Planning Board of Woodbury*[55] can be analyzed within

Guilderland's preemption reasoning. The Town of Woodbury Planning Board conditioned the approval of a subdivision plat, *inter alia*, on the developer's improvement of local access roads.[56] The Second Department based its decision in favor of the developer, in part, on *Person Kent Corp. v. Bear*,[57] which held that a planning board could deny approval of a subdivision—but not require off-site improvements—based on the traffic impact of the proposed development.[58] Although the court's reasoning was sound and *Sepco* has independent importance,[59] an alternative, and perhaps better, approach would have been to base the decision on *Guilderland*. If a statutorily enacted local transportation impact fee was preempted by state law, *a fortiori*, an ad hoc transportation impact fee, which off-site improvements certainly are, must also be preempted by state law. Further, it is precisely this kind of ad hoc exaction that seemed to trouble the Supreme Court in *Nollan* and *Dolan*.[60] Consequently, *Guilderland*'s state preemption argument could be a useful tool in challenges to impact fee exactions generally.

b. Statutory Interpretation Challenges: The Water and Sewer Cases

The second broad category of impact fee cases consists of challenges to the use or application by a municipal authority of a statutorily granted power. The examples in the subsection draw from the statutory authority granted under article 5, chapter 43-A of the Public Authorities Law, which permits various local water authorities to conduct business as public utilities—including the power to charge usage fees for their services. The statutory language of chapter 43-A does not grant the local authorities the explicit power to assess impact fees;[61] however, it is possible to imply the power—whether permissibly in the light of other New York law or not—from the general grant.

This was the allegation in the saga of *Phillips v. Town of Clifton Park Water Authority*.[62] In 1992, the town of Clifton Park Water Authority ("Authority"), concerned about future development in the town, adopted a water service fee schedule, including one-time "source" and "storage" fees,[63] that applied only to all new and changed service.[64] It was conceded by the Authority that at the time of adopting the new fees the system had sufficient capacity to handle current demand.[65] The Authority assessed a $22,000 source and storage fee on the petitioner's newly constructed commercial building based on the new schedule.[66] In isolation, the general language of the statute suggested that the fee was at least colorably within the powers of the Authority.[67] After nine years of procedural appeals,[68] the Third Department addressed the merits of the petitioner's complaint that the fees were a prohibited tax and not a usage fee.[69] The Appellate Division, which had consistently termed the charges impact fees, agreed with the petitioner:

> To be sure, the law does not permit a municipality to charge "newcomers" an impact fee to cover expansion costs of an existing water facility absent a demonstration that such a fee is necessitated by the particular project (as opposed to future growth and development in that municipality generally) or a demonstration that such newcomer would be primarily or proportionately benefitted by the expansion . . . [70]

Implied by the Appellate Division's discussion is the more general point that under certain limited circumstances the power to impose impact fees is included in the Public Authorities Law.[71] In other words, if the impact fee acts like a tax, it is impermissible.[72] Conversely, assuming a statutory grant of authority to impose fees, an impact fee is permissible if it benefits the newcomer or results directly from the newcomer's project.[73]

Home Builders Ass'n of Central New York v. County of Onondaga[74] nicely summarizes the interplay of federal constitutional restrictions, *Gulderland*'s preemption analysis, and *Clifton Park*'s statutory interpretation[75] in challenging impact fees in New York. The county of Onondaga imposed a one-time sewer connection fee, which it admitted was an impact fee and not a sewer rent or special assessment,[76] on new connections. The court noted that *Guilderland* left open the question of general statutory authorization for impact fees and held, like *Guilderland*, that the state had preempted the authority of the county to impose fees because of the state's comprehensive scheme to regulate local sewer districts. Next, the court briefly examined the statutory authority granted by the County Law and General Municipal Law as well as the Onondaga County Administrative Code and concluded that the general power to assess impact fees had no statutory support. Lastly, the court held, as a vague alternate ground for its decision, that the impact fee violated aspects of the state and federal constitutions. Although the federal constitutional analysis is at best incomplete, and at worst incorrect,[77] *Home Builders Ass'n* is interesting precisely because it shows how dynamic tension created among three distinct, yet related, analytical approaches can blur a court's analysis of a particular impact fee challenge.

c. Bootstrapping Challenges: The Green-Space Cases

The final, and perhaps most pliable, group of cases consists of challenges to a municipality's attempt to bootstrap a recognized power to impose impact fees in one area to another, related area. This group of cases is conceptually distinct from the statutory interpretation cases because the statute at issue affirmatively authorizes the imposition of impact fees and because external factors—like difficult budgetary times—could influence a reviewing court in the future to expand impact fee authority gradually. Nevertheless, the Court of Appeals has consistently interpreted the statutory authority to impose impact fees and other exactions narrowly. The green-space cases brought to challenge the application of Town Law § 277 effectively illustrate the Court's narrow, technical interpretation.[78]

In *Kamhi v. Yorktown*,[79] the town planning board, acting under the authority of a local law, imposed a recreation fee on a developer who sought approval for a condominium plan. Town Law § 277 specifically empowers planning boards to condition *subdivision* plans on the dedication of land or payment of a fee to the town for parks or playgrounds.[80] The proposed condominium covered 43 acres and contained up to 11 units per acre.[81] Given the physical and infrastructure similarities between the proposed condominium development and a subdivision, if the Court had been interested in extending the application of section 277—or impact fees in general—this would have been the case in which to do so. Further emphasizing its strict adherence to exact wording of the enabling statutes, the Court of Appeals refused to find that the town had exercised its supersession authority[82] under the Municipal Home Rule Law because of a failure to observe the statutory formalities.[83]

The Court of Appeals reached a similar result with similar reasoning in *Riegert Apartments Corp. v. Planning Board of the Town of Clarkstown*,[84] a case predating the *Nollan-Dolan* test. The planning board conditioned site plan approval on the payment by the appellant-developer of "money-in-lieu-of-land" for the development of public parkland. Reading section 277 narrowly, the Court found that the authority to condition subdivision plats does not include the power to condition site plan approval on the payment of an impact fee. Further, the Court refused to find the power implied from other sections and authority.

In an interesting later state Supreme Court case from Westchester County,[85] a developer facing a substantial per-unit green-space fee unsuccessfully challenged Town Law § 277 based, in part, on the then-nascent *Nollan* test. This case is notable because under either the Court of Appeals' strict adherence to formality or the more amorphous federal standard the impact fee would have been permissible. Although the court did not specifically address the statutory preconditions in its opinion, under a strict reading of section 277, the town could impose the fee because the developers' plans were for a subdivision. In analyzing the *Nollan* challenge, the court found that the development of large, regional parks within the town was a valid governmental purpose sufficiently related to the proposed development to satisfy the Takings Clause. The court felt that *Nollan* had narrowed the standard announced in *Jenad, Inc. v. Village of Scarsdale*.[86] Nevertheless, this case nicely illustrates what little effect the *Nollan-Dolan* test has had, and will have, on New York impact fee jurisprudence.

Conclusion

Although commentators have criticized New York's impact fee system, and its current piecemeal, pragmatic approach might slow municipal finance reform, there is a degree of wisdom to the current system and the Court of Appeal's reticence to tackle the issue directly. Exactions in general and impact fees in particular represent imperfect planning and finance alternatives whether the community is facing the very different pressures that result from sprawl or rapid growth. In areas facing population-stagnant sprawl, the redistribution of resources is imperfect at best and counterproductive at worst. In areas facing rapid growth, the fees are quickly passed on to the newcomers rather than the developer directly profiting from the project. In either case, the imposition of the fees raises important questions of fairness and efficacy, with little guidance from the Supreme Court. Nevertheless, municipalities have grown to depend on these fees to finance important infrastructure projects, and the importance of such revenue enhancements only increases in difficult financial times.

Policy concerns aside, New York's cautious approach to impact fees offers a property owner or developer's counsel fertile ground for a state-law challenge without resort to the often nebulous realm of federal constitutional takings jurisprudence and 28 U.S.C. § 1983 litigation. Although the best practical course might often be to advise your client to pay an impact fee—particularly in light of recent changes to the federal tax rules—counsel for a client considering a challenge to an impact fee should begin with the assumption that an unusual fee is likely not authorized under state law because a New York municipality's power to impose such fees is so carefully circumscribed.

Endnotes

1. *Compare* James Berger, Note, *Conscripting Private Resources to Meet Urban Needs: The Statutory and Constitutional Validity of Affordable Housing Impact Fees in New York*, 20 Fordham Urb. L.J. 911, 911 (1993) ("Urban local governments face greater financial strain today [1993] than perhaps at any other time in American history."), *with* Susan Schulman & Mary Pasciak, *Making Sense of The Budget Shell Game*, Buffalo News, Jan. 30, 2003, at A1 (Pataki's [proposed 2003] budget would cut aid to school districts statewide by $1.24 billion, with operating aid to individual districts sliced by 2 to 9 percent. . . . 'When you cut districts by a million dollars, that is going to be transferred to local taxpayers—or you're talking about major program cuts,' [quoting Geoffrey Hicks, superintendent of the Sweet Home, New York, School District].") and Tom Herman & Michelle Higgins, *Tax Report: Fiscal Woes Force Many States to Consider Increase in Taxes*, Wall St. J., Jan. 2, 2003, at D2 (discussing the strain on budgets of New York City

and State and the likely tax increasing to follow).

2. *See* James C. Nicholas, The Calculation of Proportionate-Share Impact Fees 1 (1988) (noting that public aversion to new taxes has forced municipalities to seek alternative methods of funding infrastructure improvements or maintenance).

3. *See* Patricia E. Salkin, *Zoning to Insure Adequate Governmental Services; The Enabling Acts*, New York Zoning Law and Practice § 6:19 (4th ed. 2002) ("The rapid expansion and sprawl of cities and towns into the suburban and rural areas has resulted in serious deficiencies in governmental services. Many municipalities have been fiscally unable to extend existing facilities to meet the needs of newly developed areas.")

4. *See generally* John M. Armentano, *Home Rule Powers Should Permit Municipalities To Act*, N.Y.L.J. Mar. 24, 2002, at 5 (arguing that, given the difficult financial times in New York State, municipalities should again attempt to impose impact fees based on Municipal Home Rule powers—a question left opened by earlier court decisions); *see also* discussion *supra* Part 3.

5. *See* Alan A. Althuler & Jose A. Gomez-Ibanez, Regulation for Revenue: The Political Economy of Land Use Exactions 34–35 (1993) (discussing the development of impact fees as a separate source of municipal revenue and citing empirical studies from the late 1980s showing that a growing percentage of municipalities derived the majority of their revenue from the provision of "services," including municipal services for which impact fees are charged).

6. It is interesting to note that in other jurisdictions, developers are using the threat of moving projects to the suburbs as leverage in negotiations with cities to abate or eliminate impact fees on downtown projects. *See* Kevin L. Mcquaid, *3 Developers Ask Sarasota for $4M: They Request Funds to Help Cover Expenses for their Proposed Downtown Projects*, Sarasota Herald-Trib., Jan. 29, 2003 at BS1 (quoting an attorney advising the city as saying, "In this case [the developers are] trying to balance out what the costs would be in a suburban location versus a downtown location.")

7. Bills have been introduced to grant specific communities the explicit power to impose impact fees, although none has become law. *See, e.g., An act to amend the town law, in relation to permitting towns and villages in the Peconic Bay region to assess special development fees in connection with the issuance of building permits*, A.B. 1873, 2003–2004 Reg. Sess. (N.Y. 2003); *see also* discussion *supra* Part 3 and *infra* note 45.

8. *See, e.g.*, Clifford B. Olshaker, Note, *Uncertainty in the Empire State: A Reevaluation of New York's Takings Jurisprudence after* Dolan v. City of Tigard, 16 Cardozo L. Rev. 1849 (1995) (arguing that many of the cases on which New York bases its takings jurisprudence do not meet the Supreme Court's more recent standards); David D. DiBari, Note, *Impact Fee Exactions in New York: The Taxman Always Rings Twice*, 52 Albany L.R. 287 (1987) (arguing that municipalities in New York do not have authority to impose impact fees). For a discussion of the federal standard and its effect on New York's impact fee jurisprudence, see *supra* Parts 2(a), 3.

9. *See Imperial Gardens, Inc. v. Town of Wallkill*, 228 A.D.2d 562, 644 N.Y.S.2d 528 (2d Dep't 1996).

10. 58 N.Y.2d 316, 323, 461 N.Y.S.2d 244, 448 N.E.2d 98 (1983).

11. *Id.*

12. *See* discussion *supra* Part 2(a).

13. Consider the facts of *Dollan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994). A municipality conditioned a commercial building permit on the dedication of adjacent land for a bike and pedestrian path, ostensibly to mitigate increased vehicle traffic to and from the expanded commercial property. The dedication, rather than an impact fee, locked in the development at its current size and limited the future uses to which an owner or lessee could put the property. Beyond including the actual amount of either the dedication or the fee into the cost of the development, an impact can give a developer more flexibility both in uses of the property and in passing this cost on to lessees or future purchasers.

14. *See also supra* Section 2(b) for a discussion of practical change to the impact fee calculus brought by I.R.S. Revenue Ruling 2002-9.

15. *See, e.g., Salt Lake County v. Bd. of Educ. of the Granite Sch. Dist*., 808 P.2d 1056, 1058 (Utah 1991) (quoting Blaesser & Kentopp, *Impact Fees: the "Second Generation*," 38 J. Urb. & Contemp. L. 55 (1990) ("An impact fee is . . . assessed as a condition to the issuance of a building permit, an occupancy permit or plat approval. . . ." *Id.* at 64.); Althuler Gomez-Ibanez, *supra* note 5, at 3 ("When governments mandate that real estate developers, as a condition for receiving permits, expend resources for the provision of public facilities or services, they are said to have imposed land development exactions. . . . Financial exactions, most commonly known as "impact" or "development" fees, require monetary payment into public coffers.")

16. *See* Althuler Gomez-Ibanez, *supra* note 5, at 77–96.

17. Haw. Rev. Stat. § 46-141.

18. Wis. Stat. § 66.0617(1)(c). To be fair, subsection six of the Wisconsin statute does list seven standards to which a municipality's impact fee law must comply. However, even if an analysis includes all seven statutory factors, the Wisconsin law allows greater latitude to the municipality than Hawaii. For example, although the first of the Wisconsin factors is restrictive, it nevertheless offers a political subdivision a fair degree of flexibility. ("[An impact fee] [s]hall bear a rational relationship to the need for new, expanded or improved public facilities that are required to serve land development." *Id.* at section 66.0617(6)(a).)

19. *See* Haw. Rev. Stat. § 46-143 (establishing criteria for determining the amount of an impact fee and listing the supporting documentation required of a municipality before imposing a fee). One may speculate that the high value and limited supply of land in Hawaii best explains the state's reluctance to require developers to donate land for public uses.

20. It is the author's opinion that considering all exactions together might be a more coherent way of addressing potential abuses. Certainly, land exactions will be necessarily more limited; however, separating different forms of exactions might be putting too fine a point on takings in general.

21. For an extended discussion of challenges under New York law, see section 2(c) of this article.

22. *See* Althuler & Gomez-Ibanez, *supra* note 5, at 62–63. An extended discussion of the public policy implications of impact fees and property taxes is beyond the scope of this article. For a general discussion of the historical evolution from property taxes to impact fees, see *Development Exactions*, 12-P9 Powell on Real Property § P9.06 (2001). Briefly stated, impact fees should cover the *infra*structure costs of a particular development—for example, the construction of a new school to accommodate an increase in the school-age population following the development of a new subdivision—and property taxes should cover municipal expenses broadly benefiting the community—for example, emergency services. *See* Althuler & Gomez-Ibanez, *supra* note 5, at 3–4.

23. See discussion *infra* Part 3. For example, in *Salt Lake County v. Bd. of Educ. of the Granite Sch. Dist.*, 808 P.2d 1056 (Utah 1991) the Utah Supreme Court held that impact fees are not a form of property tax. The court based its distinction, in part, on whether the primary beneficiary of the *infra*structure improvements is the specific project paying the fee or the community at large. If the benefit accrues primarily to the development,

the charge is an impact fee. The court also found that an impact fee did not constitute a lien on the property in the same way that a property tax assessment does. This distinction proved dispositive in *Granite School District* because under Utah state law, the school district was exempt from property tax assessments but not against the drainage fee imposed by the county. *Contra Eastern Diversified Properties, Inc. v. Montgomery County*, 319 Md. 45, 570 A.2d 850 (Md. 1989) (holding that an impact fee was a tax and the imposition of the tax by the county was *ultra vires*). The *Eastern Diversified Properties* court based its distinction on whether the county imposed the tax for revenue or regulatory purposes. State law limited local revenue generation but not regulation.

24. *See, e.g., Kontokosta v. Village of Greenport*, 1991 WL 206296 (S.D.N.Y. 1991) (discussing, with the court sitting in diversity, the interplay between federal constitutional protections and New York's impact fee jurisprudence).

25. *Lighthouse Shores, Inc. v. Town of Islip*, 41 N.Y.2d 7, 11, 390 N.Y.S.2d 827, 359 N.E.2d 337 (1976) (upholding a local ordinance regulating vehicular access on Fire Island, New York).

26. In fact, none of the important state cases cite or discuss federal takings jurisprudence. *See* discussion *supra* Part 3.

27. For an extended discussion of the federal constitutional limitations and related state laws, *see, e.g.*, Nancy E. Stroud & Susan L. Trevarthen, *Defensible Exactions after* Nollan v. California Coastal Commission *and* Dolan v. City of Tigard, 25 Stetson L. Rev. 719 (1996); Mark W. Cordes, *Legal Limits on Development Exactions: Responding to* Nollan *and* Dolan, 15 N. Ill. U. L. Rev. 513 (1995); Frank J. Wozniak, Annotation, *Validity, Construction, and Application of Road or Transportation Impact Fee Statutes or Ordinances*, 97 A.L.R.5th 123 (2002).

28. 483 U.S. 825, 107 S. Ct. 3141 (1987). In *Nollan*, the California Coastal Commission required the petitioner to grant a public easement as a condition to the issuance of its approval for petitioner's plan to rebuild a beachfront house. The Court rejected the condition as an unconstitutional taking of property, here an interest in the land, because it lacked a rational "nexus" between regulating beachfront construction to preserve public access to the beach and the petitioner's plans to rebuild a house.

29. 512 U.S. 374, 114 S. Ct. 2309 (1994). In *Dolan*, the Court expanded, or perhaps clarified, the *Nollan* nexus test to include a requirement that the taking bear a reasonable relationship to the burden caused by the development. The city of Tigard, Oregon, conditioned the approval of an expansion of petitioner's hardware store on her dedication of land needed by the city as a "greenway" and to complete a bike and pedestrian trail. The Court found a rational nexus between the city's interests and the taking; however, it found that the city did not establish a "rough proportionality" between the exaction and the impact of planned development. "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." 512 U.S. at 391, 114 S. Ct. at 2319.

30. *See, e.g.*, Vt. Stat. Ann. tit. 24 § 5203 (2001) ("A municipality may levy an impact fee on any new development within its borders provided that it has: . . . (2) developed a reasonable formula that will be used to assess a developer's impact fee. The formula shall reflect the level of service for the capital project to be funded and a means of assessing the impact associated with the development such as square footage or number of bedrooms." *Id.* at 5203(a).)

31. *See, e.g.*, Shelley Ross Saxer, *Planning Gain, Exactions, and Impact Fees: A Comparative Study of Planning Law in England, Wales, and the United States*, 32 Urb. Law. 21, 30 (2000) ("Admittedly, this process of trading benefits for permission to create adverse impacts [through impact fees and exactions] may be susceptible to public corruption through abuse of the process.").

32. *See, e.g.*, Wis. Stat. § 66.0617(1)(c). *Contra* Idaho Code § 67-8203(9) ("'Development impact fee' means a payment of *money* imposed as a condition of development approval to pay for a proportionate share of the cost of system improvements needed to serve development . . . .") (emphasis added).

33. *See* J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go from Here*, 59 Wash. & Lee L. Rev. 373, 407 (2002) (concluding that no practicable distinctions can be drawn between monetary exactions and dedications and that the *Nollan* and *Dolan* standards should apply to all exactions). Here the differences between the public policy arguments for taxes and impact fees gain more importance. It may be less convincing to argue for a taking when the alternative shifts the cost of infrastructure improvements to the public at large but retains the profits of the development for the owner or builder.

34. *Dolan*, 512 U.S. at 378, 114 S. Ct. at 2318 ("We also agreed that the permit condition would have been constitutional 'even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere.'") (internal citations to *Nollan* omitted).

35. *See generally* Rev. Rul. 2002-9, 2002-10 I.R.B. 614.

36. See Ezra Dyckman & Ronald A. Morris, *Impact Fees Strike: Are They Deductible? How Are They Allocated?*, N.Y.L.J. June 26, 2002, at 5 (discussing Revenue Ruling 2002-9's conclusion that impact fees may be capitalized under 263 and 263A of the Internal Revenue Code).

37. Tech. Adv. Mem. 200043016 (Oct. 27, 2000).

38. A developer who subdivides a parcel and resells it can, under both the old and new interpretations, recover impact fees and other expense at the sale. Under the old interpretation, a developer who holds the property would not be able to recover the impact fee expense. There is an interesting, albeit terse, discussion of the long-run economic effects of a temporary versus a permanent impact fee scheme in Althuler & Gomez-Ibanez, *supra* note 5 at 98–100. Althuler and Gomez-Ibanez cite economic studies suggesting that in markets with permanent impact fee schemes across a broad spectrum of available real estate, the cost of the impact fee will be shifted entirely to the lessees and purchasers of the developed property. Depending upon which public policy argument is selected to support an impact fee structure, this outcome could be undesirable, particularly in the development of low-income and rental property. Crudely stated, one justification for impact fees is to prevent the transfer of *infra*structure costs from the developer to the other residents of the community, who presumably will not profit directly from further development in the town. *Id.*

39. Both Tech. Adv. Mem. 200043016 and Rev. Rul., 2002-9 addressed impact fees in connection with the favorable basis given to qualified low-income building under section 42 of the Internal Revenue Code and its related regulation. *See* Leo Parmegiani, *Impact Fees*, Tax Advisor, Nov. 1, 2002, at 702 ("This [change by the IRS] will presumably increase the tax credits available for investors and may increase the attractiveness of certain projects.").

40. Rev. Rul. 2002-9, 2002-10 I.R.B. 614.

41. *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 427, 548 N.Y.S.2d 144, 145, 547 N.E.2d 346, 348 (1989).

42. *Id. But see Armentano*, *supra* note 4 (noting that purely local concerns can serve as the basis for impact fee legislation). Given the long line of precedent against implying the power to impose impact fees, it seems unlikely that a lower New York State court would be receptive to

an invitation to depart from these holdings.

43. *See Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 379, 547 N.Y.S.2d 627, 631, 546 N.E.2d 920, 923 (1989) ("We need not reach the controversial question propounded by the parties and—whether local 'impact fees' are permitted by statute, a question that has been the subject of considerable comment and litigation in other jurisdictions.").

44. Of course, like all constitutional protections, the *Nollan-Dolan* test certainly looms in the background of these cases, even if only tacitly.

45. *See* Michael G. Sterthous, Note and Comment, *Accommodating Growth And Development After Guilderland: Is The New York Legislature About To (Re)Act On Impact Fees?*, 8 Pace Envtl. L. Rev. 175, 177–78 (1990) (noting that other jurisdictions have judicially found an implied power to impose impact fees from the general power to enact zoning restrictions, but New York has opted for a more restrictive requirement of an explicit grant). Necessarily following from a general power is the capacity to overstep the constitutional proscriptions of the *Nollan-Dolan* test.

46. This distinction in the New York system may also explain why the leading cases on impact fees do not discuss federal law. If a municipality's power to impose an impact fee springs from a compartmentalized grant by the legislature, the challenge would likely have an "adequate and independent" state ground for the New York court decision, thereby insulating it from challenge at the Supreme Court. *See generally* Richard H. Fallon et al., Hart and Wechsler's Federal Courts and the Federal System 521–65 (4th ed. 1996) (setting forth the contours of the Supreme Court's appellate jurisdiction over cases containing claims with both federal and state substantive elements).

47. 74 N.Y.2d 372, 547 N.Y.S.2d 627, 546 N.E.2d 920 (1989).

48. *See* N.Y. Const. art. 9, § 1(f):

> No local government shall be prohibited by the legislature (1) from making a fair return on the value of the property used and useful in its operation of a gas, electric or water public utility service, over and above costs of operation and maintenance and necessary and proper reserves, in addition to an amount equivalent to taxes which such service, if privately owned, would pay to such local government, or (2) from using such profits for payment of refunds to consumers or for any other lawful purpose.

But see id. art. 9, § 1(g) ("A local government shall have power to apportion its cost of a governmental service or function upon any portion of its area, as *authorized by act of the legislature*.") (emphasis added).

49. *See* N.Y. Mun. Home Rule § 10:

> 1. In addition to powers granted in the constitution, the statute of local governments or in any other law,
>
> (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law relating to its property, affairs or government and,
>
> (ii) every local government, as provided in this chapter, shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law, relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government:
>
> a. A county, city, town or village:
>
> . . .
>
> (6) The acquisition, care, management and use of its highways, roads, streets, avenues and property . . .

50. *See generally* N.Y. Highway Law § 271.

51. *Albany Area Builders*, 74 N.Y.2d at 379. Perhaps because of the nature of the preemption challenge, the decision relied exclusively on the New York State constitutional, statutory, and common law and did not discuss *Nollan*.

52. *Id.* at 377.

53. For a case illustrating the possible difficulties resulting from the court's avoidance of this larger question, see, for example, *Home Builders Ass'n v. County of Onondaga*, 151 Misc. 2d 886, 573 N.Y.S.2d 863 (Sup. Ct., Onondaga Co. 1991) (quoting the Court's language in *Albany Area Builders* in a case where the municipality unsuccessfully proffered an implied-power argument—based in part on General Municipal Law § 451—to justify a sewer impact fee).

54. *See* discussion *supra* Part 2(a). *Contra* Olshaker, *supra* note 8.

55. 230 A.D.2d 913, 646 N.Y.S.2d 862 (2d Dep't 1996).

56. For the purposes of this subsection, the Second Department's discussion of a further condition for payment in lieu of parkland dedication under Town Law § 277 is omitted. For a discussion of the limits imposed on the "greenspace" authority, see discussion *supra* Part 3(c).

57. 28 N.Y.2d 396, 322 N.Y.S.2d 235, 271 N.E.2d 218 (1971).

58. *See Sepco Ventures*, 230 A.D.2d at 915 (stating "While the Planning Board may consider off-site impacts . . . and may condition approval on plan modifications . . ., such conditions may not include off-site improvements of the public roads") (internal citations omitted). The cases cited could find no statutory authority for the authority to condition approval on off-site improvements.

59. *Sepco Ventures* is important, if for no other reason then that it builds on the holding of *Person Kent* to include the conditioning of approval on the improvement of public roads. *See also Sanford v. Whearty*, 216 A.D.2d 399, 628 N.Y.S.2d 349 (2d Dep't 1995) (reversing the denial of site plan approval for a subdivision where the developer refused to pay for the relocation of a public road); *Valmont Homes, Inc. v. Town of Huntington*, 89 Misc. 2d 702, 392 N.Y.S.2d 806 (Sup. Ct., Suffolk Co. 1977) (finding that a town planning board could not condition approval of a subdivision plan on the construction by the developer of a sidewalk on a state road).

60. *See* discussion *supra* Part 2(a).

61. *See, e.g.*, N.Y. Public Authorities Law § 1048-j (authorizing the Buffalo Municipal Finance Authority to "establish, fix and revise, from time to time, fees, rates, rents or other charges" for the provision of water) ("Pub. Auths. Law").

62. *See Clifton Park*, 215 A.D.2d 924, 626 N.Y.S.2d 865 (3d Dep't 1995) ("*Clifton Park* I"); *Phillips v. Town of Clifton Park Water Authority*, 243 A.D.2d 911, 662 N.Y.S.2d 867 (3d Dep't 1997) ("*Clifton Park* II"); *Phillips v. Town of Clifton Park Water Authority*, 286 A.D.2d 834, 730 N.Y.S.2d 565 (3d Dep't 2001) ("*Clifton Park* III").

63. *Clifton Park* III, 286 A.D.2d at 834.

64. *Clifton Park* I, 215 A.D.2d at 924–25.

65. *Id.*

66. *Id.* at 925.

67. Pub. Auths. Law § 1120-d(20):

> The authority shall have the power:
>
> . . .
>
> To fix rates and collect charges for the use of the facilities of, or services rendered by, or any commodities furnished by the authority such as to provide rev-

> enues sufficient at all times to pay, as the same shall become due, the principal and interest on the bonds or other obligations of the authority together with the maintenance of proper reserves therefor, in addition to paying as the same shall become due the expense of operating and maintaining the properties of the authority together with proper maintenance reserves, capital reserves, repair reserves, tax stabilization reserves and other contingency reserves and all other obligations and indebtedness of the authority. . . .

(emphasis added).

68. *See generally Clifton Park* I, 215 A.D.2d 924 (remanding the case for reconsideration for failure to give the parties adequate notice that the court intended to treat respondent's motion to show cause to dismiss the petition, to deny the preliminary injunction and vacate the temporary restraining order as a motion for summary judgment); *Clifton Park* II, 243 A.D.2d 911, 662 N.Y.S.2d 867 (3d Dep't 1997) (remanding the case because the Supreme Court exceeded the order in *Clifton Park* I and examined the merits of the motion).

69. *Clifton Park* III, 286 A.D.2d at 835, 730 N.Y.S.2d at 566.

70. *Id.* at 835, 730 N.Y.S.2d at 567.

71. See *id.*at 835, note 1 (stating "Relatedly, even where a fee is properly imposed, the amount thereof must be based on reliable factual studies and statistics and must bear a reasonable correlation to the average, associated cost of the service provided.") (internal citations omitted).

72. *Accord Coconato v. Town of Esopus*, 152 A.D.2d 39, 547 N.Y.S.2d 953 (3d Dep't 1989), *leave to appeal denied*, 76 N.Y.2d 701, 558 N.Y.S.2d 891, 557 N.E.2d 1187 (invalidating a town law that imposed an initial hookup fee of $1,000 per dwelling and $1 per square foot of nonresidential space to connect to the town's water supply, based in part on *Guilderland's* preemption reasoning).

73. The author is of the opinion that, although it certainly seems unfair to force the newcomers to retroactively finance previous *infra*structure investments, as the court held in *Clifton Park*, it seems equally unfair to impose the entire cost of a future expansion on the subdivision or other development that pushes the town's water system over the top. Of course, the Water Authority has the option of spreading the cost of expansion throughout the entire system; however, if growth has become a local "issue," this seems unlikely. Although one could intuit a law and economics justification for shifting the burden to the newcomers, neither this approach nor the *Clifton Park* approach seems very palatable.

74. 151 Misc. 2d 886, 573 N.Y.S.2d 863 (Sup. Ct., Onondaga Co. 1991).

75. The *Home Builders Ass'n* court relied on *Coconato v. Town of Esopus*, and not *Clifton Park*.

76. *Home Builders Ass'n*, 151 Misc. 2d at 889.

77. The *Home Builders Ass'n* court's constitutional analysis (in almost its entirety) was as follows:

> [R]esolution 482-90 is unconstitutional as applied since it imposes a uniform fee on all property newly connecting to the sewer system of the district without regard to whether the development has necessitated an expansion of existing facilities, or whether the builders who have had such a fee assessed against them, or the new home owners will be primarily or proportionately benefited by any such expansion. Therefore, the impact fee constitutes a tax, violative of the Federal and State Constitutions.

Home Builders Ass'n, 151 Misc. 2d at 889. It is the author's opinion that under the *Nollan-Dolan* test, it is unlikely that a broadly applicable exaction that is collected and used by the same municipal organ, which is at least colorably acting within its authority, could fail to have a rational nexus or a rough proportionality.

78. Omitted from this discussion of the green-space cases is *Bayswater Realty & Capital Corp. v. Planning Bd. of Lewisboro*, 76 N.Y.2d 460, 560 N.Y.S.2d 623, 560 N.E.2d 1300 (1990). This subsection argues that the Court of Appeals narrowly interprets the statutory grants of power to impose impact fees. In *Bayswater*, the Court affirms a local planning board's exercise of power "borrowed" from another statutory section to assess an impact fee. Because Town Law section 281 specifically authorizes such "borrowing" an extended discussion of this case would unnecessarily cloud the general point.

79. 74 N.Y.2d 423, 548 N.Y.S.2d 144, 547 N.E.2d 346 (1989).

80. *See* Town Law § 277(c) ("[T]he planning board may require a sum of money in lieu [of a dedication of land], in an amount to be established by the town board. . . . Any monies required by the planning board in lieu of land for park, playground or other recreational purposes, pursuant to the provisions of this section, shall be deposited into a trust fund to be used by the town exclusively for park, playground or other recreational purposes, including the acquisition of property.").

81. *Kamhi*, 74 N.Y.2d 423.

82. Under Municipal Home Rule Law § 10(1)(ii)(d)(3), a town may supercede an otherwise valid state law in certain limited areas, including town property. The Court of Appeals hinted that the town might argue that the parkland and recreation are within its supersession authority. Judge Simons, in concurrence, rejected the Court's view, finding that such an action is clearly inconsistent with state law, which would preclude the exercise of supersession authority.

83. 74 N.Y.2d 423.

84. 57 N.Y.2d 206, 455 N.Y.S.2d 558, 441 N.E.2d 1076 (1982).

85. *Weingarten v. Town of Lewisboro*, 144 Misc. 2d 849, 542 N.Y.S.2d 1012 (Sup. Ct., Westchester Co. 1989).

86. 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966).

Andrew Fiorella received his J.D. from Cornell Law School in 2003. In the fall, he will join the Cleveland, Ohio, office of Jones Day as an associate.

The State of Marketable Title

By S.H. Spencer Compton

What is the state of marketable title today? It is like the state of Kashmir. In India. Or is it in Pakistan? In any discussion, various factions claim competing interests. Both "marketable title" and "unmarketable title" are slippery academic concepts generally without practical day-to-day application. It is likely that the issue will arise only when a buyer is trying to back out of a contract of sale and attorneys must evaluate the claim. Case law provides an often contradictory and certainly convoluted patchwork quilt of cases, which go off in many directions. Where to begin?

> *"Both 'marketable title' and 'unmarketable title' are slippery academic concepts generally without practical day-to-day application."*

Definition

The ALTA owner's and lender's policies provide (on the first page of the policy) coverage (subject to the policy exclusions and exceptions and conditions and stipulations) "against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of: . . . 3. Unmarketability of the title."

The ALTA 1992 form policy defines "unmarketability of the title" as:

> An alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

A circular definition at best, but one that establishes the conditions under which a marketability issue will be considered covered under the policy and, therefore, ripe as a claim of loss or defense. A claim is ripe if title is encumbered by an "alleged or apparent" defect. Note that there is no requirement to prove that the defect is real. Further, a claim is covered only if it is "not excluded or excepted from coverage." No matter how severe an effect the defect has on marketability of title, there is no coverage for any defect disclosed by or excluded from the policy.

That said, judicial interpretation—state law—determines what does and does not constitute unmarketable title such that a purchaser could be released from its obligation to buy.

State Law

The Marketability Section of *Warren's Weed New York Real Property*[1] contains a daunting list of cases with fact patterns that may or may not match the circumstances with which the client is faced. This article, and, for that matter, life, are both too short to discuss them with any breadth. Although the more subtle aspects of marketability are sometimes contradictory, a number of similar elements frequently appear and are useful as a sort of baseline. Here are a few examples:

> Every contract implies an obligation to convey a marketable title.[2]

> and:

> (Marketable title is) title that is free from encumbrances and free from reasonable doubt.[3]

> and:

> A marketable title is free from reasonable doubt, but not from every doubt.[4]

> *"[J]udicial interpretation—state law—determines what does and does not constitute unmarketable title such that a purchaser could be released from its obligation to buy."*

What Constitutes Unmarketability of Title?

There need not be an "adverse claimant" in order to raise an unmarketability claim under the title policy. The mere possibility of a "cloud" on title, sufficient to justify a potential buyer or lender in declining to buy or lend on the property, is enough to trigger coverage under the policy. However, the ALTA title-policy coverage for unmarketability of the title applies only to those unmarketability claims resulting from title defects. Unmarketability problems relating to the use of the property are not ordinarily covered by the title policy. For example, off-record environmental contamination is not a risk covered by the insuring provisions of the standard title insurance policy. Such contamination is not a "defect, lien or encumbrance," and is not a matter affecting marketability of title.

Unmarketability of title is not necessarily the same as reduction in market value. The insured may suffer a loss, when selling or mortgaging a property as a result of a title defect that was not discovered or disclosed in the original title search, that cannot be adequately measured by (as set forth in Section 7(a) of the Conditions and Stipulations of the title policy for calculation of loss) "the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy." For example, if the buyer of a property refuses to purchase it because the seller is unable to deliver title in the condition specified in the purchase agreement, the loss to the insured triggered by the inability of the seller to convey the property in the condition agreed to may be different than a loss otherwise incurred by the insured after the closing.

All policy exclusions, exceptions and conditions apply to limit the policy's coverage for unmarketability. Accordingly, even when a policy covers loss resulting from unmarketability of the title, the policy's exclusions and exceptions may preclude a right to indemnification for certain title defects that exist and, in fact, make the title unmarketable.

Although, for the most part, unmarketability of title can best be defined by a list of fact-specific state law holdings, there are certain obvious defects which most will agree render title unmarketable.

A forgery in the chain, for example, would make the title unmarketable because the last owner of record is not the true owner if a predecessor's signature was forged on a deed of conveyance.

Similarly, where there is an unexplained break in the chain, there is a question as to who has the better title: the owner of record prior to the break or the current record owner.

Titles have been rendered unmarketable due to a recital or other evidence, set forth in a recorded deed in the chain of title, which suggests or may be taken to impute notice of the existence of some outstanding interest under an unrecorded instrument. A deed, for instance, may describe a parcel of land but except from it, without specification, premises which have been previously conveyed. Fortunately, several statutes have been enacted—New York Real Property Law § 291e (RPL), for example—which makes such an indefinite reference void as against *bona fide* purchasers without notice and, more importantly, ineffective to give notice. Similarly, an improper or incorrect acknowledgment on a deed makes title unmarketable, but if the deed has been of record for ten or more years, by statute in New York, the title defect is a nullity.[5]

A mortgage lien, not expressly provided for in the contract of sale, renders title unmarketable. That the purchaser had knowledge of the mortgage is immaterial. The purchaser may assume that the seller will convey title free of the mortgage. Where the contract of sale expressly provides that the purchaser will take title subject to a specified mortgage, the purchaser is then charged with knowledge of its terms and cannot object to the existence of the mortgage so long as its terms conform to those set forth in the contract. A mortgage open of record does not render title unmarketable if the seller has a release document.

An unexpired lease in existence on the date of closing title makes title unmarketable. It is critical, therefore, that any provision in the contract making the sale subject to tenancies be carefully articulated because its omission or vagueness, in the face of tenancy, offers the purchaser an easy way to walk away from the contract with its purchase deposit intact.

Brokers

A broker is entitled to a commission from the seller even though the transaction fails to close due to unmarketable title.

Lender's Policy

In a loan policy, the "unmarketability of title" insuring provision covers the lender against title-related claims that actually disable or prevent the lender from selling its mortgage to another investor, or that would require the lender to repurchase a mortgage. Again, this language does not cover circumstances resulting from physical condition of the land, such as contamination with hazardous waste or damage to improvements.

Encumbrances

An encumbrance is a burden or charge on the property or an outstanding right in a third party, which interferes with the use or transfer of the property or subjects the property to an obligation. As a general matter, any encumbrance renders title unmarketable. Furthermore, where a property is subject to an encumbrance, title is unmarketable, despite the improbability of any adverse effect on the title or use of the property. A case in point: there was a property which was served by electric wires in the abutting street and was subject to an easement permitting the maintenance of poles and wires across the property. The court deemed the unlikelihood of any use of the easement immaterial. The existence of the easement rendered title to the property unmarketable.

Encroachments, both on and off the property, can render title unmarketable. That said, encroachments by roof cornices, trim, fire escapes, cellar doors and the like do not ordinarily discourage a willing purchaser even though title has been rendered technically unmarketable.

A jurisdictional defect in the court action from which the title is derived can render a title unmarketable. An example of this is where a foreclosing mortgagee fails to give the required notice to the defaulting mortgagor/fee owner. Similarly, a conveyance while a bankruptcy stay is still in effect is a violation of federal law, which will make title unmarketable.[6]

An easement in front of a property for an elevated railway renders title unmarketable.[7]

Restrictive covenants affecting intended use, i.e., no slaughterhouse, distillery, tallow chandlery, smith shop, etc., render title unmarketable.[8]

Restrictive covenants affecting lot area, i.e., limitation on the portion of the lot on which construction may take place, render title unmarketable.[9]

Threat of litigation or substantial expense, i.e., potential demand for the removal of encroachments, renders title unmarketable.[10]

Nonetheless, even though a covenant might render a title unmarketable, with affirmative title insurance, a purchaser will likely accept such a title. This is the distinction between marketable and insurable title, discussed below.

Surveys

Unresolved conflict between two surveys renders title unmarketable.[11] Here, two competent licensed surveyors came up with different results originating from different locations of a 1907 fence location. This case also stands for the proposition that even if a *de minimis* amount of the land to be conveyed is in question—one half of one per cent of the total area was questionable in this case—title to the entire parcel may be unmarketable.

Where a survey defect is not of record, but could have been identified if a survey had been made and submitted to the title insurer, the title insurer may be liable to the insured for a claim of unmarketability of title based on the undiscovered or undisclosed survey defect. Since the policy does not limit coverage to record matters, the title insurer must either take a general survey exception, or examine the survey and take specific exception to the items shown on the survey. If the title insurer takes specific exceptions, but misses a matter that should have been excepted and does not show it as a specific exception (such as an encroachment), the title insurer could incur liability under the "unmarketability of title" coverage provision if the buyer repudiates the contract because it has discovered the defect and refuses to close the transaction.

"[A]n insurer's willingness to insure is frequently used as a yardstick—a litmus test—for marketability."

Drafting

When drafting the provision in the contract of sale describing the condition of title to be delivered at closing, the seller's counsel's goal is to be as inclusive as possible. The following language contemplates a broad universe of facts: "Subject to any state of facts shown on the [annexed] survey prepared by ________________, dated _______ [and last redated ______] and to any additional state of facts an accurate survey or personal inspection of the property would disclose." In response, the purchaser's counsel, seeking to protect its client by narrowing the foregoing, might wish to add: ", provided such additional facts do not render the condition of title to be in violation of this contract." The reference is to the earlier contract provision where the seller has covenanted to deliver either a marketable or an insurable title, as the case may be.

Marketable Versus Insurable Title

Marketable title and insurable title are not the same. Title insurers will ignore certain defects in title for a variety of reasons, which is what title underwriting is all about: risk evaluation. It follows, then, that the test of marketability is *not* that a reputable title insurer has issued a policy free of the defect in question. Title is also not rendered marketable by the insurer's willingness to issue a new policy to a purchaser from the insured. Nonetheless, an insurer's willingness to insure is frequently used as a yardstick—a litmus test—for marketability.

An insurable title is "one which a reasonably prudent title insurance company would be willing to insure, free from exceptions (other than those normally excluded by the policy form) and at normal title insurance rates."[12] In short, an insurable title is one for which a title underwriter (or its agent) decides to issue a title insurance policy. It's that simple. Whereas, ideally, a marketable title is one free of liens, encumbrances and defects, an insurable title is not necessarily a perfect one.

A title insurer, for any number of underwriting reasons, may elect to "insure over" or "omit" a defect which, under a pure marketability of title analysis, would render title unmarketable. A typical example of this is where a property is encumbered by the lien of an open mortgage, which has not been released or satisfied of record. Under the classical marketability analysis, such a title would be unmarketable, but, so long as the title insurer has received satisfactory evidence that the mortgage was paid in full, the insurer will insure over the mortgage and omit the title defect.

A title insurer may not always be willing, nor is it required, to insure a title even where that title is marketable. In *Title Guarantee & Trust Co. v. Rudershausen*,[13] a title company refused to insure a title that had been determined by court order to be marketable.

Nor does an insurer's refusal to insure render title unmarketable.[14] A title insurance company cannot be compelled to issue a title insurance policy. It is free to conduct its business in the manner it chooses.

Clearly, an insurable title is of a lesser quality than a marketable title, but in the real world of commercial real estate transactions, that distinction is misleading. Few conveyance or loan transactions close unless and until the title insurance company is prepared to issue its policy. Having an insurable title is far more important in the world of commerce than having a technically marketable title. As a practical matter, an insurable title is often a lot easier to come by than a marketable one.

"Clearly, an insurable title is of a lesser quality than a marketable title, but in the real world of commercial real estate transactions, that distinction is misleading."

Endnotes

1. Warren's Weed New York Real Property, "Marketability" (4th ed. 2003).
2. *Laba v. Carey*, 29 N.Y.2d 302, 327 N.Y.S.2d 613 (1971). *See also Voorheesville Rod & Gun Club, Inc. v. E.W. Tompkins Co.*, 82 N.Y.2d 564, 606 N.Y.S.2d 132 (1993).
3. *Crocker Point Ass'n v. Gouraud*, 224 N.Y. 343 (1918).
4. *Voorheesville Rod & Gun Club*, *supra* note 2.
5. Real Property Law § 306.
6. 11 U.S.C. § 362.
7. *Monogram Dev. Co. v. Naben Constr. Co.*, 253 N.Y. 320 (1930).
8. *Mauser v. Friesco Realty Corp.*, 230 A.D. 790, 245 N.Y.S.2d 42 (2d Dep't 1930).
9. *Friedman v. Handelman*, 300 N.Y. 188 (1949).
10. *Dukas v. Tolmach*, 2 A.D.2d 57, 153 N.Y.S.2d 392 (1st Dep't 1956).
11. *Wates v. Crandall*, 144 N.Y.S.2d 211 (Sup. Ct., Queens Co. 1955).
12. James M. Pedowitz, Real Estate Titles, "Marketable Titles" 21–24 (2d ed. 1998).
13. 164 N.Y.S. 15 (Sup. Ct. App. Term 1917).
14. *Wilson v. Pacific Coast Title Ins. Co.*, 235 P.2d 431 (Cal. App. 1951).

S.H. Spencer Compton is a vice president and special counsel at First American Title Insurance Company of New York in New York City. Prior to joining First American Title Insurance Company of New York, he was a practicing real estate attorney with an emphasis on leasing and financing transactions for 11 years in New York City.

What Is the New TOEPP Title Policy?

By James M. Pedowitz

In January 2001, the New York State Insurance Department approved a new title policy form called the TIRSA Owner's Extended Protection Policy (TOEPP), available only for fee insurance of a property improved by a 1-4 family dwelling, and owned by a natural person (including a living trust established by a natural person for estate planning purposes). The premium is set at 120% of the applicable owner's rate under the TIRSA rate manual.

"The TOEPP policy is not an ALTA policy form and has a totally different structure."

A copy of the TOEPP policy form is annexed as Exhibit "A" (beginning on page 64). The TOEPP policy is not an ALTA policy form and has a totally different structure. While an ALTA Owner's Policy contains four broad insuring provisions that are quite all-inclusive, limited by exclusions from coverage, conditions and stipulations, and Schedule B typewritten exceptions, the TOEPP title policy contains 28 specific coverages, several of which are subject to a deductible amount ranging from $1,500 to $4,000 and a specified maximum limit of liability under four of the specified covered risks, ranging from $5,000 to $25,000, irrespective of the gross amount of the policy. It also contains exclusions, conditions and Schedule B typewritten exceptions.

The main differences in coverage from an ALTA Owner's Policy are that, in addition to the specified numbered coverages, some of the coverages include some limited protection as to loss from zoning and land use violations, plus some specified "post-policy date" losses. It also contains a provision for an automatic increase in the gross amount of the policy by 10% for each of its first five years.

Many of the enumerated coverage risks would also be covered by the insuring provisions of the ALTA Owner's Policy. Some of the TOEPP covered risks are not included, either partially or totally, within an ALTA Owner's Policy coverage:

Covered Risks 1–6 inclusive would be covered by the ALTA Owner's Policy.

Covered Risk 7 expands the coverage of Covered Risks 1–6 inclusive even if they arise *after* the policy date (but subject to the Exclusions, which include language similar to some of the ALTA Exclusions from coverage). As a result, it is somewhat difficult to imagine how some of these "post-policy" claims could claim any validity without some involvement by the insured, where that involvement would not also come within one of the Exclusions from coverage as to matters "created, allowed or agreed to" by the insured (Exclusion 4e), and which would also have been excluded under Exclusion 3(a) of the ALTA Owner's Policy.

This coverage seems to be beyond the definition of title insurance under New York Insurance Law. The case of *Van Arsdale v. Metropolitan Title Guaranty Co.*[1] has held that title insurance is designed to protect against past events, not possible future encumbrances.

Covered Risks 8–10 would also be covered by an ALTA Owner's Policy.

Covered Risk 11 enlarges the "lack of access" coverage in the ALTA Owner's Policy to specifically include "actual vehicular and pedestrian access, other than vehicular access to a condominium unit, based upon a legal right." This is an expansion of ALTA policy coverage.

Covered Risks 12 and 13 furnish a form of affirmative insurance against forced correction, or loss of title because of a violation of some covenant, condition or restriction; whether or not the violation is disclosed in the policy. This is also an expansion of ALTA policy coverage.

Covered Risks 14, 15, 16 and 17 are new. Number 14 deals with a violation of an existing subdivision law or regulation, (but subject to a deductible of $2,000, and a maximum liability of $10,000). Since the loss could involve an injunction mandating the removal of all improvements, including the residence, the question is, how much of a help is the $10,000 maximum coverage?

"Some of the TOEPP covered risks are not included, either partially or totally, within an ALTA Owner's Policy coverage."

Covered Risk 15 (deductible $4,000 and maximum loss of $25,000) deals with the cost of enforced removal because of lack of a building permit.

Covered Risk 16 (deductible $4,000, maximum liability $25,000) deals with the cost of the forced removal of structures because they violate an existing zoning law or regulation on the policy date.

Zoning coverages are not included in the ALTA policy, although in those states where a zoning endorsement is available, some of this coverage could be included.

Desirable as these coverages may be, the severely limited amount of the maximum coverage raises a question as to the desirability of the coverage, as well as the fact that the only loss covered is cost of removal, not the value of what was removed.

It can also be a source of wonderment as to how these coverages were ever approved for incorporation into a title insurance policy in New York. Compliance with zoning laws and ordinances have been held *not* to affect the marketability of title.[2]

> *"It can also be a source of wonderment as to how . . . [zoning] coverages were ever approved for incorporation into a title insurance policy in New York."*

Our courts have effectively stated that zoning, etc., are not encumbrances on "title." Since title insurance by statute in New York[3] can only insure "loss by reason of defective titles and encumbrances," and searches, etc., "affecting the title to such property," it is questionable if this insurance complies with the New York Insurance Law.

As with Covered Risk 7 this insurance seems to go beyond the definition of title insurance. This policy clearly furnishes a form of insurance in addition to title insurance as defined under Insurance Law § 6403.

There is no question that insurance that would include compliance with zoning laws and ordinances would be a valuable addition to a title insurance policy. However, with the number and variety of zoning laws and ordinances in the separate municipalities across the state, it is highly unlikely that any title insurer could harness the expertise necessary to apply each parcel being insured to the applicable law or ordinance. As a practical matter, the requirement for the production of a certificate of occupancy covering all improvements now on the property is normally an effective, though an imperfect, substitute.

Covered Risk 17 is another aspect of insurance against the enforcement of a zoning law or ordinance that would prevent use of the property as a single family residence because it would violate applicable zoning on the date of the policy.

Covered Risk 18 deals with the removal of all or part of the insured's structure(s) that encroach on a neighbor's land. It does not include encroachment onto a street or highway. There is a deductible of $1,500 and a maximum loss of $5,000 under this coverage when the encroachment is a boundary wall or fence.

Covered Risk 19 overlaps the insurance against unmarketability in Covered Risk 25, when the unmarketability is based upon an encroachment by a neighbor on the insured property. Unmarketability is also covered by the ALTA Owner's Policy.

Covered Risk 20 covers removal of an existing structure that encroaches onto an easement area or building set-back line. This coverage usually requires a current survey. If the survey does not disclose the encroachment, this could also be a form of insurance that covers the accuracy of the survey.

Covered Risk 21 covers damages to structures, other than walls or fences by reason of "a right to use the surface of the Land for the extraction or development of minerals, water or any other substance"; even if these rights are excepted or reserved from the description of the land, or in Schedule B of the policy. This is another coverage that seems to go beyond title insurance.

Covered Risk 22 gives affirmative insurance against any effort to enforce a discriminatory covenant, condition or restriction based upon "race, color, religion, sex, handicap, familial status or national origin." The more onerous of the foregoing are already prohibited by law.

> *"This policy clearly furnishes a form of insurance in addition to title insurance as defined under Insurance Law § 6403."*

Covered Risk 23 covers taxes assessed for some period before the policy date because of construction, change of use or of ownership. The ALTA Owner's Policy coverage would include this, but only if it was a lien on the date of the policy.

Covered Risk 24 covers any future encroachment by a neighbor's structures, other than boundary walls or fences. Although this appears to be a form of post-policy protection, much of it would be covered by the ALTA Owner's Policy, if the neighbor claimed some "right" to encroach on the insured property that could be traced back to or before the policy date.

Covered Risk 25 is insurance against unmarketability of the title, which is also one of the ALTA Owner's Policy coverages.

Covered Risk 26 protects against the invalidity of the insured title because some document upon which title is based "was not properly signed, sealed, acknowledged, delivered or recorded." The coverage in the ALTA Owner's Policy is much broader when it insures against loss because of "any defect in . . . the title."

Covered Risk 27 insures the correctness of the address of the property shown in Schedule A. If the address is that of some other property, and the insured can show a loss, the policy covers it.

Covered Risk 28 (the last number listed) insures against actual loss if the survey referred to in Schedule B of the policy incorrectly shows the location of the land according to public records. Although not covered by the ALTA Owner's Policy, it would be covered if the policy also included a TIRSA "Land Same as Survey" endorsement.

A purchaser of the new TOEPP policy must first answer the following questions:

1. Do the 28 enumerated risks include *all* risks that could arise under the four ALTA Owner's Policy Coverages?

   Answer—Questionable, otherwise all four ALTA coverages would have been included.

2. Are the additional coverages that are not within the ALTA Owner's Policy coverage worth the cost of the additional premium?

   Answer—Questionable, especially since several have both a deductible and a maximum limit of coverage.

3. Are those coverages that appear to be *ultra vires* under Insurance Law § 6403 enforceable against the title insurer?

   Answer—Since the form was approved and authorized for issuance by the Superintendent of Insurance, and a premium was paid, the company will probably have to pay.

"In its present form the new TOEPP policy remains a big question mark."

4. Is the TOEPP policy worth buying?

   Answer—It is too soon to judge. While many of the additional coverages are worthwhile, there is a genuine concern that the listing of specific covered risks could exclude certain losses that would have been covered by the ALTA Owner's Policy. It might have been simpler and more acceptable if the additional risks would have been included in an optional endorsement to the ALTA Owner's Policy for the same additional cost, and which would have eliminated the concerns about diminution of the basic title insurance coverages.

In its present form the new TOEPP policy remains a big question mark.

Endnotes

1. 103 Misc. 2d 104, 425 N.Y.S.2d 482 (Sup. Ct., Nassau Co. 1980).
2. *See Voorheesville Rod & Gun Club v. E.W. Tompkins Co.*, 82 N.Y.2d 564, 606 N.Y.S.2d 132 (1993); *Chasanoff v. Silberstein*, 6 A.D.2d 872, 177 N.Y.S.2d 620 (2d Dep't 1958), *aff'd*, 6 N.Y.S.2d 807, 188 N.Y.2d 194 (1959).
3. Insurance Law § 1113(a)(18).

James M. Pedowitz is counsel to Berkman, Henoch, Peterson & Peddy, P.C., in Garden City, New York. He has written and lectured extensively on real estate, title insurance, mortgage foreclosure and various other real property subjects.

Exhibit A

Policy of Title Insurance

Issued By Blank Title Insurance Company
TIRSA Owner's Extended Protection Policy

FOR A ONE-TO-FOUR FAMILY RESIDENCE

OWNER'S COVERAGE STATEMENT

This Policy insures You against actual loss, including any costs, attorney's fees and expenses provided under this Policy, resulting from the Covered Risks set forth below, if the Land is an improved residential lot on which there is located a one-to-four family residence and each insured named in Schedule A is a Natural Person.

This Policy is not complete without Schedules A and B.

Your insurance is effective on the Policy Date. This Policy covers Your actual loss from any risk described under Covered Risks if the event creating the risk exists on the Policy Date or, to the extent expressly stated, after the Policy Date.
Your insurance is limited by all of the following:

- The Policy Amount shown in Schedule A
- For Covered Risk 14, 15, 16 and 18, Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A
- Exceptions in Schedule B
- Exclusions on page (TO BE DETERMINED)
- Conditions on page (TO BE DETERMINED).

COVERED RISKS

The Covered Risks are:

1. Someone else owns an interest in Your Title.

2. Someone else has rights affecting Your Title arising out of leases, contracts, or options.

3. Someone else claims to have rights affecting Your Title arising out of forgery or impersonation.

4. Someone else has an easement on the Land.

5. Someone else has a right to limit Your use of the Land.

6. Your Title is defective.

7. Any of Covered Risks 1 through 6 occurring after the Policy Date.

8. Someone else has a lien on Your Title, including a:
   a. Mortgage;
   b. judgment, state or federal tax lien, or special assessment;
   c. charge by a homeowner's or condominium association; or
   d. lien, occurring before or after the Policy Date, for labor and material furnished before the Policy Date.

9. Someone else has an encumbrance on Your Title.

10. Someone else claims to have rights affecting Your Title arising out of fraud, duress, incompetency or incapacity.

11. You do not have both actual vehicular and pedestrian access to and from the Land, other than vehicular access to a condominium unit, based upon a legal right.

12. You are forced to correct or remove a violation existing at Policy Date of any covenant, condition or restriction affecting the Land, even if the covenant, condition or restriction is excepted in Schedule B, provided that such violation of the covenant, condition or restriction is not excepted in Schedule B.

13. Your Title is lost or taken because of a violation of any covenant, condition or restriction, which occurred before You acquired Your Title, even if the covenant, condition or restriction is excepted in Schedule B, provided that such violation of the covenant, condition or restriction is not excepted in Schedule B.

14. Because of a violation of a subdivision law or regulation existing at Policy Date affecting the Land:
   a. You are unable to obtain a building permit;
   b. You are forced to correct or remove the violation; or

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c. someone else has a legal right to, and does, refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it.

The amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.

15. The cost of the forced removal of Your structures, or any part of them, other than boundary walls or fences, as existing at Policy Date, because any portion was built without obtaining a building permit from the proper government office. The amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.

16. The cost of the forced removal of Your structures, or any part of them, other than boundary walls or fences, as existing at Policy Date, because they violate an existing zoning law or zoning regulation. The amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.

17. You cannot use the Land because use as a single-family residence violates a zoning law or zoning regulation existing at Policy Date.

18. You are forced to remove Your structures, or any part of them, as existing at Policy Date, because they encroach onto Your neighbor's land. If the encroaching structures are boundary walls or fences, the amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.

19. Someone else has a legal right to, and does, refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it because Your neighbor's structures, or any part of them, as existing at Policy Date, encroach onto the Land.

20. You are forced to remove Your existing structures because they encroach onto an easement or over a building set-back line, even if the easement or building set-back line is excepted in Schedule B, provided that such encroachment is not excepted in Schedule B.

21. Your existing structures (or a replacement or modification made to them after the Policy Date), or any part of them, other than boundary walls or fences, are damaged because of the future exercise of a right to use the surface of the Land for the extraction or development of minerals, water or any other substance, even if those rights are excepted or reserved from the description of the Land or excepted in Schedule B.

22. Someone else tries to enforce a discriminatory covenant, condition or restriction that they claim affects Your Title which is based upon race, color, religion, sex, handicap, familial status, or national origin.

23. A taxing authority assesses supplemental real estate taxes not previously assessed against the Land for any period before the Policy Date because of construction or a change of ownership or use that occurred before the Policy Date.

24. Your neighbor builds any structures after the Policy Date, other than boundary walls or fences, which encroach onto the Land.

25. Your Title is unmarketable, which allows someone else to refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it.

26. A document upon which Your Title is based is invalid because it was not properly signed, sealed, acknowledged, delivered or recorded.

27. The residence with the address shown in Schedule A is not located on the Land at the Policy Date.

28. The survey map, if any, referred to in Schedule B of this Policy does not show the correct location of the Land according to the Public Records.

EXCLUSIONS

In addition to the Exceptions in Schedule B, You are not insured against loss, costs, attorney's fees, and expenses resulting from:

1. Governmental police power, and the existence or violation of any law or government regulation. This includes ordinances, laws and regulations concerning:

   a. building
   b. zoning
   c. land use
   d. improvements on the Land
   e. land subdivision
   f. environmental protection

This Exclusion does not apply to violations or the enforcement of these matters if notice of the violation or enforcement appears in the Public Records at the Policy Date.
This Exclusion does not limit the coverage described in Covered Risk 14, 15, 16, 17 or 23.

2. The failure of Your existing structures, or any part of them, to be constructed in accordance with applicable building codes. This Exclusion does not apply to violations of building codes if notice of the violation appears in the Public Records at the Policy Date.

3. The right to take the Land by condemning it, unless:
   a. a notice of exercising the right appears in the Public Records at the Policy Date
   b. the taking happened before the Policy Date and is binding on You if You bought the Land without Knowing of the taking.

4. Risks:
   a. that are created, allowed, or agreed to by You, whether or not they appear in the Public Records;
   b. that are Known to You at the Policy Date, but not to Us, unless they appear in the Public Records at the Policy Date;
   c. that result in no loss to You; or
   d. that first occur after the Policy Date - this does not limit the coverage described in Covered Risk 7, 8.d, 21, 22, 23 or 24.

5. Failure to pay value for Your Title.

6. Lack of a right:
   a. to any Land outside the area specifically described and referred to in paragraph 3 of Schedule A; and
   b. in streets, alleys, or waterways that touch the Land.

This Exclusion does not limit the coverage described in Covered Risk 11 or 18.

7. Any claim which arises out of the transaction vesting in You Title by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights law, that is based upon:
   a. the transaction creating Your Title being deemed a fraudulent conveyance or a fraudulent transfer; or
   b. the transaction creating Your Title being deemed a preferential transfer except where the preferential transfer results from the failure:
      i. to timely record the deed to You; or
      ii. of the recording of the deed to You to be notice to a purchaser for value or a judgment or lien creditor.

CONDITIONS

1. Definitions:

Easement - the right of someone else to use the Land for a special purpose.

Known - things about which You have actual knowledge. The words "Know" and "Knowing" have the same meaning as Known.

Land - the land or condominium unit, and its interest in the common elements, described in paragraph 3 of Schedule A and any improvements on the land which are real property.

Mortgage - a mortgage, deed of trust, trust deed or other security instrument.

Natural Person - a human being, not a commercial or legal organization or entity. Natural Person includes a trustee of a Trust even if the trustee is not a human being.

Policy Date - the date shown in Schedule A. If the recording date of the instruments creating the insured interest is later than the Policy Date, this policy shall also cover intervening liens or encumbrances, except real estate taxes, assessments, water charges and sewer rents.

Public Records - records that give constructive notice of matters affecting Your Title, according to New York State law. With respect to Section 1.f. of the Exclusions, "public records" shall also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the Land is located.

Title - the ownership of the interest in the Land, as shown in Schedule A.

Trust - a living trust established by a human being for estate planning.

We/Our/Us - Blank Title Insurance Company.

You/Your - the insured named in Schedule A and also those identified in paragraph 2.b. of these Conditions

2. Continuation of Coverage:

a. This Policy protects You as long as You own Your Title or own a mortgage from anyone who buys Your Land or are liable for any title warranties You make. You cannot assign this Policy to anyone else.

b. This Policy also insures:
   i. anyone who inherits Your Title because of Your death;
   ii. Your spouse who receives Your Title because of dissolution of Your marriage;
   iii. the trustee or successor trustee of a Trust to whom You transfer Your Title after the Policy Date; or
   iv. the beneficiaries of Your Trust upon Your death.

c. We may assert against the insureds identified in paragraph 2.b. any rights and defenses that We have against any previous insured under this Policy.

3. How To Make A Claim:

a. Prompt Notice Of Your Claim
   i. As soon as You Know, or could have known, of anything that might be covered by this Policy, You must notify Us promptly in writing.
   ii. Send your notice to Blank Title Insurance Company, 123 Any Street, Anytown, NY 12345, Attention: Claims Department. Please include the Title number and the Policy number shown in Schedule A, and the county where the Land is located. Please enclose a copy of Your policy if available.
   iii. if You do not give Us prompt notice, your coverage will be reduced or ended, but only to the extent Your failure affects Our ability to resolve the claim or defend you.

b. Proof Of Your Loss
   i. We may require You to give Us a written statement signed by You describing Your loss which includes:
      (a) the basis of Your claim;
      (b) the Covered Risks which resulted in Your loss;
      (c) the dollar amount of Your loss; and
      (d) the method You used to compute the amount of Your loss.

ii. We may require You to make available to Us records, checks, letters, contracts, insurance policies and other papers which relate to Your claim. We may make copies of these papers.
iii. We may require You to answer questions about Your claim under oath.
iv. If You fail or refuse to give Us a statement of loss, answer Our questions under oath, or make available to Us the papers We request, Your coverage will be reduced or ended, but only to the extent Your failure or refusal affects Our ability to resolve the claim or defend You.

4. Our Choices When We Learn Of A Claim

a. After We receive Your notice, or otherwise learn, of a claim that is covered by this Policy, Our choices include one or more of the following:
   i. Pay the claim.
   ii. Negotiate a settlement.
   iii. Bring or defend a legal action related to the claim.
   iv. Pay You the amount required by this Policy.
   v. End the coverage of this Policy for the claim by paying You Your actual loss resulting from the Covered Risk, and those costs, attorney's fees and expenses incurred up to that time which We are obligated to pay.
   vi. End the coverage described in Covered Risk 14, 15, 16 or 18 by paying You the amount of Your insurance then in force for the particular Covered Risk, and those costs, attorney's fees and expenses incurred up to that time which We are obligated to pay.
   vii. End all coverage of this Policy by paying You the Policy Amount then in force and all those costs, attorney's fees and expenses incurred up to that time which We are obligated to pay.
   viii.Take other appropriate action.
b. When We choose the options in paragraphs 4.a. (v), (vi) or (vii), all Our obligations for the claim end, including Our obligation to defend, or continue to defend, any legal action.
c. Even if We do not think that the Policy covers the claim, We may choose one or more of the options above. By doing so, We do not give up any rights.

5. Handling A Claim Or Legal Action

a. You must cooperate with Us in handling any claim or legal action and give Us all relevant information.
b. If You fail or refuse to cooperate with Us, Your coverage will be reduced or ended, but only to the extent Your failure or refusal affects Our ability to resolve the claim or defend You.
c. We are required to repay You only for those settlement costs, attorney's fees and expenses that We approve in advance.
d. We have the right to choose the attorney when We bring or defend a legal action on Your behalf. We can appeal any decision to the highest level. We do not have to pay Your claim until the legal action is finally decided.
e. Whether or not We agree there is coverage, We can bring or defend a legal action, or take other appropriate action under this Policy. By doing so, We do not give up any rights.

6. Limitation Of Our Liability

a. After subtracting Your Deductible Amount if it applies, We will pay no more than the least of:
   i. Your actual loss,
   ii. Our Maximum Dollar Limit of Liability then in force for the particular Covered Risk, for claims covered only under Covered Risk 14, 15, 16 or 18, or
   iii. the Policy Amount then in force.

b.

i. If We remove the cause of the claim with reasonable diligence after receiving notice of it, all Our obligations for the claim end, including any obligation for loss You had while We were removing the cause of the claim.

ii. Regardless of 6.b.(1) above, if You cannot use the Land because of a claim covered by this Policy:

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You may rent a reasonably equivalent substitute residence and We will repay You for the actual rent You pay, until the earlier of:

(i) the cause of the claim is removed; or

(ii) We pay You the amount required by this Policy. If Your claim is covered only under Covered Risk 14, 15, 16 or 18, that payment is the amount of Your insurance then in force for the particular Covered Risk.

(b) We will pay reasonable costs You pay to relocate any personal property You have the right to remove from the Land, including transportation of that personal property for up to twenty-five (25) miles from the Land, and repair of any damage to that personal property because of the relocation. The amount We will pay You under this paragraph is limited to the value of the personal property before You relocate it.

c. All payments We make under this Policy reduce the Policy Amount, except for costs, attorney's fees and expenses. All payments we make for claims which are covered only under Covered Risk 14, 15, 16 or 18 also reduce Our Maximum Dollar Limit of Liability for the particular Covered Risk, except for costs, attorney's fees and expenses.

d. If We issue, or have issued, a policy to the owner of a Mortgage on Your Title and We have not given You any coverage against the Mortgage, then:

(1) We have the right to pay any amount due You under this Policy to the owner of the Mortgage to reduce the amount of the Mortgage, and any amount paid shall be treated as a payment to You under this Policy, including under paragraph 4.a.of these Conditions;

(2) Any amount paid to the owner of the Mortgage shall be subtracted from the Policy Amount of this Policy; and

(3) If Your claim is covered only under Covered Risk 14, 15, 16 or 18, any amount paid to the owner of the Mortgage shall also be subtracted from Our Maximum Dollar Limit of Liability for the particular Covered Risk.

e. We will pay any costs, attorney's fees and expenses which We are obligated to pay under this Policy.

f. If You do anything to affect any right of recovery You may have against someone else, We can subtract from Our liability the amount by which You reduced the value of that right.

7. Our Duty To Defend Against Legal Actions

We will defend Your Title in any legal action only as to that part of the action which is based on a Covered Risk and which is not excepted or excluded from coverage in this Policy. We will pay the costs, attorney's fees, and expenses We incur in that defense.

We will not pay for any part of the legal action which is not based on a Covered Risk or which is excepted or excluded from coverage in this Policy.

We can end Our duty to defend Your Title under paragraph 4 of the Conditions.

8. Transfer Of Your Rights To Us

a. When We settle Your claim, We have all the rights You have against any person or property related to the claim. You must transfer these rights to Us when We ask, and You must not do anything to affect these rights. You must let Us use Your name in enforcing these rights.

b. We will not be liable to You if We do not pursue these rights or if We do not recover any amount that might be recoverable.

c. We will pay any money We collect from enforcing these rights in the following order

i. to Us for the costs, attorney's fees and expenses We paid to enforce these rights;

ii. to You for Your loss that You have not already collected;

iii. to Us for any money We paid out under this Policy on account of Your claim; and
iv. to You whatever is left.

d. If You have rights under contracts (such as indemnities, guaranties, bonds or other policies of insurance) to recover all or part of Your loss, then We have all of those rights, even if those contracts provide that those obligated have all of Your rights under this Policy.

9. Entire Contract

This Policy, with any endorsements, is the entire contract between You and Us. To determine the meaning of any part of this Policy, You must read the entire Policy. Any changes to this Policy must be agreed to in writing by Us. Any claim You make against Us must be made under this Policy and is subject to its terms.

10. Increased Policy Amount

The Policy Amount will increase by ten percent (10%) of the Policy Amount shown in Schedule A each year for the first five years following the policy date shown in Schedule A, up to one hundred fifty percent (150%) of the Policy Amount shown in Schedule A. The increase each year will happen on the anniversary of the Policy Date shown in Schedule A.

11. Severability

If any part of this Policy is held to be legally unenforceable, both You and We can still enforce the rest of this Policy.

12. Arbitration

a. If permitted in the State of New York, You or We may demand arbitration.
b. The arbitration shall be binding on both You and Us. The arbitration shall decide any matter in dispute between You and Us.
c. The arbitration award may be entered as a judgment in the proper court.
d. The arbitration shall be under the Title Insurance Arbitration Rules of the American Arbitration Association. You may choose current Rules or Rules in existence on the Policy Date.
e. The law used in the arbitration is the law of the state of New York.
f. You can get a copy of the Rules from Us.

SCHEDULE A

Policy No: (Title No.)

Policy Amount: $ Policy Date:

Deductible Amounts and Maximum Dollar Limits of Liability
For Covered Risk 14, 15, 16 and 18

	Your Deductible Amount	Our Maximum Dollar Limit of Liability
Covered Risk 14 (Subdivision Law Violation):	$2000	$10,000
Covered Risk 15 (Building Permit):	$4000	$25,000
Covered Risk 16 (Zoning):	$4000	$25,000
Covered Risk 18 (Encroachment of Boundary Walls Or Fences):	$1500	$5,000

Street Address of the Land:

1. Name of Insured:

2. Your interest in the Land covered by this Policy is:

3. The Land referred to in this Policy is described as:

SCHEDULE B

Exceptions

In addition to the Exclusions, You are not insured against loss, costs, attorney's fees, and expenses resulting from:

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Representing Clients During Divorce and Bankruptcy: How New York's Domestic Relations Law Impacts Title to Property

By Edward W. Vopat

How can a practitioner protect a divorcing client's interest in real property when the client is not the title holder? Can real property be protected from creditors in a bankruptcy proceeding? What steps can an attorney take to maximize the post-divorce assets of the debtor or non-debtor spouse? This article examines the intersection of the Bankruptcy Code and New York's Domestic Relations Law (DRL) to provide some guidance.

> *"Federal law . . . does not establish what constitutes property rights. This is a matter of state law."*

The question of what constitutes property of the bankruptcy estate for an individual debtor normally is not a difficult question to answer. Property of the estate in a Chapter 7 filing consists of "all legal or equitable interests of the debtor in property as of the commencement of the case."[1] In a Chapter 13 reorganization, property of the estate includes both property acquired by the debtor as well as the debtor's earnings after commencement of the case *and* prior to the closing of the case or conversion to Chapter 7, 11, or 12.[2] However, determination of what constitutes the debtor's property takes on a greater complexity when put into the context of marital dissolution.

The Bankruptcy Code determines what property of the debtor becomes part of the bankruptcy estate. Federal law, however, does not establish what constitutes property rights. This is a matter of state law.[3] Accordingly, while the Bankruptcy Code is determinative of disposition of estate property, the very issue of what constitutes the debtor's property may vary between states. For the practitioner, an understanding of property laws and the impact on bankruptcy in his jurisdiction is of critical importance.

Property rights between spouses are a primary issue in most marital dissolution cases. Under New York law, the trial court determines issues of title, occupancy and possession of property,[4] and equitable distribution of property in marital dissolutions.[5] Further, assets may be considered to be marital property subject to equitable distribution regardless of the form in which title to such assets is held.[6]

> *"For the practitioner, an understanding of property laws and the impact on bankruptcy in his jurisdiction is of critical importance."*

A key issue in this area is at what point in time do property rights become vested. This was the issue in *In re Frederes*.[7] The debtor husband, Bruce Frederes ("Debtor"), filed a Chapter 7 petition in May 1989. At the time of the filing, a divorce proceeding was pending between the Debtor and his wife. A Judgment of Divorce issued on August 21, 1991, granted, *inter alia*, equitable distribution of assets and provided that a parcel of land (the "Congdon Road Property") that had been held solely in the name of Louise Frederes be retained by her, and the Debtor's interest in such property be transferred by quitclaim deed.[8] This judgment incorporated an oral stipulation between the parties relating to the Congdon Road Property that was read into the record on February 8, 1991.[9] The Trustee commenced an adversary proceeding in November 1991 against Louise Frederes claiming an equitable interest in the Congdon Road Property.

The Trustee argued that the Debtor had an equitable interest in the property because the asset was admitted to be a "marital asset" under DRL § 236. However, this proposition relied on two cases that are distinguishable from the facts in *Frederes*. Both *In re Palmer*[10] and *In re Hursa*[11] dealt with facts where the Debtor had a pre-existing ownership position either by being the sole titleholder, as in *Palmer*,[12] or by virtue of holding jointly titled assets with the non-debtor spouse, as in *Hursa*.[13] Since property rights were established *prior* to the bankruptcy petition, the *Palmer* and *Hursa* courts found the bankruptcy estate to have a claim to the debtor's interest under section 541 of the Bankruptcy Code.

> *"Property rights between spouses are a primary issue in most marital dissolution cases."*

Title to the property in *Frederes* was held *solely* in the name of the non-debtor spouse. Judge Ninfo observed that under New York law, equitable distribution rights vest only upon judgment, and that no right arises merely because property is a marital asset under section 236 of the DRL.[14] Therefore, the court found that the Debtor had no vested legal or equitable property interest in the Congdon Road Property at the time of filing. Further, there was no basis for determining that the Congdon Road Property became part of the Debtor's estate after filing. Section 541(a)(5) of the Bankruptcy Code provides:

> Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date -
>
> (A) by bequest, device, or inheritance;
>
> (B) *as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree*;[15]

Since there was no determination of property rights within 180 days of the bankruptcy filing, the non-debtor spouse's interest in the Congdon Road Property was not subject to any claim by the bankruptcy estate. Judge Ninfo also observed that the statutory factors for equitable distribution awards[16] do not include protecting or even recognizing the interests of the debtor spouse's creditors.[17]

Another bankruptcy issue that arises in this context is a debtor's attempt to avoid judgments arising out of an equitable distribution award. That was the principal issue in *In re Greenwald*.[18] James and Patricia Greenwald divorced in 1990 following a 30-year marriage. The trial court awarded Patricia Greenwald a distributive award of $4.4 million, approximately $435,000 of James Greenwald's IRA accounts (the "IRA award"), and half of his interest in an employee stock ownership plan (ESOP), which was valued at $1.7 million. Mr. Greenwald appealed the trial court determination. During the pending appeal, Patricia had judgments docketed exceeding $6 million, representing the unpaid judgments.[19] The appellate court left the awards virtually intact, reducing the ESOP award by approximately $262,000, for an award of $1.4 million.[20]

> *"Enforcement of an equitable distribution award may be delayed, but the post-judgment rights of the non-debtor spouse will be respected by the Bankruptcy Court."*

Following his unsuccessful appeal, the debtor filed a petition under Chapter 11 of the Bankruptcy Code seeking to set aside as a preference his ex-wife's levies on his accounts. The debtor also sought a ruling that his IRA was exempt property and not subject to execution.[21] Ms. Greenwald moved to dismiss the Chapter 11 case or alternatively to lift the automatic stay and allow her to collect on her judgments. [22]

Judge Conrad observed that under New York law the rights of parties in a matrimonial case are set in the final judgment.[23] Courts have held that prior to judgment, the rights of the non-debtor spouse are not superior to those of an unsecured creditor.[24] Judge Conrad specifically rejected the debtor's position that Ms. Greenwald was simply a judgment creditor.[25] Reiterating that property rights for purposes of section 541 are determined by applicable state law, the *Greenwald* court determined that Mr. Greenwald's estate did not include the value of assets awarded to Ms. Greenwald under the Judgment of Divorce, as those property rights vested in her upon entry of judgment.[26]

These cases are consistent. In *Frederes*, the rights of the Debtor to property had not been established prior to the filing of the bankruptcy petition.[27] The Trustee was unable to cause the creation of property rights where none had yet to be established under state law.[28] Unless the determination results in an award to the debtor within 180 days in a Chapter 7 case, or for a Chapter 13 debtor, prior to the closing of the case or conversion to Chapter 7, 11 or 12, the property is not subject to inclusion in the estate.[29] We also observe that a right in equitable distribution is not determinative of how marital assets will be distributed. DRL § 236 governs distribution of assets in matrimonial actions. It is clearly established under New York law that equitable distribution does not require a 50/50 division of assets.[30] The trial court has great discretion in arriving at a property distribution that is equitable under the circumstances of the case, even creating rights in things not generally considered to be assets outside of the context of domestic relations.[31] Furthermore, the DRL does not require the court to consider the effect on the debtor's estate or possible benefit to his creditors.[32]

Similarly, *Greenwald* shows that if property rights are vested in a non-debtor through a judicial determination, this property is not part of the estate under section 541.[33] While the automatic stay provision applies with the commencement of the case, a previous adjudication of property rights between spouses is not disturbed by the filing of a petition under title 11.[34] Enforcement of an equitable distribution award may be delayed, but the post-judgment rights of the non-debtor spouse will be respected by the Bankruptcy Court.[35] *Greenwald* was decided prior to the addition of 11 U.S.C. § 523(a)(15), which exempts from discharge, subject to limitations, any debt: "Not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record"[36] This amendment supports the determination in *Greenwald* that property rights vested in spouses by means of a matrimonial action shall not be diminished by a bankruptcy filing. Mr. Greenwald's contention that his IRA was not includable in his section 541 estate was indeed correct, but not in the way proposed by Greenwald. As the rights to that portion of his retirement accounts had been previously determined by the New York Supreme Court, those assets were no longer his—they were the property of Ms. Greenwald.[37] His proposal that these assets were exempt from execution was fatally flawed in that assets available to satisfy judgments do not include assets that have been determined not to be the property of the judgment debtor, a situation that is perhaps unique to matrimonial actions. Although not yet in effect at the time of *Greenwald*, the New York Legislature has further supported the premise that matrimonial debts are enforceable even against otherwise exempt assets.[38]

Practitioners must consider the effect bankruptcy proceedings may have on clients also involved in a marital dissolution. Representing a client involved in a divorce where a bankruptcy has been filed or is likely to be filed involves two key points. Is your client the title-holder of real property or the non-titled spouse? Has the divorce judgment been entered or not? Attorneys may find the illustrations below (Figure 1 and Figure 2) of suggested actions helpful.

Given the impact bankruptcy filings can have on the real property assets of both the titled and non-titled spouse, practitioners should carefully examine what actions they should take in order to prevent creditors from reaching assets properly due to a divorcing spouse, and to help secure enforcement of a hard-won equitable distribution award.

Figure 1: Bankruptcy Filing Prior to Entry of Divorce Judgment

Attorney Represents:	*Debtor*	*Non-Debtor*
Titled Spouse	Seek determination of Equitable Distribution under DRL § 236(b)(5)	Conclude Bankruptcy Case
Non-Titled Spouse	Conclude Bankruptcy Case	Seek determination of property interest under DRL § 234 and determine Equitable Distribution under DRL § 236(b)(5)

Figure 2: Effect of Bankruptcy Filing After Entry of Divorce Judgment

Attorney Represents:	*Debtor*	*Non-Debtor*
Titled Spouse	Property included in Bankruptcy Estate	Property not included in Bankruptcy Estate of Debtor
Non-Titled Spouse	Property **not included** in Bankruptcy Estate	Seek enforcement of Equitable Distribution against bankruptcy-exempt assets

Endnotes

1. 11 U.S.C. § 541(a)(1).
2. 11 U.S.C. § 1306.
3. *See Butner v. United States*, 440 U.S. 48, 55 (1979) (observing "Property interests are created and defined by state law."); *In re Rerisi*, 172 B.R. 525, 527 (Bankr. E.D.N.Y. 1994) ("Unless the Bankruptcy Code or bankruptcy case law create other legal rights, the rights of parties to an interest in real property are established by applicable state law."); *In re Crysen*, 902 F.2d 1098, 1101 (2d Cir. 1990) (explaining that the debtor's interest in property is determined by state law).
4. DRL § 234 (granting the court power to determine issues of title to property between the parties in a final judgment, or by order either prior to or subsequent to a final judgment).
5. DRL § 236(B)(5)(a) (providing for judicial determination of property distribution in absence of an agreement between the parties on equitable distribution).
6. DRL § 236(B)(1)(c) (establishing that all property not specifically defined as "separate property" under DRL § 236(B)(1)(d) is marital property).
7. 141 B.R. 289 (Bankr. W.D.N.Y. 1992).
8. *Id.* at 290.
9. *See, e.g. Rubenfeld v. Rubenfeld*, 279 A.D.2d 153, 156 (1st Dep't 2001) (holding oral stipulations on the record during matrimonial actions are enforceable and not governed by DRL § 236(B)(3) requirement that agreements between married parties be made in a form entitling a deed to be recorded).
10. 78 B.R. 402 (Bankr. E.D.N.Y 1987).
11. 87 B.R. 313 (Bankr. D.N.J. 1988).
12. *In re Palmer*, 78 B.R. 402 (Bankr. E.D.N.Y 1987).
13. *In re Hursa*, 87 B.R. 313 (Bankr. D.N.J. 1988).
14. *See In re Hilsen*, 100 B.R. 708, 711 (Bankr. S.D.N.Y. 1989).
15. 11 U.S.C. § 541(a)(5) (emphasis added).
16. DRL § 236(B)(5)(d)(1)–(d)(13).

17. *In re Frederes*, 141 B.R. 289, 293 (Bankr. W.D.N.Y. 1992). *But see* DRL § 236(B)(5)(d)(13) (allowing the court to consider "any other factor which the court shall expressly find to be just and proper").

18. 134 B.R. 729 (Bankr. S.D.N.Y. 1991).

19. *Id*. at 730.

20. *Id*.

21. *Id*. *See also* 11 U.S.C. § 522 (establishing property exempt from estate); CPLR 5205 (fixing exemptions from satisfaction of money judgments).

22. *Id*. *See also* 11 U.S.C. § 362 (establishing automatic stay following bankruptcy filing).

23. *See Rainbow v. Swisher*, 72 N.Y.2d 106, 110 (1988).

24. *See In re Hilsen*, 119 B.R. 402 (Bankr. E.D.N.Y. 1990).

25. *In re Greenwald*, 134 B.R. at 731.

26. *Id*. at 731. *See also Butner v. United States*, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law."); *In re Crysen*, 902 F.2d 1098, 1101 (2d Cir. 1990) (explaining debtor's interest in property is determined by state law).

27. *In re Frederes*, 141 B.R. 289, 290 (Bankr. W.D.N.Y. 1992) (noting that at the time of the bankruptcy filing the property rights of the Debtor were to be established by the divorce proceeding).

28. *Id*. at 293 (holding where no property right exists under state law the interest is not property of the bankruptcy estate).

29. *See* 11 U.S.C. § 541(a)(5)(B) (including in property of the estate under Chapter 7 any property the debtor becomes entitled to receive as the result of a divorce within 180 days of filing); 11 U.S.C. § 1306(a)(1) (establishing estate property under Chapter 13).

30. *Arvantides v. Arvantides*, 64 N.Y.2d 1033, 1034 (1985).

31. *See* DRL § 236(B)(5)(d); *see also DeLuca v. DeLuca*, 97 N.Y.2d 139, 142 (2001) (distributing rights to a Police Officers' Variable Supplement Fund specifically identified by statute as not being a pension asset); *O'Brien v. O'Brien*, 66 N.Y.2d 576, 580–81 (1985) (determining medical license to be a marital asset subject to equitable distribution).

32. *See* DRL § 236 (specifying factors to be considered in equitable distribution).

33. *In re Greenwald*, 134 B.R. 729, 730 (Bankr. S.D.N.Y. 1991) (observing state law determines rights in property).

34. *Id*. at 731 (lifting the automatic stay provision to allow enforcement of previously adjudicated property rights); 11 U.S.C. § 362 (creating automatic stay upon commencement of bankruptcy case).

35. *See In re Greenwald*, 134 B.R. at 731.

36. 1994 Amendments, Pub. L. 103-394, § 304(e).

37. *In re Greenwald*, 134 B.R. at 731.

38. CPLR § 5205(c)(4) (effective Jan. 1, 1998) (providing exemption of trust assets shall not apply to qualified domestic relations orders or any order of support, alimony or maintenance whether or not reduced to a money judgment).

Edward W. Vopat holds an MBA in Finance from Fordham University. He is a former adjunct professor of finance and economics at several schools, including the C.W. Post Campus of Long Island University and Pace University. Mr. Vopat is currently a law student at St. John's University and is expected to graduate in December 2003. Mr. Vopat is a member of the American Bankruptcy Institute Law Review and recently worked for Justice LaMarca, a New York Supreme Court Justice in Nassau County.

Bergman on Mortgage Foreclosures:

Consolidated Mortgage Priority Over Condo Lien

By Bruce J. Bergman

Not surprisingly, the Founding Fathers were correct. There *are* some truths we hold as self-evident—such as, when a first and second mortgage are combined via consolidation to form a single lien, well . . . they become a single lien. Too obvious a point to make? Apparently not, because there was one court which ruled to the contrary,[1] thereby subjugating a former second mortgage (now consolidated) to a later, non-intervening condominium common charge lien, in turn creating a bizarre scenario for a foreclosing plaintiff, to say nothing of the havoc it wrecked with accepted precepts of titles. (Attorneys involved with the issue will remember this as the infamous *Societe Generale* case.)

The world of physics must forever be burdened with the law of entropy, but the realm of jurisprudence needs order, which we almost, but not quite, have in the continuing battle between condominiums, championing the condominium common charge lien, and the first mortgage, asserting its own primacy.

All this evolves from RPL § 339-z, which granted the condo common charge lien a special priority over everything *except* a first mortgage of record (and a few less common interests we needn't dwell upon here). In its understandable zeal to protect condominiums, however, the statute went on to provide that when a condo unit is sold or conveyed, "unpaid common charges shall be paid out of the sale proceeds or by the grantee." That couldn't mean a foreclosure sale, though, because if it did, the basic premise preserving seniority to a first mortgage would collapse. Lucid though the preceding thought might be to most, a torturous path was trod for years[2] until the Court of Appeals affirmed what mortgagees' attorneys always believed was obvious—the statutory lien for common charges does not survive foreclosure of a first mortgage.[3]

"There are some truths we hold as self-evident—such as, when a first and second mortgage are combined via consolidation to form a single lien, well . . . they become a single lien."

In part because nuance always emerges from the fertile minds of attorneys, the story didn't end with the ultimate pronouncement by New York's highest court. The war was fought again when a 1985 first mortgage was consolidated with a second mortgage in 1990 (recorded in 1991) which became the subject of a foreclosure naming the holder of a 1992 condo common charge lien. Upon summary judgment seeking to strike the condominium's answer, the ruling was that the once second mortgage portion of the consolidated mortgage was inferior to the common charge lien. That was the befuddling *Societe Generale* decision.

Such upset to recognized notions lasted but a year when the precise issue arose again in *Dime Savings Bank of New York v. Levy*,[4] with a different result. While a consolidation agreement is indeed solely for the convenience of the contracting parties and cannot impair the priority of a lien which intervenes between the first and second mortgages, the *Dime* court observed in agreeing with the *Societe Generale*, the condo lien did not exist when the second mortgage was executed. So when the two mortgages were consolidated, they became a single first mortgage, entitled to the seniority afforded by RPL § 339-z.

With two conflicting views, extant, philosophically—and practically as a result—the issue remained unresolved. In February 2000, however, an expansive rejection of *Societe Generale* appeared, albeit still at the trial court level. Upon essentially the same facts, *Greenpoint Bank v. El-Basary*[5] joined the *Dime* camp and pointedly banished *Societe Generale*. The only difference here was the new condo argument that the consolidated mortgage was not a "purchase money" mortgage, thereby denying it the statutory exception of priority. The court rejected that with a cogent analysis of the statutory language preserving superiority to "a first mortgage of record," *sans* any reference to categorizing it as a purchase money mortgage.

In addition to persuasively crafted legal arguments, the *Greenpoint* decision also observed the compelling reality that RPL § 339-z does not bar a condominium unit owner from refinancing by satisfying an existing mortgage in a greater amount. Since under that circumstance there is no question but that the new first mortgage will be senior to a subsequent condo common charge lien, a second mortgage consolidated with an existing first mortgage becomes the same thing and is entitled to a like seniority. And it makes eminently good sense.

Unfortunately, for the anti-entropy camp, two to one below the appeals court level doesn't dispose of the apparent uncertainty. It appears that this issue may require what the underlying question required: the ruling of higher authority.

Endnotes

1. *Societe Generale v. Charles & Co. Acquisition*, 157 Misc. 2d 643, 597 N.Y.S.2d 1004 (1993).
2, The full story of the issue and the multitude of cases it begat is reviewed at *First Mortgage v. Condominium Common Charge Lien—In Legal and Political Battle*, 64 N.Y. St. B.J. 34 (Jan. 1992); *Common Charge Lien—Condo Attacks First Mortgage: A Creature That Wouldn't Die*, N.Y.L.J., July 24, 1996, at 5, col. 2; 3 Bergman on New York Mortgage Foreclosures, § 36.02[1], [2] and [3], Matthew Bender & Co., Inc. (rev. 2000).
3. *Bankers Trust Co. v. Board of Managers of Park 900 Condominium*, 81 N.Y.2d 1033, 600 N.Y.S.2d 191, 616 N.E.2d 848 (1993). The decision in the First Department which the Court of Appeals affirmed is a more comprehensive review of the subject, reported at 181 A.D.2d 274, 584 N.Y.S.2d 576 (1st Dep't 1992).
4. 161 Misc. 2d 480, 615 N.Y.S.2d 218 (1994).
5. ____ Misc. 2d ___, 711 N.Y.S.2d 275 (2000).

Bruce J. Bergman, author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (rev. 2000), is a partner with Certilman Balin Adler & Hyman, LLP in East Meadow, New York, outside counsel to a number of major lenders and servicers, and an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course. He is also a member of the USFN, the American College of Real Estate Lawyers and is on the faculty of the Mortgage Bankers Association of America School of Mortgage Banking.

Case Note

Department of Housing & Urban Development v. Rucker, 122 S. Ct. 1230 (2002).

Diminishing Tenants' Rights: The Supreme Court delivers a blow to tenants' rights by allowing local housing authorities to exercise wide latitude in the eviction of a tenant for criminal activity of which the tenant was unaware.

Facts

In 1997, the Oakland Housing Authority (OHA) attempted to evict the tenants of a housing project due to criminal activity that had taken place in the housing project. The respondents at the time were tenants of the OHA. The lease contained provisions that provided for a tenant's eviction for any criminal drug activity that was conducted on or off the premises, by the tenants or any individual that had access to the premises.[1]

When the respondents challenged the OHA's eviction action, the District Court granted the tenants a temporary injunction.[2] The tenants based their position on the assumption that the statute itself did not "require lease terms authorizing the eviction of so-called 'innocent' tenants, and in the alternative, that if it does, then the statute is unconstitutional."[3] However, the Court of Appeals reversed,[4] and later an *en banc* panel of the Court of Appeals "reversed and affirmed the District Court's grant of preliminary injunction."[5]

The Supreme Court granted certiorari and ultimately upheld the original reversal by the Court of Appeals. The Court determined that both the statutory and constitutional issues had to be resolved in the affirmative for the housing authority.

Issues

There are two issues that the Court had to address in the action by the tenants. The Court addressed both the statutory interpretation and the constitutional issues that the tenants had raised.

The first issue the Court addressed was the statutory interpretation of the applicable statutes. The statutes, as stated above, were designed to provide a check on the rampant drug use that was prevalent in public housing projects.[6] The question revolved around the way in which the *en banc* Court of Appeals had interpreted the word "any."

The Court also looked at whether the statute provided the respondents with the affirmative right of an "innocent owner" defense. The court read the statute in context with other relevant law, and also addressed the distinction that had to be drawn between a civil forfeiture case, and an action that involved a public agency as a landlord.

Finally, the Court had to address the constitutional concerns that the lower court had previously raised. These primarily had to do with the First Amendment and the Excessive Fines Clause.

Reasoning

The first issue that the Supreme Court had to address was the statutory language itself. The Court determined that the statute must be interpreted in such a way as to be consistent with the plain language of the statute.[7] The Court cited the statutory language as:

> Each public housing agency shall utilize leases which . . . provide that . . . any drug related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.[8]

The Court determined that the key to the statute was the interpretation of the word "any." Chief Justice Rehnquist stated that the word must be given a broad interpretation consistent with the plain meaning of the word and the statute.[9]

The Court made clear that the argument of the tenants that their actions were not in violation of the statute was false. Therefore, the Court reasoned that the housing authority did not have to make a distinction as to whether the tenant or tenant's guests knew of the activity, or whether the activity took place in the residence.[10] Any of the aforementioned activities would be grounds for the housing authority to terminate the lease of the tenants.

Chief Justice Rehnquist also decided that the lower court's "innocent owner" defense which the lower court provided to the tenants was not applicable to the statute and action at issue. Other previous laws that had provided tenants with this defense had expressly permitted its use in the language of the statute. In this case, such language was purposely omitted from the statute, and therefore the Court concluded that the legislative intent was such that the defense is not available to the tenants.[11]

The Court also made clear that the defense was usually applicable only in cases that involved civil forfeiture.[12] The rationale was that "it is entirely reasonable to think that the government, when seeking to transfer private property to itself in a forfeiture proceeding, should be subject to an 'innocent owner defense,' while it should not be when action as a landlord in a public housing project."[13] This interpretation provided the Court with the proper distinction such that they could ignore the legislative history that the Court of Appeals had relied upon.[14]

The Court also addressed the due process questions that the *en banc* Court of Appeals raised. The Supreme Court concluded that there were no due process violations to review.[15] In addition, the Court briefly addressed the First Amendment and Excessive Fines Clause issues that the lower court had raised.[16] The Court found that there were no violations of these constitutional rights, and therefore the law was constitutional.[17]

Conclusion

The Supreme Court in this decision provides public housing authorities the discretion to terminate a tenant's lease at any time they so desire. The Court has provided that in order to terminate a lease, a housing authority needs only to show the slightest tenuous link between the criminal activity and the tenant. All that is required is a provision in the lease that states in any terms the relationship needed between the individual committing the criminal conduct and the tenant. This rule has the possibility to change policy throughout the country, and provide a complete restructuring of the relationship between the state as a landlord, and an individual as a tenant of the state.

Brian S. Smetana '04

Endnotes

1. 42 U.S.C. § 1437d(1)(6).
2. The District Court stated the agency could not terminate a lease of a tenant for "drug related criminal activity" that did not occur in the residence, and where the tenant did not have knowledge of drug-related criminal activity. *Dep't of Hous. & Urban Dev. v. Rucker*, 122 S. Ct. 1230, 1233 (2002).
3. *Id*.
4. The Court of Appeals in reversing held that the language of section 1437d(l)(6) permits the eviction regardless of the degree of knowledge of the tenant, "and that the statute is constitutional." *Id*. at 1233.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. "As we have explained, 'the word "any" has an expansive meaning, that is "one or some indiscriminately of whatever kind." ' " *Id.*
10. "Thus, any drug-related activity engaged in by the specified persons is grounds for termination, not just drug-related activity that the tenant knew, or should have known, about." *Id.* at 1234.
11. *Id*.
12. *Id.*
13. *Id.*
14. The Court in a footnote also stated that even if it had looked at the legislative history it would have also found that the statute gave the housing authority wide discretion. *Id*. at 268. "But Congress, 'presumed to be aware' of HUD's interpretation rejecting a knowledge requirement, made no other change to the statute." *Id*.
15. The Court distinguished the cases used by the *en banc* Court of Appeals in their facts. *Id*. at 1236. In addition, the Court stated that the content here was as follows: "It is instead acting as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required." *Id*. at 1236.
16. *Id.*
17. *Id.*

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.

Committee on Attorney Opinion Letters
Jill M. Myers (Co-Chair)
46 Prince Street
Rochester, NY 14607
(585) 697-0040
Fax: (585) 697-0043
E-Mail: jmyers@jmyerslaw.com

David J. Zinberg (Co-Chair)
250 Park Avenue
New York, NY 10177
(212) 907-9601
Fax: (212) 907-9681
E-Mail: dzinberg@ingramllp.com

Committee on Awards
John G. Hall (Chair)
57 Beach Street
Staten Island, NY 10304
(718) 447-1962
Fax: (718) 273-3090
E-Mail: hallj@hallandhalllaw.com

Committee on Commercial Leasing
Austin J. Hoffman, II (Co-Chair)
4 Clinton Square
Syracuse, NY 13202
(315) 422-7000
Fax: (315) 422-7019
E-Mail: austinhoffman@pyramidmg.com

Bradley A. Kaufman (Co-Chair)
101 Park Avenue
New York, NY 10178
(212) 309-6022
Fax: (212) 309-6273
E-Mail: bkaufman@morganlewis.com

Committee on Computerization & Technology
Michael J. Berey (Chair)
633 Third Avenue, 16th Floor
New York, NY 10017
(212) 850-0624
Fax: (212) 331-1511
E-Mail: mberey@firstam.com

Committee on Condemnation, Certiorari & Real Estate Taxation
Robert L. Beebe (Co-Chair)
514 Vischers Ferry Road
Clifton Park, NY 12065
(518) 373-1500
Fax: (518) 373-0030
E-Mail: rbeebe@beebelaw.com

Jon N. Santemma (Co-Chair)
120 Mineola Boulevard, Suite 240
Mineola, NY 11501
(516) 294-8081
Fax: (516) 294-8302
E-Mail: sandatt@aol.com

Committee on Condominiums & Cooperatives
David L. Berkey (Co-Chair)
845 Third Avenue, 8th Floor
New York, NY 10022
(212) 935-3131
Fax: (212) 935-4514
E-Mail: dlb@gdblaw.com

Joseph M. Walsh (Co-Chair)
42 Long Alley
Saratoga Springs, NY 12866
(518) 583-0171
Fax: (518) 583-1025
E-Mail: joewalsh@spalaw.net

Committee on Continuing Legal Education
Terrence M. Gilbride (Co-Chair)
One M&T Plaza, Suite 2000
Buffalo, NY 14203
(716) 848-1236
Fax: (716) 849-0349
E-Mail: tgilbrid@hodgsonruss.com

Harold A. Lubell (Co-Chair)
1290 Avenue of the Americas
New York, NY 10104
(212) 541-2130
Fax: (212) 541-4630
E-Mail: halubell@bryancave.com

Committee on Environmental Law
Joel H. Sachs (Co-Chair)
1 North Broadway, Suite 700
White Plains, NY 10601
(914) 946-4777 x318
Fax: (914) 946-6868
E-Mail: jsachs@kblaw.com

John M. Wilson, II (Co-Chair)
2400 Chase Square
Rochester, NY 14604
(585) 232-5300
Fax: (585) 232-3528
E-Mail: jwilson@boylanbrown.com

Committee on Land Use & Planning
Karl S. Essler (Co-Chair)
Two State Street, 14th Floor
Rochester, NY 14614
(585) 232-1660
Fax: (585) 232-4791
E-Mail: kessler@fixspin.com

Carole S. Slater (Co-Chair)
36 West 44th Street, Suite 712
New York, NY 10036
(212) 391-8045
Fax: (212) 391-8047
E-mail: cslater@slaterbeckerman.com

Committee on Landlord & Tenant Proceedings
Edward G. Baer (Co-Chair)
270 Madison Avenue
New York, NY 10016
(212) 867-4466
Fax: (212) 867-0709
E-Mail: ebaer@bbwg.com

Gerald Goldstein (Co-Chair)
200 Garden City Plaza, Suite 315
Garden City, NY 11530
(516) 248-6400
Fax: (516) 248-6422
E-Mail: ssgdmgc@aol.com

Committee on Legislation
Robert W. Hoffman (Co-Chair)
1802 Eastern Parkway
Schenectady, NY 12309
(518) 370-4743
Fax: (518) 370-4870
E-Mail: rwhooplaw@juno.com

Gary S. Litke (Co-Chair)
237 Park Avenue, 20th Floor
New York, NY 10017
(212) 880-6190
Fax: (212) 682-0200
E-Mail: glitke@torys.com

Committee on Low Income & Affordable Housing
Brian E. Lawlor (Chair)
38-40 State Street
Albany, NY 12207
(518) 486-6337
Fax: (518) 473-8206
E-Mail: blawlor@dhcr.state.ny.us

Committee on Membership
Richard S. Fries (Chair)
405 Lexington Avenue
New York, NY 10174
(212) 973-0111
Fax: (212) 891-9598
E-Mail: rsfries@swidlaw.com

Committee on Not-for-Profit Entities & Concerns
Anne Reynolds Copps (Co-Chair)
126 State Street, 6th Floor
Albany, NY 12207
(518) 436-4170
Fax: (518) 436-1456
E-Mail: arcopps@nycap.rr.com

Mindy H. Stern (Co-Chair)
60 East 42nd Street
New York, NY 10165
(212) 661-5030
Fax: (212) 687-2123
E-Mail: mstern@schoeman.com

Committee on Professionalism
Peter V. Coffey (Co-Chair)
224 State Street
P.O. Box 1092
Schenectady, NY 12301
(518) 370-4645
Fax: (518) 370-4979
E-Mail: pcoffey@ecmlaw.com

Janet Sandra Stern (Co-Chair)
1025 Old Country Road, Suite 205
Westbury, NY 11590
(516) 876-1106
Fax: (516) 997-7876
E-Mail: janet@sawlaw.com

Committee on Publications
William A. Colavito (Co-Chair)
One Robin Hood Road
Bedford Hills, NY 10507
(914) 666-4606
Fax: (914) 241-1881
E-Mail: wcolavito@yahoo.com

Joseph D. DeSalvo (Co-Chair)
188 East Post Road, 4th Floor
White Plains, NY 10601
(914) 286-6415
Fax: (212) 331-1455
E-Mail: jdesalvo@firstam.com

Harry G. Meyer (Co-Chair)
One M&T Plaza, Suite 2000
Buffalo, NY 14203
(716) 848-1417
Fax: (716) 852-5185
E-Mail: hmeyer@hodgsonruss.com

Robert M. Zinman (Co-Chair)
St. John's University School of Law
8000 Utopia Parkway
Jamaica, NY 11439
(718) 990-6646
Fax: (718) 990-6649
E-Mail: zinmanr@stjohns.edu

Ad Hoc Committee on Public Relations
Maureen Pilato Lamb (Co-Chair)
510 Wilder Building
One East Main Street
Rochester, NY 14614
(585) 325-6700 x220
Fax: (585) 325-1372
E-Mail: mplamb@frontiernet.net

Harold A. Lubell (Co-Chair)
1290 Avenue of the Americas
New York, NY 10104
(212) 541-2130
Fax: (212) 541-4630
E-Mail: halubell@bryancave.com

Committee on Real Estate Financing
Steven M. Alden (Co-Chair)
919 Third Avenue
New York, NY 10022
(212) 909-6481
Fax: (212) 909-6836
E-Mail: smalden@debevoise.com

Leon T. Sawyko (Co-Chair)
99 Garnsey Road
Pittsford, NY 14534
(585) 419-8632
Fax: (585) 419-8815
E-Mail: lsawyko@harrisbeach.com

Committee on Title & Transfer
Karl B. Holtzschue (Co-Chair)
122 East 82nd Street, Apt. 3C
New York, NY 10028
(212) 472-1421
Fax: (212) 472-6712
E-Mail: kholtzschue@nyc.rr.com

Samuel O. Tilton (Co-Chair)
2 State Street
700 Crossroads Building
Rochester, NY 14614
(585) 987-2841
Fax: (585) 454-3968
E-Mail: stilton@woodsoviatt.com

Committee on Unlawful Practice of Law
John G. Hall (Chair)
57 Beach Street
Staten Island, NY 10304
(718) 447-1962
Fax: (718) 273-3090
E-Mail: hallj@hallandhalllaw.com

In Memoriam
Jerrold I. Hirschen

Jerry Hirschen, a long-time energetic member of the Real Property Law Section and its Executive Committee died suddenly of a heart attack on August 2. We all miss a friend, an active lawyer who found the much sought match of an effective professional practice with heartfelt community service.

Jerry was a stalwart of all of the Section's activities, as founder and Co-Chair of the Low Income and Affordable Housing Committee and in numerous other capacities. For over 40 years he practiced real estate law, concentrating in government-assisted housing and the representation of developers and community groups, frequently fighting for the creation of much needed housing.

In his practice, Jerry represented jazz great Lionel Hampton in developing moderate income housing in Manhattan; the 95-year-old, not-for-profit Phipps Houses in the creation of over 500 low and moderate income apartments in the Bronx; and prominent developers in the establishment of thousands of housing units throughout New York City, including one named for the labor leader Roy Reuther and housing named for the noted clergymen, Dr. M. Moran Weston of Saint Philips Church.

Throughout his activities, Jerry was known for conducting himself as a caring, helpful and modest man. Other interests and achievements included efforts in leadership, financing and development of independent schools, such as the Berkeley Carroll School (where he served as Trustee and Vice-Chair), the Village Community School, the Little Red School House and the Calhoun School. He was an expert in development and restructuring of Mitchell Lama developments and was a leading expert in HUD "mark to market" and other cutting-edge programs.

Jerry's expertise and commitment extended to many professional organizations other than the State Bar, including the Association of the Bar of the City of New York and the American Bar Association. His honors include the receipt of the Distinguished Service Award from the National Housing Conference and membership in the American College of Real Estate Lawyers.

Jerry was an active alumnus of Union College, which presented him its Alumni Gold Medal Award in 1992. He was also a graduate of Harvard Law School. For those who wish to remember Jerry with a contribution, the family has asked that it be made to Jackson's Garden at Union College in Schenectady, New York.

Jerry is survived by his wife of 30 years, Carole Slater, who is also a committed member of the Real Property Law Section and its Executive Committee. All of our support is extended to Carole and their daughter, Jill.

He is missed.

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 on a 3½" floppy disk, preferably in Microsoft Word or WordPerfect and no longer than 8–10 pages. 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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N.Y. REAL PROPERTY LAW JOURNAL

Section Officers

Chair
Matthew J. Leeds
Bryan Cave LLP
1290 Avenue of the Americas
New York, NY 10104
(212) 541-2290
Fax: (212) 541-1390
E-Mail: mjleeds@bryancave.com

1st Vice-Chair
Dorothy H. Ferguson
D.H. Ferguson, Attorney, P.L.L.C.
1115 Midtown Tower
Rochester, NY 14604
(585) 325-3620
Fax: (585) 325-3635
E-Mail:dhferguson@
frontiernet.net

2nd Vice-Chair
Joshua Stein
Latham & Watkins
885 Third Avenue, 10th Fl.
New York, NY 10022
(212) 906-1342
Fax: (212) 751-4864
E-Mail: joshua.stein@lw.com

Secretary
Harry G. Meyer
Hodgson Russ LLP
One M&T Plaza, Su. 2000
Buffalo, NY 14203
E-Mail: hmeyer@
hodgsonruss.com

Co-Editors

William A. Colavito
One Robin Hood Road
Bedford Hills, NY 10507
(914) 666-4606
Fax: (914) 241-1881
E-Mail: wcolavito@
yahoo.com

Joseph D. DeSalvo
First American Title Ins. Co.
188 East Post Road, 4th Fl.
White Plains, NY 10601
(914) 286-6415
Fax: (212) 331-1455
E-Mail: jdesalvo@
firstamny.com

Harry G. Meyer
Hodgson Russ LLP
One M&T Plaza, Su. 2000
Buffalo, NY 14203
(716) 848-1417
Fax: (716) 852-5185
E-Mail: hmeyer@
hodgsonruss.com

Robert M. Zinman
St. John's University
School of Law
8000 Utopia Parkway
Jamaica, NY 11439
(718) 990-6646
Fax: (718) 990-6649
E-Mail: zinmanr@
stjohns.edu

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Real Property Law Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

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