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N.Y. Real Property Law Journal

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A Message from the Section Chair

Dear Section Member,

You should know that the response of our fellow members to work on Section Committees has been very heartening. Still, if you have interest at any time, please contact either a Committee Chair or an officer. There is room for every interested person.

You should also know that the effort to put lots of information on the Section Web site is proceeding. This will include minutes of Executive Committee meetings and releases from each Section. In fact, each Section Chair has been asked to commit to announcing a project or summary of what the Committee will be doing for the Section and to look to post information for the Section members. The content will range from full reports to checklists to reports of CLE meetings. It should be valuable and should serve the Section's self-imposed mandate to communicate and to provide information of use to lawyers.

As another important development, we are close to having a Section e-mail capacity for announcements and for communicating with other members pursuant to a "list serve." You should be hearing about it soon. Particular thanks to Computerization and Technology Chair Michael Berey for computer-related Section projects.

Our membership initiative, looking to increase numbers and membership in the Section from all components of the Bar, is progressing. There have been some mailings, and in conjunction with the full State Bar effort, to reach out to segments of the Bar who are underrepresented in the Bar Association. There will be specific initiatives to address all manner of diversity: male-female; ethnic; large and small practice; upstate-downstate; young-old; etc. This effort for our Section has been and will be led by Membership Committee Co-chairs Richard Fries and Karen DiNardo. Also, the Section should especially thank Lorraine Power Tharp, former President of the full Association, for leading an effort on diversity for the full Association.

This issue of the *Journal* includes an article on the summer meeting to be held at the Equinox in Manchester, Vermont from July 15-18, 2004. The program is being planned by Program Chair Joshua Stein. At that time the Section Chair will be Dorothy Ferguson.

Finally, apologies to former Section Chair Lester Bliwise that he was omitted from a list of former Section Chairs in a recent message in the *Journal*. He remains active and, as with all former Chairs, a support to the Section.

Matthew Leeds
Bryan Cave LLP
March 1, 2004

Inside

Bring Your Family to the Equinox in Vermont This Summer—Save the Date!

Joshua Stein, program chair of the Real Property Law Section's 2004 summer meeting, promises a combination of cutting-edge continuing legal education programs and plenty of time for fun with the family at this year's summer meeting, tentatively scheduled for Thursday, July 15, through Sunday, July 18, 2004, at the Equinox Resort in Manchester, Vermont. The meeting will constitute the Section's first official event during Dorothy H. Ferguson's one-year term as chair of the Section.

"I've tried to line up some very current CLE topics and bring in some terrific speakers, so that the CLE piece of the meeting will be compelling and very much worth the time our members will invest in attending," said Stein, who has been planning the summer meeting since early 2003.

As is customary, CLE programs will take place Friday and Saturday, running through lunch at the latest. That will leave the afternoon and early evening of both days for Section members to explore the area, enjoy the Equinox Resort, and spend time with their families. The meeting agenda will also include evening social activities and meals, as well as optional activities in the afternoon.

"I felt the Section was ready to have a summer meeting at a great location that's easy driving distance from just about anywhere in the state," Stein said. "That's one reason we chose the Equinox this year, and we're looking forward to a terrific turnout."

The continuing legal education speakers at the summer meeting will collectively provide attendees with eight hours of CLE credit, covering a variety of cutting-edge topics in real estate law and practice, mostly oriented toward commercial real estate transactions but with some key residential issues on the agenda as well. Although everything remains subject to change, here is a summary of the program as it has taken shape so far:

Professor Dale Whitman, one of the leading academic writers on real property law in the country, will attend as our keynote speaker. Professor Whitman will try to make sense of the growing trend of legislatures and city councils to try to control so-called "predatory lending," where a lender makes a loan, often on draconian terms, that the borrower may be unable to repay. He will look at the "big picture" of this trend—whether predatory lending legislation makes sense, some of its common characteristics and variations, the role of federal preemption, and how all these legal developments are affecting the secondary market and other areas of real property law.

Meredith Kane of Paul Weiss Rifkind Wharton & Garrison will speak on the latest developments in "public-private" development projects where the city or state may be intimately involved in providing the site for the project or even its financing, which are some of the largest and most interesting projects today. Kane will share her insights on "how to make the deal" and new trends in public-private structuring and negotiations.

Greg Pressman of Schulte Roth & Zabel LLP and Larry Wolk of Holland & Knight LLP will speak about recent developments and new issues in legal opinion practice. They will focus on the latest new opinion requirements coming out of the rating agencies, and how an opinion giver can get comfortable with whatever new and improved conclusions they are being asked to "step up to" for a closing.

Jonathan Hochman and Lisa Cohen, both from the litigation boutique firm Schindler Cohen & Hochman LLP, will speak about how litigators and judges look at contracts and contractual language, and the principles that litigators wish deal lawyers would keep in mind as they negotiate and close their transactions. Hochman and Cohen have "promised to tell plenty of war stories but not to name any names," Stein said.

The USA PATRIOT Act has become part of every lawyer's lexicon, but few real estate lawyers understand exactly how it applies to real estate practice. Jeff Moerdler, of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC, will summarize just how this new law affects commercial real estate transactions, and what commercial real estate lawyers need to know about complying with their new obligations.

Some of the same forces that drove the USA PATRIOT Act have also driven commercial lease negotiators to pay much more attention to issues of security, access control, secure ventilation, and the like. Issues that previously were regarded as afterthoughts are now "front and center" in negotiating any major commercial lease. At the same time, technology has continued to move forward, producing new concerns about such matters as backup power, cabling, network control centers, and interconnections. Bob Shansky of Jones Day, who has negotiated some of the largest headquarters leases in Manhattan, will cover all this ground and more in his presentation on "Twenty-First Century Leasing Issues for Major Tenants."

But could it be that all the expertise of Bob Shansky (and other commercial leasing lawyers) is no longer needed to negotiate commercial leases? Can't it all be done by computer? Ron Sernau of Proskauer Rose LLP will talk about whether computers can draft leases and, if so, where the computer's job ends and the lawyer's job begins. Sernau has actually been writing software that will enable lawyers to prepare the first draft of any typical commercial lease by computer. He will talk about that software and how it could affect the lease drafting process and the role that lawyers must continue to play.

For any real estate lawyer in New York, a much less "cutting-edge" issue has always been and will probably always be New York's panoply of taxes imposed on real estate transactions.

Though old, these taxes always seem to raise new issues, and a special guest has been invited who is one of the leading experts in the state on the transfer tax and mortgage recording tax. He will make a brief presentation on some of the current issues that have arisen in these areas and then throw open the floor for questions and answers. "I'm hoping our Section members will bring along their toughest questions and throw them at this special guest speaker," Stein said, noting that the name of the guest speaker will be announced as soon as final arrangements are made.

During the last few years, the Real Property Law Section was intimately involved in the state's adoption of a Property Condition Disclosure Act, requiring sellers of houses to disclose certain information. Karl Holtzschue, who toiled endlessly on the Act for the Section, will take a look at where the Act stands a couple of years after its adoption. He will also discuss where he envisions the Act heading and where he thinks it still needs some work. He'll fill out that presentation with some other comments on recent changes in New York closing procedures and requirements.

Beyond some of the specific trends in the law of the types already mentioned, New York's common law has continued to develop incrementally through case decisions. Peter Coffey, of Englert, Coffey & McHugh LLP, will identify up to a dozen of the most recent real property cases decided by New York's appellate courts in the last couple of years, and summarize what those cases say and why it matters. A highly entertaining and engaging speaker, Coffey is well known for bringing real estate cases to life and freely mixing his own opinions with his interpretations of the decided cases.

Particularly in today's post-Enron environment, no continuing legal education program would be complete without a segment on legal ethics. Anne Reynolds Copps of The Law Office of Anne Reynolds Copps in Albany will present a brief case study on ethical issues that can arise in commercial real estate practice. She will discuss how attorneys might best deal with these issues when under the pressure of getting a deal closed. Her presentation will provide an hour of "ethics" credit.

"Overall, I think I've been able to put together a great line-up of very current CLE topics with some new speakers and some familiar faces," Stein said of the program as a whole.

What should Section members do if they want to attend the summer meeting? "At this point, nothing at all," Stein said. "Just mark your calendar in pen for the annual meeting from Thursday, July 15 through Sunday, July 18. Then watch for the registration materials in your mail, and send them back with a check as soon as possible. Space is limited. See you at the Equinox in Vermont!"

Request for Articles

If you have written an article for the *N.Y. Real Property Law Journal*, please send it to:

Newsletter Department
New York State Bar Association
One Elk Street
Albany, NY 12207

or to any of the co-editors listed on the back page.

Articles should be submitted on a 3-1/2" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

Mortgage Foreclosure Sale Skullduggery

By Peter V. Coffey

The **question**: Who is to pay for the transfer taxes in a foreclosure sale? The **issue**: The adherence to fairness and equity in foreclosure sales. The **answer**: Play by the rules.

*"The **question**: Who is to pay for the transfer taxes in a foreclosure sale?"*

The issue comes to the fore as a result of *Regency Savings Bank, FSB, v. Carey-Ross Associates*.[1] In that case the transfer taxes (what I grew up calling deed stamps) amounted to $40,000, and the failure of the bidder to pay this sum was sufficient cause for the plaintiff's attorney to seek forfeiture of the bidder's $177,500 deposit. As is the normal case, the plaintiff's attorneys prepared the terms of sale without any supervision or input by the court. And so the terms of sale called for the bidder to pay, contrary to the rules, the transfer taxes. OK, a minor playing with the rules you say? Well, as long as the court isn't looking, how about a provision that should the bidder balk at any terms of sale, including paying the $40,000, the referee is directed to forward the $177,500 deposit to plaintiff's attorney? No asking the court, no talking to the court, simply the referee is to do what the referee is told—by plaintiff's attorney. Could not happen you say? Wrong!

It is the point of this article to show just how far out of control matters have progressed in foreclosure sales, and even more troublesome that when the matter is called to the attention of the court, as in *Regency Savings Bank*, the courts often refuse to exercise any supervision. Encroachment on the rights of others often starts with a little thing, such as a minor provision inserted in the terms of sale calling for the bidder to pay the transfer taxes, taxes which by law are the responsibility of the referee. How in the world can we get from there to the potential disbarment of the referee? No problem. Read on.

*"The **issue**: The adherence to fairness and equity in foreclosure sales."*

The law is fairly clear—it is the grantor upon whom the transfer taxes are imposed. N.Y. Tax Law § 1404 states "the real estate transfer tax shall be paid by the grantor."[2] And who is the grantor? Well, we have an answer to that also. In § 1401, the Tax Law states "'Grantor' means the person making the conveyance of Real Property or interest therein."[3] The statute also provides "'Grantee' means the person who obtains real property or interest therein as a result of a conveyance."[4] And who is the grantor in a foreclosure sale? Well, the name on the deed is the referee, but the referee is truly not the grantor. For the identification of the grantor we turn to the wise words of Judge Lehman, who stated in *Lane v. Chantilly Corporation*,[5] "Here the sale was made by the Referee as an officer of the Court."[6] And as an officer how should the referee act? Judge Lehman goes on:

> The Court may direct its officer to act in accordance with fairness and equity. In effect the contract is made with the Court, and a purchaser upon a judicial sale will not be compelled to perform his contract, 'where it would not be perfectly just and conscientious in an individual to insist upon the performance of a contract against a purchaser, if the sale had been made by such individual or its agents.'"[7]

In the *Lane* case the question was whether or not the purchaser would be compelled to purchase "under the terms of sale signed by the purchaser, [providing that] the premises were sold 'subject to any state of facts which an accurate survey would show.'"[8] In fact the survey showed a problem.

*"The **answer**: Play by the rules."*

So was the buyer bound? Not at all; the Court of Appeals affirmed both lower Courts' denying plaintiff's motion to compel the purchaser to purchase. It is important to reiterate that we are talking about sales in which the court is the party selling. Such is not the rule in a private sale as opposed to a judicial sale.[9] This is an important distinction to remember as the discussion progresses. Justification for imposing the obligation to pay for deed stamps upon the purchaser has been based upon the fact that oftentimes contracts involving private parties impose this obligation on the purchaser.

As a practical matter it is the plaintiff's attorney who prepares the terms of sale, not the referee and certainly not the court. And attempts by the plaintiff's attorney to overreach are nothing new. One of the finest discussions is set forth in *Goldberg v. Feltmans of Coney Island*.[10] This case involved a motion to set aside the

sale based upon the unconscionable nature of the sale terms. The judgment was silent concerning the terms of sale. The terms announced required payment "for all cash" on the day of sale. The auctioneer and the referee refused to accept a certified check for 10% of a third party's bid or to give the bidder 30 days to pay the balance. The court observed that the paying of only a 10% deposit at the sale and the balance in 30 days are the usual terms governing such sales and these terms of sale did not meet these accepted norms. The court would have none of it:

> The Court will reject any procedure adopted to frustrate free and fair judicial sales, and it should observe great care that its practice in acting on reports of judicial sales be such as to inspire confidence in the manner and conduct thereof . . . public policy requires and the law contemplates scrupulous impartiality on the part of the officers conducting sales under the administration of the law, and to avert the possibilities of collusion between the purchaser and the selling officer.[11]

The Court observed further, after noting that the attorneys for the plaintiff generally prepare the terms of sale, that

> while this is not unusual, where such foreknowledge gives a decided advantage to the plaintiff, the Court must therefore carefully scrutinize all matters affecting the sale to see that this advantage does not adversely affect the rights of others . . . For the plaintiff to have advance knowledge of the terms of the sale which, it is admitted, were unusual, placed him in a position of advantage which the law will not tolerate.[12]

The Referee

> is a ministerial officer, charged only with the duty of making the sale in the manner the Court may direct. He is not only the agent of the Court but he is also the agent of both debtor and the creditor, and as such he is bound to act with the utmost fidelity and impartiality. The assumption on the part of a judicial officer such as a Referee in a foreclosure sale to favor the mortgagee in any way **would be repugnant to the principles of morality and good conscience and violative of the spirit if not the letter of the law.**[13]

The Court then concluded in the clearest terms: "The Court by whom the sale is conducted not only has the right, but the absolute duty, to control all actions taken over its own judgment and proceedings such as this are directed to the discretion of the Court."[14]

The requirements of justice and fairness as are mandated in judicial sales have caused courts to impose the Uniform Vender and Purchaser Risks Act[15] upon a judicial sale.[16] So it seems there are several principles applicable to judicial sales as determined by the case law: 1) the overriding principle applicable to judicial sales is fairness and equity, fairness to all involved including the purchaser and the debtor; 2) the seller is the court, the referee the court's ministerial officer; 3) the courts not only have the right but the "absolute duty" to review and control all aspects of the sale; 4) when any aspect of the sale, particularly the terms of sale, do not comport with the principles of fairness and equity as determined by the court the court will take such action as is necessary to see that fairness and equity are achieved.[17]

Case law agrees—the referee should pay transfer taxes.[18] The *Trefoil Capital* case is somewhat confusing in that it involved two issues: the payment of the transfer tax and the payment of the now repealed Real Property Transfer Gains Tax. The court held that the referee was required to pay the transfer tax as well as the gains tax prior to paying a second mortgagee. Because of various amendments to Real Property Actions and Proceedings Law § 1354 and the timing of the enactment of the gains tax and the amendments, the Appellate Division reversed the lower court's holding that the transfer gains tax, $90,450, should be paid prior to payment of the second mortgage. However, as to the transfer tax there was no question. The lower Court stated after discussing the various statutes mentioned above:

> under the transfer tax statutes, the law clearly imposes the obligation to pay the taxes on the 'grantor' or the 'transferor' . . . it is equally clear that, in the context of a mortgage foreclosure sale, under the statute at issue, the Referee is a grantor/transferor since it is he who executes and delivers the deed . . . indeed it is the Referee's primary function, as a judicial delegate, not only to conduct the sale, but to convey title free and clear of the prior outstanding debts and obligations—something which the prior owner is either unable or unwilling to do."[19]

The Court further states:

> in conclusion, the Court holds that a mortgage foreclosure sale is a transfer of real property within the meaning of the transfer and gains tax statutes; the Referee is the transferor/grantor and has the duty to pay those taxes as expenses of

> the sale from the proceeds of sale. The statutory scheme embracing the tax statutes and the RPAPL affords the parties adequate notice of both the duty to pay the taxes at issue, *and of the identity of the party having the duty to pay* (emphasis supplied).

On appeal, the second mortgagee, CMNY Capital Company, Inc., challenged the payment of the gains taxes prior to payment of its mortgage. But it did "not contest the Referee's payment of the City or state transfer taxes."[20] Accordingly, this case stands strongly for the proposition that it is the referee who has a "duty" to pay the transfer taxes. The lower Court decision does contain some *dicta* wherein the Court stated "where the written contract between the Referee and the highest bidder does not contain an agreement that the purchaser will pay the tax, and there is no clause relieving the Referee from doing so, the Referee has the obligation to pay such taxes out of the proceeds of sale." It appears the court as an aside was simply distinguishing this from a case in which the terms of sale might have directed the referee to pay the transfer taxes. An examination of this decision may give guidance as to how a court might decide this issue if presented. **However, the only actual conclusion that can be drawn from the case is that the referee must pay the transfer taxes.**

Given the rules of equity, justice and fairness which govern judicial sales and the statutory direction regarding the payment of transfer taxes, surely no plaintiff's attorney would consider submitting terms of sale providing for the purchaser to pay the transfer taxes; or if having done so no referee would adhere to such a provision; or if having done so no court would tolerate such an adherence, right? Wrong.

Consider the case of *Regency Savings Bank*,[21] noted at the beginning of this article. The terms of sale were clear. "All expenses of recording the Referee's Deed, including real property transfer tax and transfer stamps, shall be born by the purchaser." No small matter—the bid was $1,775,000, the plaintiff sought to have the defendant forfeit the deposit of $177,500, and the transfer taxes amounted to $40,000. The Court focused on the issue of whether or not the terms of sale contradicted the judgment, the judgment providing that the referee shall pay from the proceeds "The real estate and other taxes, assessments, water charges and sewer rentals which are or may become liens on the premises . . ." The Court defined the issue as the question of whether or not the transfer taxes were included within the judgment's definition of taxes, thereby requiring the referee to pay them. The Court correctly held that the transfer taxes imposed by Tax Law § 1402 are not those taxes which were defined in the judgment and, although not recited in the decision, are moneys required to be paid by the referee pursuant to RPAPL § 1354. Finding that the definition of taxes in the judgment did not include transfer taxes, the Court concluded that there was no discrepancy between the judgment and the terms of sale and accordingly the purchaser was bound to pay the transfer taxes as dictated by the terms of sale.

The decision is utterly bereft of any discussion of the principles of fairness and equity which apply to a judicial sale, the role of the court in a judicial sale, the case law as developed from *Lane v. Chantilly*, or, believe it or not, even Tax Law § 1401 which says that the seller should pay the taxes. The Court cites two cases: one agreeing with it and one disagreeing with it, but the cases are not reported **anywhere** including the *New York Law Journal*. (It is this writer's opinion that citation to unreported cases as authority is detrimental to the development of law and should not be accepted.) The Court points out that oftentimes, private contracts of sale will shift the burden on the vendee to pay the taxes and "the practice is unassailable." Given the right retainer, I have never met a practice I found unassailable.

Nevertheless, what that statement refers to is the private negotiation between parties freely entering into a contract. Admittedly there is nothing in the statute which prohibits shifting the burden to pay for transfer taxes to the vendee, although a reading of the statute certainly wouldn't give the impression that the statute permits it. The situation of a privately negotiated contract has no application to the situation regarding a judicial sale. Recall the earlier discussion of the distinctions between private contracts and a contract with the court. Purchasers at a judicial sale do not prevail upon a referee or plaintiff's attorney to change any of the terms. The idea that the terms of sale are not negotiated was recognized early on specifically in the case of *Sohans v. Beavis*.[22] The Court stated as follows:

> We agree with the Learned Appellate Division that a sale of land in the haste and confusion of an auction room is not governed by the strict rules applicable to formal contracts made with deliberation after ample opportunity to investigate and inquire. When the plaintiff (not the plaintiff in the foreclosure action) was required to sign the terms of sale or lose the benefit of his bid, he could not ascertain the extent of the restriction relating to the buildings which then came to his notice for the first time . . .

> when he signed the terms of sale within a few minutes after the property had been struck off to him, he had no chance to investigate but had to act at once.[23]

The Court in *Regency Savings Bank* then discusses the case *Maxton Builders Inc. v. LoGalbo*.[24] The issue in *Regency Savings Bank* was whether or not the purchaser had to forfeit the $177,500 deposit, and *Maxton Builders* is as harsh as it gets in its rule regarding a defaulting purchaser. The *Maxton Builders*' decision is based upon the 1881 Court of Appeals decision of *Lawrence v. Miller*.[25] The issue of *Lawrence* and its harsh holding becomes relevant to our discussion because the Court of Appeals in *Maxton Builders* notes the harshness of the rule in *Lawrence* but justifies its adherence to the rule (a defaulting purchaser forfeits the deposit without any showing by the seller of damages) in the following language:

> Finally, real estate contracts are probably the best examples of arm's length transactions. Except in cases where there is a real risk of overreaching, there should be no need for the Courts to relieve the parties of the consequences of their contract. If the parties are dissatisfied with the rule of *Lawrence v. Miller*, the time to say so is at the *bargaining table*.[26]

They do not put out bargaining tables at foreclosure sales. If the Court could research the question presented sufficiently to find *Maxton Builders* and *Lawrence*, which apply to private contracts and have no application whatsoever to judicial sales, how could the Court not have found *Chantilly*, which sets forth the rules in judicial sales?

The Court in *Regency Savings Bank* goes on to conclude that the terms of sale "may be treated as a contract."[27] Certainly the terms of sale have meaning and to the extent they are just and fair define the terms of purchase. It is submitted that no one questions that the bid price is generally binding on the purchaser and the referee/court, although even here if the bid is too low it can be rejected by the court.[28] For purposes of discussion here, the issue as to whether or not the terms of sale constitute a contract is not conclusive. What the Court in *Regency Savings Bank* was holding was that the purchaser at a foreclosure sale agreed to the terms and conditions as set forth in the terms of sale, and as they may be treated as a contract the purchaser is bound whether the term contested was fair or not, citing *Bergman on New York Mortgage Foreclosures* § 30.05 [1] [f].

"They do not put out bargaining tables at foreclosure sales."

But that same text states at § 30.05 [3] "Thus, there is no contract of purchase and sale between the bidder and the Referee. Instead, the bidder makes an offer which the Court in the exercise of discretion can accept or reject." That is of course precisely the nature of the situation. The court is free to accept or reject any terms of sale and when the court determines that a term of sale violates fairness and equity, out it goes.

Imposition by the attorney for the foreclosing party of an obligation contrary to statutory and case law dictates is not fair and equitable. The buyer does not have to accept title shown by a survey to be defective regardless of what the terms of the sale say and should not have to pay the transfer taxes regardless of terms of sale.

OK, what's the big deal about some piddling transfer taxes? Well first of all in the *Regency Savings Bank* case there were $40,000 worth of transfer taxes. Moreover, and more importantly, the failure to play by the rules does not stop at the imposition of an obligation on the purchaser for the responsibility for transfer taxes. It is like the tip of the proverbial iceberg. Take a gander at the liberties I have seen plaintiff's attorneys take:

A. "Pay in addition to the purchase money the auctioneer's fee of $500 for each parcel sold" (no provision in the judgment providing for this whatsoever). Why stop at the auctioneer's fees? What about the plaintiff's attorneys fees? What about any deficiency?

B. "Purchaser understands that these transfer stamps are a tax, and are not taxes which become liens on property but which are required to be paid in order for the title to be conveyed." Yes, that is true and we assume plaintiff understands that it is the seller's obligation to pay them.

C. "The balance of the purchase price will be required to be paid by the successful bidder to the Referee at the office of plaintiff's attorney." The office was in New York City—the property was located in Schenectady County.

D. These terms keep getting more overreaching as we proceed. Try this one—"Time is of the Essence with respect to the closing date as to the *purchaser only*" (emphasis supplied). There was no provision in the judgment making time of the essence and even if there were—time of the essence for one side only? It was possibly dictated by the other side—probably that plaintiff's

attorney in New York City who thought he/she might get caught having to come to Schenectady for the closing and possibly the stagecoach wasn't running that day. It should be noted that this provision was also in the terms of sale in the *Regency Savings Bank* case. First of all, a demand for time of the essence assumes mutuality. As was stated by Karl Holtzschue[29] "once having made time of the essence, the party doing so must tender performance of its obligation on the date so fixed (the 'law day')."[30] Also, note that this provision in the terms of sale makes time of the essence prior to law day (forgetting for the moment that it creates a unilateral obligation.) The case of *Baltic v. Rossi*[31] states that time of the essence cannot be made prior to law day: "However, the plaintiffs were not entitled to declare that time was of the essence before the date set forth in the contract, and thus their refusal to close at another time was a breach of contract."[32] Accordingly, not only is the provision inequitable, it is against the rules as determined by the Court in *Baltic*.

E. The following attorney wasn't opposed to an extension (initially anyway), not being as absolute as the prior attorney. No, this attorney was perfectly willing to grant at least one extension on the following terms:

> In the event that the time for completion of said purchase is extended by the Referee, the extension shall be granted **only** on the following terms and conditions:
>
> (A) Any extension of time granted shall not exceed 30 days (the date to which the closing date is extended is hereinafter referred to as the 'extended date'); (B) Purchaser shall pay on closing an additional 10% of the purchase price on account of the purchase price by unconditional bank cashier's check [that must be a real good check, huh?] or certified check of the purchaser drawn on a New York clearing house; (C) Purchaser shall pay interest at the rate of 14% per annum on the total purchase price during the period from the closing date to the extended date; (D) . . . (E) The extended date shall be Time of the Essence with respect to the purchaser only."

Well, after all he did give one extension—what do you want? Accordingly the referee is told when he/she can give an extension, how many extensions can be given and the terms if he/she dares grant the extension. Here we have a 10% penalty off the top and a chance of a 14% interest rate. Let us assume that the purchase price is $100,000 and the extension is granted for 30 days.[33] The Court of Appeals in *Band Realty*[34] reaffirms the traditional method for calculating the true interest rate of a loan from the principal of which a discount has been retained by the lender. The discount, divided by the number of years of the term of the mortgage, should be added to the amount of interest due in one year, and this sum compared to the difference between the principal and the discount in order to determine the true interest rate. The rule is that the discount must be taken off the top, which means we now have a balance of $90,000 upon which to compute the true rate of return. So we have an annual charge of $14,000—at 14% of $100,000—plus the discount of $10,000. A total annual interest charge of $24,000. When computed upon $90,000, the rate of interest is 26.66%. It is usurious in the case of an individual purchaser as it exceeds 16% per annum.[35] It is not simple good old-fashioned usury either, but a Class C Felony as it exceeds 25%.[36]

Do not view the $10,000 as a discount? Want to call it an add on? Well, if that is the case and the extension is limited to 30 days, that is 10% a month or 120% a year which together with the 14% calls for interest at the rate of 134% a year. Some might argue that the $10,000 is a penalty after default, but usurers historically attempt to hide their usurious intent and surely a court of equity would not allow such a subterfuge. Nor should the imposition of usury be saved by the further provision in the terms of sale "in no event should the rate of interest charged hereunder be in excess of the maximum amount provided by applicable law." Clearly the drafter of these provisions anticipated a defense of usury knowing full well, as any attorney practicing in this area would know, that the imposition of a 10% charge on top of a 14% interest rate was usurious. The attempt to exonerate itself as submitted was a CYA provision which implies—"if we get caught we didn't mean it." Certainly it was meant and courts have not been kind in such situations. As was stated in *Fiedler v. Darrin*[37]

> it follows that the transaction was usurious, and the security void. The effect of the transaction was secure to the plaintiff more than 7% per annum for the loan. The agreement was vicious because of the usurious effect, by

> which the intent of the parties must be judged . . . it will not avail one, who deliberately fires his neighbor's house, to swear that he did not intend to commit arson; and one who deliberately and intentionally secures to himself $1,650 at the end of four months, in return for a present advance of $1,500, cannot avoid the consequences of the act by testifying that he did not intend to take usury; that is, that he intended to give the transaction a different name from that which the law gives it, and call that purchase and sale which the law calls a loan of money, secured by a mortgage."[38]

(Note: The respondent was represented by Samuel Hand, Learned Hand's father.)

F. "The premises are sold, 'AS IS as of the date of the later to occur—the closing date or the extended date'" (emphasis in original). Nothing in the judgment provided for this. So much for the Uniform Vendor and Purchaser Risk Act.

G. "In the event the purchaser fails for any reason to comply in any way with these terms of sale by the closing date, or, if applicable, the extended date, the Referee is **directed** to tender the partial payment to plaintiff within 10 days of the date of purchaser's default" (emphasis supplied).

One has to really think about this to understand just what is going on here. First of all, the plaintiff's attorney who prepared the terms is directing the actions of the referee. The judgment never directed the referee to do any such thing, but the problem here is much more fundamental. This clause directs the referee, often an attorney who is an escrow agent, an officer of the court, to give an escrow deposit to one side without consulting the other side or with the agent's principal—the court. To get a flavor of just how bad this is, see *Attorney Escrow Accounts—Rules, Regulations, and Related Topics* (NYSBA 2001), Escrow Agreements, Section III.C.2., Wrongful Delivery. The discussion mentions a lot of not nice things as applying to the escrow agent who wrongfully delivers the property, such as a right of action against the agent on theories such as breach of contract, breach of fiduciary duty, conversion, money wrongfully had and received, gross negligence. As was stated in *National Union Fire Ins. Co. v. Proskauer Rose Goetz & Mendelsohn*,[39] "[t]he escrow agent becomes trustee of the parties who have a beneficial interest in the subject matter of his or her trust . . . the escrow agent as trustee owes 'the highest kind of loyalty.'"[40] Where there is a dispute

> it would be inappropriate for the lawyer to assume the power to resolve the dispute by releasing the escrow and returning the funds to the sellers, because a stipulated contingency for release of funds has not occurred (citing a Brooklyn Bar Opinion). The attorney escrowee may not disburse the funds based on his or her own notions of fairness.[41]

The lawyer/referee who complied with those terms of sale should, simultaneously with forwarding the sums to the plaintiff's attorney, forward his or her resignation as an attorney to the appropriate Committee on Professional Standards.

The foreclosure market today has become a free-for-all which begs for judicial intervention. Although not directly related to the topic discussed, this writer became aware of a practice evidencing how out of control the foreclosure market has become.

A client was referred by an approved organization for representation. I investigated and found that "Unified Capital Services Inc." currently represented her (with the slogan "Keeping a roof over America"). This outfit checks the filings of Notices of Pendency in County Clerks' offices and then contacts, **solicits by phone,** the defendants for representation. They charge a fee of $1,500 (I subsequently received a call from an individual in another situation who was being sued in Albany City Court by Unified Capital for collection of an unpaid portion of its fee.). Unified Capital sent a letter to the attorneys for the plaintiff with the proper address, the proper regarding, the index number, etc., outlining the legal situation and requesting legal relief. They also put in an answer. Although the answer did say that the client was "Pro-se," the client, who had no legal ability, claimed in her answer that "Plaintiff has failed to state a legally cognizable cause of action,"; that "this Court lacks personal jurisdiction over the defendant . . . "; that "the defendant . . . has a defense found upon laches etc." In short, the good people at Unified Capital Service prepared that answer.

The plaintiff's attorney treated the letter as an answer submitted by an attorney. Incidentally, once the answer didn't work, the good people at Unified Capital referred the client to a bankruptcy attorney indicating they had done all they could. In short, the charge was $1,500 for sending in a form answer of a page and a half and a form letter somewhat tailored to this situation. The lawyer for the plaintiff corresponded with United Capital Services Inc. and faxed to United Services reinstatement figures.[42] Incidentally, the "law firm" of Unified Capital Services Inc. violated its ethical obligation by refusing to turn the file over to me when requested even though it had

been paid the full sum of $1,500. We moved to open the default on the basis of this misrepresentation known by plaintiff's attorney. The decision of the Supreme Court fully outlines this entire situation. The Court stated in its decision:

> The Court is not unsympathetic to the predicament that the defendants now faces and is not pleased that the defendants may have been the victims of a party or parties engaged in the unlawful practice of law. The Court does not countenance or condone the unlawful practice of law, and would expect that any violation of the law which might have occurred including the charging of a $1,500 fee would, upon appropriate complaint by the Defendant, be vigorously prosecuted by the appropriate District Attorney for the protection of the defendant and others, who might in the future be 'represented' by United Capital Services Inc. Nevertheless, upon the circumstances present at Bar, plaintiff's counsel, in the Court's view, owed no duty to defendant to protect them in this regard. Moreover, there is insufficient evidence in the present record to establish that plaintiff's counsel had knowledge that Defendant (name of defendant) was being represented unlawfully.

Attorneys do owe an obligation to the courts and to the profession to not abide a non-lawyer in the practice of law. These rules do create obligations.[43]

At the bottom of the letter of the Unified Capital Services Inc., it is stated that the (law) firm is "serving 62 counties throughout New York State." Well guess what? When you have a good thing going why stop at the State of New York? The chief counsel of one of the Disciplinary Committees in the State of New York received an inquiry from Claudia Herrington of the Office of Disciplinary Counsel of the Supreme Court of Ohio. This chief counsel referred Claudia to me, and we had a very interesting discussion. It turns out that Unified Capital Services Inc. has opened offices representing clients in the State of Ohio. In the words of Dave Barry, "I am not making this up."

"It is the responsibility of the courts to impose the law in foreclosure sales . . . and to take affirmative action to prohibit non-lawyers from practicing in their courts."

Unfortunately the expectations of the Supreme Court Judge went unfulfilled. No one would do anything.

I do not mean to be dismissive when calling the situation a game, but we do have a referee and rules. The rule states that the seller should pay for the transfer taxes. The rule is not immutable of course, but the changing of the rule can never be appropriately bargained for in this situation, for the bidder at a foreclosure sale is never party to the action until the day of sale and no one is suggesting that a few hours be spent negotiating the terms of sale. OK, initially we have a matter of a few dollars, but then it escalates to $40,000. Then we have the clearly inequitable imposition of time of the essence applied only to one side and the requirement of traveling long distances to deliver the money on the law day which has been wrongfully mandated as time of the essence. Then we have the imposition of usury—not just simple usury but criminal usury. Then we have the violation of one the most sacred obligations of an attorney—violation of the trust of an escrow agent. Finally, we have the absolute practice of law by a non-lawyer in clear violation of the law itself and a violation of Disciplinary Rules. So it has progressed from a few dollars' worth of deed stamps to Unified Capital Services Inc. and along the way has trampled upon all the applicable rules. I understand that it is the obligation of an attorney to represent their client zealously—see CANON 7—**A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.** It is that last provision of Canon 7, which needs to be applied in these cases. When the game turns out of hand, oftentimes it is the referee's responsibility. It is the responsibility of the courts to impose the law in foreclosure sales according to the wise words of Judge Lehman and to take affirmative action to prohibit non-lawyers from practicing in their courts.

Endnotes

1. N.Y.L.J., Nov. 27, 2002, p. 21 col. 4 (Sup. Ct., Queens Co.).
2. N.Y. Tax Law § 1404(a).
3. N.Y. Tax Law § 1401(g).
4. N.Y. Tax Law § 1401(h).
5. 251 N.Y. 435 (1929).
6. *Id.* at 437 (emphasis supplied).
7. *Id.*
8. *Id.* at 436.
9. *See McCarter v. Crawford*, 245 N.Y. 43 (1927) ("We do not see how it is possible to get away from that provision of the contract regarding the facts to be shown by a survey."); *Id.* at 46.
10. 205 Misc. 858, 130 N.Y.S.2d 723 (Sup. Ct., Kings Co. 1954).
11. *Id*. at 727–28.
12. *Id.* at 728.
13. *Id.* (emphasis supplied).
14. *Id.* at 730.
15. N.Y. General Obligations Law § 5-1311.
16. *See Citibank v. Liebeskind*, 237 A.D.2d 478, 656 N.Y.S.2d 39 (2d Dep't 1997); *Ononda-*

ga Savings Bank v. Wagner, 101 Misc. 2d 109, 420 N.Y.S.2d 657, (Sup. Ct., Onondaga Co. 1979) ("the Court, being guided by principles of fairness and equity of judicial sales"—citing *Lane v. Chantilly)*; *N.Y. Medical College v. 15-21 East 111th Street Corp.*, 90 N.Y.S. 591 (Sup. Ct., New York Co. 1949) (citing *Lane v. Chantilly* for the proposition that fairness and equity are what are required).

17. *See Morgan v. Ellenville Savings Bank*, 55 A.D.2d 178, 180, 389 N.Y.S.2d 660, 661 (3d Dep't 1976) ("The Referee has no power or authority to include such a clause in the terms of sale since it was not provided for in the judgment of foreclosure. His role is purely ministerial and any altering in the terms of sale fixed by the judgment of foreclosure is void." That case involved a discrepancy between the terms of sale and the judgment but the proposition is clear—the courts have no problem voiding terms of sale the Court finds unfair.); *see also The Bank of New York v. Love*,___ A.D.2d ___, ___N.Y.S.2d (1st Dep't, 2004), N.Y. App. Div. LEXIS 12. The Appellate Division stated

> The Court[Lower Court] concluded that the purchasers were obligated to satisfy the condition in the terms of sale regarding the payment of taxes, notwithstanding that the language and the judgment indicated otherwise . . . we have consistently held that a judicial sale of real property must conform to the judgment, and the terms of sale may not deviate from the judgment . . . the judgment provides no authorization for the referee to require the purchaser to pay the taxes without receiving a credit.

18. *See Trefoil Capital Corporation v. Creed Taylor Inc.*, 125 Misc. 2d 152, 479 N.Y.S. 2d 308 (Sup. Ct., New York Co. 1984), *rev'd. in part*, 121 A.D.2d 874 (6), 504 N.Y.S.2d 112 (1st Dep't 1986).
19. 125 Misc. 2d at 156.
20. 121 A.D.2d 874 at 877.
21. N.Y.L.J., Nov. 27, 2002, p. 21 col. 4 (Sup. Ct., Queens Co.).
22. 200 N.Y. 268 (1911).
23. *Id.* at 271–2.
24. 68 N.Y.2d 373 (1986).
25. 86 N.Y. 131 (1881).
26. 68 N.Y.2d at 382 (emphasis supplied).
27. *See also Citibank*, 237 A.D.2d, 656 N.Y.S.2d 39 (2d Dep't 1997).
28. *See Polish National Alliance of Brooklyn, v. White Eagle Hall Co.*, 98 A.D.2d 400, 470 N.Y.S.2d 642 (2d Dep't 1983)
29. Holtzschue, Karl. *Holtzschue on Real Estate Contracts* § 2.9.1 (PLI, 2d ed. 2002), *Adjournments and Time of the Essence*, pp. 2-93/94.
30. Citing *Dub v. 47 E. 74th St. Corp.*, 204 A.D.2d 145; 611 N.Y.S.2d 198 (1st Dep't 1994), *appeal dismissed*, 84 N.Y.2d 850 (1994) (which states "the IAS Court correctly held that defendant seller, who created law day by sending plaintiff, buyer, a 'time of the essence' letter was required to tender performance of his obligation on law day . . .").
31. 289 A.D.2d 430, 735 N.Y.S.2d 148 (2d Dep't 2001).
32. *Id.* at 430.
33. *See Hammelburger v. Foursome Inn Corp*, 76 A.D.2d 646, 437 N.Y.S.2d 356 (2d Dep't 1980), *modified*, 54 N.Y.2d 580, 446 N.Y.S.2d 917 (1981).
34. 37 N.Y.2d 460, 373 N.Y.S.2d 97 (1975).
35. *See* N.Y. Banking Law § 14A.
36. *See* N.Y. Penal Law § 190.42.
37. 50 N.Y. 437 (1872).
38. *Id*. at 443.
39. 165 Misc. 2d 539, 634 N.Y.S.2d 609 (Sup. Ct., N.Y. Co. 1994), *aff'd*, 227 A.D.2d 106, 634 N.Y.S.2d 609 (1996).
40. *Id.* at 545–46. *See also* NYSBA Comm. on Professional Ethics, Op. #710, Nov. 6, 1998, p. 146 of *Attorney Escrow Accounts* ("As a general rule, an escrow agent has contractual and fiduciary duties to all parties to an escrow arrangement which may be discharged only in accordance with the terms of the escrow agreement or with the informed consent of all parties.").
41 NYSBA Comm. on Professional Ethics, Op. #710, Nov. 6, 1998.
42. *See* D.R. 3-101(A). "A lawyer shall not aid a non-lawyer in the unauthorized practice of law."
43. *See* D.R. 3-101.

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Condominium Liens and the Priority of a Consolidated First Mortgage—Revisited

By Joel David Sharrow

In *Bankers Trust Company v. Bd. of Mngrs of Park 900 Condominium*,[1] the Court of Appeals held that a first mortgage of record has priority[2] over a condominium board's subsequently filed statutory lien for unpaid common charges[3] and that such subordinate lien is cut off by foreclosure of the first mortgage of record.[4] But there appears to be some uncertainty whether foreclosure of a first mortgage of record, which has been consolidated with a junior mortgage recorded (collectively, the "Foreclosing Mortgage") and the consolidation occurring before a condo board's lien is filed, fully wipes out the statutory lien or if the Foreclosing Mortgage must be split into its component parts with only the initial first mortgage of record retaining its priority over the condo board's lien.[5] Yet, detailed familiarity with all of the facts, motions and appellate briefs in *Bankers Trust Co.* (where the bank held two (2) separate consolidated and cross-collateralized first mortgages of equal priority upon two condominium units) as well as the legislative history of RPL § 339-z suggests—indeed, may compel—the conclusion that there should be no such uncertainty. A Foreclosing Mortgage retains the first mortgage priority of all of the previously recorded and consolidated mortgage liens over the condominium's later filed lien.

The Basis of the Confusion

The apparent confusion arose out of the nature of consolidated liens, predicated upon the interplay of two well-settled concepts. First, a mortgagee's rights generally are fixed at the time its mortgage(s) are recorded, and cannot be enlarged or impaired by subsequent acts of the mortgagor.[6] Second, and as a result of that first rule, is the elementary tenet that consolidation benefits only the parties to it:

> A consolidation of outstanding loans is a device intended for the convenience of only the contracting parties. A consolidation agreement cannot impair liens in favor of parties that are not the contracting parties, which retain their independent force and effect ([citing, *Dime Svg. Bk. v. Levy*]; *Dominion Fin. Corp. v. 275 Washington St. Corp.*, 64 Misc. 2d 1044 [Sup., Westch. Co., 1970]).[7]

In *Dominion Fin. Corp.*, cited by *Fed. Dep. Ins. Co.*, the court correctly held that where a lease had been recorded during the interstitial gap of the recording of an earlier second mortgage with a subsequently recorded and consolidated third mortgage, such consolidation could not "prime" the interests of the priority of the lease because the tenant was not a party to the consolidation agreement. Thus, the lease retained its priority over the later recorded third mortgage portion of the consolidated liens.

Therefore, the Court in *Societe Generale*, while citing the Appellate Division's affirmance of summary judgment to the bank under RPL § 339-z in *Bankers Trust*,[8] nevertheless found the nature and effect of consolidation agreements to be controlling. It held that although the lender recorded a consolidation of a reduced pre-existing first mortgage with a new second mortgage earlier than the recording of the condo board's statutory lien, there still were two mortgages, only one of which could be a first mortgage under RPL § 339-z.[9]

It may be, and this writer submits, that such "split priority" injected into RPL § 339-z by *Societe Generale* (later expressly rejected by both *Dime Sv. Bk.* and *Greenpoint Bank*),[10] stemmed from the fact that in *Bankers Trust* the Appellate Division—and, thereafter, the Court of Appeals—held that the lender's two equal in lien cross-collateralized and consolidated first mortgages were, for purposes of RPL § 339-z, only one first mortgage of record. Consequently, it may be that the court in *Societe Generale* was unaware of the number of mortgages held by the bank in *Bankers Trust*, that they were consolidated mortgages, and then spread and cross-collateralized.

The *Bankers Trust* Case

In *Bankers Trust* a series of purchase money and other mortgages on two condominium units had been assigned to the bank by a prior mortgagee. The bank then advanced additional funds to the unit owner and the repayment of such new monies was secured by new mortgages on each of the units. The previously assigned and the bank's subsequent new mortgages on each unit were consolidated; and, as consolidated, each was cross-spread. As a result, the bank wound up holding two equal first mortgages of record on both units.[11] The Board filed its statutory lien after the bank recorded its mortgages, their consolidation and cross-collaterization.

During the pendency of the Board's appeal to the Appellate Divi-

sion from the award of summary judgment to the bank, the Board cross-moved in the IAS Court for an Order, among other things, splitting the consolidated mortgages into their earlier and later new mortgages. If successful, the Board's much later lien for unpaid common charges would have had priority over the lien of the bank's new mortgages. The IAS Court denied that motion[12] and the Appellate Division affirmed summary judgment for the bank.[13]

Thereafter, the Board did a one hundred and eighty degree turnaround. In its brief to the Court of Appeals, the Board went out of its way to explicitly acknowledge that the bank held two consolidated *first* mortgages of record.[14]

The Court of Appeals did not address the fact that the bank held two consolidated mortgages or the general rule regarding the nature and effect of consolidation of liens. Instead, just as the Appellate Division had previously concluded, the Court of Appeals viewed the bank's Foreclosing Mortgages as but a single first mortgage of record.[15]

The implicit holding in each of the decisions in *Bankers Trust* was that when the new mortgages granted to the bank had been recorded and consolidated with the previously assigned pre-existing mortgages on the two units and cross-collateralized, all of which took place before the Board filed its lien for unpaid common charges, any subordinate status of the bank's new mortgages to the previously assigned earlier mortgages was irrelevant.[16]

The Legislative History of RPL § 339-z

The Appellate Division's decision to affirm summary judgment for the bank rested not only upon the express language of RPL § 339-z, but also upon the statute's legislative history.[17] The bank showed that on and after the 1964 enactment of the Condominium Act, RPL Art. 9-B,[18] RPL § 339-z, its then amendments, and a 1991 unadopted proposed amendment, that the Legislature consistently intended that a lender's earlier recorded first mortgage of record retains its priority over a residential condominium's board's subsequently filed "priming" statutory lien for unpaid common charges.

The proof is in the pudding: First, the initial amendment of RPL § 339-z occurred in 1974, and provided that the declaration of an exclusively non-residential condominium could provide that a board's lien for unpaid common charges would be superior to even a first mortgage of record.[19] Second, in 1988, RPL § 339-z was amended to exclude from the priority of a board's lien subordinate mortgages granted to the Urban Development Corporation, and the State Assembly's Legislative Memorandum in support of such amendment stated: "*The statutory protection of first mortgages against the risk of subordination to liens for subsequently occurring unpaid common charges* should likewise be extended to subordinate mortgages held by UDC, and Section 339-z should be modified accordingly (emphasis added)."[20] Third, by contrast in 1991, a bill was introduced in the state Senate which provided that even in an exclusively residential condominium, there should be certain instances where a board's later lien would prime even a pre-existing first mortgage of record, either to the extent of six (6) months of unpaid common charges or six (6) months of unpaid charges which became due immediately before commencement of an action to foreclose the first mortgage.[21] That proposed amendment, to alter the established priority scenario, was not enacted.

Similarly not enacted was the post-*Bankers Trust* 1993 Assembly Bill A.438, Senate Bill S.2887, which, similar to the 1991 unenacted proposal, proposed awarding priority to a condo lien over a pre-existing first mortgage but limiting the priming effect of a board's later filed lien "to the extent of . . . unpaid common charges . . . which would have become due during the six months immediately preceding the date on which the first delinquent installment of the mortgage was due."[22] If adopted, that unenacted 1993 amendment, just like the unadopted 1991 proposal, would have restricted the amount of any legislatively created subordination of a first mortgage of record.

More recently, RPL § 339-z was again amended, with the primary purpose to aid New York City. The 1997 amendment was enacted to give priority to subordinate mortgages of record held by a city municipality having a population of one million or more persons or by the New York City Housing Development Corporation over a condo board's statutory lien.[23] The Memorandum of Legislative Representative of the City of New York, as well as the identical State Senate's Supporting Memorandum, urged enactment of that amendment, as follows:

> This legislation will authorize the City and HDC to utilize subordinate mortgage loans as a means to finance the development of condominium units throughout the City of New York. These amendments will remove the existing technical prohibition stifling the City's and HDC's efforts to increase homeownership opportunities in many of New York City's distressed neighborhoods.
>
> Both the City and HDC often utilize their loan powers to advance housing development within the City of New York by leveraging private sector financing. In most cases, the private sector lender's participation in a project is conditioned upon

receiving a sole first mortgage position. Thus, the City or HDC loan may be secured by a second mortgage. Because a condominium unit constitutes real property pursuant to the Section 339-g of the Real Property Law, the City and HDC should be able to accept a subordinate mortgage with respect to a condominium unit, as they currently accept a subordinate mortgage with respect to any other real property.

The State Legislature has previously determined that the first mortgage limitation in the New York Condominium Act does not apply to other development instrumentalities of the State. After enactment of the New York Condominium Act in 1964, Section 339-z and 339-ff were amended twice. Initially these sections were changed to specifically allow the New York State Job Development Authority to accept subordinate mortgages with respect to condominium units and, most recently, to provide the Empire State Development Corporation with similar authority. The City and HDC should be granted a similar exemption.

The statutory protection of first mortgages of record against the risk of subordination to liens of unpaid common charges should likewise be extended to subordinate mortgages held by the City and HDC. This protection is added in Section 339-z. (Emphasis added).[24]

Thus, it is beyond cavil that at all times the legislature always knew what it was doing when it enacted, amended—and, rejected certain amendments to—RPL § 339-z. The legislature has never waivered in its clearly stated intention that a first mortgage of record have and retain its priority over a subsequently filed condo board's lien for unpaid common charges which—but for few statutorily stated exceptions—primes and subordinates all other prior liens. Notably, none of these exceptions make a distinction between the initial portions versus the later portions of a consolidated first mortgage of record where all portions are recorded and consolidated before a condominium board gets around to filing its unpaid common charges lien—despite the then-extant, and twice expressly rejected, decision in *Societe Generale.*[25]

Conclusion

The notion of "hybrid priority" has been around since 1989 and of "split priority" since 1993.[26] Nevertheless, the legislature has not even attempted to overrule the judicial rejections of those concepts by statutory amendment to RPL § 339-z.

Furthermore, based upon the legislative history of the Condominium Act, amendments to RPL § 339-z, as well as the non-enacted proposed amendments thereto, and the legislature's knowledge of the well-settled law regarding consolidated liens,[27] it is submitted that the legislature never intended to allow a pre-existing consolidated first mortgage of record to be broken into its initial and junior liens upon foreclosure when there is a subordinate condominium board's lien encumbering the subject realty.

In addition, each of the Courts in *Bankers Trust* had before them the documentary evidence that the bank held consolidated mortgages.[28] Yet, both the Appellate Division and the Court of Appeals considered the Foreclosing Mortgages to be a single first mortgage of record.

As a result, it is submitted that there should be no reason for any concern arising out of the holding in *Societe Generale*. It is this writer's opinion that the decision in *Societe Generale* was an isolated aberration; and, as held in both *Greenpoint Bank* and *Dime Svg. Bk.*, is not to be followed.

Endnotes

1. 81 N.Y.2d 1033 (1993), *aff'g* 181 A.D.2d 274 (1992), *aff'g* ___ Misc. 2d ____, N.Y.L.J., June 26, 1991, p. 23, col. 1 (Sup. Ct., N.Y. Co.; Gammerman, J.).
2. *See* Real Property Law § 339-z.
3. *See* RPL § 339-z and § 339-aa.
4. *Bankers Trust Co.*, 81 N.Y.2d 1033.
5. *Compare Societe Generale v. Charles & Co. Acquisition*, 157 Misc. 2d 643 (Sup. Ct., N.Y. Co. 1993), which "split" a consolidated first mortgage—and thereby extended the basic concept that consolidation of a third or more junior liens with a first lien can not "prime" an intervening pre-existing second lien [e.g., *Skaneateles Svg. Bk. v. Herold*, 50 A.D.2d 85 (4th Dep't 1975), *aff'd* on Op. of App. Div., 40 N.Y.2d 999 (1976)—holding that a condo board's lien for unpaid common charges, filed after the consolidation of earlier recorded mortgage liens, nevertheless "primed" the consolidated first mortgage to the extent that all additional monies advanced by the lender and secured by new liens for such extra funds are subordinate to the condominium's subsequently filed statutory lien, in effect creating a "split priority" of the lender's consolidated first mortgage, not dissimilar to the since-rejected "hybrid priority" of a lender's non-consolidated first mortgage of record lien as enunciated by a court in *East River Savings Bank v. Saldivia*, ___ Misc. 2d ___, N.Y.L.J., Oct. 11, 1989, p. 21, col. 4 (Sup. Ct., N.Y. Co.) and its progeny; see also the affirmed Appellate Division decision in *Bankers Trust*, 181 A.D.2d 274 at 276 (1st Dep't 1992), referring to such unwarranted "hybridization" of priority effected by *Saldivia, supra*] *with Greenpoint Bank v. El-Basary*, 184 Misc. 2d 888 (Sup. Ct., N.Y. Co. 2000), rejecting *Societe Generale, supra*, and *Dime Svg. Bk. of New York, F.S.B. v. Levy*, 161 Misc. 2d 480 (Sup. Ct., Rockland Co. 1994), similarly rejecting *Societe Generale, supra*. A more comprehensive discourse of this dichotomy in IAS Court holdings is set out in "Consolidated Mortgage Priority Over Condo Lien," by Bruce J. Bergman, NYSBA *N.Y. Real Property Law Journal*, Summer 2003, Vol. 31, No. 2, pp. 77–78.
6. *Fed'l Dep. Ins. Co. v. Five Star Mgm't, Inc.*, 258 A.D.2d 15 (1st Dep't 1999). *See also UMB Bank and Trust Co. v. S.H.M. West Parking Corp.*, 181 A.D.2d 577 (1st Dep't

1992) (where three of the four mortgages were consolidated and recorded prior to the recording of a tenancy agreement; those three mortgages, as consolidated, were held to be superior in lien to and, upon foreclosure, wipe out the leasehold rights emanating from the recorded tenancy agreement); and *Citibank, N.A. v. Chicago Title Ins. Co.*, 214 A.D.2d 212 (1st Dep't 1995), *app. dsm.*, 87 N.Y.2d 896 (1995) (each mortgage comprising a consolidated mortgage retains its own original priority).

7. *Fed. Dep. Ins. Co.*, 258 A.D.2d at 22.

8. 181 A.D.2d 274 (1st Dep't 1992).

9. 157 Misc. 2d at 646–648.

10. *See* note 5, *supra*.

11 *See* Record on Appeal in *Bankers Trust* (the "Record") pp. 50–130; 35–38.

12. The IAS Court orally denied the Board's motion "from the Bench." As a result, the IAS Court's decision was not reported. The short-form Order, simply denying the Board's cross-motion, was entered in the N.Y. Co. Clerk's Office on Apr. 6, 1992.

13. At the outset of the case, and shortly after the Board had commenced foreclosure of its statutory lien, the bank and the Board stipulated that the bank's consolidated mortgages had complete priority over the Board's unpaid common charges lien. Record, pp. 216–17; and pp. 11–12. *See also* 181 A.D.2d at 275. Nevertheless, the IAS Court, the Appellate Division, and the Court of Appeals, did not rely upon that stipulation; instead, their respective decisions rested upon the language of RPL § 339-z and/or its legislative history. *See*, Record, at pp. 12–14 (the IAS Court also expressly agreed with other similar IAS Court holdings construing RPL § 339-z, *id.*, at pp. 13–14); 181 A.D.2d at 276–77 and 278–80 (the Appellate Division also referred to the condominium's By-laws, 181 A.D.2d at 280); and, 81 N.Y.2d, at 1035–36.

14. *See* Board's Main Brief on its appeal to the Court of Appeals, at pp. 7–8 thereof.

15. 181 A.D.2d at 576; 81 N.Y.2d at 1034 and 1035.

16. *See also Economic Necessity of Lien Priority Of First Mortgages,* by Joel David Sharrow, N.Y.L.J., Apr. 13, 1994, p. 5, col. 2. *Compare with Washington Fed'l Svg. & L. Assoc. v. Scheider,* 95 Misc. 2d 924 (Sup. Ct., Rockland Co. 1978), the first reported decision under RPL § 339-z, where the court correctly held that a lender's second mortgage recorded before a condo board filed its lien nevertheless was statutorily relegated to a position subordinate to the later filed condo lien; and *Foxwood Run Condominium v. Goller Place Corp.*, 166 Misc. 2d 216 at 217 (Sup. Ct,, Richmond Co. 1995), where the court acknowledged that while then recent amendments to RPL § 339-z were enacted to induce lenders to extend mortgages to condominiums [op. cit. om.], the amendment[s] had no intention of furthering this goal by derogating the well-established legal concept of 'prior in time, prior in right' [cit. om.]. The logical conclusion is that [RPL § 339-z] applies to the common situation of a first mortgage recorded prior to a recorded common charge lien, but the less common situation as the one at bar, in which a first mortgage is recorded subsequent to a recorded common charge lien, is governed by priority of recording.

17. At oral argument, the author handed up to the Appellate Division the relevant legislative history of RPL § 339-z and a copy of the condominium's filed By-laws, neither of which had been presented to the IAS Court. The Appellate Division appropriately took judicial notice of and relied upon both. 181 A.D.2d at 278–80, 280. A court may judicially notice legislative history of a statute, *Riley v. County of Broome,* 95 N.Y.2d 455, at 463 (2000), quoting McKinney's Cons. L. of N.Y., 1 Statutes § 92[a] (Courts are to "ascertain and give effect to the intention of the Legislature") and *id.*, § 124 ("legislative history of an enactment may also be relevant 'and is not to be ignored, even if words [of a statute] be clear'") as well as of public documents. *See Sunhill Water Corp. v. Water Resources Comm'n,* 32 A.D.2d 1006 (3d Dep't 1969) (noticing public records); *Siwek v. Mahoney,* 39 N.Y.2d 159 (1976) (taking judicial notice of information culled from public records); *Rex Paving Corp. v. White,* 139 A.D.2d 176 (3d Dep't 1988) (judicially noticing on appeal public records, including official Executive Memorandum and the Governor's letter). Similarly, the bank submitted the legislative history to the Court of Appeals via an Appendix—albeit raised during oral argument, in its decision the Court of Appeals did not address the legislative history.

18. *See* Session Laws of 1964, Ch. 82.

19. *See* Session Laws of 1974, Ch. 1056, § 8.

20. *See* Memorandum, 1988 Session Laws, at pp. 2128, 2130.

21 *See* Senate Bill S.5183, as amended by S.5183-A and S.5183-B.

22. Assembly Bill A.438.

23. *See* Session Laws of 1997, Ch. 349.

24. *See* The Legislature, Memoranda, Session Laws of 1997, at pp. 2335–6, 2336–7.

25. *See* note 5, *supra.*

26. *Saldivia*, ___ Misc. 2d ___, N.Y.L.J., Oct. 11, 1989, p. 21, col. 4; *Societe Generale,* 157 Misc. 2d 643.

27. *See* notes 5, 12 and 16–23, *supra* (Further, it has long been well-settled that the legislature, upon amending a statute, is presumed to know how the courts have construed and enforced the unamended statute); *Orinoco Realty Co., Inc. v. Bandler,* 233 N.Y. 24 at 30 (1922) ("When the Legislature amends or considers afresh a statute it will be assumed to have knowledge of judicial decisions interpreting the statute as then existing, and, if it deals with it in a manner which does not rebut or overthrow the judicial interpretation, it will be regarded as having legislated in the light of and as having accepted such interpretation."); *followed by, Foy v. 1120 Ave. of Americas Assoc.*, 223 A.D.2d 232 at 237 (1st Dep't 1996). *See also Conesco Industries, Ltd. v. St. Paul Fire and Marine Ins. Co.,* 184 A.D.2d 956 at 958–59 (3d Dep't 1992) ("In the absence of a contrary intent, the language of an amendment should be construed in the light of previous judicial decisions construing the original act and the Legislature is presumed to have known of existing judicial decisions in enacting amendatory legislation. [cit. om.]").

28. *See* the Record, pp. 50–130; 35–38.

Mr. Sharrow is a member of Moses & Singer LLP, in New York City, which firm represented the bank in *Bankers Trust Co*. Mr. Sharrow was lead counsel at the firm for, and argued the summary judgment motion as well as the intermediate and ultimate appeals on behalf of, Bankers Trust Company.

New York City Transfer Tax on Multiple Residential Cooperatives and Condominiums

By Michael J. Berey

In computing New York City's Real Property Transfer Tax ("RPTT") on a transfer of real property in the city one must first determine the applicable transfer tax rate. This process should not be complicated. The RPTT is generally applied to the transfer of a one-to-three family dwelling, an individual residential condominium unit and an individual residential cooperative apartment at the rate of 1% when consideration is $500,000 or less, and at the rate of 1.425% when consideration is more than $500,000. These rates of tax are often identified as the "residential" rates. The transfer of other property is taxed at the so-called "commercial" rates of 1.425% when consideration is $500,000 or less, and 2.625% when consideration is above that amount.

However, the process is often not straightforward, particularly when multiple residential condominium units are being conveyed by separate deeds from the same grantor to the same grantee, or when the same transferor is transferring more than one cooperative apartment unit to the same transferee. In such instances, the parties to the transaction are often surprised at closing, or after closing when they receive a notice of an audit, when they first become aware that the residential tax rates do not apply, and the transfer tax payable to the city of New York is substantially greater than the amount anticipated. This is because the city's Department of Finance deems multiple-unit transfers as bulk sales and applies its commercial transfer tax rates. This is its position regardless of whether, in the case of condominium units, all units are transferred by a single deed or each unit is conveyed by a separate deed, and regardless of whether, for cooperative units, there is one assignment or separate assignments of proprietary leases. The transferor and transferee both have RPTT liability for an underpayment of tax, and for any resulting interest and penalties.

The Rules of the City of New York ("RCNY") on "Imposition" of the RPTT deal with the transfer of multiple cooperative units by a single transferor to a single transferee. An illustration in the Rules indicates that the 2.625% commercial rate applies in such an instance, and consideration includes a portion of the outstanding balance of the underlying mortgage on the cooperative corporation's property allocated based on the transferor's percentage ownership interest in the cooperative corporation.[1]

In addition, a proportionate amount of the cooperative corporation underlying mortgage attributable to the shares of stock in the cooperative corporation being transferred is included in taxable consideration on the initial transfer of shares of cooperative stock by the sponsor or on the subsequent transfer of shares of stock attributable to a unit that is not an individual residential unit.[2] For the transfer of multiple cooperative units between the same parties, the Department of Finance has determined that there is not the transfer of an individual residential unit and, therefore, consideration for the sale of each unit will include a portion of the building's underlying mortgage debt.

The Rules do not, however, set forth the rate to be applied when multiple condominium units are being conveyed between the same parties.

A Department of Finance Memorandum issued June 19, 2000[3] confirms that commercial transfer tax rates will be applied to the entire, aggregated amount of consideration on the bulk sale of cooperative units. The Memorandum further advises that while commercial rates will be applied to the bulk sale of condominium units, the rates will be separately applied to the consideration allocated for each deed, provided that the units are conveyed by separate deeds. The Memorandum provides that the "Department will accept the taxpayer's apportionment of the consideration for the bulk sale to each deed provided the apportionment reasonably reflects the relative values of the units transferred." The Memorandum does not detail how these standards are to be applied.

Application of the standards in the Memorandum is set forth in a Letter Ruling of the Department of Finance dated May 23, 2003.[4] The hypothetical facts set forth in that Ruling are that a seller contracts to sell two units to a single buyer under two independent contracts of sale. The larger unit, a single-family dwelling, is to sell for $2,500,000 and the smaller unit, a maid's quarters, is under contract for $100,000. The units are on separate floors and are not connected.

The Ruling sets forth that commercial transfer tax rates will apply to a transfer of multiple condominium units or cooperative apartments, notwithstanding their residential use. For condominium units, the higher commercial rate of 2.625% will apply to the transfer of the family's dwelling since its purchase price is in excess of $500,000. The lower

commercial rate, or 1.425% will apply to the transfer of the maid's quarters; the purchase price for that unit is $500,000 or less.

The Ruling indicates that if cooperative apartments are being transferred, the higher commercial transfer tax rate of 2.625% will apply to the aggregate consideration for the transfers. Consideration will include a proportionate share of the underlying mortgage of the cooperative corporation and no continuing lien deduction as to that mortgage debt would be applied.

New York City Administrative Code § 11-2102 provides that on the transfer of an individual residential condominium unit or an individual residential cooperative apartment (or a one-to-three family house or an interest in any such dwelling), consideration may, with certain exceptions, exclude the "amount of any mortgage or other lien or encumbrance . . . that existed before the delivery of the deed or the transfer [which] remains thereon after the date of delivery of the deed or the transfer."[5] Because the transfer of multiple units or apartments is not deemed a transfer of an individual residential unit, no continuing lien deduction would be available on the computation of transfer tax for any of the units being transferred.

According to informal advice from the Department of Finance, the rules under which the transfer of a residential unit will be subject to the commercial RPTT rate may also apply to the transfer between the same parties of a residential unit and either a garage or parking space unit or a storage unit. However, a 1999 Letter Ruling of the Department of Finance[6] dealing with such a situation does not provide clear guidance. In the 1999 Ruling, the Department determined that residential transfer tax rates would apply on the transfer between the same parties of a residential unit and a parking space unit. The consideration for the transfer of the parking space unit was under $25,000, and therefore not taxable, and the conveyance of the parking space was not contingent on its being transferred to a residential unit purchaser. The 1999 Ruling also noted that the residential unit and the parking space were different types of property. It is not certain how the Department of Finance would apply this holding if the amount of consideration for the parking space was above the threshold for application of the transfer tax, or if the sale of a parking unit is required to be in connection with the transfer of a residential unit.

There are limited ways to avoid application of the commercial rates when multiple units are being separately transferred pursuant to separate contracts of sale between the same parties. First, according to the Letter Ruling of May 23, 2003, the lower, residential rates may apply, and the transfer of units or apartments not be treated as a single transaction, if "facts and circumstances indicate that the transfer of multiple condominium or cooperative units are independently negotiated and are unrelated." This will not be possible to establish in most circumstances. Whether the closings of the units take place on the same day or on separate days is immaterial in determining if the transfers are unrelated.

Another approach is to combine the units into a single unit prior to closing. The Memorandum provides that if the units are adjacent and have been physically combined into a single residence prior to their transfer, the lower residential rates would apply. According to the Memorandum,

> the Department will examine all of the applicable facts and circumstances in determining whether two or more apartments or units have been physically combined. The issuance of a revised Certificate of Occupancy, a *letter of completion* from the Buildings Department or a revised tax lot designation reflecting the joining of two or more apartments or units will be acceptable evidence of such a combination. However, the absence of any of these documents will not be conclusive. (Emphasis added)

The letter of completion referred to may issue under the Building Department's Technical Policy and Procedure Notice.[7] The Notice eliminates for all multiple dwellings the requirement that a certificate of occupancy be amended when apartments are combined to create larger dwelling units. An Alteration Type II application is required and, after filing of a completion sign-off by a Professional Engineer or a Registered Architect, the Building Department will issue a letter of completion. The letter of completion will state that the "Department of Buildings does not require a new or amended certificate of occupancy for combining these apartments."

The Notice sets forth certain requirements. The combining of apartments must result in no greater number or zoning room, each new room must comply with natural light and air requirements and those requirements must not be diminished for existing non-compliant rooms, egress is not to be altered, and the second kitchen must be eliminated. In addition, when condominium units are being combined, a new tentative tax lot number for the combined unit must be obtained from the Department of Finance before the Alteration Type II Application is filed.

The Department of Finance has applied the residential transfer tax rates if the units have been combined in compliance with the Notice. The Department requires that an affidavit of the owner of the unit accom-

pany the NYC-RPT transfer tax form when submitted, stating that (i) the transfer involves two or more units that have been combined into a single unit, (ii) the second kitchen has been eliminated, (iii) the combination of units has been approved by the Department of Buildings, and (iv) the combination of the units was approved under the Notice. An affidavit of an architect certifying that the units were combined and that there is one kitchen is also required. Sample forms should be available from an office of a title insurer located in New York City.

Accordingly, when transferring between the same parties more than one condominium unit or the stock and proprietary leases attributable to multiple cooperative apartments, advance planning, if allowed by the circumstances, will be necessary to limit the amount of RPTT payable. Consultation with a tax advisor and counsel for a title insurance company or agent may be advisable.

Endnotes

1. 19 RCNY § 23-03 (h)(8).
2. 19 RCNY § 23-03 (h)(6).
3. "Real Property Transfer Tax on Bulk Sales of Cooperative Apartments and Residential Condominium Units," Department of Finance Memorandum 00-6 (June 19, 2000) *available at* http://www.ci.nyc.ny.us/html/dof/pdf/00pdf/fm00_6.pdf ("Memorandum").
4. Letter Ruling by the Department of Finance—FLR-034801-021 (May 23, 2003), *available at* http://www.ci.nyc.ny.us/html/dof/pdf/02pdf/034801r.pdf ("Ruling").
5. New York City Administrative Code § 11-2102.
6. 1999 Letter Ruling by the Department of Finance—FLR-984736-021, *available at* http://www.ci.nyc.ny.us/html/dof/pdf/984736r.pdf ("1999 Ruling").
7. The Building Department, *Technical Policy and Procedure Notice #3/97*, *available at* http://www.nyc.gov/html/dob/html/tppn0397.html ("Notice").

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Real Property Law Section's Annual Meeting
New York Marriott Marquis • New York City

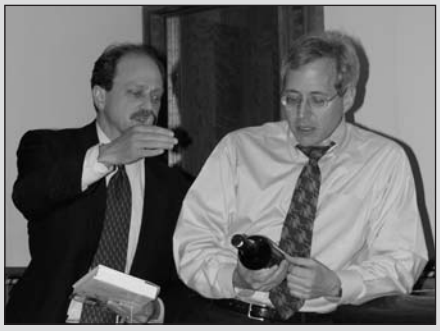





Executive Committee Dinner
Wednesday Evening, January 28





Section Program
Thursday Morning, January 29













Section L
Thursday, J


• New York Marriott Marquis • New York City

Luncheon January 29

Committee on Condominiums and Cooperatives Thursday Afternoon, January 29

Real Property Law Section's Annual Meeting
New York Marriott Marquis • New York City













Committee on Professionalism
Friday Afternoon, January 30

New York's New Brownfield Law

By James P. Rigano and Barry S. Cohen

October 29, 2003

In October 2003, after several years of debate, a new environmental law was enacted in New York State that is designed to foster and regulate the redevelopment of contaminated properties known as "brownfield" sites. The new law also refinances and revamps the state's existing Superfund law.

The primary focus of the new law is on brownfields, contaminated industrial and commercial parcels of land common in urban and suburban areas that are underutilized primarily due to the significant environmental liabilities associated with these parcels. These properties typically blight the local landscape and result in lost taxes and a decline in community character. The problems associated with developing brownfield sites have resulted in increased development of agricultural land and pristine properties. Additionally, liability concerns have been compounded by the lengthy process required to investigate and clean up contaminated properties to the satisfaction of the state.

New York's new brownfield law addresses many of these concerns. This article will summarize significant components of this new comprehensive law. More detailed information requires a review of the law itself.

Existing Programs Involving Subsurface Contamination

The new law has significantly changed certain existing programs, but does not effect other areas relating to the investigation and remediation of soil and groundwater contamination in New York State. The New York State Department of Environmental Conservation ("DEC") administers four programs associated with the cleanup of subsurface contamination as follows:

- **Inactive Hazardous Waste Disposal Site Program**: The new law amends portions of this established program.
- **Voluntary Cleanup Program**: The new law places the DEC's existing voluntary cleanup program in statute with significant new additions that will be summarized in this paper.
- **Petroleum Spills**: This well-established program is amended to a limited degree under the new law.
- **Resource Conservation and Recovery Act ("RCRA")**: The state's version of this federal statute, which requires the cleanup of hazardous waste at treatment and disposal facilities and facilities owned or operated by certain large quantity generators of hazardous waste, has not been affected by the new law.

In addition to the programs administered by DEC, the U.S. Environmental Protection Agency ("EPA") administers the federal Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), also known as Superfund. Under the federal Superfund program, the EPA oversees the investigation and cleanup at federal Superfund sites. There are approximately 1,000 such sites in the country and several in New York State. Amendments to CERCLA in 2002 resulted in enhancements to EPA's principal brownfield program, particularly with respect to prospective purchasers of brownfield sites. Under this federal legislation, a prospective purchaser automatically receives relief from CERCLA liability if the purchaser meets certain conditions including, but not limited to, acquisition after disposal, appropriate pre-purchase inquiry, steps to stop continuing releases, and prevention of environmental exposure. New York's new brownfield law does not affect EPA jurisdiction or CERCLA.

Nassau and Suffolk counties have their own separate programs addressing subsurface contamination. These programs primarily focus on the remediation of subsurface leaching structures. Under county requirements, subsurface leaching structures must be remediated to the county's satisfaction. The new state law does not affect the county's requirements pertaining to the remediation of subsurface leaching structures.

It should be noted that there are significant underground storage tank ("UST") requirements at the federal, state, and county levels. These UST requirements pertain to the design and operation of active tanks, the closure of inactive tanks, and remediation of spills. The new state law does not affect these UST requirements.

The new law principally pertains to the state Voluntary Cleanup Program now known under the law as the Brownfield Cleanup Program, and to a lesser degree the Inactive Hazardous Waste Disposal Site Program. The following pages summarize the new law.

The Brownfield Cleanup Program

The new law creates the statutory Brownfield Cleanup Program for sites contaminated with hazardous

waste or petroleum. The statutory program is in large part modeled after DEC's preexisting voluntary cleanup program. In the mid-1990s, the DEC created the voluntary cleanup program to promote the redevelopment of contaminated parcels. The Department's effort was not based on a statutory program and was not set forth in DEC regulations. Rather, it was an informal but nevertheless significant process implemented under DEC's discretion.

Under the voluntary cleanup program, DEC hoped to eliminate or reduce open-ended cleanup costs, allow the reuse of contaminated sites with appropriate protection for public health and community needs, and provide limited liability relief to parties performing cleanups and notice to potential purchasers and lenders. Under the program, the Department and the volunteer/developer executed an enforceable agreement, with the volunteer agreeing to perform an investigation of the contamination and remediation of the premises. DEC considered the future use of the property in evaluating cleanup levels. Where future industrial uses were contemplated for the property, the volunteer would be required to clean up the site consistent with such industrial use. The agreement included a qualified release that was executed by the Department after the site was remediated. The DEC's voluntary cleanup program has been successful in addressing hundreds of contaminated sites located throughout the state.

As noted above, the new statutory Brownfield Cleanup Program is modeled after the DEC's voluntary cleanup program. The following are key elements of the program.[1]

- Upon submission of an application for the program, a brownfield site will not be listed as an inactive hazardous waste disposal site or in any spill report so long as the applicant acts in good faith within the program. If a site was previously listed, participation in the program would not result in the site being removed from the list. Sites that are not eligible for the program include Class 1 or 2 sites listed in the state registry of inactive hazardous waste disposal sites, sites that are on the federal National Priorities List, and sites that are subject to enforcement actions. However, Class 2 sites that are owned by a party that either did not contribute to the contamination or did not own it when the release of contamination occurred may be eligible to participate if enrolled in the program by July 1, 2005.
- A volunteer is defined as any person, including a current owner, who was not responsible for the contamination and was not the owner of the site at the time that the disposal of hazardous waste took place. The volunteer must exercise appropriate care with respect to the hazardous waste found at the facility by stopping any continuing release; preventing any threatened future release; and preventing or limiting human, environmental, or natural resource exposure to any previously released hazardous substances. A volunteer receives significant benefits. The volunteer must investigate and clean up the site, but with respect to off-site contamination, need only perform a qualitative exposure assessment which could involve collection of off-site data.[2]
- A participant is an applicant other than a volunteer, that is a party who was the owner of the site at the time of disposal or a person otherwise responsible for the release. A participant is responsible for both on-site and off-site contamination.[3]
- The Brownfields Cleanup Agreement must be executed by DEC and the applicant and must include a provision requiring the reimbursement of state costs by the applicant as well as a commitment to investigate and, if necessary, remediate the site. The agreement must also contain provisions for citizen participation, which are discussed below.
- The law has a number of provisions pertaining to implementation, monitoring, and enforcement of engineering and institutional controls. Engineering controls are defined in the law as any physical barrier or method to actively or passively contain, stabilize, or monitor hazardous waste or petroleum and could include pavement, subsurface barriers, building ventilation systems, access controls, alternative water supplies, and installing filtration devices. Institutional controls are described as any non-physical means of enforcing a restriction on the use of the real property that limits human or environmental exposure; restricts the use of groundwater; and provides public notice to potential owners, operators, or members of the public. A professional must certify annually that the controls remain in place. The new law also creates what are referred to as environmental easements that are designed to ensure the continued success and viability of engineering and institutional controls.[4]
- Where (i) a site poses a significant threat, (ii) contamination is migrating off-site, and (iii) a volunteer, as compared to a participant, is the applicant, the Department must address the off-site migration. The law requires the state to commence an enforcement action within six months against parties other than the volunteer who would be responsible

for the off-site contamination. If such an action cannot be brought, DEC must proceed to commence remediation of the off-site contamination within one year of completion of the enforcement action or of the volunteer's remediation.

- The new law has significant new public participation requirements. A comment period is required once an application is complete and at other stages of the process involving investigation and remediation of the premises. Public notice includes newspaper notification and a notification to municipal officials as well as affected individuals. Under certain circumstances, a public hearing may be required.
- After completion of a successful remediation project, the DEC must issue a Certificate of Completion. Upon receipt of the Certificate, the applicant would not be liable to the state for any claim based on or arising from the contamination on or emanating from the site. The release extends to the applicant's successors and assigns.
- Under the preexisting voluntary cleanup program, a site that is subject to a RCRA cleanup—including those applicable to large quantity generators on Long Island—could not enter the voluntary cleanup program. Now, under the Brownfield Cleanup Program, a site subject to a RCRA cleanup can enter the program unless a final (Part B) permit was issued for a Treatment, Storage, or Disposal facility.
- A volunteer may receive a release for natural resource damages that may be available under federal law. A participant would not receive such a release.
- A Certificate of Completion is subject to a number of reopeners involving environmental contamination that is no longer protective of public health or the environment, non-compliance, fraud, and other conditions. A reopener can also be based on failure of the developer to make substantial progress toward completion of the development within three years.

New Cleanup Requirements

The new law requires DEC to issue regulations setting cleanup requirements.[5] These provisions represent significant new aspects of the law.

DEC must establish soil cleanup objectives in regulations that include three tables (i.e., "look-up" tables) of contaminant-specific remedial action objectives for soil based on a site's future use as unrestricted, commercial, and industrial. Under these provisions, the risk associated with the remedial action objectives shall not exceed an excess cancer risk of one in one million or a non-cancer hazard index of one.

The look-up tables will apply to a multi-track approach for contaminant remediation set forth in DEC regulations. The new regulations must be proposed within 12 months (by October 2004).

- Under track 1, the remedial program must achieve a cleanup level that will be in compliance with the unrestricted requirements under the look-up tables that will allow a site to be used for any purpose without restriction and without reliance on long-term institutional or engineering controls.
- Under track 2, the remedial program may include restrictions on the use of the site or reliance on long-term engineering and/or institutional controls, but shall achieve contaminant-specific remedial action objectives for soil contained in the look-up tables.
- Under track 3, the remedial program must achieve contaminant-specific remedial action objectives for soil that conform to the criteria used to develop the look-up tables. Under this track, site-specific data may be used to determine the soil cleanup objectives rather than the specific numerical objective in the look-up tables. For example, if a site were going to have a commercial use, the same assumptions used to develop the commercial look-up table numbers may be used, but site-specific scientific information unique to the site can be utilized to develop what will presumably be less restrictive site-specific cleanup standards.
- Under track 4, the remedial program must achieve a cleanup level that will be protective of the site's intended use with employment of institutional or engineering controls. The look-up tables would not be used. Rather, a site-specific evaluation would apply. If a cancer risk of greater than one in one million or a hazard index for non-cancer risk of one is exceeded, DEC and the New York State Department of Health must make findings that the remedy is protective of public health and the environment.

The new law also provides specific guidance on source removal and control measures with preference for removal or treatment of free product, dense non-aqueous liquids, and grossly contaminated soil. Other control measures that rank from most preferable to least preferable are containment, elimination of exposure, and treatment at the point of exposure.

It is important to understand that these cleanup provisions only apply to the Brownfield Cleanup Program according to the terms of the new law.

Groundwater Protection and Remediation Program

Under new sections 15-3101 to 15-3111 of the Environmental Conservation Law, the DEC is required to develop a strategy to address the long-term remediation of groundwater contamination including strategies to protect groundwater from future degradation from contaminated sites. The strategy must be issued within three years. Once the strategy is adopted, it must govern all programs within the department responsible for groundwater protection and remediation.

While the new law gives DEC significant discretion in the establishment of the groundwater remediation strategy, the law provides guidance and conditions with regard to the strategy:

- Under the provision of the law directing DEC to establish the groundwater strategy, the law recognizes that due to the complexity of groundwater contamination problems, the restoration of groundwater to its classified use may not currently be feasible at some sites.
- The law specifically requires DEC to assume responsibility for off-site groundwater contamination at sites under the Brownfield Cleanup Program where the volunteer is not responsible for off-site conditions. As stated previously, the DEC, within six months of determining that a site poses a significant threat, must bring an enforcement action against other parties that are responsible for the contamination and, if such actions cannot be brought or do not result in the initiation of the off-site remediation program, the DEC must proceed to use its best efforts to remediate the off-site problem.
- Under the discussion regarding the development of regulations pertaining to a Track 1 cleanup, the law recognizes the reduction of groundwater to asymptotic levels, a recognition that groundwater standards typically cannot be achieved in a cleanup.
- Under the Brownfields Cleanup Program, the law requires that a volunteer perform a qualitative exposure assessment to determine the exposure of human, fish, and wildlife to contaminants. This suggests that a finding of no exposure would be significant in evaluating groundwater cleanup strategies.

Inactive Hazardous Waste Disposal Site Program

Since 1979, New York State has had a program governing the investigation and remediation of the many hundred sites listed in the inactive hazardous waste disposal site registry. Under this program, DEC seeks to have responsible parties (e.g., current or prior owners or operators of the site) execute a consent order for the investigation and cleanup of the premises. If a responsible party does not execute a consent order and perform the work, the DEC will typically perform the work and seek cost recovery. Under the new law, certain key elements of the Inactive Hazardous Waste Disposal Site Program have been amended. For example, while the program previously applied only to hazardous waste, under the new law it has been expanded to also apply to hazardous substances, a much broader definition. As a result, under the new provision, the 274 hazardous substance sites previously identified by DEC will now be addressed through this program. Additional hazardous substance sites may also be addressed.

The new law also adds affirmative defenses that are available under federal law (CERCLA):

- Act of God,
- Act of war, or
- Act or omission of a third party other than an employee or agent and other than one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly with the defendant and the defendant (i) exercised due care with respect to the hazardous waste, (ii) took precautions against foreseeable acts or omissions of the third party.

The new law also provides lender, municipal, and fiduciary liability relief that is similar to federal law. Under the lender exemption,[6] lenders who hold a security interest may foreclose and subsequently sell or liquidate property without having liability so long as they seek to sell at the earliest practical and commercially reasonable time. However, a lender does not receive the exemption from liability if the lender participates in management which would involve exercising control over environmental compliance or act as the manager of this site responsible for day-to-day decision-making. It is not likely that this lender liability exemption will result in a reduction in the need for an environmental assessment at properties prior to the issuance of a loan. Lenders will continue to have an interest in determining whether property is contaminated to assure the value of the collateral.

Under the municipal exemption, if a site is involuntarily acquired by a municipality, such as through a tax lien, seizure, or abandonment, a municipality will not have liability. However, the municipality may not participate in the development of the property and maintain the exemption. Significantly, the municipality

must notify the DEC of any release within 10 days of knowledge of such a release. Failure to notify DEC would result in loss of the exemption.

The new law also provides for institutional and engineering controls under the Inactive Hazardous Waste Disposal Site Program.[7]

The cleanup provisions described earlier involving the soil cleanup look-up tables and tracks 1 through 4 are, under the law, specifically applicable to the Brownfield Cleanup Program. However, it seems likely that DEC will exercise its discretion and apply the look-up tables to the inactive hazardous waste disposal sites as well.

Petroleum Spill Program

The new law has limited amendments and applicability to the Petroleum Spill Program. Under the existing program, a spill must be reported to the DEC and a spill number assigned. Subsequently, spill program representatives will oversee a responsible party or a department-administered investigation and cleanup of the site. Typically, the state will pursue cost recovery actions against responsible parties where the DEC has performed a cleanup. The Brownfield Cleanup Program described in detail previously in this article is applicable to petroleum sites in addition to hazardous waste sites. Although the existing voluntary cleanup program has also been available for many years for use in connection with petroleum sites, its use has generally been limited to hazardous waste sites. This trend may well continue under the new program.

The groundwater strategy that must be developed by DEC, as discussed earlier in this article, will be applicable to the cleanup at petroleum sites. As a result, once the strategy is developed, it will impact petroleum cleanups.

The cleanup provisions described earlier involving the soil cleanup look-up tables and tracks 1 through 4 are, under the law, specifically applicable to the Brownfield Cleanup Program. However, it seems likely that the Department will exercise its discretion and apply these provisions to the petroleum program.

As described in subsequent paragraphs in this article, the Petroleum Spill Program has been financed with additional fees.

Finally, the one amendment specifically applicable to the Petroleum Spill Program is an amendment to Section 181 of the Navigation Law. This amendment provides that the only defenses that may be raised by a person responsible for a discharge of petroleum are :

- an act or omission caused solely by war, sabotage or governmental negligence, or
- an act or omission caused solely by a third party, other than a contractual relationship resulting from a loan, mortgage or conduit financing from the person responsible, if the person responsible established that they exercised due care with respect to the petroleum and took precautions against the acts or omissions of such third party.

The defense is not available to a person who fails to report the discharge or provide all reasonable cooperation in the cleanup and removal activity undertaken by the Department. This provision of the new law is not clearly worded and may require a future amendment. Prior to enactment of the new law, a defense under the statute was based on an act or omission caused by war, sabotage, or governmental negligence and was limited to owners and operators of major petroleum facilities.

Funding

The state Superfund has provided, since 1986, approximately $1.2 billion for the cleanup of more than 800 contaminated sites across New York State. However, since March, 2001, the fund had been fully allocated, and DEC estimates that there are at least an additional 800 Superfund sites in need of investigation and remediation. The new law provides $120 million that will be made available on an annual basis for the state Superfund program.

Thirty-three million dollars is made available for the Petroluem Spill Program to be financed by industry fees, and $15 million is available for various purposes, including technical assistance grants to community-based organizations to participate in the cleanup programs, the development of a geographic information system for groundwater resources, and other planning programs.

Tax Benefits

The new law provides significant new tax benefits that have not previously been available in New York. The tax benefits are potentially significant and could swing the economic benefits of a project to result in its financial viability. Potential tax benefits should be examined carefully before proceeding with a brownfield development. The following summary is intended as a general outline. It is essential that a developer examine the available tax benefits with an attorney who concentrates in environmental law and their tax advisor. The potential benefits merit a careful review.

Tax credits are available for a percentage of the site preparation costs, tangible property, and on-site groundwater remediation costs. The site preparation costs involve preparation of the site for erection of a building, excavation, scaffolding, demolition, fencing, and security.

Tangible property costs include the cost or basis for the buildings and structural components of the buildings. The amount of the credit is 10% to 12% of the above-described costs. The percentage can be increased by an additional 8% if the program is located in an environmental zone (an area designated by the commissioner), and can be increased by an additional 2% if the site has been remediated in accordance with track 1.

The tax credit may only be taken for a site where a Certificate of Completion has been issued by the DEC under the Brownfield Cleanup Program.

A tax credit is also allowed for acquiring environmental insurance. The amount of the credit is the lesser of $30,000 or 50% of the premiums paid.

Municipal Brownfield Program

In 1996, $200 million was made available from a bond act for the restoration of contaminated properties owned by municipalities. Under the program, municipalities that have not contaminated the property may apply to the state for 75% of the cost to study and clean up the site. Of the $200 million, approximately $30 million has been committed to 116 projects in New York. However, approximately $170 million remains in the fund available to municipalities. In order to encourage utilization of the fund by municipalities, the new law increases the state grant to municipalities from 75% to 90%.

Assistance to Municipalities and Community-Based Organizations

Brownfield opportunity planning grants are available to municipalities and community-based organizations to plan for the redevelopment of brownfields. The state assistance can include site assessments in brownfield opportunity areas.

Technical assistance grants are also available to municipalities and community-based organizations to assist in the evaluation of site data and development under the Brownfield Cleanup Program and the Inactive Hazardous Waste Disposal Site Program.

* * *

Under the new law, DEC is required to issue a series of new regulations that will have a substantial impact on the investigation and remediation of brownfield sites. It can be anticipated that these new regulations will result in substantial changes to the redevelopment of contaminated properties.

The new requirements under this law must be examined carefully by environmental professionals and developers proceeding with a brownfield project. The provisions of the law will have a substantial impact on the approach that is adopted in a brownfield development.

Endnotes

1. *See* N.Y. Environmental Conservation Law (ECL) §§ 27-1401 to 27-1431.
2. *See* ECL § 1411(1) and (2).
3. *Id.*
4. *See* ECL §§ 71-3601 and 71-3611.
5. *See* ECL §§ 27-1415(4), (5), and (6).
6. *See* ECL § 27-1323.
7. *See* ECL § 27-1318.

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Private Standing to Restrain Zoning Violations

By Andrew D. Brodnick

Zoning regulations protect property owners by restricting the manner in which neighboring properties may be used. Accordingly, property owners expect that the municipality will enforce those regulations when those regulations are violated.

Unfortunately, a municipality sometimes neglects or refuses to enforce such regulations. When the municipality does not enforce its zoning regulations, a property owner may not individually enforce zoning regulations based solely on a general desire to see zoning code violations restrained.

A property owner has standing to restrain a code violation only when the property owner suffers "special damages," i.e., damages that are causing specified damages different from the damage suffered generally by the community as a result of the violation. Only then does a property owner have standing to maintain a private cause of action based upon a public right which is otherwise enforced by the municipality.

General Enforcement of Zoning Code Violations

Zoning ordinances are enacted to protect the health, safety and welfare of the community.[1] A property owner relies both on the "promise" that a zoning ordinance provides to one's property, and on the fact that the municipality will enforce the code to protect against diminution in the value of one's property.[2]

While a property owner may rely on the protection afforded by zoning restrictions, an owner may not enforce zoning regulations solely on the grounds that such enforcement will benefit the general welfare of the community and enhance property values.[3] In other words, the general desire to see zoning regulations strictly enforced does not confer standing.[4] Instead, the decision to enforce zoning regulations rests solely with the municipality, and a citizen may not compel zoning officials to punish or restrain a violation.[5] As a general rule, a private party may not assert a claim which complains of the same damages which a zoning violation causes the public generally.[6]

Private Right of Action

A property owner obtains standing to enforce a zoning regulation only when: (i) the violation of that regulation affects "a discrete, separate identifiable interest" distinguishable from the general public interest;[7]and, (ii) the owner can demonstrate that his or her interest is one that the code was meant to protect.[8]

The special interest of the owner must be "substantially damaged" by the zoning violation in order for the owner to obtain standing to enforce zoning regulations in his or her own right.[9]

The finding that an owner has standing involves a delicate balance of competing interests. On the one hand, standing requirements should be liberally construed "so that land use disputes are settled on their own merits rather than by preclusive, restrictive standing rules."[10] On the other hand, courts must also be sensitive to granting standing in a manner which could interfere with the municipal process.[11]

Special damages are established by demonstrating that the value of the owner's land has been diminished as a result of the violation.[12] The owner must provide "specific, detailed evidence" of the damage suffered.[13] Conclusory allegations are insufficient.[14] As previously noted, the damages sustained must differ from that suffered by other residents of the community, and the alleged injury must fall "within the zone of interests sought to be promoted or protected by the statute."[15]

Special damages need not be pleaded and proved and may be inferred when one is in close proximity to the violation.[16] This proximity may extend to one in "eyeshot" of the violation.[17] However, the party affected by the violation must still show that the interest violated is within the "zone of interest" to be protected, and still must show irreparable injury and a diminution of the value of the party's property.[18]

The "proximity" test is applied by determining whether the neighboring owner is close enough to the violation to suffer some harm other than that experienced by the public generally.[19] However, "even where petitioner's premises are physically close to the subject property, an ad hoc determination may be required as to whether a particular petitioner itself has a legally protectable interest so as to confer standing."[20]

An owner seeking to restrain a zoning violation must establish the traditional standards of entitlement to injunctive relief: irreparable injury, likelihood of success on the merits and the equities balancing in the owner's favor.[21]

The fact that a zoning violation may cause a diversion of business does not constitute special damages.

In *Cord Meyer Development Co. v. Bell Bay Drugs, Inc.*,[22] the Court of Appeals upheld the dismissal of an action commenced to enjoin a code violation by which a pharmacy in proximity to the complaining party was operated. The owner must demonstrate something "offensive" about the effect of the violation of the zoning code above and beyond that of mere competition.[23]

If a property owner has suffered special damages, he or she need not exhaust administrative remedies before commencing a private cause of action.[24] Nor does a litigant have to wait for public officials to take action.[25]

Cases that grant owners standing to restrain a zoning violation are fact specific, but some examples may be helpful. In *Williams v. Hertzwig*,[26] plaintiffs obtained an injunction restraining their neighbors from maintaining a dog kennel which violated the zoning code. In another case, the construction of a motel was enjoined by neighboring property owners.[27] Neighboring business owners had standing to enjoin an adult entertainment establishment,[28] and were granted standing to seek an injunction against the operation of a flea market on a neighboring parking lot.[29]

One court refused to enjoin the construction of radio towers.[30] Restraint of a prior non-conforming use of a sawmill operation—even after the scope of the operations increased—could not be enjoined on the grounds that it constituted a violation of the zoning code.[31] Similarly, another court declined to enjoin the operation of a marine sales and service facility, even where it was found that the use of the property violated the zoning ordinance.[32]

Statutory Basis for Relief

While an individual owner must demonstrate special damages to enforce zoning regulations, there are statutory methods by which multiple owners may enforce zoning regulations without demonstrating special damages. Curiously, this right is dependent on whether the property is located in a town, village or city.

For instance, New York Town Law provides that the proper local authorities may direct the abatement or correction of a violation of any building improperly constructed or altered, or of property subdivided in violation of Town Law.[33] If the local town authorities do not enforce the code or restrain a violation, a resident taxpayer may make a written request on that officer to do so, and, after ten days, three resident taxpayers, who are jointly or severally aggrieved by a violation and who reside in the district in which the violation is located, may institute an action in the same manner as the local authority.[34]

This provides a method for relief by which resident taxpayers may unify to bypass the municipal enforcement remedy.[35] The statute also provides a means of enforcing the code without having to show the injunctive requirements which would be required for a private action.[36]

Curiously, the Village Law and the City Law do not have analogous provisions.[37]

Conclusion

While violations of zoning regulations may be enforced by a municipality, a property owner does not have a general right as a member of the community to enforce those regulations. However, if the violation causes the owner's property specific, demonstrable and unique damage, then the owner obtains standing to restrain the violation through a private cause of action.

Endnotes

1. *Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of the Town of North Hempstead*, 69 N.Y.2d 406, 412, 515 N.Y.S.2d 418, 420 (1987).
2. *Id.*
3. *Blumberg v. Hill*, 119 N.Y.S.2d 855, 857 (Sup. Ct., Westchester Co. 1953).
4. *Hattem v. Silver*, 19 Misc. 2d 1091, 1092, 190 N.Y.S.2d 752, 753 (Sup. Ct., Nassau Co. 1959).
5. *Young v. Town of Huntingon*, 121 A.D.2d 641, 642, 503 N.Y.S.2d 657 (2d Dep't 1986).
6. *Copart Industries v. Consolidated Edison of New York*, 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169, 172 (1977).
7. *Little Joseph Realty v. Town of Babylon*, 41 N.Y.2d 738, 742, 395 N.Y.S.2d 428, 431 (1977) (citation omitted).
8. *Sun-Brite Car Wash, Inc.*, 69 N.Y.2d at 408 (citations omitted).
9. *Slevin v. Long Island Jewish Medical Center*, 66 Misc. 2d 312, 314, 319 N.Y.S.2d 937, 942 (Sup. Ct., Nassau Co. 1971) (citations omitted).
10. *Parisella v. Town of Fishkill*, 209 A.D.2d 850, 851, 619 N.Y.S.2d 169, 170 (3d Dep't 1994) (citation omitted).
11. *Sun-Brite Car Wash, Inc.*, 69 N.Y.2d at 413 (citations omitted).
12. *Futerfas v. Shultis*, 209 A.D.2d 761, 762, 618 N.Y.S.2d 127, 128 (2d Dep't 1994) (citations omitted).
13. *Santulli v. Drybka*, 196 A.D.2d 862, 863, 602 N.Y.S.2d 151, 151–52 (2d Dep't 1993) (citation omitted).
14. *Guzzardi v. Perry's Boats, Inc.*, 92 A.D.2d 250, 253, 460 N.Y.S.2d 78, 81 (2d Dep't 1983) (citations omitted).
15. *Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 441, 628 N.Y.S.2d 375, 377 (2d Dep't 1995) (citations omitted).
16. *Sun-Brite Car Wash, Inc.*, 69 N.Y.2d at 408; *Williams v. Hertzwig*, 251 A.D.2d 655, 675 N.Y.S.2d 113 (2d Dep't 1998).
17. *Daum v. Meade*, 35 A.D.2d 598, 313 N.Y.S.2d 625 (2d Dep't 1970).
18. *Sun-Brite Car Wash, Inc.*, 69 N.Y.2d at 416.

19. *Oates v. Village of Watkins Glen*, 290 A.D.2d 758, 761, 736 N.Y.S.2d 478, 481 (3d Dep't 2002) (citations omitted).
20. *Id.*
21. *Town of East Hampton v. Buffa*, 157 A.D.2d 714, 549 N.Y.S.2d 813 (2d Dep't 1990).
22. 20 N.Y.2d 211, 282 N.Y.S.2d 259 (1967).
23. *Town of East Hampton*, 20 N.Y.2d at 216, 282 N.Y.S.2d at 263. *See also Sun-Brite Car Wash Inc.*, 69 N.Y.2d at 415 (citations omitted).
24. *Haddad v. Salzman*, 188 A.D.2d 515, 591 N.Y.S.2d 193 (2d Dep't 1992); *Armstrong v. Gibson & Cushman*, 202 Misc. 399, 117 N.Y.S.2d 185 (Sup. Ct., Suffolk Co. 1952).
25. *Daub v. Popkin*, 171 N.Y.S.2d 513 (1st Dep't 1958).
26. 251 A.D.2d 655, 675 N.Y.S.2d 113 (2d Dep't 1998).
27. *Reichenbach v. Windward at Southhampton*, 80 Misc. 2d 1031, 364 N.Y.S.2d 283 (Sup. Ct., Suffolk Co. 1975).
28. *Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 441, 628 N.Y.S.2d 375, 377 (2d Dep't 1995) (citations omitted) (injunction denied on other grounds).
29. *Camarda v. Vanderbilt*, 100 A.D.2d 836, 473 N.Y.S.2d 831 (2d Dep't 1984).
30. *Allen Avionics, Inc. v. Universal Broadcasting Corp.*, 118 A.D.2d 527, 499 N.Y.S.2d 154 (2d Dep't 1986).
31. *Futerfas v. Shultis*, 209 A.D.2d 781, 618 N.Y.S.2d 127 (3d Dep't 1994).
32. *Beaudin v. Town of Alexandria Planning Board*, 233 A.D.2d 855, 649 N.Y.S.2d 278 (4th Dep't 1996).
33. Town Law § 268.
34. Town Law § 268(2).
35. *Little Joseph Realty v. Town of Babylon*, 41 N.Y.2d 738, 741, 395 N.Y.S.2d 428, 431 (1977).
36. *Eggert v. LeFever*, 222 A.D.2d 1043, 1044, 635 N.Y.S.2d 857, 858 (4th Dep't 1995) (citations omitted).
37. Village Law § 7-714; 2 Salkin, *New York Zoning Law & Practice*, § 34:07, p. 34–121 (4th ed.).

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Got Mold?

By Fred Schauf

Introduction

The call comes in from a client who is selling his house, just a week before the scheduled closing date. He states that the house inspector for the buyer indicated that there may be a mold/fungus problem in the house. The prospective buyers are afraid to close on a house that has mold in it. What does this mean to the sale of the house? Will the closing be canceled or delayed? Will the mold need to be removed? How will this affect your client's sale or sale price of the house?

Calls like this may become more frequent as people become more aware of mold problems, real or perceived. This article will attempt to inform you of what mold is, how the investigation and removal process works and whether you need to be afraid or just aware that there is a fungus among us. Because of the constraints of this article and the variety of abatement situations, not all considerations and abatement options have been discussed.

Background

Fungi (singular is fungus) are a separate kingdom from plants and animals that includes yeasts, mushrooms and molds. Fungi are prevalent almost everywhere in the world and they can grow on nearly any organic substance as long as there is moisture and oxygen present. In New York State the main cause of fungal problems is excessive moisture or humidity. Fungi reproduce by use of spores that are nearly impossible to destroy.[1]

Fungi can affect human health in a number of ways. People can be affected by the inhalation or ingestion of the spores; inhalation of volatile organic compounds (VOCs) that are a product of fungal growth (the VOCs are the moldy odors often associated with fungi); inhalation of mycotoxins that certain fungi emit; and from the inhalation or ingestion of fungi that have grown or landed on food or have become airborne when they were disturbed.[2] The health effects of fungal exposure are well-documented but may be very difficult to prove.[3] Whether the fear of fungal exposure is real or perceived is often immaterial—the buyer wants the mold removed.

Presently, there are no state or federal regulations that specifically address exposure to fungi. The New York City Department of Health & Mental Hygiene, Bureau of Environmental & Occupation Disease Epidemiology published a set of guidelines, dated December 6, 2002, for the investigation and removal of fungi which it compiled from a variety of publications and the input of industry and academic professionals titled "Guidelines on Assessment and Remediation of Fungi in Indoor Environments" ("Guidelines").[4] The Guidelines form the basis of the industry standards for the investigation and removal of fungi. However, most fungal investigators and removal contractors perform the investigation and/or removal to standards beyond that of the Guidelines. Better fungal abatement training companies, some of which are sponsored by the American Indoor Air Quality Council, advocate a more complete removal of the fungi and better worker safety procedures than the Guidelines prescribe.[5] I will explain when my recommendations exceed those of the Guidelines. It is advisable to use an experienced and trained fungal consultant for the investigation, supervision and final clearance determination, as well as to use a trained and experienced fungal contractor for the abatement of the fungi.

Fungal Investigation

A good consultant will conduct a visual investigation to delineate the fungal contamination and prepare a work plan for its abatement. Of most importance, the area must be dried and the source of moisture must be corrected. The best abatement job will be worthless if moisture continues to be a problem. The fungi will reappear.

Basically, if you can see the fungi, it needs to be abated. If there is a strong moldy odor, fungi are present. They may be behind walls or between floors. Most often there is no reason to sample for fungi during the investigation. However, if the investigator is unsure if fungi are present in a particular area, if the case may go to trial or if the person affected by the fungi needs to identify the fungi for medical purposes, it may be necessary to sample and identify the fungi.[6] Surface, bulk or air samples may be collected for analyses by a laboratory familiar with fungal analyses and that is accredited by the American Industrial Hygiene Association EMLAP (Microbiology). The results will identify the fungi's Genus and possibly species. Typically, the investigation and written work plan can be completed in a few days.

Fungal Abatement

The work plan will detail the procedures for the safe abatement of the fungi that the contractor should follow. All removal work should be conducted under negative air pressure to isolate the work area and minimize fungal contamination outside of the work area. When fungi are disturbed, millions of spores are released into the air causing exposure risks to the residents. Therefore, the air exiting the containment

should be filtered by use of high efficiency particulate air (HEPA) filters.

The Guidelines assign levels of abatement based on the size of the area impacted by the fungi. These levels designate worker and occupier safety and abatement techniques.[7] I recommend that only small impacted areas (less than 10 square feet), where there will be very little disturbance of the fungi during removal, be abated without the use of a containment. I also recommend that workers wear protective clothing and use full face respirators with P100 (HEPA) and organic vapor filters (OSHA Type C protection) for all levels of abatement. The guidelines recommend respirators with HEPA cartridges for only the largest abatement level and disposable face N95 dust respirators for all other levels.[8] However, N95 respirators offer no protection against vapors and offer limited protection against dust and spores.

Any impacted porous material (ceiling tiles, drywall, etc.) should be removed and discarded.[9] The Guidelines allow for the cleaning and reuse of non-porous (metal glass, etc.) and semi-porous material (wood, concrete, etc.).[10] I recommend that the impacted area of semi-porous material be either sanded or scrubbed to remove any fungi. The sanding or scrubbing will more effectively remove the fungi growing on, or in the case of wood, in the material. Since even the best anti-fungicides are not 100% effective and thousands of viable fungi colony units per square inch may remain after application of the fungicide, especially on wood, physical removal is highly recommended.[11] In addition, the dead fungi, not physically removed, may also cause reactions in humans.[12]

After the physical removal is complete, the work area should be HEPA vacuumed. All surfaces should then be cleaned, vacuumed and cleaned again with a final vacuum.[13] The Guidelines recommend the use of detergents as the cleaner and, in the case of HVAC systems, it recommends the use of a biocide.[14] I recommend the use of a fungicide as the cleaner which will be more effective in killing the fungi than a detergent. The Type C protection worn by the workers will allow them to apply the fungicide safely. The use of gaseous, vapor-phase or aerosolized biocides to remediate the fungi is not recommended.[15] In short, the risks outweigh the benefits.[16]

I also recommend an application of a fungicide paint sealant on all impacted wood surfaces.[17] The effectiveness of any one of the individual abatement methods—the physical removal, application of the cleaner and sealant—may be suspect. The use of all abatement techniques will result in a more complete abatement of the fungi.

The abatement may take several days to a few weeks to complete depending on the size and complexity of the abatement project.

Clearance Sampling

As with most abatement projects, final clearance parameters will need to be established in order to determine when the abatement will be complete. The contractor that undertakes the project will need to know the criteria for completion. Because there are fungi spores nearly everywhere, it would be impractical to expect there to be no spores remaining even in the work area, no matter how effective the abatement.

The Guidelines recommend that air samples be collected for the highest level of abatement.[18] I recommend that surface and air samples be collected from the abatement area prior to removal of containment for all levels of abatement.[19] The samples should be compared to background samples collected from unaffected areas or from outside of the building. Once the samples are analyzed and the consultant determines that the abatement has been affective, the containment can be removed and the project ended.

The sampling and analyses may be completed in a few days to two weeks, depending on the type of sampling and analyses conducted.

Conclusion

Once the consultant has determined that the final sample results are satisfactory and has inspected the abatement area to insure that it has been properly cleaned (including the removal of all equipment and barriers), the consultant should prepare a final report summarizing the abatement process and sample analyses results.

So, is there a fungus among us? Yes. Is there reason to panic? No. Remember, fungus is not something we can eliminate; we can only control it within our indoor environments. If there is a fungal problem, it has probably been caused by moisture intrusion. Correct the cause of the moisture intrusion and make sure the area is dried as quickly as possible. Then deal with the fungus. There are some excellent web sites concerning fungus that will help you better understand the issues involved. These Web sites include:

- the U.S. EPA at http://www.epa.gov/iaq;
- OSHA at http://www.ohsa.gov;
- the Center for Disease Control at http://www.cdc.gov;
- the American Industrial Hygiene Association at http://www.aiha.org; and http://www.doctorfungus.org.

It may take time and money to properly handle a fungus problem, but in the end you can come out not smelling mold and mildew, but smelling like a rose with your clients.

Endnotes

1. Spores from glacial ice tens of thousands of years old have been successfully cultivated. *See* Castello, J.D., S.O. Rogers, et al., 1999, *Detection of Tomato Mosaic Tobamovirus RNA in Ancient Glacial Ice*, Polar Biology 22, 207–212; Catranis, C. and W.T. Starmer, 1991, *Microorganisms Entrapped in Glacial Ice*, Ant. J. of the U.S. 26, 234–236.
2. New York City Department of Health & Mental Hygiene Bureau of Environmental & Occupation Disease Epidemiology, 2002, *Guidelines on Assessment and Remediation of Fungi in Indoor Environment available at* www.nyc.gov/html/doh/html/epi/moldrpt1.html.
3. *Id*. See also a very good legal overview of fungi by William A. Ruskin, Summer 2002, *Mold: Corporate Prevention and Response*, 22 The N.Y. Env. Lawyer 6–11.
4. New York City Department of Health & Mental Hygiene Bureau of Environmental & Occupation Disease Epidemiology, 2002, *Guidelines on Assessment and Remediation of Fungi in Indoor Environment, available at* www.nyc.gov/html/doh/html/epi/moldrpt1.html.
5. The American Indoor Air Quality Council (IAQ) has a Web site at http://www.iaqcouncil.org; *see also* U.S. Department of Labor, *A Brief Guide to Mold in the Workplace*, Safety and Health Information Bulletins 03-10-10, *available at* http://www.osha.gov/dts/shib/shib101003.html.
6. New York City Department of Health & Mental Hygiene Bureau of Environmental & Occupation Disease Epidemiology, 2002, *Guidelines on Assessment and Remediation of Fungi in Indoor Environment available at* www.nyc.gov/html/doh/html/epi/moldrpt1.html.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. The American Indoor Air Quality Council (IAQ) has a Web site at www.iaqcouncil.org.
12. U.S. Department of Labor, *A Brief Guide to Mold in the Workplace*, Safety and Health Information Bulletins 03-10-10, *available at* http://www.osha.gov/dts/shib/shib101003.html.
13. New York City Department of Health & Mental Hygiene Bureau of Environmental & Occupation Disease Epidemiology, 2002, *Guidelines on Assessment and Remediation of Fungi in Indoor Environment available at* www.nyc.gov/html/doh/html/epi/moldrpt1.html.
14. *Id.*
15. *Id.*
16. *Id.*
17. The American Indoor Air Quality Council (IAQ) has a Web site at www.iaqcouncil.org.
18. New York City Department of Health & Mental Hygiene Bureau of Environmental & Occupation Disease Epidemiology, 2002, *Guidelines on Assessment and Remediation of Fungi in Indoor Environment available at* www.nyc.gov/html/doh/html/epi/moldrpt1.html.
19. The American Indoor Air Quality Council (IAQ) has a Web site at www.iaqcouncil.org.

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Bergman on Mortgage Foreclosures: Process Service and the Statute of Limitations

By Bruce J. Bergman

That process service is one of the major bugaboos in the mortgage foreclosure case is a topic well recognized by practitioners. And there is hardly a mortgage lender or servicer who has not been on the receiving end of an eve of sale order to show cause brought by a chagrined borrower vociferously outraged that service of process was never effected upon him. Editorially, we observe that it doesn't seem to matter that the borrower was hiding, or would never come to the door, or euchered his cousin at the house to lie and assert that the borrower moved away, or that he *did* move to other parts, conveniently neglecting to leave a forwarding address for the mortgage holder.

When a borrower swears that service was never made, courts are understandably reluctant to put a person's property—particularly a home—in jeopardy without a hearing, and so too often mortgage holders are forced to a traverse hearing. Whether service was proper is sometimes less a matter of law than one of credibility of witnesses, a judge's sympathy and in the end, whatever the court says it is. So it becomes somewhat philosophical. Of course, it is also conspicuously practical because if the court chooses to rule in favor of the parties claiming lack of service, the case is over as to them. They must then be served anew or, a separate action may have to begin against them, later to be consolidated back into the foreclosure.

All this is a mess, but one with which the initiated are familiar. It *happens* and is one of the particular perils in a judicial foreclosure state like New York. But it can be worse—as in the instance where deficient process service intersects with the statute of limitations.

The statute of limitations to sue upon a mortgage is six years. So, from the moment the mortgage balance may have been accelerated, or when the mortgage balance would have matured, the six years begins to run and any action brought later than the six years would be barred by the statute of limitations. That should hardly be a commonplace difficulty because lenders would not readily wait six years to begin an action. Nevertheless, it does happen that way under sometimes extreme circumstances and here is where the mortgage holder can be whipsawed. A foreclosure is begun. For whatever reason, the case is litigated, delayed and/or neglected and by the time it nears a conclusion, the issue of jurisdiction somehow first arises. If service is successfully challenged (as happened in *Rols Capital Co. v. Beeten*[1]) jurisdiction over the protesting parties would not have been acquired. Therefore, either service anew with court permission must be made on those parties, or, a new action must be begun. However, if it is now six years since the accrual of the action, it is barred by the statute of limitations—precisely what occurred in the cited case.

While it would be helpful to say that the lesson of all of this is to be careful with process service, care is already a watchword. Sometimes despite best efforts, a court can conclude that service was no good and if such a finding intersects with the statute of limitations in an odd case, the result could be a disaster.

Endnote

1. 264 A.D.2d 724, 696 N.Y.S.2d 48 (2d Dep't 1999).

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

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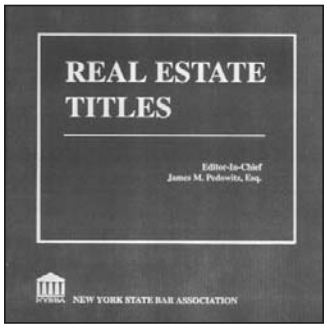

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