FEDERAL STANDARD ABSTRACT
TITLE NEWS

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Title News

New York City Retaining Walls

In our January '09 issue we reported that the Administrative Code of New York City had been amended to raise retaining wall maintenance standards. In order to mitigate the impact of the new legislation, the Commissioner of Buildings introduced the No-Penalty Retaining Wall Inspection Program on March 25, 2009. Under the Program, individuals may request an inspection of their retaining walls without risking fines. The inspectors will come out to the site and assess the wall at no cost and without issuing violations. Call 311 to request a free inspection. The Program ends on June 1, 2009.

Broker's Commissions Due at Closing

Under New York law, a real estate broker is entitled to her commission upon finding a purchaser ready, willing and able to purchase on the seller's terms. Seller's counsel often negotiate clauses by which the commission will only be due on the transfer of title. The purpose is to protect the seller from broker's claims in case the transaction fails for any reason (e.g. title, zoning, or environmental issues). But what if the seller decides not to sell the property and chooses to default on the contract? In that case, there is no transfer of title. Are brokers entitled to their commissions or are they precluded by the "due on transfer" clause? In *Triumph Property Group, Ltd. c. EAI Two, LLC*, 2009 N.Y. Slip Op. 50323 (U) (New York, Feb 25, 2009), the court decided that a seller cannot escape liability to the broker with a "due on transfer" clause, if the seller purposely prevented the transfer.

NYC Transfer Tax Refunds

The NYC Dept. of Finance has promulgated a new form to request refunds of transfer tax overpayments. The new form CR-100 can be found here: http://www.nyc.gov/html/dof/html/pdf/04pdf/register_refund.pdf.

Rights of Tenants in Possession

The Appellate Division, 2nd Dep't., reaffirmed the principle that possession of real estate amounts to notice of real property rights without need to record. Purchaser in foreclosure took title subject to a 99-year lease in favor of residential tenant, despite the fact that the lease was not recorded and that the purchaser had no actual knowledge of it. The foreclosure did not vacate the tenant's rights because the tenant was not named in the foreclosure action. *1426 46 St., LLC v. KLEIN*, 2009 N.Y. Slip Op 01784 (N.Y.A.d 2nd Dep't, Mar. 10, 2009).

The Survey Exception

The survey exception ("policy excepts any state of facts an accurate survey would show") appears in title policies whenever title is insured without a current survey. The purpose of the exception is to disclaim issues of physical use and possession that would not appear in the title records. If there is no proper survey, the title company cannot know of these matters (such as projections, encroachments, or shared driveways) so they are excepted.

In *1440 Empire Blvd Dev't Corp. v. Lawyers Title Insurance Corp.*, 855 N.Y.S.2d 825 (Monroe, 2007), *Aff'd*, 2009 WL 724411 (N.Y.A.D. 4th Dep't, Mar. 20, 2009) the purchaser closed without a title survey only to find out later that a portion of the property was claimed by the adjoining owner as well, as it was part of the legal descriptions for both properties. The purchaser requested that the title insurer clear title, since it concerned land within its legal description. The title insurer refused coverage on the basis of the survey exception. The insurer argued that the legal description was correct (this was admitted to by the purchaser) and that any discrepancies between the legal description and the actual land were excepted by the survey exception.

The court disagreed. The court reasoned that the fact that both parcels claimed the area at the rear in their legal descriptions was not something that would have been disclosed by an accurate survey. An accurate survey of the purchaser's parcel would have shown the entire parcel with the area at the rear, but it would not have disclosed that the area was claimed in the deed for the adjoining property as well. Therefore, the survey exception was found to be inapplicable. This case sets an important precedent in the interpretation of the standard survey exception and possibly a re-thinking of title review guidelines. A diligent search of the purchaser's parcel would not have disclosed the neighbor's claim. The only hint would have been the neighbor's physical use of the area. But without a survey, the title company would have never seen it. The lesson for insurers seems to be that the industry should expand the survey exception to except such matters filed against other parcels that may be supported by facts disclosed in an accurate survey.

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