

# FEDERAL STANDARD ABSTRACT

## TITLE NEWS

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## Title News

### **New York City Wetlands**

The NYC Building Information System (the Department of Building's online database) has been upgraded to disclose when buildings are situated within wetlands. Buildings and vacant lots located within wetlands suffer very important restrictions regarding what renovation work or new buildings may be built on them.

Wetlands, as the name implies, are areas covered by shallow water, typically disdained as marshes or swamps. Scientific studies have shown that these lands are very important for the survival of many species, water quality, and for storm and flood control. New York State was the first state to recognize their importance by passing the nation's very first Tidal Wetlands Act of 1973, followed by the Freshwater Wetlands Act of 1975. The laws protecting wetlands are not new. What is new is the easy availability of wetlands classification provided by the Building Information System.

Any construction occurring within wetlands must first be approved by the NYS Department of Environmental Conservation. Wetlands are not obvious to the eye. Even a parcel that appears completely dry may be considered a wetland if it is close to a body of water. Parties intending to buy property for further development should check whether the property lies within mapped wetlands.

### **Bicycle Access Required for NYC Office Buildings**

In an effort to reduce traffic congestion, the New York City Council passed Intro-871a, which requires landlords of office buildings to create a bicycle access plan. Within 30 days of receiving a request from a tenant or subtenant, the landlord (or lessee, as the case may be) must provide either a plan for bicycle access to the building or show a certificate of exemption from the Department of Transportation. This law covers all buildings currently under construction, or finished hereafter, as long as they are office buildings, have a suitable freight elevator, and are not otherwise required to provide bicycle parking. The bicycle access plan must include the location of the entrances and the routes to the designated elevators and parking areas. Landlords may obtain certificates of exception if: (a) the circumstances are such that use of the freight elevator would constitute a safety risk; or (b) there is available bicycle parking within three blocks of the building.

Intro-871a goes into effect on December 11, 2009. A summary of the law can be found here:

[http://www.nyc.gov/html/dob/downloads/pdf/intro\\_871a\\_factsheet.pdf](http://www.nyc.gov/html/dob/downloads/pdf/intro_871a_factsheet.pdf)

### **Hotel Tax Expanded to Cover Out of City Price Differences**

The NYC hotel tax is essentially a form of sales tax applicable to short-term hotel occupancy. Earlier this year, the City Council amended the statute to cover sales of hotel rooms occurring out of the City. By release dated August 14, 2009, the Department of Finance has announced that the tax has been amended again to cover a related loophole. The price difference between what the hotel room costs and what

is charged by the out of City hotel "remarketers" (such as travel agencies, or third-party online booking services) will now be subject to the hotel tax. Hotel remarketers selling occupancy in NYC hotels are now required to register with the Department of Finance and submit tax returns for their sales, just as the hotels themselves do. Remarketers are also required to post their registration certificate prominently in their sales office or on their website, as the case may be. The tax memorandum can be found here: [http://www.nyc.gov/html/dof/html/pdf/09pdf/hotel\\_room\\_occupancy081409.pdf](http://www.nyc.gov/html/dof/html/pdf/09pdf/hotel_room_occupancy081409.pdf)

### **City and State Taxing Authorities Issue New Power of Attorney Forms**

The NYS Department of Taxation and Finance and the NYC Department of Finance have jointly promulgated new power of attorney forms to be used in conjunction with any taxes administered by their Departments. Although the new forms correspond to the new power of attorney law (effective September 1, 2009), the forms are altogether different from the ones that have been circulated by the title industry in the preceding months. Moreover, the "General Information" on the forms specifically indicates that they are to be used for the City and State transfer taxes, among other uses. In other words, when filing a TP584 or an RPTT executed by power of attorney, the power of attorney may have to be in the new form.

The press release by the Departments can be found at: [http://www.tax.state.ny.us/pdf/notices/n09\\_17.pdf](http://www.tax.state.ny.us/pdf/notices/n09_17.pdf)

The power of attorney form for entities to use is called POA-1 and can be found at: [http://www.tax.state.ny.us/pdf/current\\_forms/misc/poa1.pdf](http://www.tax.state.ny.us/pdf/current_forms/misc/poa1.pdf)

The form for individuals is called POA-1-IND and can be found at: [http://www.tax.state.ny.us/pdf/current\\_forms/misc/poa1\\_ind.pdf](http://www.tax.state.ny.us/pdf/current_forms/misc/poa1_ind.pdf)

It is reported that the title underwriters have requested an Advisory Opinion from the NYS taxing authority asking how this will be enforced. It is possible that the tax departments may respond that the forms are necessary for tax challenges and not for filing returns. This may be so, but until the extent of these forms is clarified, attorneys are well-advised to use them, even if that means requiring two different powers of attorney for closing.

### **Class Action Claims Challenging Increases in Homeowner's Insurance Premiums**

Plaintiff Spagnola filed a putative class action against his homeowner's insurer, Chubb, alleging inter alia violations of New York's Insurance Law and deceptive business practices act; the class action complaint alleged that Chubb violated the terms of the policy "by improperly increasing coverage and premiums without his consent and in excess of the Consumer Price Index". *Spagnola v. Chubb Corp.*, \_\_\_ F.3d \_\_\_, 2009 WL 2231635, \*1 (2d Cir. decided on July 28, 2009).

Reviewing the district court's order de novo, the Second Circuit Court addressed the following three issues: (1) the condition notice requirements under New York Insurance Law §3425.5 do not apply to the renewals in this case here because the increase was tied to a provision in the policy which required the insured to maintain coverage equal to the appraised value of the property<sup>1</sup>, which is substantially similar to the costs and values term of Spagnola's policy; (2) the district court did not err in dismissing Spagnola's breach of contract claim based on lack of consent by reasoning that an insured is expected to have read the restrictions, conditions and limitations in his original policy of which Spagnola did not dispute such language permitting Chubb to adjust coverage amounts; however, the district court erred in dismissing plaintiff's breach of contract action as defendant's explanation for the increase in his coverage amounts and premiums did not resolve the ambiguity of the terms in the policy and did

not adequately refute plaintiff's claim that the increases were not based on current costs and values, and thus plaintiff has met the standard necessary to resist the motion to dismiss; (3) the voluntary payment doctrine does not preclude a Spagnola from recovering payment under breach of contract claim here since the pleadings before the district court did not establish whether Spagnola knew or should have known that the increased amounts were not based on current costs and values, and Spagnola was not required to preemptively plead facts refuting the voluntary payment doctrine<sup>2</sup>, therefore, the voluntary payment doctrine cannot stand as an alternate basis for dismissal of plaintiff's claim.

The interesting question here is that DOI General Counsel Opinions for guidance regarding interpreting a regulation are not generally binding authority, but a court could choose to incorporate the guidance provided in the opinion letter into a court decision which would become binding, like the footnote 1 mentioned hereinabove.

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<sup>1</sup> Conditional Renewal of Commercial Lines Insurance Policies, Office of General Counsel, N.Y. Ins. Department No. 9-9-96 (31) (September 9, 1996), informal opinion.

<sup>2</sup> See *Abbas v. Dixon*, 480 F.3d 636,640 (2nd Cir. 2007)

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