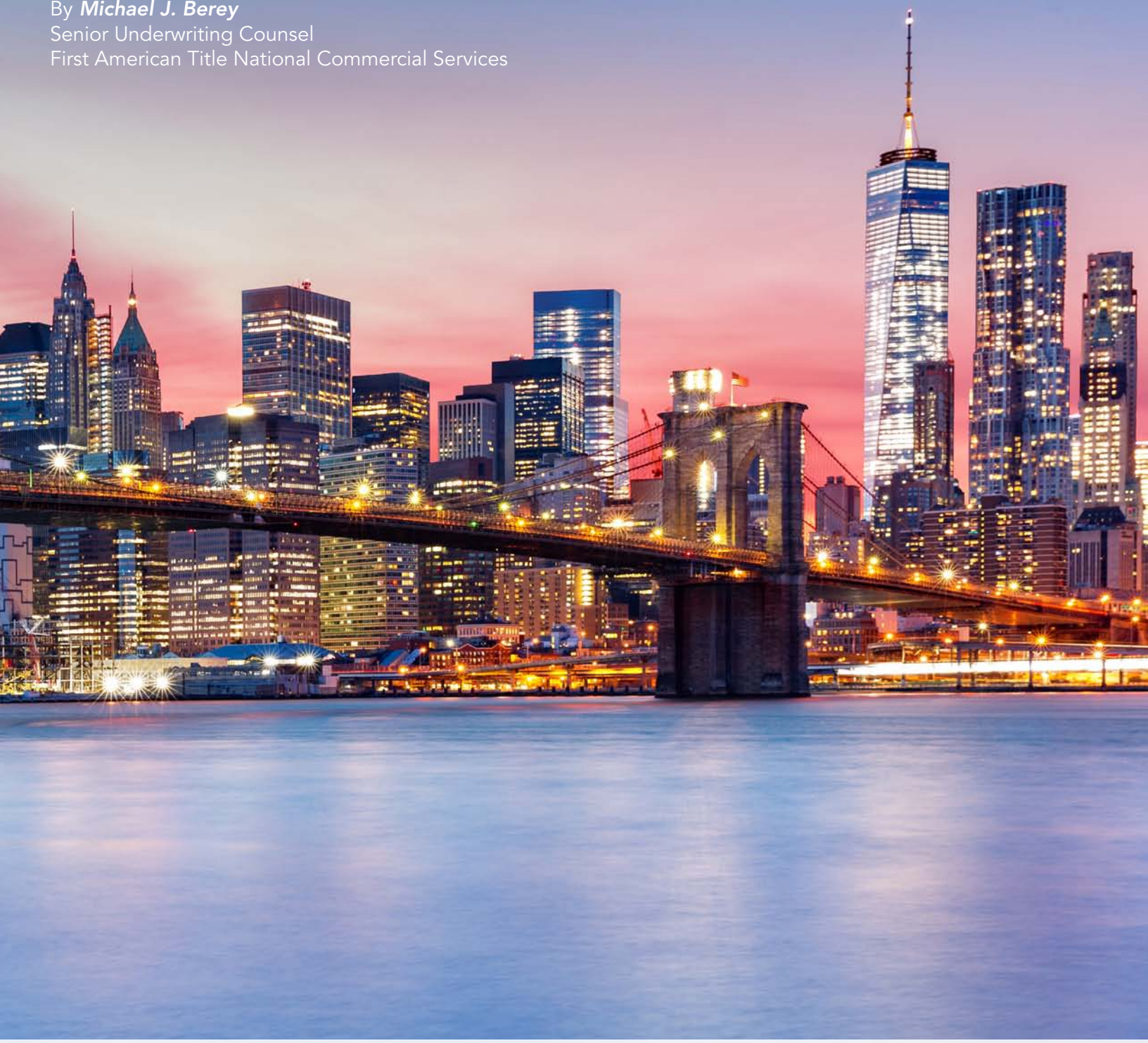
First American Title™
NATIONAL COMMERCIAL SERVICES

Current Developments

By ***Michael J. Berey***
Senior Underwriting Counsel
First American Title National Commercial Services



No. 173 | March 1, 2016

Condominiums & Cooperatives

As reported in Current Developments dated January 15, 2016, the United States Treasury Department's Financial Crimes Enforcement Network ("FinCEN") on January 13, 2016 issued Geographic Targeting Orders ("GTOs") requiring "certain U.S. title insurance companies to identify the natural persons behind companies used to pay 'all cash' for high-end residential real estate in the Borough of Manhattan in New York City, New York, and Miami-Dade County, Florida." The GTOs are effective March 1, 2016 and, unless extended, expire on August 27, 2016.

New York State Department of Law's Real Estate Finance Bureau issued a "guidance document" dated February 8, 2016 requiring that all prospectuses for the offering and selling of residential condominiums and cooperatives must disclose that title insurance companies are to report information as required by FinCEN. The new procedures apply immediately and affect new offering plans and offering plans already filed. The Memorandum ("Disclosure Requirements Regarding FinCEN's Geographic Targeting Order") is posted at http://www.ag.ny.gov/pdfs/ref/Disclosure_Requirements_Regarding_FinCen_Targeting_Order_2-8-2016.pdf.

The Real Estate Finance Bureau has also issued "Testing the Market, Cooperative Policy Statement #1 (Applicable to Cooperatives, Condominiums, Timeshares [for vacant and new construction developments only] and Homeowners Associations) with Suggested Forms". The Policy Statement, effective on January 15, 2016, supersedes the prior version of Cooperative Policy Statement #1. The Policy Statement is posted at http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/real_estate_finance/Cps1.pdf.

Contracts of Sale

A contract of sale for the sale of property listed as an inactive hazardous waste site was executed in 2004. The contact was amended in 2006 to increase the purchase price and make other changes. Closing was contingent on the Defendant-Seller obtaining government approvals for development. In 2008, prior to the "final", extended closing date, the Purchaser commenced an Action seeking rescission of the 2006 contract amendment and specific performance of the 2004 contract, with an abatement in the purchase price to account for the Defendants' failure to acquire necessary approvals. The Purchaser claimed it had been defrauded into entering into the contract and by the Defendants misrepresenting in the contract amendment that a seawall had been built as required by New York State's Department of Environmental Conservation. All of the Plaintiff's causes of action had been dismissed.

The Defendants sought partial summary judgment on their counterclaim that the Plaintiff materially breached the contract, that the contract was therefore terminated, and that the Defendants could therefore retain the down payment and "compaction" payments made by the Purchaser, which were payments relating to the excavation and refilling of the land. The Supreme Court, New York County, granted the Defendants' motion, holding that the Purchaser anticipatorily breached the contract by commencing the suit, and that the Defendants were therefore entitled to retain the down payment and the compaction payments as liquidated damages. The Appellate Division, First Department, affirmed the ruling of the lower court. According to the Appellate Division,

> "[t]he questions raised by this appeal are whether a prospective purchaser of real property anticipatorily breaches a contract of sale by commencing an action against the seller for rescission of a contract before the closing date, and whether, in the event of the buyer's repudiation, the seller is required to show that it was ready, willing, and able to complete the sale (by obtaining certain governmental approvals as a condition precedent to closing) in order to retain the deposit and certain other payments as liquidated damages. We hold that, because a rescission action unequivocally evinces the plaintiff's intent to disavow its contractual obligations, the commencement of such an action before the date of performance constitutes an anticipatory breach. As to the second question, we hold that the seller was not required to show that it was ready, willing, and able to complete the sale because the buyer's anticipatory breach relieved it of further contractual obligations."

Princes Point LLC v. Muss Development L.L.C., 2016 NY Slip Op 00783, decided February 4, 2016, is posted at http://www.courts.state.ny.us/reporter/3dseries/2016/2016_00783.htm.

Easements

In 1985, the Defendant conveyed property to Larry French. The deed also granted "to Larry French, a right of way for ingress and egress" over a 33-foot wide strip of land on the Defendant's other, adjoining property. The right-of-way was used for French's customers. The deed from French, and the subsequent deeds, expressly included the right-of-way. In 2015, the property was conveyed to the Plaintiff.

In 2015, the Defendant, claiming that the right-of-way was only a license for French's use, erected a fence over the right-of-way. The Plaintiff commenced an Action to quiet title under Real Property Actions and Proceedings Law Article 15. The Supreme Court, Essex County, notwithstanding that the question of whether the grant of the easement, which personally identified French, was an appurtenant easement or an easement in gross personal to French was a question for the trier of fact, found that the equities favored the Plaintiff and that the Plaintiff would suffer irreparable injury absent an injunction. It therefore granted the Plaintiff's motion for a preliminary injunction and directed the Defendant to remove the fence, conditioned upon the Plaintiff filing a $5,000 undertaking with the Essex County Clerk. According to the Court,

> "[t]he deed from defendant to French fulfills all of the elements of an easement appurtenant. It conveys in writing 'a right of way for ingress and egress'…; it is subscribed by defendant and it burdens defendant's property – the servient estate – for the benefit of the premises – the dominant estate. While the language of the deed does not specifically describe the easement as permanent, the grant of an easement appurtenant 'need not include language expressly describing the easement as 'permanent' because an easement once created, necessarily runs with the land' [citations omitted]. The Court further notes that [the] deed does 'not contain any language restricting the easement or retaining any right of revocation' [citations omitted]. Under these circumstances, there is no need to look beyond the deed itself to determine that the easement created therein is an easement appurtenant that runs with the land – not an easement in gross personal to French [citation omitted]. In other words, there is no need to look at the intent of the parties."

Wilmeth D. Deyo, LLC v. Ross, 2015 NY Slip Op 51963, decided November 2, 2015, is posted at http://www.courts.state.ny.us/reporter/3dseries/2015/2015_51963.htm.

Marital Property

The Plaintiff-wife and her Defendant-husband purchased a marital residence in 1983. In 1995, title was transferred to a qualified personal residence trust ("QPRT"). In 2013, prior to their divorce, the Defendant listed the property for sale; the Plaintiff moved to enjoin the Defendant-husband from selling or transferring the property. The Supreme Court, Nassau County, denied the Plaintiff's motion, holding that the property, being owned by the QPRT, was not a marital asset. The Appellate Division, Second Department, modified the Order of the lower court by deleting the provision denying the Plaintiff's motion. According to the Appellate Division, "[s]ince the marital residence was purchased by the parties during their marriage, using marital funds, it is presumed to be marital property. [citations omitted] The fact that title had been transferred to the QPRT, allegedly for estate planning purposes, while the parties continued to reside at the marital residence, was, under the circumstances here, insufficient to rebut the presumption." Yerushalmi v. Yerushalmi, 2016 NY Slip Op 00960, decided February 10, 2016, is posted at http://www.courts.state.ny.us/reporter/3dseries/2016/2016_00969.htm.

Mechanics' Liens

A mechanic's lien for $122,621.83 was filed for allegedly unpaid architectural services. The property owner filed a bond for $134,884, 110% of the amount claimed as required by Lien Law Section 19 ("Discharge of lien for private improvement"), to discharge the lien. The mechanic sought an Order requiring that the Defendants increase the bond to add 110% of the aggregate amount of service charges accrued since the lien was docketed; the invoices

included a service charge of 1.5% per month on any balance unpaid more than 30 days. The Supreme Court, New York County, denied the motion. The charges that are and are not lienable are in dispute and a judgment rendered in the underlying action may be "significantly less" than the current amount of the bond. Further, any award of interest is at the discretion of the court. The Court also denied the Defendants' motion for summary judgment dismissing the Lien; the validity of the charges under the Lien is to be determined at trial. Maverick Construction Services LLC v. 868 Broadway Corp., 2016 NY Slip Op 30040, decided January 6, 2016, is posted at http://www.courts.state.ny.us/Reporter/pdfs/2016/2016_30040.pdf.

Mortgage Recording Tax/New York State Transfer Tax

New York's Department of Taxation and Finance announced that the interest rate to be charged for the period April 1, 2016 – June 30, 2016 on late payments and assessments of Mortgage Recording Tax and the State's Real Estate Transfer Tax will be 8% per annum, compounded daily. The interest rate to be paid on refunds will be 3% per annum, compounded daily. The notice issued by the Department is posted at http://www.tax.ny.gov/pay/all/int_curr.htm.

Party Walls

The northerly wall of a building owned by the Plaintiff's corporation shares a brick wall with the building on the Defendant's adjoining property. The wall is located within the corporation's property. The Defendant's building does not extend to the most easterly portion of the wall, and the building of the corporation does not extend to the most westerly portion of the wall. To benefit a restaurant on its property, without the corporation's permission, the Defendant installed light fixtures and utilities on the exposed eastern portion of the wall and placed a doorway in the western portion of the wall to serve as an emergency exit for the restaurant. The door opens into a parking lot on the property of the corporation. The Plaintiff is the corporation's President.

The Plaintiff commenced an Action for trespass. The Supreme Court, Schuyler County, ordered the Defendant to remove the fixtures and the utilities The Court also enjoined the use of the doorway for regular entry and exit, finding that such use constituted trespass as a matter of law. However, citing "public policy", the Court declined to enjoin the use of the doorway in the event of an emergency. The Appellate Division, Third Department, affirmed. According to the Appellate Division, "defendant's actions were beyond the scope of a party wall easement; the fixtures and utilities that defendant placed on the exposed eastern portion of the wall neither provided support to defendant's building nor contributed in any way to the maintenance of a dividing wall between the buildings. Instead, they were installed solely for defendant's 'mere convenience or advantage' in operating its restaurant." The Appellate Division also found that there was "no error" in the lower court's ruling that the Defendant's use of the doorway for other than emergency purposes without permission constituted trespass. Stamp v. 301 Franklin Street Café, Inc., decided January 21, 2016, is reported at 2016 WL 237312.

Recording Act

MNR Corp. purchased a tax lien certificate in 2010 and received a Treasurer's Deed dated May 15, 2013. The property owner conveyed the property for consideration to Defendant 800 W. Merrick Rd. Corp. ("Merrick"), subject to tax liens, by a deed recorded on May 31, 2013. The Treasurer's deed to MNR Corp. was recorded on June 14, 2013. MNR Corp. re-conveyed the property to the Plaintiff by a deed recorded on July 23, 2013.

The Plaintiff brought an Action to extinguish any other rights to the property; Merrick counterclaimed for a judgment extinguishing the Plaintiff's interest in the property, or, alternatively, holding that Merrick was equitably subrogated to the interests of tax lien holders when it paid tax liens in connection with the closing in 2013. The Supreme Court, Nassau County, held that Merrick, having "won the race to record" and being unaware of the unrecorded Treasurer's Deed, had "made out a *prima facie* case that it is a subsequent good faith purchaser for value, protected by the recording statutes". According to the Court, "[t]ax lien records do not constitute notice of a tax sale conveyance." The Treasurer's Deed and the deed to the Plaintiff were held to be void, and Merrick was declared the record owner. 21 Park Place LLC v. Granado Service, Inc., decided November 19, 2015, is reported at 50 Misc.3d 1213.

Recording Act

In 2002, Dominic Barbara ("Barbara") executed a deed recorded in 2009, transferring property in Shelter Island for no consideration to himself and his two children, all of whom are the Defendants. In 2006, Barbara refinanced the mortgage on the property; a consolidation agreement consolidating the existing indebtedness with new money borrowed was recorded in 2014. The Plaintiff lender filed suit seeking a declaration that its mortgage lien was superior to the interests of Barbara and his children.

As an affirmative defense, the Defendants asserted that they were entitled to the protection of New York's Recording Act [Real Property Law Section 290]. However, the Supreme Court, Suffolk County, ruled against the Defendants. According to the Court, "[t]he Recording Act protects 'second in time' conveyances if the following two conditions are met. The party claiming the protection must show they paid a valuable consideration for the property and they had no knowledge of the unrecorded prior interest." Although Barbara's children stated that they had no knowledge of the consolidation agreement executed in connection with the 2006 refinancing, they had not paid valuable consideration for the conveyance to them. They were not, therefore, entitled to the protection of the Recording Act. JP Morgan Chase Bank, N.A, v. Barbara, 2016 NY Slip Op 26034, decided January 28, 2016, is posted at http://www.courts.state.ny.us/reporter/3dseries/2016/2016_26034.htm.

Religious Corporations

The Defendant-seller, a not-for-profit corporation created in 1912 by a Special Act of the New York State Legislature, claimed that a court Order is not required for it to sell real property. The Plaintiff-purchaser refused to close unless the Defendant obtained court approval for the sale, as is generally required of a religious corporation under Religious Corporations Law Section 12 ("Sale, mortgage and lease of real property of religious corporation"). The Appellate Division, First Department, affirming the ruling of the Supreme Court, New York County, held that even if the Defendant is a religious corporation within the meaning of the Religious Corporations Law, it was not required to obtain court approval. The Special Act incorporating the Defendant controls, and the Special Act "places no limit on its ability to sell or otherwise dispose of the property." Further, court approval was not required under Not-For-Profit Corporation Law Section 510 ("Disposition of all or substantially all assets') because the sale did not constitute "all or substantially all" of the Defendant's assets. Vista Developers Corp. v. Board of Managers of the Diocesan Missionary and Church Extensions Society of the Protestant Episcopal Church in the Diocese of New York, 2016 NY Slip Op 00281, decided January 19, 2016, is posted at http://www.courts.state.ny.us/reporter/3dseries/2016/2016_00281.htm.

Religious Corporations

As reported in Current Developments dated February 3, 2014, the Non-Profit Revitalization Act enacted by Chapter 549 of the Laws of 2104 took effect on July 1, 2014, Among the changes made to the Not-For-Profit Corporation Law ("N-PCL") and to other Chapters of New York Law, the Act repealed the Type A, B C or D designations under N-PCL Section 113 and designated a not-for-profit corporation as either a "Charitable Corporation" or a "Non-Charitable Corporation."

Prior to the Act, the N-PCL required a Type B or C not-for-profit corporation to obtain the approval of the supreme court in the judicial district or in a county court of the county in which the entity has its office or its principal place for the carrying out of its purposes to sell, lease, exchange or otherwise dispose of all or substantially or all of its assets. Notice of the petition was given to New York State's Attorney General. By reason of changes made by the Act, a charitable corporation may now sell, lease, exchange or otherwise dispose of all or substantially all of its assets by obtaining either court approval or the approval of Attorney General. Section 12 of the Religious Corporations Law, requiring leave of court for a religious corporation to "sell, mortgage or lease for a term exceeding five years any of its real property" was not amended.

Chapter 555 of the Laws of 2015, effective December 11, 2015, making "clarifying amendments" to the Act, amended Religious Corporations Law Section 12 to authorize the Attorney General to allow a religious corporation to sell, mortgage or lease for a term exceeding five years any of its real property, in lieu of obtaining a court order.

Zoning/Development Rights

As reported in Current Developments dated July 20, 2015, in Harmit Realties L.L.C. v. 835 Avenue of the Americas, L.P., development rights were transferred by agreements which did not specify the quantity of development rights being transferred. The Defendant-developer submitted an application to New York City's Building Department which relied on a surveyor's computation of floor space in the Plaintiff-transferor's building that did not account for floor space attributable to a mezzanine level. The Plaintiff sought an Order requiring the Defendants to submit an application to the Department that did not incorporate development rights used at the Plaintiff's property. The Supreme Court, New York County, in a decision dated June 2, 2015 (2015 NY Slip OP 30931), dismissed the Defendants' counterclaims for fraud, negligent misrepresentation, reformation and breach of contract. The Appellate Division, First Department, affirmed the lower court's ruling.

According to the Appellate Division, "the counterclaims for fraud, negligent misrepresentation, and reformation are precluded by the subject agreements' express disclaimers stating that Harmit [the transferor] made no representations concerning the amount of its utilized development rights and excess development rights, where defendants had the means to discover the correct amounts before they entered into the agreements." [citations omitted] Further, the counterclaim Plaintiffs "failed to properly allege a breach of the Zoning Lot Development Agreement because they did not indicate how the alleged unlawfully oversized mezzanine or inaccurate certificate of occupancy adversely affected their rights or property." Harmit Realties LLC v. 835 Avenue of the Americas, L.P., decided January 19, 2016, is reported at 23 N.Y.S.3d 230.

Zoning/Development Rights

The Plaintiff transferred development rights within an expanded zoning lot to enable the Defendant, the owner of other parcels within the zoning lot, to build a hotel on part of the Defendant's property. Under the Zoning Lot and Development Agreement ("ZLDA"), the Defendant's new building was to be constructed on only two specifically identified parcels "and in no event on Lot B or Lot C", other property owned by the Defendant within the zoning lot. Further, under the ZLDA, the Defendant "shall not alter the improvements located on Lot B and Lot C…in any manner that would cause the Lots B/C Buildings to extend beyond the respective heights, setbacks or articulations of the Lots B/C Buildings as of the date hereof…" In the event of a breach of the ZLDA, the non-defaulting party "shall have the right to any remedy available at law or equity, including, but not limited to, injunctive relief."

The Plaintiff claimed that the Defendant was violating the ZLDA by constructing utilities and other improvements on Lots B and C. It commenced an Action for damages, for a permanent injunction, and for an Order directing the Defendant to restore Lots B and C to their condition before construction. Finding that the Plaintiff had demonstrated a likelihood of success on the merits, The Supreme Court, New York County, granted the Plaintiff's motion for a preliminary injunction, enjoining the Defendant from "engaging in any construction activities at or on Lot B or Lot C in violation of the ZLDA, including any excavation, concrete pouring, utility installation, equipment operation, and delivery of supplies or other materials", conditioned on Plaintiff posting a bond for $25,000. 81-83 Rivington Corp. v. D.A.B. Group LLC, 2011 NY Slip Op 34209, decided June 3, 2011, was posted on January 14, 2016 at http://www.nycourts.gov/reporter/pdfs/2011/2011_34209.pdf.

Michael J. Berey
Senior Underwriting Counsel

Reporting Current Developments since 1997
No. 173; March 1, 2016
mberey@firstam.com