

ENTRY UPON NEIGHBORING PROPERTIES FOR CONSTRUCTION

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Challenges Facing Builders and their Immediate Neighbors

- Numerous recent crane accidents
- Sidewalk sheds and related issues
- Roof protection, nettings, etc.
- Excavation, underpinning, sheeting, shoring, etc.
- Need for monitoring for vibrations, cracking, etc.

Statutory and Regulatory Framework

Real Property Action and Proceedings Law Section § 881:

When an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry.

Key Aspects of RPAPL 881

- [The] repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner ...
- [P]ermission so to enter has been refused ...
- [T]he owner ... seeking to make such improvements or repairs may commence a special proceeding for a license so to enter ...

Key Aspects of RPAPL 881 (cont'd)

- The [owner's] petition ... shall state the facts making such entry necessary and the date or dates on which entry is sought.
- Such license shall be granted by the court ... upon such terms as justice requires.
- The licensee shall be liable to the adjoining owner ... for actual damages occurring as a result of the entry.

Local Building Codes

- Requirements to protect, support adjacent properties, e.g., NYC Building Code Chapter 33
- Special Provisions for non-adjacent buildings
Landmarked Buildings, TPPR 10-88 Landmarks Rules

Problems with NYC Regulatory Framework

- RPAPL 881 – no provision for permanent easement(s)
- NYC Building Code – if access refused, liability theoretically devolves onto adjoining, but not how system operates

Principles in the Case Law

- No iron-clad rules
- Balancing Test
- Must address competing interests of Adjoining Owner and Constructing Owner
- Few Reported Cases (Rosma Development)
- Parties must perform cost/benefit analysis to weigh risks of possible application to Court

Important Issues to Negotiate re License Agreement

- Underpinning, Sheeting and Shoring
- Party Walls
- Providing Protection Plans, Construction Plans Generally
- Pre-Construction Inspections

Important Issues to Negotiate re License Agreement (cont'd)

- License Fees, Other Fees
- Providing Security for Adjoining Building
- Lot Line Window Issues
- Indemnification/Insurance
- Confidentiality of License Agreement Itself

Other Important Considerations

- Specifics of protective work
- Specifics of construction work generally
- Terms of access to adjoining building
- Identifying contact persons, etc.

Practical Considerations

- Risks of Waiting Too Long to Bring An Action
- Costs/Benefits of Litigating

Litigation Options and Strategy

- Builder's Order to Show Cause to Compel License Agreement

vs.

- Adjacent Property's Suit to Enjoin Construction

Insurance Issues

- What license agreement should require of developer
- What damages are covered by CGL
- What CGL covers in an injunction action

Conclusions

- Much advanced planning required
- Time a critical factor
- Costs to factor in – engineers, attorneys, license fees, costs of adjoining owner(s).