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Need To Protect Your Neighbor's Property? It's Going To Cost You.

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Anyone who has walked a few blocks down the streets of New York City has likely seen unsightly sidewalk sheds and scaffolding adorning buildings and covering sidewalks. While such temporary protective equipment may be irksome to some, it serves an important purpose of protecting pedestrians and adjacent properties during construction projects of neighboring properties. Moreover, property owners and developers are required to install the protective equipment on their neighbors' buildings pursuant to the New York City Building Code (the Code), when they are performing construction work on their own building.

When an owner seeks to make improvements or repairs to its property, and such improvements or repairs require access to the adjacent property, the owner must request access from the neighbor and attempt to negotiate a license agreement for access to install temporary protection on the adjacent premises.

Far too frequently, the owner and the neighbor cannot reach an agreement and fail to execute the license agreement. The most common sticking points for these negotiations are coverage of the neighbor's attorney fees incurred in connection with negotiating the license agreement, the neighbor's engineering fees incurred in connection with the review of the owner's construction and site safety plans, and the license fee requested by the owner to compensate it for the loss of use and enjoyment of its property.

Fortunately for owners and developers, when the parties

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reach an impasse and an adjacent owner refuses access for the installation of the temporary protection, the developer can seek court-ordered access by commencing a special proceeding pursuant to §881 of New York Real Property Actions and Proceedings Law (RPAPL).

Over the past decade, the volume of RPAPL §881 proceedings has skyrocketed as property development has increased. While the courts will generally grant an owner's petition for access, they have been inconsistent when deciding whether the adjacent owner is entitled to the reimbursement of its legal and

engineering fees, and whether the adjacent owner should be paid a license fee (see, e.g., *10 E. End Ave. Owners v. Two E. End Ave. Apartment*, 35 Misc.3d 1215(A) (Sup. Ct. New York County 2012) (holding that RPAPL §881 does not warrant the imposition of a license fee); *109 Montgomery Owner v. 921 Washington Ave.*, 2018 N.Y. Slip Op. 31530(U), 5 (Sup. Ct. Kings County 2018) (granting license for access and declining to impose a license fee and award attorney fees); but see *DDG Warren v. Assouline Ritz 1*, 138 A.D.3d 539 (1st Dep't 2016) (granting license for access, but awarding adjacent owner a license fee and attorney fees; *Matter of North 7-8 Invs. v. Newgarden*, 43 Misc.3d 623 (Sup. Ct. Kings County 2014) (same)).

On February 15th, the First Department issued a decision in *In the Matter of Panasia Estate v. 29 West 19 Condominium*, 2022 NY Slip Op 00975 (1st Dep't Feb. 15, 2022), which confirmed that, although not expressly stated, RPAPL §881 authorizes courts to award license fees, attorney fees, or engineering or other design professional fees. This means that courts will order developers to pay an adjacent owner's license fees, professionals' fees incurred in negotiating a license agreement, and the adjacent owner's fees in defending against an RPAPL §881 proceeding— which has not always been the case.

In the case at hand, the petitioner sought to improve its property by adding two stories for commercial office space, which will take up to three years to construct. In connection with its planned improvements, the petitioner sought access to respondents' adjoining properties to perform a pre-construction survey and install, among other things, overhead protection, roof protection and flashing on the respondents' properties to protect the properties. When the negotiations of license agreements with the adjacent owners halted over payment of license fees and professionals' fees, the petitioner commenced the proceeding. The trial court granted petitioner's request for access, but ordered petitioner to pay respondents' attorney fees, engineering fees, and a monthly license fee which escalated after 12 months.

Petitioner appealed from the order to the extent it ordered the petitioner to pay monthly license fees and the respondent's engineering and attorney fees in connection with the license and to post a bond in the amount of $1 million. Respondents appealed from the order to the extent the motion court declined to order a term for the license to, inter alia, order petitioner to pay the professional fees they incurred in connection with the license.

Among other things, the petitioner argued that RPAPL §881 does not authorize awards of license fees, attorney fees, or engineering fees. Specifically, the petitioner claimed that "upon such terms as justice requires" cannot be interpreted to authorize license fees, counsel fees, or other professional fees not explicitly authorized, because the statute specifically provides for liability only for "actual damages." The petitioner further argued that the absence from the statute's legislative history of any mention of a monetary remedy other than actual damages is consistent with the American rule—which provides that attorney fees are incidents of litigation, and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute, or court rule. Finally, pe-

titioner argued that public policy requires that RPAPL §881 be interpreted such that property owners will be encouraged to improve their properties without fear of being extorted by their neighbors.

The court, however, rejected these arguments, reasoning that because "[t]he respondent to an 881 petition has not sought out the intrusion and does not derive any benefit from it … [e]quity requires that the owner compelled to grant access should not have to bear any costs resulting from the access" (id. quoting *DDG Warren*, 138 A.D.3d at 540). The court explained that license fees are warranted where the temporary protection will interfere with the adjacent owner's use and enjoyment of its property. Furthermore, an adjacent owner should not be put in a position of either having to incur the costs of a design professional to ensure petitioner's work will not endanger his property or having to grant access without being able to conduct a meaningful review of the petitioner's plans. Moreover, the court explained the American rule is inapplicable in the context of an RPAPL §881 proceeding because attorney fees are a condition of a license as opposed to an incident of litigation.

Interestingly, the court did not address the fact that the Code puts the onus of protecting the adjacent property on the adjacent owner if it refuses access to the developer. Indeed, §3309.5 of the Code provides, "if the person who causes the construction, demolition, or excavation work is not afforded a license, such duty to preserve and protect the adjacent property, *shall devolve to the owner of the adjoining property*" (emphasis added).

Nor did the court address its decision in *Meopta Properties II v. Pacheco*, 185 A.D.3d 511, 512 (1st Dep't 2020), where it declined to award license fees and professionals' fees in connection with remedial and protective construction work (see also *Berard v. Hamersley*, 2021 N.Y. Slip Op. 30248(U), 9 (Sup. Ct. New York County 2021) (granting license to access adjacent property and refusing to award attorney fees or license fees where access was necessary to repair and renovate the exterior walls, windows and roof of petitioner's building)).

Although the Second Department has not weighed in so definitively, this decision will undoubtedly have a significant impact on developers who seek to improve their property. Developers will need to account for paying their neighbors' professionals' fees and for monthly license fees when developing their projects' budgets. It will also, almost certainly, lead to an increased amount of RPAPL §881 proceedings against adjacent owners, who will be emboldened by this decision and will delay the developers' projects until they receive the compensation to which they believe they are entitled. As a result, courts will spend their time determining what license fee amounts are "reasonable."

Developers will be smart to keep negotiations with adjacent owners on a short leash, offer reasonable compensation and commence RPAPL §881 proceedings as soon as it is clear that the neighbor's demands are unreasonable, so as to avoid any further project delays caused by the neighbor's obstruction.

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