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Expert Analysis

Open Issues in RPAPL §881 Litigation: Accessing Neighboring Property

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With the latest boom in construction and development in New York City, where buildings are frequently built right up to the adjacent property line, building owners and developers often need access to neighboring property to perform improvements or repairs to their own property. Where such access cannot be agreed upon amicably, Section 881 of New York's Real Property Actions and Proceedings Law (RPAPL) governs efforts to compel access to adjoining property to perform work on one's own property, and provides an opportunity for a building owner or developer to obtain a court-ordered license for that purpose.

Specifically, RPAPL §881 states in pertinent part:

> 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… Such license shall be granted by the court in an appropriate case upon such terms as justice requires.

Section 881 of New York's Real Property Actions and Proceedings Law governs efforts to compel access to adjoining property to perform work on one's own property.

This article provides a brief introduction to the statute and its application, and explores two open issues in the applicable case law: the availability of discovery in an RPAPL §881 proceeding, and whether the statute applies to demolition work.

RPAPL §881 was enacted in 1968. An April 5, 1968, memorandum for Governor Nelson Rockefeller from the attorney general contained in the statute's bill jacket succinctly explained its purpose as follows:

> This measure is intended to remedy a situation caused by the refusal of an owner or lessee of real property to permit entry on his property by the abutting owner or lessee who wants to repair or improve his property, but, because of the physical situation, cannot do so without entry on the adjoining property.

Forty-eight years after its enactment, the statute appears to be used more and more frequently, especially as real estate development accelerates. Perhaps the most common misconception regarding this statute is the belief that once a party commences a special proceeding under RPAPL §881, it has an absolute right to obtain a temporary license from the court. One commentator has stated that RPAPL §881 "requires" the adjacent property owner to grant a license.[1] This reading is erroneous. As the Appellate Division, First Department, has explained, a petitioner's right under RPAPL §881 "is

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the right to seek a license under certain circumstances," not the unconditional right to obtain one.[2] And as one court noted in 1968, the year the statute was enacted, "the statute does not direct the court to grant a license to every applicant," but is available "where necessary, under reasonable conditions, and where the inconvenience to the adjacent property owner is relatively slight compared to the hardship of his neighbor if the license is refused."[3]

Discovery

There are few, if any, reported decisions discussing disclosure or discovery in connection with an RPAPL §881 proceeding. But there is no reason that disclosure should be prohibited in an RPAPL §881 proceeding, and in some cases it may be critical to the respondent's ability to frame a defense to the petition. Thus, the availability of discovery seems to be a sorely overlooked issue in RPAPL §881 litigation.

Special proceedings, including cases brought pursuant to RPAPL §881, are governed by Article 4 of the CPLR. Unlike in plenary actions, discovery in special proceedings is not available as of right, but is governed by CPLR §408, which provides that discovery requires leave of court. Under CPLR §408, courts have broad discretion to permit discovery in aid of a special proceeding.[4]

In general, the party seeking disclosure in a special proceeding must establish by motion that the requested information is "material and necessary" to the prosecution or defense of the proceeding.[5] As the Court of Appeals has held, "material and necessary" should be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial..."[6] Of course, if leave of court has been granted, "where it is appropriate, the full range of discovery devices is available to parties to a special proceeding," including document demands and depositions.[7]

Among topics that may be ripe for disclosure in an RPAPL §881 proceeding are whether the planned improvements or repairs truly "cannot be made" without access to adjoining property, and relatedly, whether the specific access requested is genuinely necessary, as required by the case law. Sources of disclosure to request may include communications between the petitioner and its contractors, engineers and architects relating to plans and alternative plans, as well as drawings and schematics. In some cases, a deposition—whether of the petitioner, an architect, or engineer—may be warranted.

Can a property owner obtain an RPAPL §881 license for work necessary for the demolition of its building? Put another way, is demolition an improvement or repair within the meaning of the statute?

While not every RPAPL §881 proceeding lends itself to discovery, the savvy practitioner will be aware of this tool in cases where it may prove useful.

Demolition

Another RPAPL §881 issue ripe for exploration is whether the statute permits a court-ordered license to access property for the purpose of performing demolition work. The plain language of the statute limits the grant of a license to a landowner or lessee who seeks "to make improvements or repairs" to its property. But in the New York City real estate market, development often requires demolition of an existing building to make way for a more expansive, profitable structure. Can a property owner obtain an RPAPL §881 license for work necessary for the demolition of its building? Put another way, is demolition an improvement or repair within the meaning of the statute?

The state of the law is unsettled, as there is no clear appellate authority on point. Taking it as a given that a demolition is not a repair, defining "improvement" is a good place to start this analysis. According to Black's Law Dictionary, an improvement is "[a]n addition to real property, [usu. real estate,] whether permanent or not; esp., one that increases its value or utility or that enhances its appearance."[8]

Of course, a demolition, considered in isolation, is not an "addition" to real property. Numerous other legal authorities draw an express distinction between an "improvement" and demolition work. For example, Section 25-318-a of the Administrative Code of the City of New York, governing landmark

preservation and historic districts, references "[p]lans for the construction, reconstruction, alteration or demolition of any improvement or proposed improvement…" One court also noted that an improvement can be demolished, arguably implying that a demolition itself cannot be an improvement.[9] The Court of Appeals has discussed the New York Real Property Tax Law's reference to improvements constituting real property for tax assessment purposes as "[b]uildings and other articles and structures, substructures and superstructures erected upon, under or above the land, or affixed thereto…"[10]

Thus, these authorities consider or define an improvement in its ordinary use, the same way that Black's Law Dictionary does: as an addition to land, and therefore as something distinct from a demolition.

Because the statute is a legislative enactment in derogation of the common law, the applicable canon of interpretation holds that RPAPL §881 is subject to strict construction, with any ambiguities interpreted in the respondent's favor.[11] Imposing this kind of reading on the statute would seem to counsel against shoehorning demolition into the category of improvements or repairs necessary to obtain a statutory license.

However, at least one lower court decision read the law broadly and included demolition work within the statutory ambit. *Deutsche Bank Trust v. 120 Greenwich Development Assoc.* involved an RPAPL §881 petition seeking judicial authorization to enter onto a neighbor's property in order to "completely demolish the building on [the petitioner's] own property" to permit construction of a new building.[12] The respondent opposed the petition, arguing, among other things, that the statute does not permit granting a temporary license to perform demolition, as such work is neither an "improvement" nor a "repair."

The court correctly noted that the statute is subject to strict construction, but in holding that a statutory license could be available for demolition work, opined that "the court believes that the statute was not and could not have logically been intended to permit a licensing only for those improvements that do not require any demolition of the existing structures in whole or part." The court also explained that "…in many circumstances, demolition, whether it be partial or complete, is a necessary element of making improvements to property."

Arguably, the statute's silence on demolition, combined with a strict constructionist reading, weighs toward excluding demolition from the statute's coverage. But the court may have felt that demolition is so much a part of many development projects now that to exclude it from the statute would be to unduly restrict the statute's application.

The bottom line is that until there is clear appellate guidance, this is likely to remain an issue ripe for creative litigators to explore.

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1. See Brian Lustbader, "Gaining Access to Neighboring Properties for Protection During Construction," N.Y. St. B.J., vol. 42, no. 1, at 9 (Winter 2014).

2. *Matter of 155 W. 21st St., LLC v. McMullan*, 61 A.D.3d 497 (1st Dept. 2009) (emphasis in original).

3. *Chase Manhattan Bank (Nat. Ass'n) v. Broadway, Whitney Co.*, 59 Misc.2d 1085 (Sup Ct, Queens County 1969).

4. *Greens at Washingtonville v. Town of Blooming Grove*, 98 A.D.3d 1118, 1119 (2d Dept. 2012); *Matter of Wendy's Restaurants v. Assessor, Town of Henrietta*, 74 A.D.3d 1916, 1917 (4th Dept. 2010).

5. *Stapleton Studios v. City of New York*, 7 A.D.3d 273 (1st Dept. 2004) .

6. *Allen v. Crowell-Collier Publishing Co.,* 21 N.Y.2d 403, 406 (1968).

7. *Barbour v. New York*, 163 Misc.2d 321, 325 (Sup Ct, Kings County 1994).

8. Black's Law Dictionary (10th ed. 2014).

9. *Matter of City of New York*, 20 Misc.3d 179 (Sup Ct, Kings County 2008).

10. *Matter of Consolidated Edison Co. of N.Y. v. City of New York*, 44 N.Y.2d 536, 541 (1978).

11. See e.g. *Deutsche Bank Trust v. 120 Greenwich Development Assoc*., 7 Misc.3d 1006(A) (Sup Ct, New York County 2005) (citing *Matter of Bayswater Health Related Facility v. Karagheuzoff*, 37 N.Y.2d 408, 414 [1975]).

12. 7 Misc.3d 1006(A) (Sup Ct, New York County 2005).

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