CALCULATING A COVER CHARGE

PUTTING A PRICE ON ACCESS

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Construction workers at the building next door to your co-op want to gain access to your property. In the past, you might have told the developer to take a hike – but it was an uphill battle. If you did not come to terms with the builder, he would just go to court and get a license requiring that you let workers and equipment in.

That has changed, thanks to the decision in the landmark *DDG Warren LLC v. Assouline Ritz 1, LLC,* handed down in April by the state appellate court in Manhattan. The court ruled that gaining access "often warrants the award of contemporaneous license fees."

"This is the first time an appeals court had considered the issue of awarding license fees and attorneys' fees when a property owner is seeking access to [another] property," says Dani Schwartz, a partner with Rosenberg & Estis. "Lower courts had considered the issue and had not always had consistent results."

Calculating Costs

How does a board put a price on access? In one recent case where construction workers wanted to use part of a resident's terrace as a staging area and work site, the court estimated that the terrace was "29 percent of the total square footage of the apartment," Schwartz notes, "and so the court did math computations of the percentage of the terrace against total monthly common charges." From there the judge took the percentage of the terrace that would actually be affected and found "that $2,000 per month is a just and equitable license fee."

This is not necessarily the way all such future computations will be done, but it gives you an idea of what's possible. "Common charges are not an estimation of the value of an apartment but simply a pro-rated apportionment of expected building expenses," Schwartz says.

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>
> —C. JAYE BERGER, ATTORNEY

Attorney Steve Troup, a partner at Tarter Krinsky & Drogin, says you can also use comparable rental value to determine a license fee. "If the rental value of an apartment is $2,000 a month greater with the terrace than not," Troup says, "then that's what you should get."

In one noteworthy access case that built on the April decision, *Van Dorn Holdings, LLC, v. 152 W. 58th Owners Corp. and David Fallarino,* the court awarded the co-op attorneys' fees and engineering fees, noting that the co-op "clearly had a right to have an engineer of [its] choosing present when the probing [of exterior walls] occurred to ensure that [Van Dorn's] engineer would give an accurate estimate of how long the work would take." The judge tacked on $500-a-day penalties if construction continued beyond an agreed-upon date.

"They wanted to use our common areas and the [shareholder's] terrace to stage their construction without paying for it," says Troup, whose firm represented the co-op in *Van Dorn*. "We thought the law firm representing the developer was far too aggressive."

How likely is your building to experience something like this? "It happens all the time, especially in Manhattan," says Troup. "Typically it's either new construction or Local Law 11 work."

Factors to Consider

A neighboring developer needs access to your building. How do you handle negotiations?

Get information on the project. "The first thing you do is ask for a copy of their plan, a description of what they intend to do and what they want from you," says Schwartz. "Then you would discuss with your attorney whether this is a serious access issue or not, whether it makes sense to get an engineer/architect or site-safety consultant. It may be that the plan is very intrusive and does not fall under the access statute, in which case the discussion may be over. Alternatively, if it seems that the plans are viable and more or less reasonable, it may make sense to get a construction professional involved."

"You want to make sure your whole team has clear documentation early on that defines what's being requested and what it's being requested for," says Gene Ferrara, president of the engineering and consulting firm JMA Consultants.

Hire professionals to review the plan. Troup advocates bringing in an engineer/architect at the start. "You need to know exactly what will be going on with the construction, not just a general description," he says. "You need to get your attorney and engineer/architect involved right away to participate in meetings and independently confirm exactly what [the developer is] planning to do, how it's going to impact your building, and how long it's going to take."

Co-op and condo attorney C. Jaye Berger adds, "When the developer says to you, 'Let's not get lawyers involved,' that's a red flag." She even recalls a situation in which the building owners who wanted access didn't have an attorney. "And I made them get an attorney because I wanted to make sure I'm talking to someone who knows what I'm talking about," she says. Another time a developer didn't want a board to get an attorney. "And they hired me anyway," Berger says. "It turned out the developer was going to build over our client's property line, and our clients didn't know about it."

Whatever you do, says architect Howard L. Zimmerman, principal of his eponymous firm, a board member "should never engage in any conversation [with the developer's representatives] other than, 'I'll get back to you.'"

Hammering Out the Agreement

Your attorney and the developer's attorney will hammer out an access agreement, also called a temporary license agreement. These documents should:

Set the working hours. The agreement sets out things like "the hours they're allowed to work, the duration of the project, the amount of fees to be paid, and what access they're going to have," says Troup, who cautions: "Never give them keys to the building. Always have a super or somebody give them access."

Get insurance coverage. The building doing the work will almost certainly have its own insurance, says Berger, "but make them name your building and your managing agent as additional insureds and give you a certificate of insurance evidencing that. In one case, I insisted they get more insurance."

Set penalties. "You will often want to include in the agreement a penalty provision if they overstay their welcome," says Schwartz. "For removal of overhead protections or sheds or platforms, you could set either a cut-off date or a benchmark when certain aspects of the project are complete. If materials are not removed within a certain number of days from that date or benchmark, there could be financial penalties."

Require safety standards. "You need to know the capacity of the load they want to put on your terrace or roof," Ferrara, the engineer, notes. "How many pounds per square foot is it? Depending on what kind of protection is planned, there may be significant engineering studies that need to be done."

What happens if the developer is using a contractor who has been in the news for safety violations, or even fatal accidents? Can you insist the developer use a different one?

"A judge isn't going to make a ruling like that: 'Use this contactor over this contractor,' " says Berger. "The contractor may say, 'We'll do better now, we have safety inspectors to improve our safety.' If you feel it's an extreme case and that no way in hell you're going to agree to that, then you have to go to court" specifically on that issue.

Zimmerman has actually faced such a scenario. A developer "mentioned a name, and I gave out a gasp, based on his safety record, skills, and all of that. So we made our case that – because this guy is sloppy, and he's going to make mess of our roof, and has no regard for safety – we needed to impose certain protections. We asked for a greater area of our roof to be protected, we asked for greater insurance limitations, and we asked that certain safety procedures be adhered to."

Consider non-monetary compensation. Sometimes agreements involve compensation other than money. "We have been involved in negotiations where a contractor will say, 'We'll fix your facade" or 'We'll paint your fire escape,' " says Zimmerman, adding that sometimes a developer will even give you a new roof "since it's not that much more of an expense – they already have workers and equipment there."

Finally, suggests Troup, it's prudent to have contingency money in escrow or a bond, "so if the neighboring owners default, there's a pool of money that can be used to compensate the co-op or condo for its damages."

There's one overarching piece of advice in all this: don't get greedy. "Remember," says Ferrara, "this goes both ways. If you negotiate to get $10,000 a month, that may be what you have to pay the guy next door when you need access to *his* building. Keep it amicable."

Zimmerman agrees. "Neighbors," he says, "need to get along." ■