Gaining Access to Neighboring Properties for Protection During Construction

By Brian G. Lustbader

As they develop their properties, builders are required to avoid damaging adjoining properties from their construction work, something that has always been a problem, but especially so in New York City, where construction activities have damaged neighboring properties, most notably the seemingly epidemic spate of recent crane accidents. The method for dealing with these problems is the statutorily mandated requirement that the owner/developer enter into a license agreement with adjoining property owners permitting access to protect those properties. Despite the extensive, advanced planning that goes into real estate development projects, this requirement is often overlooked. Yet doing so will create real problems, as negotiating and/or litigating the myriad issues associated with these license agreements can create many delays to the development process, especially because neighboring property owners often leverage their required approval by making exorbitant demands.

Builders and the owners of properties adjoining construction sites each have enforceable rights that often conflict, so they must be balanced, usually a difficult and arduous task. The adjoining neighbor's rights include the ability to use its property without interference, that is, free from trespass, and also free from damage caused by others. The builder's rights are equally meritorious, as it is entitled to develop and build on that property as permitted by the local building authorities, subject only to non-interference with neighbors. In addition to some thorny legal issues, there are many practical issues the parties must address, including (a) monitoring for vibrations, cracking, and the like; (b) excavation, underpinning, sheeting, and shoring; (c) erecting sidewalk sheds, which often obstruct neighbors' entrances; and (d) erection of nettings and other protection of adjacent roofs, once the new building exceeds the height of its neighbors.

Statutory and Regulatory Framework

There are a number of statutes and regulations that govern the relationship between builders and adjoining property owners. The statutory framework begins with Real Property Action and Proceedings Law (RPAPL) § 881, which requires the owner of the property under development to obtain a license from the adjoining property owner and also requires that the latter grant such a license.[1] The statute provides as follows:

> 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.[2]

There are a number of important aspects of this statute. First, the statute—at least theoretically—grants the owner/builder the right to actually compel the adjoining property owner to grant a license for the owner/builder to enter the adjoining property, provided the "repairs cannot be made by the owner or lessee without entering the premises of [the] adjoining owner."[3] If the adjoining property owner refuses to grant the requested license, the builder/owner is entitled to proceed to court to obtain an order compelling the recalcitrant adjoining property owner to grant the license. The court hearing the matter is directed to grant that license "upon such terms as justice requires," while the owner/builder will remain liable to its neighbor for damages caused by its entry onto the adjoining property and, presumably, any damage resulting from its construction activities.[4]

In addition to the New York State RPAPL provision quoted above, New York City has its own, additional rules governing protection of adjoining properties during construction, as is true for many other jurisdictions. Section 3309 of the New York City Building Code provides, among other things, that the adjoining property owner "shall" grant a license to the builder, and if the adjoining owner fails to grant that license, then the liability for any damage devolves upon the party refusing to grant the license, i.e., the adjoining property owner.[5] This appears to be a sure-fire method to force the adjoining property owner to grant the requested license. In practice, however, this is not so because the New York City Department of Buildings (DOB) will usually refuse to grant the builder the requisite permit to build without receiving a copy of the signed licensed

agreement, thereby negating the force of the Building Code section by eliminating the ability of the builder to force the issue short of moving in court as permitted under RPAPL § 881 noted above.[6]

Also of note is a problem with the New York statutory system, not limited to New York City. RPAPL § 881 has no provision for permanent easement(s) for anything that the builder might install on the adjoining property, for example, anchors to sheeting or shoring protection, structural elements added to party walls, or waterproofing/flashing.[7] Presumably, both parties will want these items to remain, but the statute does not require the adjoining property owner to allow this if he or she so chooses to demand removal.

Underlying Legal Principles—Competing Property Rights

There are no ironclad rules governing the relief to which each side is entitled, as RPAPL § 881 merely requires the court to grant the license "upon such terms as justice requires."[8] Finding the license that "justice requires" necessarily involves a balancing test, as the courts must balance those competing rights—for example, requiring the neighbor to grant access, but limiting the time period and the physical intrusion and requiring the builder to pay for or remedy all damages caused by its work. In some cases, the court will require the builder to pay for the neighbor's engineers and other professionals, obtain insurance coverage, and, in addition, post a bond to cover potential damages to the adjoining property, and/or pay a license fee to the neighbor for the period during which the protection is in place. The latter payment would be to compensate the neighbor for the extent of its loss of use of its property, whether complete or partial, over the time period required for protection.

All of these terms should be negotiated in a license agreement between the parties, discussed in more detail below. Where the parties are unable to come to agreement on the terms of that license agreement, however, one party or the other will need to apply to court for redress. Procedurally, it works in either of two ways. The most common scenario is where the builder/developer seeks a court order pursuant to RPAPL § 881.[9] If, however, the builder proceeds without a license (if the DOB grants a permit), the adjoining property owner is entitled to bring an injunction action seeking to stop construction unless, and until, the builder/owner enters into a satisfactory license agreement.[10] The adjoining property owner can also attempt to avoid the legal expense of applying to court by applying for a stop work order from the local department of buildings, e.g., the NYC DOB, but if that department refuses to get involved, as is often the case, then that adjoining property owner must proceed to court for an injunction.[11]

Even when one party does apply to the court for an order, more often than not the judge will attempt to resolve the issues informally without rendering an actual decision, because most judges do not like to get involved in the nitty-gritty of the specifics of each situation, in essence converting the case to a mediation with the judge acting as the neutral mediator. As a result, there are few reported decisions with any detailed analysis of the issues.

One of the few such decisions containing such an analysis is *Rosma Development, LLC v. South*.[12] In that decision, the adjoining owner raised an entire host of arguments as to why it need not be compelled to provide a license to the builder/owner, including the following: (1) the builder's work was not an "improvement" within the meaning of the statute, (2) the protection plans should have been part of the builder's DOB application, (3) the builder was "at fault" in seeking to construct an eight-story building between two four-story buildings and therefore should not be "rewarded" with a license for such improper behavior, (4) the builder's construction work will impair the adjoining owner's own efforts to improve its own property, and (5) DOB violations had been issued against the builder for its excavation work to date. In essence, rejecting all of these arguments, the Court ruled that the builder's rights to develop its property was a bona fide public purpose and therefore outweighed the adjoining owner's inconvenience, and required the latter to grant the requested license. However, in order to protect that adjoining property owner's interests, the Court required that that license be carefully circumscribed, as follows: (1) limited duration (12 months), (2) a license fee to be paid to the adjoining owner ($2,500/month), (3) prohibiting the builder from "unreasonably interfering" with the adjoining owner's use of its property, (4) requiring the builder to restore the adjoining owner's property to its prior condition, and (5) requiring the builder to be responsible for all damages, provide the requisite insurance, and hold the adjoining property owner harmless for all third-party claims, among other things.[13]

Terms to Include in License Agreements

Using the *Rosma* decision and the principles outlined above as a template, one can determine the items to include in license agreements between builders and adjoining property owners.[14] Below are some of those provisions:

1. Builder to provide to the neighbor with a schedule of the work to be performed, and sometimes the actual plans themselves, both for the protection work and the construction work generally (plans filed with the DOB should be sufficient as to the overall construction work). Alternatively, the builder can spell out in detail the specifics of the protection work, e.g., underpinning, sheeting and shoring, and/or roof protection work;
2. Builder to conduct pre-construction inspections, including photographs and videos of the

neighbor's property, and thereafter install gauges to monitor vibrations, cracks and the like during construction;

3. Builder to pay the fees incurred by the neighbor in connection with negotiation of the license agreement and thereafter, including fees for engineers, attorneys, etc.;
4. Builder to pay the neighbor a license fee, either as a lump sum, or on a per-month, or per-week basis, depending on the overall length of the project;
5. If no license fee is to be paid (or even conceivably if it is), builder to be assessed a penalty or liquidated damages if the protection work runs later than set forth in the schedule provided by the builder;
6. Builder to provide site security for all sidewalk sheds and scaffolding used for its work so as to assure that there are no intrusions into the neighbor's property;
7. Builder to provide full indemnification of neighbor and insurance at coverage amounts appropriate to the scope of the work being performed, naming the neighbor and its agents as Additional Insureds;
8. To address potential claims and/or damage to the neighbor's property, builder to agree to repair all damages caused on neighbor's property, and/or post a bond (as was required in *Rosma*), or put money in escrow;
9. Terms of license agreement to be kept confidential, as the builder usually will not want other neighbors to know the terms agreed upon;
10. Both parties to provide contact information for contact personnel who can be reached on a 24-hour basis, for emergencies, for access to the neighboring property, and otherwise;
11. Where party walls exist between the two parties' properties, builder to conduct probes to see whether to address structural issues in that wall; and
12. Establishing responsibility for closing up lot line windows in the neighbor's property, i.e., who is to perform the work and who pays for it.

This list is hardly exhaustive, however, as there are many other, site-specific issues that the parties will undoubtedly need to address.

Practical Considerations; When to Litigate

Negotiating a license agreement is not an easy proposition, even in the best of circumstances. Builders are anxious to get moving on their construction, as time is money and the sooner the work is complete, the sooner revenues will begin to flow, construction loans can be paid off, etc. Adjoining property owners, realizing that their approval is a prerequisite to the builder's ability to get started, will typically make high monetary demands in the hopes of reaping a windfall for granting consent. Under these circumstances, each side will have to measure how long to negotiate before actually going to court, each running its own cost/benefit analysis of the likely risks and rewards of litigation. For the builder, while litigation is never inexpensive, and one can never be assured of the result, waiting too long to litigate can mean a significant loss of time and money. Conversely, if the adjoining property owner's demands are excessive, it may find itself in court and ultimately receive a license agreement from a judge on terms not as favorable as those offered by the builder in the pre-litigation negotiating phase.

There are a few practical pointers to keep in mind. First, unlike typical litigation that can last for years, an action under RPAPL § 881 is necessarily a discrete, one-shot application and decision (or court-mediated settlement), so it is unlikely to last more than a month or so. As a result, litigation will not usually delay the builder unduly. In a similar vein, the builder need not establish a large litigation "war chest" for this type of action. In addition, as noted above, judges typically shy away from rendering decisions on these issues, and so will usually force the parties to settle, in essence acting as a mediator to bring the sides together. However, unlike the typical mediation where the mediator has no enforcement power, the judge as mediator has leverage with which to coerce a recalcitrant party—the very real threat that he or she will rule against that party acting unreasonably if the matter is not resolved. Given this state of affairs, parties should not be as leery of applying to court as they might be under ordinary circumstances.

Additional Issues, re: Insurance

There are many other issues that may arise regarding license agreements, including several related to insurance. As noted above, the adjoining property owner will want to be covered under the builder's insurance policy, but a question arises as to which side will cover the deductible in the event of a claim under the policy. Presumably it should be the builder, but in the absence of a specific provision in the license agreement's indemnification provision to that effect, that cost may devolve on the neighbor.

In addition, there are often many exclusions in the comprehensive general liability (CGL) insurance policies that may bear on ultimate payouts, e.g., subsidence, water damage. Other exclusions include consequential damages, e.g., lost rents, living expenses, and engineering and legal fees. Note that RPAPL § 881 only requires the builder to pay "actual damages," which necessarily precludes such consequential damages, so if the adjoining property owner wishes the benefit of such damages, it must seek to include them in the license agreement.[15]

Questions may also arise over whether coverage will extend to strict

liability situations or only negligent acts of the builder and its contractor/construction manager. Note also that one attorney will typically represent both the owner/builder and its contractor/construction manager in the dealings with the adjoining property owner, but when insurance liability issues arise, those two parties' interests may no longer be aligned, so each may need separate counsel to avoid conflicts between them.

CGL policies usually exclude attorneys' fees in an injunction action, so a question may arise regarding responsibility to pay attorneys' fees there. And with respect to injunction actions, query whether a court decision there can act as "law of the case" in any subsequent proceeding between the same parties.

These questions are not answered in the present state of the case law, so it will pay to address as many of them as possible in any license agreement and thereby avoid open issues down the road.

Conclusion

Given that time is such a crucial aspect of any real estate development project, and the myriad issues, time and expense involved in negotiating license agreements with neighbors, when addressing their projects, owners/developers should be sure to allocate the necessary time and advanced planning required to address the issues outlined here, in addition to all the other matters they need to address in getting their projects built.

Endnotes

1. N.Y. Real Prop. Acts. Law § 881 (McKinney's 2013).
2. *Id*.
3. *Id*.
4. *Id*.
5. N.Y.C. Bldg. Code § 3309.2 (Int'l Code Council 2008); N.Y.C. Bldg. Code § 3309.4 (Int'l Code Council 2008).
6. N.Y. Real Prop. Acts. Law § 881 (McKinney's 2013).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.; see e.g.,* McMullan v. HRH Constr. LLC, 38 A.D.3d 206, 207, 831 N.Y.S.2d 147, 149 (1st Dep't 2007).
11. N.Y. Real Prop. Acts. Law § 881 (McKinney's 2013) (when permission is denied to enter an adjoining property to make repairs to an owner's building, owner may "commence a special proceeding for a license so to enter").
12. Rosma Dev., LLC v. South, 5 Misc. 3d 1014(A), 798 N.Y.S.2d 713 (Sup. Ct. Kings Cnty. 2004).
13. *Id.* (holding that adjoining property owners must be reasonable in denying the neighboring property's developer from entering the premises in order to make improvements or repairs).
14. *See id.* (providing a general template for a RPAPL 881 license).
15. N.Y. Real Prop. Acts. Law § 881 (McKinney's 2013).

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