

## Outside Counsel

## Expert Analysis

# Litigation Remains Powerful for Property Owners to Secure Requested Access

Construction on real property can be complicated and expensive, but nowhere is this more accurate than in New York City. Extensive building regulations only contribute to the multitude of complications and costs. For instance, property owners are required to install temporary protections (e.g. roof protection, sidewalk sheds, scaffolding, etc.) on neighboring parcels when developing or even repairing their own property. As a result, it is essential for property owners seeking access from a neighbor to take into account four main considerations when deciding whether it would be best to enter into an amicable license agreement or aggressively litigate.

### Reasonable Access Is Essentially Guaranteed

Property owners and neighbors alike should be mindful that the former will likely obtain access to the latter's parcel when the requested access



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is reasonable and necessary to make repairs to, or develop, their own parcel in compliance with the New York City Building Code.

Once negotiations prove fruitless or circumstances indicate that the neighbors do not intend on granting access on fair terms within a reasonable time frame, property owners can and should proceed to litigation.

Real Property Actions and Proceedings Law ("RPAPL") §881 explicitly provides that when an owner or lessee seeks to "make improvements or repairs to real property so situated that such improvements or repairs cannot be made . . . without entering the premises of an adjoining owner or 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" and "[s]uch a license *shall* be granted by the court in an appropriate case upon such terms as justice requires." Courts have repeatedly held that RPAPL §881 *compels* a property owner to grant necessary and reasonable access to a neighbor.

### Failure to Negotiate in Good Faith Doesn't Preclude Access

Parties must attempt to engage in good faith negotiations before seeking judicial intervention under RPAPL §881. However, neighbors cannot use this requirement as a means to hold property owners hostage, either in efforts to secure excessive compensation or heavily slanted terms in a license agreement, to get the property owners to pursue unreasonable alternatives obviating the need for access, or to get property owners to give up on development plans altogether. In fact, no specific proof is required to satisfy the "good faith negotiations" requirement. Property owners merely need to establish that access was not granted.

Once negotiations prove fruitless or circumstances indicate that the neighbors do not intend on granting access on fair terms within a reasonable time frame, property owners can and should proceed to litigation. Neighbors cannot hold property owners hostage under the guise of ongoing negotiations and property owners would be wise to catch onto this oft-employed delay tactic sooner rather than later.

### **Litigation Can Be a Quick And Effective Tool**

While litigation can be cumbersome and time-consuming, in the context of RPAPL §881 applications, it can be a quick and effective tool to get access.

In terms of timing, it takes a New York City court just under four months to issue a decision on a petition seeking relief under RPAPL §881. Consequently, if the neighbor does not grant access within a reasonable period of time (e.g. within a month), the property owner should commence litigation immediately. Delaying litigation will only serve to put the owner at risk for getting a violation from the Department of Buildings or could negatively impact the overall construction schedule.

In terms of efficiency, while neighbors may be unwilling to enter into a license agreement initially, litigation forces them to expend time and money to address the requested access. Litigation can actively motivate neighbors who were otherwise adverse to settlement or refused to engage in good faith

negotiations, to enter into a license agreement for fear of being subject to an unfavorable court order.

### **Litigation May Not Be More Expensive Than a License Agreement**

Neither entering a license agreement nor going into court is cheap; however, the true cost differential can be negligible in the long run. By entering a license agreement, property owners can avoid court costs; however, they will likely agree to pay a license fee, pay professional fees incurred by the neighbors (e.g. attorneys' fees, architect's fees, and/or engineer's fees), post a bond and/or provide high insurance coverage in efforts to gain quick and amicable access. By contrast, when litigating, as a condition of granting the requested access, while the court will likely require certain insurance coverage, the court may or may not direct the property owner to pay the neighbor a license fee, post a bond, or pay the neighbors' professional fees.

While many believe that license fees are standard in this context, this is not always the case. The plain language of RPAPL §881 arguably precludes any license fee by solely guaranteeing that neighbors shall be entitled to recover "damages occurring as a result of entry" from property owners. For instance, the New York State Supreme Court in New York County stated in, *10 East End Avenue Owners, Inc. v. Two East End Avenue Apartment Corporation*, "While RPAPL provides that the court may issue a license 'upon such

terms as justice requires,' this court does not construe such provision to warrant the imposition of a monetary license fee or award to the licensor, in exchange for access, given that, the statute speaks to monetary damages separately later in the statute, and limits such damages to 'actual damage occurring as a result of entry.'"

Property owners should not assume they will have to pay a license fee unless the requested access is notably prolonged and intrusive. Owners also are not necessarily responsible for paying professional fees incurred by the neighbors in connection with the litigation. Similarly, courts often do not require property owners to post a bond to obtain necessary access to the neighbors' parcel under RPAPL §881.

Overall, while litigation involves a level of risk and attorneys' fees, it can still provide a more cost-effective means for property owners to secure the requested access. This is particularly true when a neighbor is less than cooperative and remains stubbornly unreceptive to entering into a fair and timely license agreement.