

W E L C O M E

A message from David J. Pfeffer*David J. Pfeffer*

In 2013 we continued to see a surge in development and investment in our construction and real estate industries. This has led to significant growth across most sectors of New York City real estate. Despite uncertainties with interest rates and a new political administration, continued reduction in supply across all asset classes and growth in housing commercial use should result in a strong real estate market for the coming years.

Our clients are involved in some of New York City's most interesting and cutting-edge projects in Manhattan and Brooklyn, large-scale commercial build outs in Manhattan, and mixed-use and multi-family residential property development throughout the country. Many of our not-for-profit clients are also embarking on significant expansion of their facilities. In addition to traditional development services, we have been busy guiding our clients through creative joint ventures, partnerships and financing solutions for their projects.

With lenders investing more in the outer boroughs, we continue to see unprecedented growth in Brooklyn and our construction and real estate groups remain at the forefront of these developments. From hotels, residential rentals and condominiums, to movie theaters, restaurants and night clubs, our clients continue to explore new development opportunities, revive stalled projects and find success in re-positioning manufacturing and commercial buildings into mixed-use residential in flourishing neighborhoods like Williamsburg, Bushwick and Greenpoint.

In recent years, large and complex construction projects have seen significant benefits from the use of advanced planning and design technologies. Building Information Modeling (BIM) has been valuable in helping cut costs for owners and streamline project development. This issue of the *Construction Advisor* addresses best practices for implementing BIM.

We have also included an article on the importance of utilizing fair temporary license agreements for development and renovation projects. In New York City where residential and commercial buildings are adjoining, it is often difficult for owners and developers to make renovations to an existing structure without encroaching on adjoining properties. Carefully prepared agreements and reasonable negotiations at the start of a development project usually works to avoid expensive and drawn out negotiations and court battles between neighbors.

We hope that you find the articles in this issue informative and useful, and we welcome your comments and suggestions. If you have a specific topic that you would like to see addressed in a future issue of the *Construction Advisor*, we would be pleased to research your topic and write about it.

Best,

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GOOD AGREEMENTS MAKE GOOD NEIGHBORS: PREPARING A FAIR TEMPORARY LICENSE AGREEMENT TO AVOID COURT ORDERED ACCESS

In a major metropolitan setting, open space can be hard to come by. In New York City, the facades of many residential and commercial buildings extend right up to the property line, or near enough to prevent access to some exterior walls without encroaching on neighboring properties. As a result, it is often extremely difficult, if not impossible, to make repairs or renovations to an existing structure without physically entering onto an adjoining parcel.

Unfortunately for building owners and developers, the need to access an adjoining property does not automatically confer the right to do so; property owners have a right to quiet enjoyment of their own premises. These two distinct interests often lead to conflicts between developing owners and neighboring owners, whereby the developing owner requires access to the neighboring property to facilitate repairs to his own property, and the neighboring owner refuses to allow it. When these conflicts arise, the parties are generally left with two options: (i) the parties can negotiate a mutually agreeable temporary license agreement, or (ii) the developing owner can seek a judicially issued license for temporary access to an adjoining property under Real Property Actions and Proceedings Law (“RPAPL”) § 881. A successful claim pursuant to RPAPL § 881 can permit a developing owner access to a neighboring property to effectuate repairs. However, in this situation litigation usually benefits no

one. For the reasons discussed herein, a well-negotiated temporary license agreement is almost always preferable to a judicial license proceeding.

Unauthorized physical intrusions into a neighboring property are generally considered trespasses under the law, even when undertaken for a good reason (such as building repair). However, with RPAPL § 881, New York State lawmakers have acknowledged the public utility of facilitating necessary entry onto adjoining parcels for the purposes of repair and improvement, while making certain allowances for the protection of the neighboring owner’s rights.¹ Unfortunately, obtaining an RPAPL § 881 license can have negative consequences. First, there is no guarantee that a court will issue the license. If it does, the court may require bonds and insurance coverage on the part of the developing owner,² and owners generally want to avoid judicial interference in such matters. Most importantly, obtaining access via a RPAPL § 881 license may irreparably damage the developing owner’s relationship with the neighboring owner. The stigma of bringing what amounts to a lawsuit to obtain entry can have potentially long-lasting and unforeseen detrimental effects on the property going forward.

Negotiated temporary license agreements are often a much more beneficial resolution for temporary access disputes. Firstly, they avoid litigation, the costs thereof,

and the potential judicial oversight of development projects that can result. Second, temporary license agreements provide a greater opportunity for both parties to address their concerns and reach a mutually satisfactory resolution. This differs from judicial proceedings, where one party generally emerges as a “winner,” and the other a “loser.” Reaching an agreement, rather than litigating in court, offers much greater prospects of nurturing a cooperative relationship between the parties going forward, which can have unforeseen benefits when future issues arise (as they always seem to). Third, and perhaps most importantly, the property owners have a better understanding of their own needs and the particulars of the project than any court ever will. A fairly negotiated temporary license agreement allows the developing owner and the neighboring owner to address their individual concerns more completely than a court-ordered license might.

A properly negotiated temporary license agreement should provide the developing owner with the needed access to the adjoining property, while simultaneously providing ample protection for the neighboring owner’s existing structures and use of the premises. The primary items to be addressed in any temporary license agreement are: (i) the license period; (ii) the scope of the license (work parameters); (iii) protective measures for the neighboring property; (iv) insurance and indemnification; and (v) a negotiated license fee.

(i) License Period

Access to conduct repairs often requires an unsightly or noisy physical intrusion onto the neighboring property. As such, any neighboring owner will want some sort of firm timeline for the repairs, or at least a reasonable estimation. This is particularly true when the neighboring property is a residential space, although commercial neighbors will want some sort of assurances as to the length of the project as well. It is important to provide a realistic timeline for project completion,



as projects that run long can often lead to disgruntled owners and unwanted litigation.

(ii) Scope of the License (Work Parameters)

It is important that the scope of the project is clearly defined in the body of the temporary license agreement. A developing owner entering into an agreement that is unclear or fails to address all aspects of the required work, may find themselves knee-deep in a new round of negotiations halfway through the project to enter into a new license agreement, or even in court. The scope of the work should therefore be defined clearly enough to provide the neighboring owner with an accurate understanding of what s/he is consenting to, while remaining broad enough to allow for minor changes to the project that may be necessitated by unforeseen complications.

(iii) Protective Measures for the Neighboring Owner

Protective measures come in two forms: physical protections against debris and incidental damage resulting from the work (e.g. workers walking through prized flower-beds), and protections that limit the manner in which the work is performed to protect non-tangible interests of the neighboring owner, such as hourly and day-of-week limitations. Physical protections may include, but are not limited to, installation of protective barriers, erection of protective scaffolding, and preventative measures for dust and

debris, depending on the type of project undertaken. The physical protection work should be agreed upon between design professionals for both the developing owner and the neighboring owner, and the developing owner should agree to pay a reasonable fee to the neighboring owner so that the neighboring owner can hire an engineer. This is customary practice, particularly when there is a resource imbalance between the developing owner and the neighbor.

Non-tangible protections are often particularly important for residential neighboring owners, who may be much more willing to enter into an agreement if there are assurances that work will stop by five o'clock every evening, or that no work will occur on specified holidays. This provision will vary significantly depending on the parties and the scope/duration of the project, and well-negotiated protective provisions will address the unique requirements of the project and the parties to the agreement.

(iv) Insurance & Indemnification

By law, a developing owner must indemnify the neighboring owner under RPAPL § 881, so any developing owner should agree to a provision in the temporary license agreement indemnifying the neighboring owner against any claims arising out of the work. Furthermore, the agreement should contain insurance requirements on the part of the developing owner. As a rule, the developing owner should name the neighboring owner as a beneficiary under the insurance policy for the project,

and the developing owner should have contractors name the neighboring owner as beneficiaries under their own policies.

(v) Negotiated Fee

Developing owners should agree to a reasonable fee payable to the neighboring owner as consideration for entering into the temporary license agreement. Willingness to provide a license fee greatly increases the developing owner's chances of persuading a reluctant neighboring owner to consent to a negotiated license agreement. Furthermore, courts have the ability to order a license fee under RPAPL § 881,³ so the parties may as well agree to a mutually agreeable fee amount, as opposed to an arbitrary court determination. The license fee should be based off of the term of the license, with provisions for an increased fee in the event the work proceeds beyond the negotiated term. Providing for the increased license fee keeps the parties out of court in the event of unforeseen complications and delays in the project.

Negotiated temporary license agreements represent the best chance to resolve a temporary access dispute for both developing and neighboring owners in a mutually satisfactory manner, and can avoid the bad blood often created by litigation. For assistance with your temporary license agreement, or any other aspect of your next construction project, contact one of our experienced Construction professionals.

¹Sec. 881. ACCESS TO ADJOINING PROPERTY TO MAKE IMPROVEMENTS OR REPAIRS.

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 See *Deutsche Bank Trust v. 120 Greenwich Dev. Assoc.*, 2005 WL 782810 (Sup.Ct. N.Y. County 2005).

³ See *Ponito Residence LLC v. 12th Street Apartment Corp.*, 959 N.Y.S.2d 376 (Sup. Ct. N.Y. County 2012).

BIM: BUILDING INFORMATION MODELING AND CONSTRUCTION PROJECTS

In recent years, construction projects have seen increasing benefits from the use of advanced planning and design technologies. One such technology is Building Information Modeling (known as “BIM”), and it is helping cut costs for owners and streamline project development.

BIM is defined by the National Building Information Model Standard Project Committee as “a digital representation of physical and functional characteristics of a facility.”¹ Unlike traditional architectural plans or AutoCad, BIM allows for the creation of three-dimensional constructs that show all of the planned systems and build-outs on a construction project. For example, BIM can be used to design electrical and plumbing systems overlaying structural support schematics, helping project managers identify problematic intersection conflicts long before actual work commences on a development. Each project utilizing BIM typically has a BIM Manager who is generally responsible for overseeing the digital platform and updating shared information as plans are modified and work is completed on-site.

A project that utilizes BIM can drastically reduce construction delays and substantially eliminate cost overruns, which may be the difference between a profitable project and an abandoned job site. BIM is especially effective in streamlining subcontractor activity by facilitating reliable offsite prefabrication of building components, which decreases the need for stockpiling of materials at the job site, leading to reduced project waste and increased efficiency during construction. As an added bonus, BIM functionality extends past the completion of construction. In some situations, the exacting detail of BIM designs can allow building managers to refer to the models as a substitute for physical inspection of problem areas, particularly when product and specific part information is preserved in digital form.²

This type of functionality means that BIM is particularly well suited for large projects, such as multi-building complexes and high-rise towers, especially those in an urban setting such as New York City. When traditional design methods are implemented on large projects, the intricacies of the design process, coupled



with the number of parties that contribute to the design and construction phases, often results in unanticipated and costly design flaws, delays and cost overruns. BIM can help mitigate these risks, and owners and developers considering these types of projects should seriously consider integrating BIM into the design and management process of their projects.

Leading authorities within the industry have started to realize the benefits of BIM. Last year, the American Institute of Architects (“AIA”) updated its standard contract documents to include new language about BIM and other digital design tools.³ This inclusion by the AIA reflects the degree to which BIM use is becoming an industry staple. Owners and developers who plan on utilizing BIM in their projects should ensure that their construction agreements adequately outline the responsibilities and obligations of BIM managers in order to maximize the benefits of utilizing BIM. The Construction Group at Tarter Krinsky & Drogin LLP has substantial experience assisting owners and developers to utilize BIM on their projects. For more information on BIM, and to determine if BIM is right for your project, speak to a Construction Group Attorney at Tarter, Krinsky & Drogin LLP.

¹ National BIM Standard - United States. National Building Information Model Standard Project Committee, available at <http://www.buildingsmartalliance.org/index.php/nbims/faq/>.

² Leite, Fernanda, et al., *A Formalized Representation for Supporting Automated Identification of Critical Assets in Facilities during Emergencies Triggered by Failures in Building System*, ASCE Journal of Computing in Civil Engineering (2001).

³ See Paula Melton, *AIA Builds BIM into Contract Documents*, BuildingGreen.com, available at <http://www.buildinggreen.com/auth/article.cfm/2012/10/2/AIA-Builds-BIM-Into-Contract-Documents/>

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