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NYC Access Agreement Trends To Watch In 2019

By **Laurie Stanziale** (December 19, 2018, 12:13 PM EST)

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Densely populated areas like New York City create special challenges when doing construction or performing other work on one's property. These challenges have been recognized by the city's legislature through the creation of the Real Property Actions and Proceedings Law, RPAPL §881.

A RPAPL §881 proceeding is an expedited process that grants a property owner or developer — who seeks to make "improvements or repairs" to his or her real property — a temporary license to enter the property of an adjoining owner. The owner/developer must first ask the adjoining property's owner for permission to access the property. If turned down, the developer can then petition the court to grant a license to enter the premises for a reasonable period of time.

What happens when these temporary license negotiations or RPAPL 881 proceedings are about much more than just access or not about access at all? The fact is that, despite its original intent, these "access agreements" are increasingly no longer just agreements for access to a neighboring property.

Neighbors are now digging (no pun intended) into the work hours on the site and trying to regulate same with late starts for noisy work or other daytime restrictions based on the neighbor's use of their property. They are looking to the developer to address the neighbor's encroachments onto the developer's property or the closing up of impacted lot line windows, even though the duty lies with the neighbor. Or they simply are viewing the neighboring development as an opportunity to have the developer make improvements to their property.

The design of a sidewalk shed, for instance, is highly debated because it is not "on" the neighbor's property but rather on the public sidewalk in front of the neighbor's property. Still, the shed can impact commercial tenants on the ground floor, as well as the views from second-story windows. Further, of import, neighbors are evaluating, commenting on and, at times, disputing and prohibiting excavation activities on the developer's site, even though no access is being requested and long before a shovel has even entered the ground.

The courts seem to be entertaining these "non-access" objections in the context of RPAPL §881s, even though the proceeding was created to address the need for access to the neighbor's property.

During the RPAPL 881 proceeding, a neighbor can tell the court about its concerns or objections relating

the work because it involves access to their property. That is a proper forum and proper use of the 881 statute. However, the courts now are entertaining objections by neighbors to the work itself (those portions that are done strictly on the developer's properties). By doing so, the courts are allowing the neighbor to step into the shoes of the city's Department of Buildings, or DOB, to make determinations about what is or is not proper and what should be allowed. This is not currently within the court's jurisdiction under RPAPL 881.

The current process is for developers or parties doing work on their properties to submit their plans for approval to the DOB and follow various Building Code rules that determine whether or not the plans are consistent with code and the work should be approved. If those plans do not involve access to the neighbor's property, there is usually no further review process and the work on the developer's property can commence. However, in the context of the RPAPL 881 proceedings, we seem to be sliding into dangerous territory where neighbors, more than or in addition to the DOB, are determining what is or is not safe and what construction may or may not be performed, regardless of whether it involves access to their property.

It is worth noting that the 2014 New York City Building Code, for the first time, mentions the RPAPL 881 proceeding in Section 3309.2, stating that nothing in the code prohibits the owner of the property that is performing the work from petitioning the court. So, the code seems to be pushing these matters into the court. However, I have been advised of instances where the DOB has asked the party doing the work whether they have a license agreement with the neighbor if the submitted plans require protection or access to the neighbor's properties. This poses an interesting Catch-22 because many times neighbors want to see "DOB-approved" plans, but now the DOB is sometimes requesting "neighbor-approved" plans before it will approve. This seems to blur the lines between who is "responsible" for approving the plans.

A developer's excavation can certainly impact a neighbor's property even if the developer is not crossing over the property line. Further, a developer's sidewalk shed, which extends in front of the neighbor as required by the Building Code, may impact the neighbor's tenants. Even though neither instance involves actual physical access onto the neighbor's property, these issues are heavily negotiated and, perhaps more concerning, are being litigated in the context of an RPAPL §881.

From a business point of view, an 881 is an isolated procedure for which a developer can somewhat budget for as to time and cost however if the court proceeding is turned into a venue for a neighbor to object to other aspects of the work, it becomes a complex and lengthy process which might hold up a construction project for many months or years.

To further frustrate the process, the DOB does not typically like to get in the middle of these disagreements, which they view as private. However, the DOB has not been immune to being sued by a concerned neighbor who alleged fault on the DOB's part for approving plans and issuing permits to the developer (this occurred in a relatively recent New York Supreme Court case). So, the parties end up in court wherein a judge is reluctant to ignore a neighbor's legitimate concerns. But does the court really have jurisdiction?

When did an agreement for construction protection become an agreement to allow the neighbor to govern the construction? On the other hand, what recourse can or should a neighbor have if there is reason to believe a developer's excavation will damage their property and/or impact their tenants or rental income, even though there are DOB-approved plans? There are no easy answers to such questions, even for someone like me, who has experience on both sides of the table and the courtroom.

How and whether the courts will continue to entertain disputes between neighbors about construction, even if no damage has occurred and no access is required — and how and whether the DOB will be compelled to take a more active role in these disputes: these will be two important trends to watch in 2019.

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