

### CONSTRUCTION LAW

# Party Walls And New Construction

By  
**Kenneth M.  
Block**



With New York City's constantly evolving built landscape (particularly in Manhattan and Brooklyn), old buildings are being demolished and new (and bigger) ones are being constructed in their place. Often, the new buildings are infill projects replacing brownstones and townhomes previously sharing party walls with adjoining neighbors. In this article, we will address the issues raised with demolition and new construction on sites previously occupied by a building sharing a party wall with its neighbor.

#### Party Walls in General

In urban neighborhoods, buildings of all types were traditionally built adjacent to each other with a separating wall that, under certain circumstances, was considered a "party wall" forming a common wall for the two adjoining structures. A party wall is unique because it is an adjoining wall and also carries with it legal principles that embody certain rights and duties of the adjoining owners. Generally, a party wall may stand directly on the dividing line between two parcels of land.<sup>1</sup> As such, the co-owners own so much of the

wall as stands on their land, subject to the easement of the other owner in their share for the support and the equal use as an exterior wall of his or her building.<sup>2</sup> Similarly subject to the easement belonging to an adjoining owner, a party wall may stand entirely on the land of one owner. A party wall easement may be acquired by grant, prescription, or by agreement between the adjoining owners.

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#### Adjoining Structures

In the case of adjacent buildings, including buildings sharing party walls, Section 3309 of the New York City Building Code imposes non-delegable duties on a developer performing construction work to protect the adjoining property. Particularly, where demolition and excavation is involved, the developer must support the vertical load of the adjoining structure—including a party wall—by proper foundations, underpinning, or other equivalent means.<sup>3</sup> The duty of the excavating owner does not end with the

completion of the excavation; he or she is required to support the wall by proper foundations so that it remains as stable as before. For example, the excavator may be liable if the settling of the new building carries down the foundation of the adjoining house.<sup>4</sup>

Where, as a result of the proposed excavation for the new building, underpinning of the adjoining foundation is required, the developer must first enter and inspect the adjoining building, provided a license from the neighbor is obtained. A license is also needed to perform the work necessary for the purpose of protecting the adjoining building. If such a license is withheld by the adjoining owner, the duty to preserve and protect her structure shifts to that owner.<sup>5</sup> Ultimately, the responsibility of affording any license to enter adjoining property for the purpose of compliance with the statutory duties—without imposing any additional conditions if granted<sup>6</sup>—rests upon the owner of the adjoining property involved. While RPAPL Section 881 may afford a license to a property owner to enter an adjoining property to effect repairs or improvements, the section has been held not to permit a neighbor to install underpinning—viewed as a permanent encroachment—under the adjoining property.<sup>7</sup>

KENNETH M. BLOCK is a member of Tannenbaum Helpert Syracuse & Hirschtritt. BORIS BROWNSTEIN, an associate of the firm, contributed to the preparation of this article.

After permission to enter an adjoining property has been obtained, a physical examination of such property must be conducted prior to the commencement of work and at reasonable periods during its progress. Observed conditions must be recorded and such records must be made available to the Department of Buildings upon request.<sup>8</sup> Whenever subsurface operations are conducted that may impose loads or movements on adjoining property, the effects of the operations on adjoining property and structures must be monitored. Where placement of a foundation will cause changes in the ground water level under adjacent buildings, the effects of the changes on the stability and settlement of the adjacent foundations must be investigated and any damage to the buildings averted.<sup>9</sup>

Failure to protect adjoining premises may render the excavating owner liable for damages. Similarly, failure to comply with an administrative order to support adjoining structures may lead to liability for costs incurred in compliance with that order by adjoining owner.<sup>10</sup> For example, if failure to protect the adjoining building during excavation undermines its foundation, the developer may be found strictly liable for damages,<sup>11</sup> including the costs of repairing structural damage, lost rent, relocation and buyout expenses, and professional fees.<sup>12</sup>

### Affecting Party Walls

Where a party wall will be affected by excavation, regardless of the depth, the code requires the owner to preserve the safe condition of the wall.<sup>13</sup> This includes preventative as well as remedial measures at the developer's expense.<sup>14</sup> If the excavating owner intends to use a party wall—which can now be done only where the new construction is for a one-family residence three stories or less, otherwise a “seismic gap” must be provided<sup>15</sup>—the wall must be protected

and supported by proper foundations.<sup>16</sup> Furthermore, when any construction or demolition operation exposes or breaches a party wall, the code outlines specific preventative and remedial steps that owners must take.<sup>17</sup>

If a party wall is to be used for the purposes of existing and new structures, then it is incumbent on the excavating owner to ensure proper foundations support the party wall. Also, where the level of the foundations of the adjoining structure is at or above the level of the bottom of the new excavation, the developer must support the vertical load of the adjoining structure—including the party wall—by proper foundations, underpinning, or other equivalent means.<sup>18</sup>

To mitigate the risk accompanying the use of a party wall, and thus potentially limiting time and expense involved, developers of new construction may construct separately from the adjoining structure, without using a party wall. For one, this would be possible where a party-wall easement has terminated. A party wall easement is one of necessity of continued support of an existing building. This implies that, in the absence of an agreement to the contrary, when a buildings is no longer in condition to need and enjoy that support—due to the accidental or casual destruction of a party wall,<sup>19</sup> or of the buildings—the easement terminates, as well as any appurtenant right.<sup>20</sup> The result is the same where one owner demolishes her building.<sup>21</sup>

As noted above, new buildings over three stories must be separated from existing structures pursuant to the building code.<sup>22</sup> Specifically with new construction, compliance with the code's technical specifications require a separation between buildings that accounts for seismic drift (one inch for every 50 feet above grade).<sup>23</sup> The separation requirement may also affect certain enlargements, and the code and the Buildings Department

commissioner's technical guidance must be consulted.<sup>24</sup> Steps must also be taken to protect the exposed party wall and adjoining building in the same manner as required by the code for other adjacent properties.

### Conclusion

A party wall requires special care by developers in order to avoid unnecessary liability, especially relating to demolition, excavation and foundation work, as well as work necessary to protect the wall's structural integrity. All provisions of the building code should be carefully reviewed before undertaking any construction activities that may affect party walls.

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1. See *145 W. 10 Realty LLC v. Whelan*, 107 A.D.3d 461, 462 (2013). Under the New York City Building Code a party wall is defined as “a fire division on an interior lot line common to two adjoining houses.” New York City Administrative Code §27-232.

2. *Sakele Brothers, LLC v. Safdie*, 302 A.D.2d 20, 25 (1st Dept. 2002).

3. See New York City Admin. Code, Title 28, Sections 3309.4.1 and 3309.4.2.

4. *Bernheimer v. Kilpatrick*, 6 N.Y.S. 858, 860 (Gen. Term 1889) aff'd, 127 N.Y. 672, 28 N.E. 255 (1891).

5. New York City Admin. Code, Title 28, Section 3309.5.

6. See *Korn v. Weir*, 88 N.Y.S. 976, 978 (App. Term 1904) (such agreement would lack consideration).

7. *Broadway Enterprises, Inc. v. Lum*, 16 A.D.3d 413, 414 (N.Y. App. Div. 2005).

8. New York City Admin. Code, Title 28, Section 3309.3.

9. New York City Admin. Code, Title 28, Section 3309.6.

10. See *Wear v. Koehler*, 168 A.D. 115 (1st Dept. 1915).

11. See *Yenem Corp. v. 281 Broadway Holdings*, 18 N.Y.3d 481, 490 (2012) (interpreting Section 27-1031(b)(1), predecessor to New York City Admin. Code, Title 28, Section 3309.4).

12. See *E. 77 Owners Co., L.L.C. v. King Sha Grp., Inc.*, 975 N.Y.S.2d 365 (N.Y. Sup. Ct. 2013).

13. See New York City Admin. Code, Title 28, Section 3309.4.2.

14. See New York City Admin. Code, Title 28, Sections 3309.8 and 3309.9.

15. See New York City Admin. Code, Title 28, Sections 1617.3.2 & 1620.4.5; Reference Standard RS 9-6 §2312(h)2.K. Building Separations, enacted with Local Law #17/95.

16. New York City Admin. Code, Title 28, Section 3309.4.2.

17. See New York City Admin. Code, Title 28, Section 3309.8; *USAA Cas. Ins. Co. v. Permanent Mission of Republic of Namibia*, 681 F.3d 103, 111 (2d Cir. 2012) (Section 3309.8 imposes a nondelegable duty).

18. See New York City Admin. Code, Title 28, Sections 3309.4.1 and 3309.4.2.

19. See *Heartt v. Kruger*, 121 N.Y. 386, 392 (1890) (unimpaired foundation of the wall is insufficient to continue the easement in the wall where the wall is otherwise totally destroyed).

20. See *Partridge v. Gilbert*, 15 N.Y. 601, 614 (1857) (the right continues as long as the wall continued to be sufficient for that purpose and the buildings remained in a condition to need and to enjoy that support).

21. See *357 E. Seventy-Sixth St. Corp. v. Knickerbocker Ice Co.*, 263 N.Y. 63, 67 (1933).

22. See New York City Admin. Code, Title 28, Section 1620.4.5.

23. See New York City Admin. Code, Title 28, Section 1617.3.2.

24. See Reference Standard RS 9-6 §2312(h)2.K. Building Separations, enacted with Local Law #17/95.