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CONSTRUCTION LAW

Recent Developments In Neighbor Litigation


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In New York's current real estate climate, with construction seeming to exist on every vacant parcel and often in close proximity to neighboring properties, it is often necessary to obtain permission of the adjacent neighbors to erect protection on their properties. (The erection of sidewalk bridges on public rights of way does not require permission of the property owner fronting the sidewalk bridge, unless the bridge is affixed to the neighbor's property.)

Where the developer finds an uncooperative neighbor, recourse to Real Property Actions and Proceedings Law § 881, pursuant to which the developer may obtain a license to enter the neighbor's property, is available. Section 881 is silent as to conditions which may be imposed for granting the license, stating only that the license shall be granted by the court "as justice requires," and a body of case law has developed providing guidance as to whether conditions, such as fees and other costs, to granting the license should be imposed. This article will discuss some of the more notable cases.

License Fees and Other Costs

The most often cited decision for the imposition of a license fee is *DDG Warren v. Assouline Ritz 1,* where the First Department affirmed the award of license fees to an adjoining property owner because the petitioner's access would, in the court's view, "substantially interfere with the [adjoining owner's] use and enjoyment" of their property. 138 A.D.3d 539, 540 (1st Dept. 2016). The court did not, however, establish the amount of the fee or the basis for setting the fee. Instead, it merely held that it was an improvident exercise of the trial court's discretion to postpone the determination of the fee amount until the conclusion of the 30-month project. *Id.*

For guidance on the range of fees that are typically awarded, earlier and subsequent decisions are instructive. *See, e.g., In re North 7-8 Invs.,* 43 Misc. 3d. 623, 634 (Sup. Ct., Kings County 2014) (finding that a license fee of $3,500 per month was justified where the developer's construction plan required a cantilevered construction scaffold to be suspended six feet above the licensor's only outdoor space); *Snyder v. 122 E. 78th St. NY LLC*, 2014 N.Y. Slip Op. 32940(U), 2014 WL 6471438 (Sup. Ct., N.Y. County 2014) (finding that a $3,000 per month license fee was warranted in light of the prolonged duration of the project, which required workers to regularly enter the licensor's property and scaffolding to be affixed to the licensor's walls); *Ponito Resident v. 12th St. Apt. Corp.*, 38 Misc.3d 604 (Sup. Ct., N.Y. County 2012) (awarding an adjoining owner a $1,500 per month license fee for the petitioner's maintenance of a sidewalk shed in front of the adjoining property for a period of five months).

Each 881 case is fact-specific, however, and despite *DDG Warren's* noticeable impact on the demand for license fees, courts have broad discretion to grant or deny such requests. One line of 881 cases, for example, holds that the authorization of actual damages built into 881 obviates the need for license fees. *See 10 E. End Owners v. Two E. End Ave. Apt. Corp.*, 35 Misc.3d 1215(A), 2012 WL 1414942 (Sup. Ct., N.Y. County 2012) (concluding that the imposition of license fees

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was unwarranted because the relief afforded by 881 is limited to "actual damages occurring as a result of the entry"). Nothing in the *DDG Warren* decision suggests that fees are automatically awarded, and therefore, *10 E. End Owners* remains good law.

This no-fee approach was recently endorsed in *New York Public Library v. Condominium Board of the Fifth Avenue Tower*, Sup. Ct., N.Y. County, Nov. 30, 2017, Index No. 157703/2017 (Bluth, J.), where this firm represented petitioner. There, a condominium board's dispute with the New York Public Library made headlines when the board demanded $15,000 per month for the duration of the library's renovation of its midtown branch. Pursuant to its 881 petition, the library sought to, among other things, erect scaffolding and roof protection over a pocket park between its building on Fifth Avenue and the neighboring condominium tower. The board complained that the protections in the park would deprive residents and commercial tenants of the use and enjoyment of the outdoor space and reduce the rental and sale value of the condominium units. The library argued that the protections were required by the New York City Building Code and would not render the park unusable. Relying on the plain text of Section 881, the court declined to impose a license fee, emphasizing that the statute does not mandate an award of license fees, and agreeing with the library that in this particular case, the interests of justice were not served by the imposition of fees. A notice of appeal has been filed by the board; however, as of this writing the appeal has not been perfected.

Compensation for Loss of Value

It is important to note that the purpose of a license fee is to compensate an adjoining owner for the temporary loss of use and enjoyment during the timespan of the interference. Thus, an adjoining owner's argument that it will suffer financial losses or a decrease in property value as a result of the interference (as was argued in *New York Public Library*) is generally not a valid justification for a higher license fee. In fact, this argument was recently rejected in *PB 151 Grand LLC v. 9 Crosby*, 58 Misc.3d 1219(A), 2018 WL 771792 (Sup. Ct., N.Y. County 2018).

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There, the adjoining owner—a hotel—argued that its ability to rent rooms would be affected by the petitioner's protective work, and the hotel was therefore "entitled to a license fee commensurate with the financial losses" it believed it might incur. *Id*. at *10. Rejecting the hotel's argument, the court stated that "recovery for actual damages [pursuant to Section 881] and a license fee compensate two entirely different things," and, in any event, the hotel's claim that it might lose patrons was "largely speculative." *Id*. at *11.

Inspection of the Developer's Plans

Another argument made and rejected in *New York Public Library* was that the neighbor was entitled to review the full plans for the Library's midtown project as a condition to granting the 881 petition. *See New York Public Library, supra.* While it may be appropriate to share "support of excavation" and foundation plans with neighbors where the developer contemplates excavation and new foundations, any comments of the neighbor's engineer should be addressed to the developer and, if not resolved, to the Department of Buildings, which has the discretion to make determinations as to the compliance with the Building Code. *See Idlewild 94-100 Clark, LLC v. City of New York*, 27 Misc.3d 1006, 1017 (Sup. Ct. Kings County, April 1, 2010) (a non-881 case in which the court concluded that "issues [of this kind] are discretionary determinations of [the] DOB to which the Court must defer").

Without clear direction from Section 881, litigants must look to recent case law to support arguments for and against the imposition of conditions to the granting of a license to enter a neighbor's property. Each case is fact specific and the foregoing discussion is intended only to provide guidance as to how a particular court would rule on a given issue.