

Recent Developments in Construction Access Under RPAPL § 881 and What to Expect in 2024

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In a city as dense as New York City, property owners often cannot make repairs and improvements to their property without access to their neighbor's land. Section 881 of the Real Property Actions and Proceedings Law ("RPAPL") provides a means by which these owners can petition a court to compel their neighbors to grant them temporary access if access has been refused. In this advisory we provide a brief overview of Section 881, look back at several notable decisions from New York courts in the year 2023, and discuss the potential for major changes in the law that could prevail in 2024.

RPAPL Overview

RPAPL § 881 creates an expedited process (a "special proceeding") in New York Supreme Court wherein developers and landowners can obtain a court ordered license to access neighboring properties for the purpose of making "improvements or repairs to real property." The statute instructs courts to grant access "upon such terms as justice requires." As a general rule, courts have interpreted justice to require, at a minimum, insurance and indemnification; repair of all damages to the adjacent property; professional fees, including attorney's fees for negotiation and litigation; license fees for use of the adjacent owners property; and time limits on access. *Panasia Estate, Inc. v. 29 W. 19 Condominium*, 204 A.D.3d 33 (1st Dep't 2022).

Notable 2023 Decisions

2023 was not marked by any major breakthroughs in the law around Section 881 and construction access, however there were a few notable decisions.

This past year, several courts including the First Department of the Appellate Division denied access where the developer had failed to provide adequate or specific information regarding the improvements being made and the extent of the access sought. Although courts are generally permissive in granting access on reasonable terms, these cases are a clear signal that courts will not give the benefit of the doubt to developers who for strategic reasons, or just sheer carelessness, are not forthcoming with adjacent landowners about the exact nature of their project. For example, in *Thomas Anthony Holdings LLC v. Goodbody*, 216 A.D.3d 538 (1st Dep't 2023), the First Department affirmed a lower court decision denying access "because petitioner failed to provide adequate or sufficiently specific information concerning the temporary overhead, chimney, and rooftop protections at issue to ensure protection of respondents' interests." To be sure, the court did not deny the petitioner access outright but called for a hearing at which additional information could be adduced. Likewise, a lower court, in *875 E. 35th St. Mgt. LLC v. Cole*, 2023 N.Y. Misc. LEXIS 1919 (Sup. Ct. N.Y. Cnty. Apr. 14, 2023), denied a Section 881 petition without prejudice where the developer failed to produce the project plans filed with DOB, thus rendering it "impossible to determine the extent to which safety measures are required and whether there is an alternative means to perform the work." The upshot of these cases is that there is little advantage to be gained by developers in withholding information from adjacent owners, only potentially time-consuming delays.

In at least one decision a lower court granted access to a developer who sought to install “underpinning” on an adjacent property. See *Namdar Hughes Dev. LLC v. Hughes Terrace LLC*, 2023 N.Y. Misc. LEXIS 16190 (Sup. Ct. Bronx Cnty. Mar. 28, 2023). In order to prevent destabilization and collapse of adjacent foundations, the New York City Building Code requires developers to “at his or her own expense, underpin the adjacent building” provided the developer is afforded “a license . . . to enter and inspect the adjoining buildings and property, and to perform such work thereon as may be necessary for such purpose.” NYC Building Code § 3309.5. The installation of underpinning on an adjacent property owner’s land is a permanent encroachment that would seem to be beyond the reach of Section 881, which courts generally understand as affording developers *temporary* access rights. The caselaw could be clearer on this issue but in recent years, including in 2023 in the *Namdar* decision, courts have granted underpinning access in limited circumstances. See *CUCS House. Dev. Fund Corp. IV v. Aymes*, 159303/2018, 2019 N.Y. Misc. LEXIS 731 (Sup. Ct. N.Y. Cnty. February 26, 2019). The constitutionality of a law that authorizes permanent encroachments on another’s land seems ripe for the Court of Appeals consideration.

Finally, one lower court in 2023 addressed the, perhaps, novel question of whether a party in contract on a property, but not yet the owner, may have standing to seek an access order from the court effective immediately upon closing of the sale of the property. The court answered “no” citing the plain language of Section 881 which affords the remedy to owners and lessees only. *Habitat Mosaic Brooklyn, LLC v. Zion 126, Inc.*, 2023 N.Y. Misc. LEXIS 9534 (Sup. Ct. Kings Cnty. Oct. 24, 2023).

What to look for in 2024: Amendments to RPAPL § 881

In the last few years, the New York State Senate has twice, with near unanimity, approved bills that would make significant changes to RPAPL § 881. Both times the bills have stalled in the Assembly, but the Senate is again poised to vote, and likely pass, a very similar bill. [Senate Bill S1305](#) would codify many elements that have already emerged from the Section 881 jurisprudence while bringing potentially significant changes to the way construction access is negotiated in New York, with material implications for developers and adjacent landowners. Governor Hochul’s strong pro-housing agenda could provide the political momentum needed to get the amendments over the finish line.

In what would be a major win for developers, the new law would clarify that courts may issue licenses for certain permanent encroachments “including, without limitation, wall ties, tiebacks, anchors, straps and underpinning.” Uncertainty around the status of permanent encroachments under Section 881, as previously described, has proven to be major leverage for adjacent owners in negotiating access agreements.

The proposed amendments, consistent with existing case law, authorizes courts to require that developers reimburse adjacent owners for professional fees (e.g., engineering and architecture expenses) spent in reviewing the developer’s project. But in another potential win for developers, the new law would change how attorney’s fees are negotiated and litigated in the section 881 context. The proposed amendment provides that attorney’s fees are warranted when either party, developer or adjacent owner, “acted in bad faith or engaged in willful misconduct in seeking, denying, or conditioning” the license. This would seem to make an award of fees the exception, rather than the rule. Under the existing law as interpreted by courts where the parties are at loggerheads in negotiating access and end up in court, the adjacent owner will typically be entitled to attorney’s fees even if the developer’s position was held in good faith. This change would seem to offer developers a significant negotiating advantage.

The law also includes certain provisions that would benefit adjacent owners (but which are already the norm in well-negotiated access agreements), such as requiring: reasonable compensation for the use and occupancy of the premises; reasonable prior notice to adjacent owner; that the developer provide a good faith estimate of the dates and duration of access (and “diligent efforts” to adhere to this schedule); that copies of relevant documents, such as plans, specifications, surveys, or engineering reports be provided where access includes a right to install, maintain, inspect, repair, replace or remove devices, structures, materials or equipment on the adjoining property; and that the developer and any contractor, consultant or agent procure and maintain commercial general liability insurance for damage to persons or property that names the owner as additional insureds.

We will continue to follow legislative developments in this space, as well as important court decisions, and as always keep you updated with timely advisories.

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