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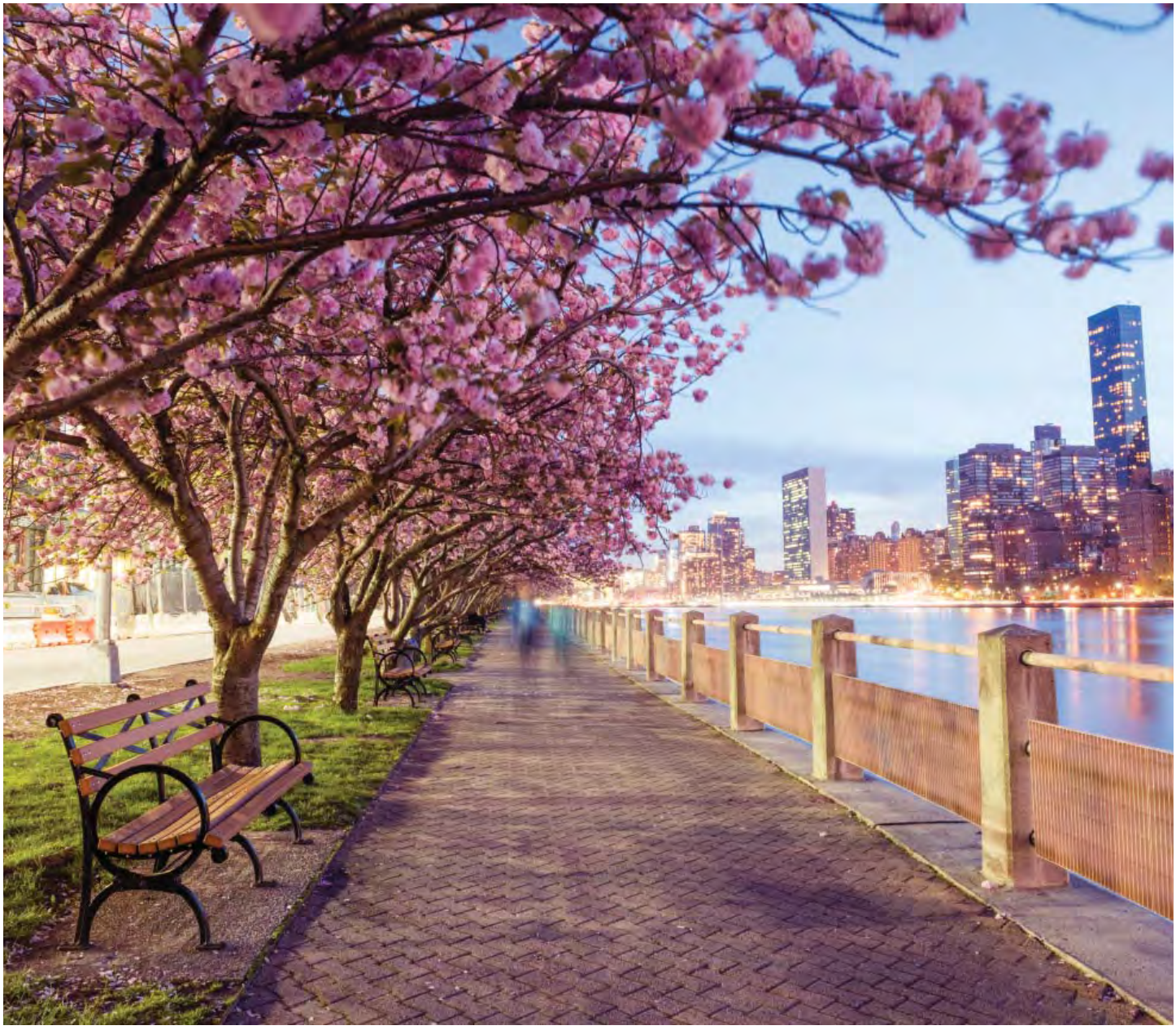

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Ducking the Cranes: Protecting Neighbors During Construction

By Brian G. Lustbader

Just what are the standards governing builders' obligations to protect adjacent properties during construction? And what access must those adjacent property owners grant to those builders and developers? These are important questions to ask whether one is representing the building party or the adjacent property owner. The law is still not fully settled on all the critical issues, but there have been several pertinent court decisions since publication of my Winter 2014 *New York Real Property Law Journal* article setting forth the then-applicable standards governing how a builder gains access to neighboring properties for protection during construction.[1] This article reviews those recent cases so both sides can better understand how to negotiate in this arena.

Background

My earlier article reviewed the statutory and regulatory framework for this developing area of construction law, citing the most informative of the cases that had been rendered as of that date, a 2004 case rendered by the Supreme Court in Brooklyn, the *Rosma Development* decision.[2]

The applicable statute is Real Property Action and Proceedings Law § 881 (RPAPL 881), which states that when the building party seeks a license from the adjacent property owner to protect that adjacent property during the construction work and the adjacent property owner refuses to grant the requested license, the building party may go to court to get the license and the court is to grant that license "in an appropriate case upon such terms as justice requires." The entire statute reads as follows:

> 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.[3]

As is often the case, the "devil is in the details," and, while the *Rosma* decision spelled out a number of those details, many were either not addressed or were not fully fleshed out. Moreover, the *Rosma* decision is not binding on other courts because it was rendered by a lower court, and there had not been any decisions of importance from New York appellate courts in this area as of late 2013 when I prepared my article.

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Previously Unaddressed Issues

Among the previously unaddressed questions that have since been addressed are the following: (1) Whether there any circumstances where the license will be denied altogether, that is, where the court will find that the matter before it is *not* "an appropriate case [to grant the license]"; (2) Whether the building party is required to pay the adjacent owner's legal and engineering fees incurred in connection with negotiating and entering into the license agreement; (3) Whether the building party is required to pay a "license fee" to the adjacent owner and, if so, whether the adjacent property owner's actual economic losses should inform the amount of that fee; and (4) If the duration of building party's work exceeds the term set forth in the license, whether the neighbor may require the building party to pay some sort of additional fees, liquidated damages, to the adjacent property owner.

1. Outright Denial of License

In view of the fact that RPAPL 881 states that the court *shall* grant the license for access, an initial question concerns whether a court will ever deny such a license altogether. Theoretically the answer could be yes, as the statute states that the court shall grant the license "in an appropriate case," thereby implying that there can be circumstances where it may be "appropriate for the court to deny the license. Notwithstanding the "out" offered by the statute, as a practical matter the answer is almost universally no. That is, in virtually every reported decision, the courts have granted the license in some fashion.

There is one recent decision, rendered by the Appellate Division, where the license was denied outright, albeit in circumstances whereby the building party was to be permitted to reapply for the license.[4] In that 2014 decision, the First Department ruled that the building party had failed

to show that its use of a swing scaffold over the adjacent property was "reasonable and necessary," and reversed a lower court's granting of the license.[5] Although no additional explanation was provided in that decision, presumably the court was not convinced that use of the swing scaffold was the least intrusive method possible, and therefore required the building party to investigate other methods of performing its work, after which it would be able petition the court anew for a license under RPAPL 881.

2. Payment of Legal/Engineering Fees

Of critical importance to adjacent property owners is whether they will be reimbursed for fees they incur for attorneys and, where necessary, engineers, when negotiating the license agreement and, if the matter is litigated, fees incurred in court proceedings under RPAPL 881. While there have been a number of lower court decisions granting attorneys' fees, there was no appellate division authority to that effect until the recent *DDG Warren* decision.[6] In that case, the First Department ruled that it was appropriate for the court to grant attorneys' fees, including fees incurred in the court proceedings, to the adjacent property owners. In addition, the court ruled that such fees should be payable to all three sets of counsel who had opposed the building party's RPAPL 881 petition. A like ruling was also rendered in the *North 7-8* case, out of Brooklyn Supreme Court in 2014.[7]

This reasoning has apparently not swayed all judges, however. In a very recent decision, *2225 46th St. LLC*,[8] a Queens Supreme Court judge ruled that no attorneys' fees would be awarded due to the minor nature of the building party's work, even though that same court did award a license fee to the adjacent property owner. In an earlier decision, *MB-REEC Houston Property Owner*,[9] a New York County Supreme Court judge denied the requested awarding attorneys' fees, stating that such fees are "rarely granted in RPAPL 881 cases." The court distinguished the *North 7-8* case on its facts, and then stated that the attorney fees were granted there "not as in incident to litigation but as a condition of the license."[10]

3. Standards for Assessing License Fees

A common misconception is that the license fees granted by the courts are to be based on economic loss(es) that the adjacent property owner has suffered or will suffer. In point of fact, the courts typically do not take into account actual economic loss in assessing license fees. Instead, they will review what other courts have awarded in similar circumstances and simply assign a value they deem to be commensurate with those other decisions. In other words, the courts' "standard," such as it is, is a subjective one.

Representative of this type of subjective reasoning is the *North 7-8* decision referenced above,[11] where the protection consisted of, among other things, installation of a wooden fence and access to airspace above the adjacent owner's property, plus construction of a temporary safety balcony on the adjacent property. There, the court referenced two other cases that had awarded license fees for lesser intrusions, including the *Rosma* case noted above, where $2,500/month had been awarded.[12] After reviewing those decisions, and based on the more intrusive nature of the protection before it, the *North 7-8* court awarded $3,500/month license fee, for one year.[13]

A similar result obtained in the *Snyder* decision from 2014,[14] where the court granted a license to install temporary overhead protection in the rear yard of the adjacent premises, including sidewalk bridging and scaffolding, as well as scaffolding that extended into the airspace above the adjacent premises. As for a license fee, the court reviewed prior decisions granting license fees, including *Rosma* and *North 7-8*, and apparently determined that the level of intrusion was somewhere in between those two, and awarded a $3,000/month license fee.[15]

Such subjective decision-making may be changing. Two more recent decisions have attempted to inject a level of objectivity into this determination. In the first, the *Van Dorn* decision in 2016, the court evaluated the evidence submitted as to the lost use of a terrace and, based on that evaluation, awarded $2,000/month license fee, a ruling that was affirmed on appeal to the Appellate Decision.[16] In the second, the *2225 46th Street* decision referenced above, the court refrained from awarding a license fee on an immediate basis, but instead ordered the parties to retain real estate brokers to report on the appropriate value of the lost space, with a very specific directive: "Rather than set a somewhat arbitrary fee, this Court directs the petitioner and respondents to each submit one expert affidavit from a real estate expert as to the value of the use and occupancy of ten (10) feet of a backyard piece of property in the subject area."[17] For the sake of certainty, it is to be hoped that such objectivity may continue in future decisions.

There have also been a few decisions where the courts have refused to award any license fees at all. This has typically been in the situation where the building party is performing government-mandated repair work as opposed to elective work for profit, usually to perform Local Law 11 masonry repair work.[18] This is not a universal rule, however. In the *Van Dorn* case noted above, the court granted a license fee to the adjacent property owner, even though the work in question was New York City Local Law 11 work, i.e., government-mandated.[19] That ruling was affirmed on appeal to the Appellate Decision, as noted above.

4. Liquidated Damages for Late Completion

As a dis-incentive to the building party, the adjacent property owner will often demand that the builder pay an increased license fee if the work exceeds the term set forth in the license agreement. This type of increase fee, or liquidated damages, if you will, has been sanctioned by the courts. For example, in the *Snyder* decision referenced above, the court assessed a license fee of $3,000/month, for four months, and further ruled that that amount was

"to be substantially increased if the work is not completed within four months from issuance of the license."[20]

Providing that a license fee "will be substantially increased" if a completion deadline is not met, does not provide any certainty as to what that increased fee will be. Better practice is to specify a new, higher dollar amount under those circumstances. However, it is not yet clear whether and, of so, to what extent the courts will permit such increase(s). For example, in the above-cited *Van Dorn* case,[21] the Supreme Court ruled that the license fee would increase to $500/day if the builder performing the work did not complete in the time frame set forth in the license. On appeal, the First Department affirmed virtually the entire lower court decision, except for that liquidated damage provision.[22] The appellate court did not disallow the liquidated damages either. Instead, it required that the parties reapply to the court for consideration of a higher fee if and when the work extended beyond the permitted term.[23] No reasoning was given for this reversal, although the appellate court may have been concerned about the potentially excessive amount of that $500/day amount, as it translates to $15,000/month, more than seven times the original $2,000/month license fee ordered by the lower court.

One possible way to draft a license agreement to avoid such a court reversal might be to specify a higher amount, but closer to the original license fee. For example, if the license fee for the basic construction term were $2,500 per month, perhaps the liquidated damages should be no more than double that amount, say $5,000 per month, not the more than seven times that amount that was provided for in the *Van Dorn* case. So long as the increased amount is reasonably tied to the original amount, the courts might very well sustain it. Indeed, one of the courts' mantras in this area has been to prevent overreaching by either party.[24]

Adverse Consequences from Overreaching

A very recent case, decided just this past summer, demonstrates the risks of overreaching, of overplaying one's position. In that case,[25] the adjacent property owner sought to hold up the building party until his financial terms were met, but wound up with not receiving any compensation, at least not right away, while the builder was permitted to proceed. There, the builder of a six-story building, Chelsea Partners, had been stymied in completing its work by the owner of an adjacent three-story building, a Dr. Molle.[26] In fact, Dr. Molle had obtained a partial stop work order against Chelsea's construction for failure to adequately provide information to him and failure to protect the roof of his building. Chelsea argued that it had attempted to reach an agreement for access to install roof protection, but Dr. Molle had adamantly refused such access.[27]

The procedural process was not typical. Rather than seek an order from the court under RPAPL § 881, Chelsea brought an Article 78 proceeding against the Department of Buildings seeking rescission of the latter's stop work order.[28] Thereafter, because Dr. Molle had not been not a party to the Article 78 proceeding, he moved to intervene and, upon intervention, obtain confirmation of the stop work order.[29] The court took it upon itself to get the parties to settle, conducting some three conferences with them during the summer of 2017.[30] At one of those conferences, Dr. Molle agreed to allow Chelsea limited access to inspect his roof and prepare an architect report, at Chelsea's expense, both of which were done.[31] However, thereafter Dr. Molle refused to consent to have the protection installed until his monetary demands, including a weekly license fee, were met, all the while refusing to entertain any counter offers.[32]

The court dealt with Dr. Molle's intransigence in a unique way. It did not order the Department of Buildings to rescind the stop work order (it actually dismissed the Article 78 petition), but instead found that Chelsea had provided Dr. Molle with all the relevant documentation, so ordered the latter to grant Chelsea access to install the necessary roof protection, which would in turn result in lifting the stop work order.[33] At the same time, the court directed the parties to negotiate financial terms, permitting them to seek further relief from the court if necessary.[34]

In a very real sense, this case demonstrates the risk the adjacent property owner takes if he or she attempts to overplay their cards. As noted above, the courts will not sanction overreaching.[35] Thus, while the adjacent property owner may indeed have leverage over the builder in the sense that the former may be able to hold up construction for a time, if he or she becomes totally intransigent the court has the means to cut through the intransigence and permit the construction to proceed, and to do so without yielding to the adjacent property owner's unreasonable demands.

Conclusions

From this analysis of recent cases, there are a number of important takeaway messages for preparation of license agreements, whether one is a building party or the adjacent property owner adversely affected by the construction. First, one way or another, the builder will obtain the license sought, so the adjacent property owner should make its demands as palatable as possible to the building party. Second, the builder should be prepared to pay the reasonable attorneys' fees, and, where required, engineering fees, incurred by the adjacent property owner. Third, the builder should be prepared to pay a license fee, and a court might require that fee to be connected to some ascertainable financial loss that the adjacent property owner will suffer. The courts may not impose a license fee for government-mandated work, but that is not a settled question. Fourth, it may be appropriate to require the building party to pay liquidated damages, a higher license fee if the builder fails to complete in timely fashion. And underlying all of these considerations, both parties should keep in mind—and avoid—undue demands that a court might find to be overly aggressive, i.e., overreaching.

Endnotes

1. Brian G. Lustbader, *Gaining Access to Neighboring Properties for Protection During Construction*, N.Y. Real Prop. L.J., Vol. 42, No.1, 9-12 (2014).
2. *Rosma Dev., LLC v. South,* 5 Misc. 3d 1014(A), 798 N.Y.S.2d 713 (Sup. Ct. Kings Co. 2004).
3. *Id*.
4. *Board of Managers of Artisan Lofts v. Montgomery*, 114 A.D.3d 491; 979 N.Y.S.2d 811(1st Dep't 2014).
5. *Id*.
6. *DDG Warren LLC v. Assouline Ritz 1 LLC*, 138 AD 3rd 539, 30 NYS 3rd 52 (1st Dep't 2016).
7. *North 7-8 Investors, LLC v. Newgarden*, 43 Misc. 3d 623, 982 N.Y.S.2d 704 (Sup. Ct., Kings Co. 2014).
8. *2225 46th St LLC v. Giannoula-Hahralampopoulos*, 55 Misc. 3rd 621, 46 NYS 3rd 772 (Sup. Ct. Qns Co. 2017).
9. *MB-REEC Houston Property Owner LLC v. The Bd. of Managers of 179 Ludlow St. Condominium*, 2016 WL 3632471(Sup. Ct. N.Y. Co. 2016).
10. *Id.,* 2016 WL 3632471*2.
11. *See* note 7, *supra.*
12. *See* note 2, *supra*.
13. *See* note 7, *supra*.
14. *Snyder v. 122 East 78th Street NY LLC*, 2014 WL 6471483 (N.Y. Sup.)
15. *See* notes 2 & 7, *supra*.
16. *Van Dorn Holdings LLC v. 152 W. 58th Owners Corp.*, 2016 N.Y. Misc. LEXIS 3077 (Sup. Ct., N.Y. Co. Aug. 19, 2016), *aff'd in part and rev'd on other grounds,* 149 A.D.3d 518, 52 N.Y.S.3d 316 (1st Dep't 2017).
17. *See* note 8, *supra*.
18. *401 Broadway Bldg. LLC v. 405 Broadway Condominium*, 2014 WL 3853846 (Sup. Ct. N.Y. Co. 2014), which followed the decision rendered in *10 East End Ave. Owners, Inc. v. Two East End Ave. Apartment Corp.*, 35 Misc. 3d 1215(A), 951 N.Y.S.2d 84 (Sup. Ct., N.Y. Co. 2012).
19. *See* note 16, *supra*.
20. *Snyder*, *supra,* note 14, 2014 WL 6471483*11.
21. *See* note 7, *supra*.
22. *Van Dorn Holdings LLC v. 152 W. 58th Owners Corp.*, 149 A.D.3d 518, 52 N.Y.S.3d 316 (1st Dep't 2017).
23. *Id.*
24. *See North 7-8 Investors, LLC*, *supra,* note 7, 43 Misc. 3d at 628.
25. *Chelsea Partners LLC v. New York City Dept. of Bldgs.*, 2017 N.Y. Misc. LEXIS 3264, *7; 2017 N.Y. Slip Op. 31832(U), **3 (Sup. Ct. N.Y. Co. 2017). I am indebted to my colleague, Ariel Weinstock, Esq., for bringing this case to my attention.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. No monetary amounts were recited in the opinion, but presumably the amount demanded was steep, or else the builder would have agreed to pay it.
33. *See* note 25, *supra*.
34. *Id.*
35. *See* note 22, *supra*.

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