



NYCLA CONSTRUCTION LAW JOURNAL

A publication of the NYCLA Construction Law Committee

Volume I, Issue II

Summer 2011

Letter From the Chair

Dear colleagues, thank you all for your participation and contributions over the past year. The effort that everyone has put forward has really allowed the Committee to grow and make a difference. The support and contributions to the Journal have been remarkable. Again, congratulations to our Editor, Gary Strong, who really deserves all the credit for making the Journal happen. Special thank you to all of those who made the time to be a speaker at a CLE or a committee meeting.

As we move into the summer months planning for the fall and next spring will gather momentum. I encourage all of you reading this to get more involved. We are always looking for people to speak at and lead CLEs. If you have an idea for a CLE or a topic for discussion at a meeting, please contact Ariel Weinstock or myself. We would love to hear from you. If you have an idea for an article for the Journal, please contact Gary Strong or myself.

I hope to see you all again this fall and encourage those of you thinking about it to join us.

Regards,

Joel

Statement of the Editor In Chief

Summer will soon be upon us with heat and humidity and hopefully many public and private construction projects will be in full bloom in New York and the tri-state area. This issue of the Journal contains a wide range of articles including but not limited to Labor Law §240, termination for convenience clauses, and the usual case summaries.

As I am always seeking to improve the journal we will soon be soliciting articles for the Fall Journal so if you are working on an interesting case and have a topic feel free to contact me or the co-chairs about submitting such an article.

INSIDE

ARTICLES

Recent Trends And Construction Financing 101 By Sarah B. Biser, Esq., Robert A. Rubin, Esq., and Stephanie Spangler	Pg. 2
RPAPL §881 And Preventing Collapse Of An Adjacent Building By Kenneth G. Roberts, Esq.	Pg. 4
Performance Bonds: Default, Defenses & Discharge By Brian G. Lustbader, Esq.	Pg. 7
Traditional Design-Bid-Build Contracts May Contain Unanticipated Design Risks For Contractors By William J. Tinsley, Jr., Esq.	Pg. 10
Developments In Interpreting Scaffold Act/Labor Law §240 By Barry Temkin, Esq., and Mark J. Weber, Esq.	Pg. 13
The Rights Of Project Owner Against A Contractor Terminated For Convenience By Frederick Cohen, Esq. and John S. Wojak Jr., Esq.	Pg. 16
New Jersey's Construction Lien Law Undergoes Reform By Gary Strong, Esq.	Pg. 20

CASE SUMMARIES

Why Claims For Contribution And Indemnification Are Not As Simple As They Seem By David J. Pfeffer, Esq. and Abraham Gdanski, Esq.	Pg. 23
Pay-If-Paid Provisions In Construction Contracts Are Enforceable In New York Where The Project Is Located Outside The State. By Michael S. Zicherman, Esq.	Pg. 24
Procedural Errors In Architect's Decision Making Are Beyond The Scope Of Judicial Review. By Peggy Gizzarelli, Esq.	Pg. 25
Result Of A Stay - The Surety May be Irreparably Harmed. By Melaine C. Alphonso, Esq.	Pg. 26
Gifford v. U.S. Green Building Council: In Development By Stephanie Spangler	Pg. 28
Packet of Invoices as Sufficient Written Notice Under New York's Little Miller Act. By Geoffrey S. Pope, Esq.	Pg. 31

CONSTRUCTION LAW COMMITTEE

CHAIR

Joel Sciascia, Esq.
JSciascia@pavmcgovern.com

EDITOR IN CHIEF

Gary Strong, Esq.
gstrong@lbbbslaw.com

VICE CHAIR

Ariel Weinstock, Esq.
aweinstock@katskykorins.com

MANAGING EDITOR

Ariel Weinstock, Esq.
aweinstock@katskykorins.com

RPAPL §881 And Preventing Collapse Of An Adjacent Building

By Kenneth G. Roberts, Esq.

What happens if the Building Code requires a developer to perform safety or protective work on an adjacent property in order to proceed with construction on the developer's property, but the neighbor will not grant access? Normally, New York State Real Property Actions and Proceedings Law ("RPAPL") §881 would provide important relief to the developer by authorizing a judicial grant of a license to enter the adjacent property and perform the required work. But what if the court denies the license? Public safety could be threatened, or important development could be stymied.

The issue becomes significant when the Building Code requires stabilization of an adjacent building that may be subject to collapse. When a developer excavates its property near an existing adjacent building, the New York City Building Code ("Building Code") requires underpinning – a process of strengthening and stabilizing the foundation of a building – to avoid destabilization and collapse of the building.¹ Obviously, building collapses cause substantial property damage and personal injury not only to the adjacent property owner but also to other properties and innocent passersby.

The case law on whether RPAPL §881 applies to underpinnings of adjacent buildings is sparse, likely because the majority of these situations are resolved amicably. Recent decisions, discussed below, appear to indicate that a Section 881 license cannot be granted for an underpinning. However, when amicable resolution is impossible, a court should be able to balance the competing interests under §881 and grant a license to underpin adjacent property "in an appropriate case upon such terms as justice requires."²

The Underpinning Problem

In dense urban areas such as Manhattan – where many buildings are built right up to the adjacent property line – developers often need access to the adjacent property in order to comply with safety requirements imposed by the Building Code. Common examples include a requirement to install protection on the roof of an adjacent building to protect it from falling debris, or a requirement to erect sidewalk bridging in front of adjoining property in order to protect pedestrians walking near the construction site.

According to experts, inadequate underpinning results in more frequent failures and costly lawsuits than any other construction failure event. In recognition of the problem, the New York City Department of Buildings ("DOB") created a special excavation unit to inspect sites and ensure protection of adjacent properties. According to the DOB, "[e]very excavation site has the possibility of impacting at least three existing buildings on neighboring lots, as well as nearby public walkways and streets."³ For example, in 2008, DOB issued 4,300 permits for excavation work in conjunction with new buildings, "meaning that approximately 13,000 neighboring buildings could have been affected."⁴

In order to prevent destabilization and collapse of adjacent foundations, the 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."⁵ This brings us to the question: what can a developer do if the adjacent property owner refuses or imposes unreasonable conditions to a license to underpin?

RPAPL §881

In general, when an adjacent property owner refuses to grant a developer necessary access, Section 881 allows the developer to commence a special proceeding to obtain a license to enter the adjacent property. The developer must demonstrate: (1) it "seeks to make improvements or repairs to real property"; (2) the improvements are "so situated that such improvements or repairs cannot be made by the owner... without entering the premises of an adjoining owner"; (3) "permission so to enter has been refused"; and (4) the dates on which entry is needed. RPAPL §881.

Significantly, §881 evenhandedly protects the neighboring property owner by making the developer "liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry." *Id.* It also allows the court to impose "such terms as justice requires." *Id.* Thus, once a developer demonstrates that entry onto an adjacent property is necessary for improvement to real property, it would appear that the only issue for the court to decide is what conditions, if any, "justice requires" to be imposed on the developer. The statute thus calls for the court to balance the

¹ Building Code §3309.5 (the Building Code is contained in N.Y.C. Admin. Code §28-701.2).

² RPAPL §881.

³ *The New York Times*, "City to Overhaul 'High-Risk Construction' Rules," Feb. 3, 2009, <http://cityroom.blogs.nytimes.com/2009/02/03/city-announces-overhaul-of-high-risk-construction>.

⁴ *Id.*

⁵ Building Code §3309.5.

competing interests of both the developer and the adjacent owner – allowing construction to proceed while protecting the adjacent owner’s property rights with safeguards such as insurance, indemnity, and temporal and spatial restrictions on the incursion.⁶

In *Chase Manhattan Bank v. Broadway, Whitney Co.*,⁷ the New York Court of Appeals upheld the constitutionality of §881 under, inter alia, the due process, taking, and equal protection clauses of the United States and New York Constitutions. The Court affirmed the lower court’s opinion which recognized that “the statute is in accord with the modern concept of permissible police power, particularly in large cities, where failure or inability to repair existing structures encourages urban blight.”⁸

In addition to being based in the principle of permissible police power, Section 881 can also be seen as rooted in the common law exception to trespass known as the doctrine of “private necessity”. As recognized by the New York State Law Revision Commission when it recommended the enactment of RPAPL §881, the doctrine of private necessity “is an important qualification to the statement that entry of a person on the land of another is an actionable wrong.”⁹ Under the doctrine of private necessity, “[o]ne is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to (a) the actor, or his land or chattels, or (b) the other or a third person, or the land and chattels of either, unless the actor knows or has reason to know that the one for whose benefit he enters is unwilling that he shall take such action.”¹⁰ Significantly, even the fact that the adjoining property owner is unwilling “does not destroy the privilege to act for the protection of the interest of a third person.”¹¹

§881 is also grounded in the equitable principle that any one landowner’s property rights are not immutable but, rather, are subject to balancing with other private and public interests. As explained by the New York Court of Appeals, a court of equity will not blindly protect an adjacent owner’s property rights where there are “other considerations which forbid, as inequitable, the remedy of the prohibitive or mandatory injunction.”¹² Thus, in balancing the competing

interests, New York courts will not enjoin a trespass that causes relatively little harm to the landowner when the purpose is to prevent great private or public danger: “If the protection of a legal right even would do a plaintiff but comparatively little good and would produce great public or private hardship, equity will withhold its discreet and beneficent hand and remit the plaintiff to his legal rights and remedies.”¹³

Thus, it is seen that §881’s balancing of interests is well-grounded in the concept of permissible police power, the common law qualification on trespass known as “private necessity,” and equitable principles of balancing the relative benefits and hardships of the parties.

Between a Rock and a Hard Place

The Building Code requires a developer who is excavating its property to, “at his or her own expense, preserve and protect from damage any adjoining structures,”¹⁴ and to, “at his or her own expense, underpin the adjacent building.”¹⁵ Each of the preceding requirements expressly condition the developer’s obligations on the neighbor affording the developer a license “to enter and inspect the adjoining buildings and property, and to perform such work thereon as may be necessary for such purpose.”¹⁶ If the neighbor refuses, the Building Code shifts the “duty to preserve and protect the adjacent property” to the neighbor.¹⁷

Yet shifting the “duty to preserve and protect” the property to the neighbor may leave the developer between a rock and a hard place. The Building Code does not, for example, specify that the neighbor must underpin his own property or state when he is required to perform the work. Thus, the neighbor is in a position to stymie the development. Even if the neighbor proceeds immediately, the Building Code by no means releases the developer from liability if the neighbor’s underpinning is defective and collapse of the neighbor’s building causes personal injuries and property damage to third parties.

Judicial Application of RPAPL §881 to Underpinnings

The difficulty faced by a developer who needs to underpin a recalcitrant neighbor’s property appears custom-made for a court to alleviate under RPAPL §881. Allowing a developer to underpin the neighbor’s property in order to protect the public from a dangerous collapse would seem to be precisely a circumstance

⁶ *E.g., Rosma Development, LLC v. South*, 798 N.Y.S.2d 713 (Sup. Ct. Kings Co. Oct. 19, 2004).

⁷ 294 N.Y.S.2d 416 (Sup. Ct. Queens Co. 1968), *aff’d mem.*, 24 N.Y.2d 927, 249 N.E.2d 767, 301 N.Y.S.2d 989 (1969).

⁸ 57 Misc. 2d at 1094.

⁹ N.Y.S. Law Revision Commission, Leg. Doc. (1966) No. 65(B), at 11.

¹⁰ Restatement (Second) of Torts § 197 (1965).

¹¹ *Id.* at Comment e.

¹² *McCann v. Chasm Power Co.*, 211 N.Y. 301, 305 (1914).

¹³ *Id.*

¹⁴ Building Code §3309.4.

¹⁵ *Id.* §3309.5.

¹⁶ *Id.* §§ 3309.4, 3309.5.

¹⁷ *Id.*

RPAPL §881 was designed to address. Yet, in *Broadway Enterprises, Inc. v. Lum*,¹⁸ the courts refused to grant the builder a Section 881 license for an underpinning. The builder had obtained a permit from DOB to construct a three-family home on its property but was refused access to underpin the neighbor's foundation. The motion court denied the builder's Section 881 petition for a license to perform the underpinning, and the Appellate Division affirmed on the grounds that "the underpinning could constitute a permanent encroachment and there are alternative methods of construction that the petitioner may utilize in constructing its property."¹⁹

By combining two reasons for its decision – (1) the underpinning could be permanent; and (2) alternative construction methods may exist – the Appellate Division may have left open the possibility that a Section 881 license could be granted for a permanent underpinning if no reasonable alternative exists. However, if the two bases for the decision are seen as disjunctive, the holding in *Broadway Enterprises* may preclude operation of Section 881 whenever there is a possibility of a permanent encroachment – as at least one court has recently stated.²⁰

Yet precluding a Section 881 license for a permanent underpinning may not be justified under the statute or the principles on which it is based. First, §881 does not expressly limit its application to temporary encroachments or expressly preclude a license for a permanent encroachment. Rather, its only limitation is that the case must be "appropriate" and the terms of the license must be "just": "Such license shall be granted by the court in an appropriate case upon such terms as justice requires." Second, the only case cited by the Appellate Division in *Broadway Enterprises* for the proposition that §881 does not apply to permanent encroachments was a 1969 lower court decision, which itself did not cite any precedent for the proposition.²¹

Third, the permissible police power recognized by the Court of Appeals as justifying the constitutionality of §881 may justify allowing a permanent underpinning in order to protect the public from possible destabilization and collapse.²² Fourth, applying §881 to a permanent underpinning in an appropriate case would be consistent with the common law doctrine of private necessity recognized by the New York State Law

Revision Commission when it recommended the enactment of RPAPL § 81.²³

Finally, application of §881 to a permanent underpinning when the private and public benefits outweigh any inconvenience to the adjoining property owner would be consistent with equitable principles requiring the balancing of private and public interests. A court of equity will not protect an adjacent owner's property rights when it would do him relatively little good as compared to "great public or private hardship" that would be caused by denial of access.²⁴

Thus, either judicial or legislative clarification of this issue is needed. Because underpinning of adjacent properties is required by the Building Code when excavation approaches the property line and is essential to protection of the public from dangerous building collapses, a court should be allowed to balance the respective property rights and grant a Section 881 license for underpinning "in an appropriate case upon such terms as justice requires."²⁵

Kenneth G. Roberts, Esq. is a Member of Cozen O'Connor's Commercial Litigation practice group in New York.

¹⁸ 16 A.D.3d 413 (2d Dep't 2005).

¹⁹ *Id.*, 16 A.D.3d at 414 (citations omitted).

²⁰ *Buck Dev. LLC v. Noury*, 2008 N.Y. Misc. LEXIS 10732 (Sup. Ct. N.Y. Co. Dec. 15, 2008).

²¹ *Foceri v Fazio*, 306 N.Y.S.2d 1016 (Sup. Ct. Queens Co. 1969).

²² *Chase Manhattan Bank*, 57 Misc. 2d at 1094, *aff'd mem.*, 24 N.Y.2d at 927.

²³ N.Y.S. Law Revision Commission, Leg. Doc. (1966) No. 65(B), at 11.

²⁴ *McCann*, 211 N.Y. at 305.

²⁵ RPAPL §881.