ALM | LAW.COM

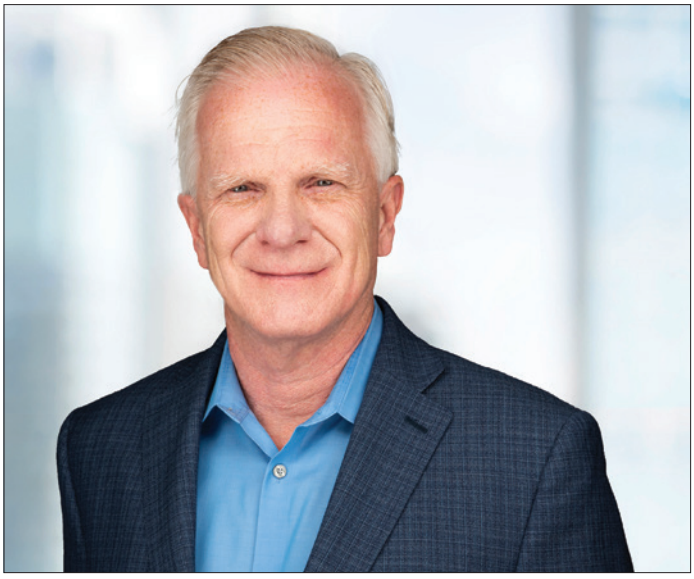
New York Law Journal

Proposed Amendments to RPAPL 881: Changes Without a Cause?

By Raymond T. Mellon

March 26, 2024

Developing real property in a densely congested metropolis like New York City poses logistical and safety difficulties with neighboring properties. Recognizing these difficulties and problems, in 1968 the New York State Legislature enacted Section 881 of the Real Property Actions and Proceedings Law. This statute was enacted to carefully balance the need and the right for properties to be developed and maintained, while protecting adjoining property owners impacted by the construction. Essentially, RPAPL 881 provided developing parties with a statutory vehicle to institute a special (expedited) proceeding in the New York State Supreme Courts to obtain a judicial order granting a temporary license to access neighboring properties to improve or repair real property, where such improvements cannot be made "without entering the premises of an adjoining owner" and where permission to do so has been refused. Since enactment, RPAPL 881 has been utilized in those instances where the developer and the adjoining neighbor could not reach an agreement on access. Where the parties do agree on the terms of an access agreement, recourse to RPAPL 881 is not needed.



Courtesy Photo

Raymond T. Mellon

In the last two years, a number of New York State legislators have concluded that, although RPAPL 881 has been utilized and interpreted by numerous Courts over the past five decades, the balance between developers and neighboring property owners suddenly required statutory adjustment. During the 2023-2024

legislative session, the New York State Senate passed S1305, which would amend RPAPL 881 in a number of ways (the "Amendments"). However, the identical bill introduced into the New York Assembly was not passed prior to the end of the legislative session. On March 13, 2024, the Senate once again passed S1305, and delivered it to the Assembly for deliberation. Since the proposed bill is again the subject of voting in the present legislative session, it is appropriate to analyze both the alleged problems that the legislation is supposed to rectify, as well as who will benefit from the passage of the RPAPL 881 Amendments.

Given the explicit text of the RPAPL 881 Amendments, it cannot be credibly denied that proposed changes heavily favor developers to the detriment of neighboring property owners. As a result, the balance that RPAPL 881 originally struck between developers and adjoining owners would be vitiated by the passage of this bill. Given this obvious result, one can ask how this proposed law has advanced so far in the New York State Legislature? The answer is that developers constitute a strong lobbying body that has strenuously pushed for the passage of the Amendments and have controlled the narrative. In contrast, neighboring property owners are not a unified, or even an identified class until a development is situated next to their property. One example of controlling the narrative is found in the press release of one leading industry organization that promoted the Amendments by blithely claiming that "in some cases" developers and neighbors were able to work out an access agreement between themselves, but "in many instances" developers are compelled to litigate to obtain access to a neighboring property. In this nuanced way, the impression is being fostered that, in most cases, developers had no choice but to seek relief under RPAPL 881. Almost any practitioner in this area of construction law will attest that the vast majority of developer/neighboring property access issues are resolved through execution of a license agreement allowing access under specified conditions that protect the neighbor and their property. Since time is money and resort to litigation takes time, it is the relatively infrequent situation where a developer utilizes RPAPL 881.

To understand if the pro-developer Amendments are actually necessary, the proposed changes must be reviewed to determine what, if anything, they add to the existing practice of the construction industry. First, since a developer's request for access must first be refused by a neighbor before resort to RPAPL 881 can be made, the proposed bill defines "refusal" to be where there is "the absence of any affirmative response" to a developer's written request for access. While ostensibly attempting to provide clarity, this definition ignores the realities of negotiating an access agreement. If a developer proffers a request for access that is, for example, woefully lacking in detail as to the protection to be provided, duration of the access requested, or compensation for the loss of use of the neighbor's property, is a "refusal" to be construed simply if the neighbor does not provide an affirmative response? This definition does not provide any clarity in such a situation and simply constitutes a "green light" for a developer to prematurely file a RPAPL 881 petition.

The next provision of the proposed Amendments that purports to add substantive provisions is Section 3. This provision identifies numerous

tasks and protections that a developer (identified as a "licensee" in the Amendments) can seek permission to perform or install when requesting Court-ordered access to a neighboring property. However, virtually all of the tasks listed are items that are already required under Article 33 of the New York City Building Code (entitled "Safeguards During Construction or Demolition") (the "Code"). These tasks and protections are usually included in license agreements and are typically imposed, depending on the scope of access needed, by a Court granting access in a RPAPL 881 proceeding. Included in the tasks listed both in the proposed Amendments and by the Code are (a) a preconstruction survey of the adjoining property, (b) installation of vibration, crack and optical monitors, (c) sidewalk bridges and roof protection, (d) scaffolding on or over the neighboring property, (e) shoring and support of excavation protection, (f) flashing and weatherproofing, and (g) extensions or offsetting of chimneys and vents. Inasmuch as all of these listed items are already part of the protections required by Code, and routinely included in executed license agreements and Court-ordered licenses, the listing in the proposed Amendments does not add anything new.

What is new and significant, and hidden in the text of Section 3 of the Amendments, is the explicit inclusion of "underpinning" as an item of work that a developer can request from a Court in a RPAPL 881 proceeding. In specifying underpinning of a neighboring property as an item of work available to a developer in a Court-ordered license, the Legislature is ignoring a significant body of caselaw that has held that underpinning is a permanent encroachment upon a neighboring property. Established caselaw has determined that a Court-ordered license cannot grant to the developer the right to place a permanent encroachment on a neighboring property. While items such as roof protection or overheard protection do constitute an encroachment on an adjoining property, they are temporary, and the encroachment terminates upon removal of the protection. In contrast, underpinning will be permanently affixed to the foundation of an adjoining property. While Code Section 3309.5 does currently provide requirements for underpinning of an adjoining property, it does not confer the right to underpin a neighboring building. In fact, it specifically limits the underpinning to situations where the adjoining property owner affords the developer a license "to perform such work". Consequently, in the absence of a party wall, a developing party requires consent of the owner of the adjoining property in order to underpin the neighboring building.

Given the established judicial precedent on the subject of underpinning of an adjoining building, why does the proposed bill seek to confer this valuable right upon developers? The answer is simple economics – if a developer can utilize a neighbor's property to maximize the subterranean space in its project, the developer will obtain a financial windfall at the neighbor's expense. While it is true that adjoining neighbors often seek license fees before consenting to allow underpinning of their property, and developers complain about rapacious neighbors, the license fees pale in comparison to the substantial financial benefit the developer will enjoy for many years.

In contrast, the more important issue that many neighboring property owners have faced in the past when their property was underpinned

by a developer, either with or without consent, is the damage suffered due to shoddy underpinning. While underpinning is commonly performed on many building in New York City, it is not a construction procedure without risk. Structural engineers typically expect a building that is successfully underpinned will still settle one-half inch. But the underpinning process is an involved and time-consuming procedure that, if corners are cut, can cause substantial damage to the property being underpinned. Since the damage often suffered is structural in nature, the Department of Buildings commonly issues a vacate order for the damaged neighboring building while repairs are made. It is cold comfort to homeowners, who had to vacate their home, that they must now look to the developer's and/or contractor's insurance company to promptly make appropriate repairs. Rarely is that an expedited process.

Given the balance that the current version of RPAPL 881 has achieved between developer and neighbor for over 55 years, gifting the developer an "as of right" entitlement to underpin neighboring buildings makes one question why the Legislature is jettisoning this statutory arrangement. Those that are particularly subject to abuse if the Amendments are enacted will be homeowners in neighborhoods that are being gentrified. It is in those areas, lower income homeowners, who have lived in their homes for decades, will be ill-suited to fend off an aggressive developer demanding the ability to underpin their property. Moreover, as the proposed bill is currently drafted, there is no guarantee that these lower income homeowners will be paid their attorneys' fees if they oppose the developer's demands in Court. The Amendments as currently drafted only provide for an award for attorney's fees in the limited circumstance where the Court finds that the "other party acted in bad faith… in seeking, denying, or conditioning" the issue of access to the neighboring property. In the absence of a finding of bad faith, it can be argued that a neighbor will not be entitled to an award of attorney's fees, something that is adverse to a recent appellate decision by the First Department. In the case of *Panasia Estate, Inc. v 29 West 19 Condominium*, 204 A.D.3d 33, 164 N.Y.S.3d 551 (1st Dept. 2022), the Appellate Division acknowledged the aforesaid balance that is the current purpose of RPAPL 881 as follows:

> Unlike in other types of litigation, respondents in a special proceeding pursuant to RPAPL 881 are not accused of any wrongful conduct but are haled into court by the petitioner seeking access to their properties solely for its own benefit. That access can be extremely invasive: *RPAPL 881 is designed to strike a balance between the petitioner's interest in improving its property and the harm to the adjoining property owner's enjoyment of its property.* Id.at 38. (Emphasis added)

The *Panasia* case is also instructive to the discussion of amending RPAPL 881 because it specifically concerned arguments where a developing party was claiming that neighbors should not be awarded attorney's fees incurred in opposing the developer's RPAPL 881 petition. The *Panasia* developer had protracted negotiations with the neighbors concerning a

license agreement for the installation of various protections on their adjoining properties. When negotiations broke down over payment of engineering and attorneys' fees, the developer commenced a RPAPL 881 proceeding against the neighbors. While the lower Court granted the developer a license to perform the access work, the developer appealed the award of attorneys' fees incurred by the neighbors. On appeal, the developer claimed that under RPAPL 881 the Court could only award "actual damages", and not license fees, attorneys' fees or engineering fees. In rejecting the developer's arguments, the Appellate Division relied upon prior cases in which license fees, attorneys' fees and engineering fees were awarded, and held as follows:

> What petitioner seeks is essentially to compel respondents to grant it a license on its own terms. However, as we have recognized, because "[t]he respondent to an 881 petition has not sought out the intrusion and does not derive any benefits from it… [e]quity requires that the owner compelled to grant access should not have to bear any costs resulting from the access." Id. at 37.

Inasmuch as the Amendments appear to limit any award of attorneys' fees to situations where "bad faith" was found, it can be credibly argued that the Amendments have been crafted to restrict the Court's ability to award attorneys' fees in developer/neighbor disputes factually similar to the dispute in the *Panasia* case.

Thus, the effective impact of the Amendments will be to "gift" developers the right to underpin neighboring properties, while financially handicapping affected homeowners from credibly opposing such efforts in Court. Based upon the established case law determining the scope of RPAPL 881 for over five decades, this rush to change the carefully constructed statutory balance between developer and neighbors is inexplicable. Since neighboring property owners are an inchoate class, it is up to their elected officials and legislators to protect their interests. Perhaps if more light is shined on the proposed Amendments, and the actual beneficiaries of those changes, New York State Legislators will realize that their homeowning constituents are going to be harmed and that there is no need to fix something that is not broken.

Raymond T. Mellon, *Senior Partner at Zetlin & De Chiara LLP, is a leading construction litigator and experienced trial lawyer with an extensive background representing prominent real estate owners and developers, and architectural, engineering and contracting firms on business negotiations and in litigation.*