Lasser Law Group | Real Estate, Construction & Litigation Attorneys

Access To Neighbor's Property

Stephen Lasser · Sunday, January 15th, 2017

More and more buildings are added to New York's skyline each year. Frequently, it is impossible for a new construction project or building-wide gut rehabilitation to be completed without the owner who is performing the construction entering upon an adjoining owner's property. New York has had a statute in effect since 1968, which addresses the situation where adjoining owners cannot amicably arrange construction access: New York Real Property Actions and Proceedings Law §881 (hereafter referred to as "RPAPL §881"). A recent appellate court decision has interpreted RPAPL §881 broadly to require the encroaching owner who seeks access to pay fees to the owner of the encroached upon property, even though the statute makes no mention of fee reimbursement.

The original purpose of RPAPL §881 was to provide a legal basis for an owner who could not obtain consensual access to an adjoining owner's property for the purpose of making improvements or repairs on his or her own property to obtain court ordered access. The statue provides a specific mechanism for filing a lawsuit and authorizes the courts to grant an access license to the encroaching owner "in an appropriate case upon such terms as justice requires." Although the statute is silent on the issue of whether the encroaching owner should have to reimburse the burdened owner for fees incurred as a result of the encroachment, the Appellate Division, First Department recently awarded both license fees and attorneys' fees to an owner that was sued and compelled to provide an access license to its property during its adjoining neighbor's construction project.

Are You Kidding Me?! I Have to Pay My Neighbor's Fees?!

Although some lower court decisions granted license fees and attorneys' fees to encroached upon property owners, there was no appellate authority awarding such fees until April 2016. In the case *DDG Warren LLC v. Assouline Ritz 1, LLC*, 138 A.D.3d 539 (1st Dept. 2016), the Court awarded license fees and attorneys' fees to the encroached upon property owner because the access license would "substantially interfere with the use and enjoyment" of the property, thus decreasing its value during the adjoining owner's construction. The Court also stated that "[e]quity requires that the owner compelled to grant access shall not have to bear any costs resulting from the access."

Each access case is very fact specific, so although the decision in the *DDG Warren LLC* case creates a new appellate precedent regarding payment of license fees and legal fees, the real take away from the *DDG Warren LLC* case is that courts have broad powers to impose license access

terms between adjoining property owners. If you need access to your neighbor's property, you should try to work out reasonable voluntary access agreement terms before you sue your neighbor under RPAPL §881 because you may not like the terms and fees imposed by a court. And on the flip-side, if your adjoining neighbor requests access to your property, do not expect him or her to write you a blank check. In sum, try to cooperate with your neighbors—the shoe usually ends up on the other foot over time.

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