

# Practical Strategies for Protecting the Flow of Construction License Fees

By Bradley Pollina

April 7, 2025

Construction in New York City is often a tight squeeze. Given the density of development, developers frequently require access to neighboring properties to ensure their protection during a construction project.

The same is often the case not just where new construction is underway, but also where the owner of an existing building is performing repairs, maintenance or inspection work, most commonly, façade inspections and associated repairs under Local Law 11.

For simplicity, this article will use the term “developer” to refer to the party requiring access to one or more adjacent properties and “adjacent property owner” to refer to the party impacted by the encroachment. It should also be remembered that adjacent property owners impacted by neighboring construction work may themselves be developers and landlords.

The obligation to protect neighboring properties is codified in Section 3309 of the New York City Building Code. That section begins with Section 3309.1, which requires generally that “[a]djoining public and private property,



Photo: Ryland West/ALM

## Construction site in New York

including persons thereon, shall be protected from damage and injury during construction or demolition work” and provides further that “[p]rotection must be provided for footings, foundations, party walls, chimneys, skylights and roofs as specified by this section.”

The remainder of Section 3309 imposes more specific obligations that fall within the ambit of Section 3309.1’s general prescription. Temporary protective measures often include installations like netting, scaffolding or overhead protection on or above neighboring properties.

When access to a neighboring property is required, the ideal route is for the parties to negotiate a voluntary license agreement (also referred to as an “access agreement”) regarding the scope and terms of the required access. However, entering into a voluntary license agreement is not always feasible. In such cases, Real Property Actions and Proceedings Law (RPAPL) §881 offers a powerful statutory mechanism for developer to obtain judicially granted access.

RPAPL 881 provides for a special proceeding in Supreme Court to secure a court ordered license to access an adjoining property for the purpose of making “improvements or repairs to real property,” and instructs court to grant access “upon such terms as justice requires.”

Thus, this access generally comes at a cost, and courts routinely condition the grant of access on the payment of license fees to the adjacent property owner, compensating for loss of enjoyment and diminution in value due to loss of use. See generally *Panasia Estate, Inc. v. 29 West 19 Condo.*, 204 A.D.3d 33, 38 (1st Dept. 2022).

While adjacent property owners may have a right to license fees as consideration for access, the payment of those fees can be surprisingly vulnerable. Whether agreed upon in a privately negotiated access agreement or ordered by a court under RPAPL 881, license fees may go unpaid if a developer runs into financial distress, loses interest in the project or simply decides not to pay.

Adjacent property owners are therefore well-advised to take proactive steps to protect the actual payment—and continued payment—

of those fees, not just the stated right to receive them.

This article explores practical strategies that adjacent property owners can use to secure the payment of license fees under both negotiated agreements and RPAPL 881 licenses ordered by courts.

### **Guaranties**

Where access is granted through a negotiated agreement, an adjacent property owner should consider requiring a personal or corporate guaranty of the developer’s payment obligations.

A guaranty—particularly from a solvent parent company or individual principal—can offer recourse if the entity seeking access fails to pay.

Any guaranty should explicitly provide that the scope of the guaranteed obligations includes license fees for so long as the relevant encroachment remains in place, including instances where the stated “term” of the access period has expired.

Guaranties can disincentivize breach of an obligation to pay license fees in cases where a judgment against a guarantor will be easier to enforce than a judgment against the ownership entity that holds title to the building where the work is being performed. That entity may, of course, be a single purpose limited liability company without easily discoverable liquid assets to satisfy a judgment.

Requiring a guaranty thus adds a layer of practical security to an otherwise fragile entitlement and may provide a more direct path to recovery than suing the developer entity itself for breach of a license agreement.

## **Surety Bonds**

A payment bond issued by a surety can offer another layer of protection against the non-payment of license fees. In this arrangement, the developer posts a bond guaranteeing payment of license fees, and the adjacent property owner can make a claim against the bond in the event of non-payment.

While bonds are not strictly required by RPAPL 881, courts have authority to order that they be posted in order to secure payment of license fees. See *DDG Warren LLC v. Assouline Ritz 1, LLC*, 138 A.D.3d 539, 540 (1st Dep't 2016).

Courts may be persuaded to require such a bond as a condition of granting access where the developer has little operating history, the license term will be extensive or where the license fees are substantial.

Equitable circumstances, including pre-license conduct such as trespassing or starting work without a license agreement, may also factor into a court's decision on this issue. Outside of court, parties remain free to agree that surety bonds will be posted as part of a negotiated license agreement.

## **Escrow Arrangements**

A highly effective, though often underutilized, mechanism is the use of escrow. Adjacent property owners can negotiate for developers to deposit license fees into an escrow account in advance of any permitted access. This escrow account is administered by a third party such as an attorney, title company or escrow agent.

The creation of an escrow fund can allow fees to be disbursed on a regular schedule,

ensuring uninterrupted payment regardless of future disputes or project delays.

Escrow arrangements can also be tailored to allow for dispute resolution without halting payments entirely. For example, disputed fees can remain in escrow while agreed-upon fees are released, thereby protecting both side's interests.

Courts may entertain this request in RPAPL 881 applications, particularly when an adjacent property owner raises credible concerns about the developer's solvency, payment history or risk of future breach.

## **Acceleration and Default Clauses in License Agreements**

Where access is granted via an agreement rather than court order, adjacent property owners can negotiate acceleration clauses, i.e., provisions that render all future unpaid fees through the end of the term immediately due and payable upon default in the payment of license fees. Late payment penalties and interest provisions may also be appropriate.

Including such provisions also makes it easier to quantify damages in a litigation context, potentially speeding up summary judgment motions or settlement discussions. Therefore, these clauses serve as a powerful disincentive against breaching a contractual obligation to pay license fees.

## **Default-Triggered Injunctive Relief Clauses**

In the context of a negotiated license agreement, the parties can include a clause that authorizes the adjacent property owner to seek temporary injunctive relief (such as suspen-

sion of access) in the event of non-payment, without waiving other remedies.

While courts may be reluctant to issue injunctions that interfere with construction, a contractual acknowledgment by the developer that non-payment constitutes irreparable harm can strengthen the adjacent property owner's hand in court and, again, disincentivize breach in the first place. Such a provision will not guarantee an injunction, but it improves the odds and raises the stakes for the developer, who may be highly motivated to avoid delays and litigation costs.

### **Judicial Retention of Jurisdiction**

In RPAPL 881 proceedings, adjacent property owners should request that the court retain jurisdiction over the matter after the court orders a license, including with respect to disputes concerning the payment of license fees. Retention of jurisdiction can protect against delays in seeking relief in the event of non-payment, among other possible disputes.

Without a retention of jurisdiction by the court that ordered the license, the injured adjacent owner is required to commence a new action, serve the defendant, await a response to the complaint (which could be a motion to dismiss) and only then proceed to discovery and/or summary judgment motion practice, as appropriate.

If the developer moves to dismiss or successfully argues that discovery is necessary in opposing a motion for summary judgment, swift relief will be out of reach. Where the court retains jurisdiction, by contrast, the injured party should be able to proceed directly to motion practice in the existing action.

### **Conclusion**

Whether established through a negotiated agreement or an RPAPL 881 proceeding, license fees are a critical component of the adjacent property owner's protection during neighboring construction. However, entitlement to these license fees alone is not enough to ensure they are timely and continually paid. Adjacent owners should think creatively and proactively about collection at the outset.

By using tools such as guaranties, bonds, escrow accounts, protective contract language and court oversight, adjacent property owners can better ensure that license fees continue to be paid even when projects stall or disputes arise.

As New York's built environment continues to densify, disputes over access and compensation will only increase. A well-crafted strategy for securing license fee payments can make all the difference in turning a legal right into real-world revenue.

*Bradley Pollina is a partner at Bergstein Flynn Knowlton & Pollina.*