



The demolition and construction concerns for adjacent property owners

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The effects of demolition and construction can be disastrous for property owners who own buildings or homes adjacent to an active construction site. More often than not, improper excavation, demolition and construction will lead to significant damage to adjacent properties in close urban construction environments, such as those found in N.Y.C. and its surrounding boroughs, in the form of cracking in building foundations, shifts that cause windows and doors to come out of alignment, and even the complete and total collapse of a building. Improper and defective excavation and underpinning operations are one of the leading causes of construction damage to neighboring properties. Thus, a duty of care is owed to neighboring properties and structures from the party that is causing construction to be done on their property. For this reason, proper protection and underpinning, the process of strengthening and securing the foundation of an existing building, vis-à-vis the adjacent property owners' building, is often required as a part of the construction process.

In densely populated areas, such as N.Y.C., almost every parcel of land has at least two to three adjoining properties. As a result, a strong possibility exists that any given construction project will require that adjoining or adjacent properties be protected and that they each be underpinned. In N.Y.C., prior to the underpinning of an adjacent property, written consent of the adjoining landowner is required, or if written consent cannot be obtained, a party may request for judicial permission to underpin the project under Real Property Actions and Proceedings Law Section 881. However, should a party fail to obtain judicial license or landowner consent, yet proceeds to underpin the project, there is a good chance that upon discovery by the Department of Buildings of underpinning without consent the project will be audited, shut down and stop work orders issued.

Strict guidelines have been set in place to protect adjacent properties from construction and excavation work, including Section 3309.2 of the N.Y.C. Building Code, which requires that a person who causes construction work shall, at his or her own expense, underpin the adjacent properties provided that he or she is afforded a license to do so. Furthermore, pursuant to Building Code Section 1704.9.1, all underpinning work must be inspected by a "special inspector." Furthermore, any contractor that will be performing "earthwork" must notify the building department 24 to 48 hours in advance of the beginning of work, and an approximate date must be provided to the building department for any underpinning scheduled to take place. These requirements and obligations are intended to protect adjacent properties from damages that may result from excavation and construction taking place at adjoining properties.

One other area of damage that is often attributable to adjacent property construction is water damage as a result of a change in the flow of surface water due to improvements made to the adjacent property. However, land owners will not be liable to their neighbors for damages resulting

from a change in the flow of surface water provided that the improvements were made in good faith and made for some rational use. An owner of an adjacent property who has suffered from damages has the burden of establishing that the improvements on their neighbor's property is causing surface water to be diverted to his or her property by artificial means, such as drainage pipes and ditches. See *Hulse v. Simoes*, 71 A.D.3d (2nd Dept. 2010). Thus, a landowner can improve his or her property without concern for water runoff to his or her neighbor's property, so long as the diversion of water is not caused by artificial means.

When a property is damaged by construction activity at an adjacent property, ordinarily the contractor is required to indemnify the property owner for any claims brought against him for the damage to the adjacent property. However, in an attempt to provide further protection to adjacent property owners, recent bills have been proposed to require additional notice and a deposit of funds to protect against damage to neighboring properties. New York State assembly bill A00317 proposes to require notice to owners of adjoining properties before construction, excavation or demolition work is performed. Furthermore, assembly bill A00706 proposes to require developers to deposit a portion of the total estimated project cost into an escrow fund for damage caused by construction at neighboring properties. Both bills have been referred for consideration but, to date, have not been passed by the legislature.

It is important for property owners, especially in densely populated areas, to be aware of issues that often appear when construction is taking place at adjoining properties. Demolition, excavation and construction frequently cause damage to adjacent properties as a result of close proximity construction. Thus, it is essential for property owners to understand that proper protection must be afforded to their property, and that they have a right to seek compensation for damage their property, when facing adjacent property construction activities.

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