nyrej
CELEBRATING 30 YEARS

A lawyer discusses access license agreements and pre-construction surveys: The reality - by C. Jaye Berger

August 21, 2018 - New York City

C. Jaye Berger,
Law Offices C. Jaye Berger

A common situation these days is for a developer and possibly also his attorney to walk across the area between their property and an adjoining property to introduce themselves and tell you they are going to be commencing a construction project shortly and will need access to your property to conduct a “pre-construction survey.” A pre-construction survey is a photographic survey to document different parts of your building, from top to bottom, showing any imperfections and cracks which may exist before the neighbor’s adjacent or nearby building project commences. Should there be any complaints down the road about damage being caused by their project, the pre-construction survey will be used to show whether they were “pre-existing” damages or the damages were caused by the construction.

The goal is to try work things out amicably with a license agreement to avoid a court hearing under Section 881 of the Real Property Actions and Proceedings Law which allows an owner seeking to make improvements, whose property is situated so that he cannot make them without entering the neighboring premises, to get permission from the court, by commencing a special proceeding, when the neighbor has refused to allow it.

In order to conduct such a survey, the neighbor and its consultants will need “access” to your property. They will be accompanied by your consultants and possibly also by you, your attorney and the property manager on a mutually agreeable date and time. They will walk throughout the property and photograph what they see, especially in the basement, on the roof and the walls closest to where the work will be done. They will also walk through all the apartments and other affected areas, including gardens. They may be planning to install crack monitors on existing cracks to document whether they become larger during the course of construction and to install other protection.

What starts out as a straightforward negotiation process to allow access, can quickly become fraught with disagreements. The general rule is that a license may be granted by the court “upon such terms as justice requires.” That means it is very much open to interpretation and arguments by the attorneys. There is no formula. For example, cases state that since the property owner has not sought out the intrusion and does not derive any benefit from it, the owner who may be compelled to grant access should not have to bear any costs resulting from the access. That might seem obvious, but it is not. It usually means reimbursing legal and engineering expenses. What is typically covered has developed over time through various court decisions.

The developer’s attorney will interpret that concept narrowly to limit those expenses to reasonable expenses for retaining an attorney only to negotiate and draft the license agreement itself and possibly to retaining an architect or engineer to review plans. It may or may not include a fee for maintaining a sidewalk shed extending across the adjacent property. Protection affecting the neighbor’s “use and enjoyment” of the space may require some compensation.

The client will want to try to negotiate having the developer reimburse for legal advice during the project, if any questions arise. The reality is that the attorney for the developer will try to refuse to pay for anything after the license agreement has been signed. A smart developer will want “happy”

neighbors and will no doubt err on the side of paying more rather than less to keep the peace. A savvy developer will usually agree to escrow some money to cover those expenses, since he will need more “favors” from the neighbor down the road, such as allowing some equipment or materials to be staged on the neighbor’s property.

One building said they were going to install a sidewalk shed and needed to dig on the property. The property owner consulted with an architect for advice on this. Later the developer decided they could do the project without digging on the property and offered a simple license agreement for a survey and only wanted to reimburse the property owner for that, not all the time spent on the complicated agreement. They agreed to pay for that time, but only after a lot of arguing back and forth.

The “reality” and significance of these access agreements hits when there are damages alleged towards the end of the project and these cases and the license agreements are litigated for years because all the insurance companies refuse to pay damages for repairs and claim the conditions were “pre-existing.” They create delays during litigation by arguing that more discovery is needed and argue about who was the person who made the decision to excavate under the Administrative Code § 3309.4 and which was the contractor who carried out the physical work. This becomes complicated with regard to the construction manager, who usually claims he was not directly involved with the excavation and should not be absolutely liable under the statute. It comes full circle and underlies the importance of pre-construction surveys and having your own survey done and not just relying on the neighbor’s.

C. Jaye Berger, Esq, is the principal, Law Offices C. Jaye Berger, New York, N.Y.