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Handling complications with access agreements - by C. Jaye Berger

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There are many properties where there is a portion that is undeveloped and crying out for a building to be built on it. Developers can come seemingly out of the blue and ask for access to your property in connection with their building project. As long as they make reasonable demands and pay reasonable amounts of money for using your property, it is allowable. The protection that will be provided for the building is a big source of conversation and is an important term of such an agreement. The protection plan is confirmed as an exhibit in “access agreements.” How it affects the building is related to the license fee.

Litigation involving access agreements is governed by Section 881 of the Real Property Procedures Act. It is commonly referred to as an “881 proceeding.” They can be started at any time, even when you feel that you’re acting in good faith talking with the developer and that there is no problem. All of a sudden you can find yourself being served with papers. It is important to keep this in mind since it hangs over these proceedings like a hammer waiting to fall and negotiations have a life of their own with motion practice, scheduling and papers being exchanged with a lot of exhibits.

Whichever judge is assigned to the case, it is usually a referee who presides over the details of these matters.

The referee also has the authority to award legal fees to one side or the other. And the invoices for the services provided to date in connection with the negotiation of the access agreement are exhibits at the hearing. Most attorneys are familiar with drafting motions in court at the actual hearings for a signature right then and there. In this context, it is surprising to know that the forms in these matters are pre-drafted forms from the court with fill in the blank spaces.

The decisions are very much driven by decisions in other contemporary cases. Therefore, counsel must be aware of such decisions and be able to cite them. There are also cases where counsel for the neighbor has asked for something new such as a performance bond and has been turned down by the developer. Those kinds of cases can be litigated way beyond motion practice. This is why it behooves the parties to try to work things out if they want to advance the project. Also, since it is a special proceeding, the referee has the authority to grant legal fees to one party and not the other.

Anyone involved in such a proceeding needs to be armed with an appropriate team of professionals.

The property owner who is being asked for the access should have an attorney and engineer experienced in this area of the law. For example, when it comes to protection needed for the building during the work, it is not a question of reviewing plans to see if the building will stand and be structurally sound, but rather whether the protection is adequate under the circumstances. It is a different type of review than most engineers are usually faced with. There are certain issues that arise where the property owners' engineer will need to confer with the neighbors engineer and agree on whether it would be mutually acceptable to do something a certain way.

Access agreements are not some thing that arise in the normal course of legal practice. The attorney reviewing it on behalf of the property owner must have an understanding of the types of provisions that are needed and what they typically provide for. For example, how long will the developer be expected to pay a license fee. When will the protection be removed ?These are extremely time consuming projects for the engineers and the attorneys representing the parties. Developers' attorneys have become much more persistent in trying to pay only what the clients have been actually billed for by the professionals and no more than that. There should also be an agreed upon monthly access fee and termination date of the access agreement.

Attorneys can agree on a ceiling for those expenses or require that they exchange detailed billing statements which are open to question in a hearing. All of these topics, including insurance, go into the access agreement.

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