

CLIENT ADVISORY

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APPEALS COURT GRANTS ACCESS LICENSE TO ADJOINING PROPERTY OWNER, SUBJECT TO CONDITIONS AND FEES

Especially in a crowded city such as New York, a property owner doing construction or maintenance work on its property will often need to gain access to an adjoining property for purposes such as staging the work. In the best case, arrangements for such access are worked out directly between the two adjoining owners. In negotiating such matters, the owner being asked to provide access should remember that someday the tables may be turned, and he or she may be the one needing access to the neighboring property.

When the two owners are unable to reach agreement to allow access and on what terms, the owner requiring access can bring a court proceeding under Section 881 of the Real Property Actions and Proceedings Act (RPAPL), asking the court to grant an order allowing access. Such a court order will typically be subject to conditions, such as limitations on the nature and duration of the mandated access as well as insurance and indemnification for any damage that may result.

The Appellate Division reviewed the provisions of Section 881 in **Matter of Panasia Estate, Inc. v. 29 West 19 Condominium, 2022 N.Y. App. Div. LEXIS 974, 2022 N.Y. Slip Op. 00975 (1st Dep't Feb. 15, 2022)**. The petitioning owner wished to add two stories of office space to the top of its existing building. In connection with these planned improvements, petitioner sought access to several neighboring properties for purposes including conducting a pre-construction survey as well as installing overhead protection, roof protection, flashing, and an outrigger and netting system to protect the neighboring properties. The parties negotiated concerning the potential terms of an access license but were unable to reach agreement, and petitioner filed an RPAPL 881 access proceeding.

The lower court granted petitioner a license to access the adjoining properties subject to payment of license fees totaling several thousand dollars per month, increasing over time. The lower court also directed petitioner, as a condition of the license, to reimburse the neighboring owners for attorneys' and engineering fees, to post a \$1 million bond, and to provide proof that the neighbors had been named as additional insureds on petitioner's relevant insurance policy. All the parties appealed from different provisions of this order.

The petitioning owner argued on its appeal that RPAPL 881 does not authorize awards of license fees, attorneys' fees, or engineering or other professional fees. The appeals court disagreed. It observed that the statute allows the court to grant an access license "upon such terms as justice requires." It reaffirmed prior decisions holding that an owner required to grant access to its property against its will should not be forced to incur costs, such as attorneys' or engineering fees, resulting from the unwanted intrusion.

The court also disagreed that imposing a licensing fee would confer a "windfall" on the adjoining owner in the absence of actual financial harm such as lost income. Rather, a license fee is warranted "where the granted license will entail substantial interference with the use and enjoyment of the neighboring property during the [license] period, thus decreasing the value of the property during that time."

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The appellate court found that the lower court had failed to identify an evidentiary basis for the amounts of the engineering and attorneys' fees that had been awarded, and directed that these awards be recalculated based on the actual expenses incurred. The court also deleted the provision for escalation of the license fees over time, which it regarded as "punitive," and required that the insurance requirements for the license be made more specific. Finally, the court agreed with the adjoining owners that the license should have an outside time limit of 24 months, and directed that the petitioner "timely commence the project and proceed diligently."

NEW YORK'S FORECLOSURE AND EVICTION MORATORIUMS HAVE ENDED

Beginning in 2020, New York State imposed a moratorium on certain foreclosure and eviction proceedings as a result of the coronavirus pandemic. This moratorium, with certain limitations, was extended through early this year, but it was allowed to expire on January 15, 2022.

As a result, many previously stayed foreclosure and eviction cases may now resume and new cases may be commenced. Given the anticipated influx of resumed and new cases, we can anticipate backlogs in processing them. In addition, foreclosure and landlord-tenant proceedings remain subject to a variety of procedural and substantive requirements. Some of these require that certain notices be sent before a court proceeding may be brought, and others require certain steps within the action. All of these requirements must be carefully observed before a proceeding can be commenced and an ultimate judgment of foreclosure or of eviction can be issued.

To assist residential borrowers facing foreclosure, a New York Homeowner Assistance Fund was established. Homeowner-borrowers whose applications are approved could receive a five-year forgivable grant of up to \$50,000 that can be applied to their mortgages, property taxes, and/or condominium or cooperative fees. At present, the funds allocated for this fund have been exhausted; however, eligible borrowers may sign up for a waiting list in case additional funding becomes available in the future. Further information is available from the fund's website at www.nyhomeownerfund.org

APPELLATE DIVISION ENFORCES CONDOMINIUM BY-LAW AUTHORIZING APPOINTMENT OF RECEIVER AFTER OWNER FAILED TO PAY COMMON CHARGES

Last month, we reported on a lower-court decision in which the court enforced a condominium's bylaw providing that if the condominium sued to foreclose on a common charges lien, it would be entitled to the appointment of a receiver to collect the common charges on the unit while the litigation is pending.

More recently, the Appellate Division has issued a decision to the same effect. In **Board of Managers of Honto 88 Condominiums v. Red Apple Child Development Center, 2022 N.Y. App. Div. LEXIS 1245, 2022 N.Y. Slip Op. 01233 (1st Dep't Feb. 24, 2022)**, an owner of commercial condominium units failed to pay its common charges and the condominium sued to foreclose on the resulting common charges liens. The condominium moved for a temporary receiver and a lower court granted the motion.

The appellate court agreed that "[t]he motion court providently exercised its discretion in appointing a temporary receiver in this action to foreclose on common charges liens on commercial units, as authorized by the condominium bylaws.... The court properly determined that [the unit owner's] significant stake in the condominium, history of arrears and litigation against [the condominium], and failure to make certain undisputed payments while receiving rental income warranted the appointment [of the receiver] to prevent financial hardship to the residential unit owners."