Your Court Street Lawyer's Quick Reference Guide

A Man's Home Is (Not Always) His Castle

RPAPL 881 License to Enter Neighbor's Property

By Richard A. Klass, Esq.

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."

— *Abraham Lincoln*
Notes for a Law Lecture, *July 1850*

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Prior results do not guarantee a similar outcome.

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Book design and production by Robert Matson
The Innovation Works, Inc.
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BIO

Richard A. Klass is the quintessential "Court Street lawyer," as defined by *The New York Times*, a "street-smart sharpie with verve, hustle and a striver's charisma." Practicing law much like a critical care doctor functions, Klass is the lawyer clients appreciate when the issue is so vital. Practicing primarily in the areas of commercial litigation, debt collection and enforcement of judgments, legal malpractice, and real estate litigation, his firm also represents clients in bankruptcy, civil appeals, and federal court litigation. Mr. Klass lectures and writes extensively for lawyers and industry professionals.

Mr. Klass serves as an Officer of the Brooklyn Bar Association, Member of the Grievance Committee for the Appellate Division, Second Department, Former Chair of the General Practice Section of the New York State Bar Association, Co-Editor of the New York State Bar Association's General Practice Section *One on One* Publication, and an Arbitrator, Small Claims Part of the Civil Court of the City of New York, County of Kings. He also served as a representative to the Statewide Special Counsel for the Supreme Court's Commercial Division. Mr. Klass also serves as a Fee Arbitrator in the Part 137 Attorney-Client Fee Dispute Program. He has been selected for the New York Super Lawyers List.

In 1989, Mr. Klass received his Bachelor of Arts at Hofstra University and his Juris Doctorate at New York Law School in 1992. He was the Recipient of the American Jurisprudence Award in Conflict of Laws. Mr. Klass is admitted to the following jurisdictions: State of New York (1992); State of New Jersey (1993); U.S. District Court for the Eastern District of New York (1992); U.S. District Court for the Southern District of New York (1992); U.S. District Court for the District of New Jersey (1993); U.S. Court of Appeals for the Second Circuit (1999); and the U.S. Supreme Court (1997).

Richard Klass has been a formative voice within New York law circles both for the high standards of his work as well as his extensive writings, lectures, and appearances in the media. He reaches an audience of lawyers and non-lawyers equally through publications which include his quarterly newsletter, *Law Currents* and his blogs *Law Currents* and *The Legal Malpractice Blog, New York.* His books include *I Got Bloomed: Keeping Client Confidences and Loyalties* (2018), *Killing the "Zombies": Recent Changes to New York State's Foreclosure Laws* (published 2017), *Attorney's Liens and Legal Fee Enforcement* (2015), *Retention and Withdrawal of Counsel: a guide for attorneys* (2015), and *Successfully Defending Your Credit Card Lawsuit* (2013). The newsletter and blog, *Law Currents,* with tens of thousands of readers combined, is particularly popular. Written in a style that appeals to nearly anyone who likes a good story, this two-page illustrated quarterly features entertaining and informative case studies written in plain English.

Richard A. Klass, Esq.

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Legal Malpractice

Attorney fee collection

Consultation on and litigation of attorney's retaining and charging liens

Expert Witness analysis and testimony on reasonable attorney's fees and award

Table of Contents

A Man's Home Is (Not Always) His Castle

In the current economic and political climate in New York City, which encourages building more and more housing units for the multitudes, it is not surprising that property owners are experiencing "growing pains." Among those "growing pains" are the inconvenience and annoyance to neighboring property owners when a developer buys land next door, then seeks to build on that land, and must gain access through the adjacent owners' property in order to do the work. Access may be needed to move equipment, build up to the property line, or deliver material to the building site.

RPAPL 881 grants a license to enter property:

New York law seeks to find middle ground between the property developer and the neighboring owner so that the developer may build its structure while the neighbor can be left relatively undisturbed. Real Property Actions and Proceedings Law (RPAPL) Section 881 provides as follows:

When an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry.

RPAPL 881 affords adjacent property owners rights

There is a judicial recognition that the statute was enacted as part of the State's police powers in order to ensure that adjacent property owners can gain access to the other's land when needed.

Sakele Bros., LLC v Safdie, 302 AD2d 20, 28 [1st Dept 2002] ("RPAPL 881 provides for a special proceeding to obtain a license to enter another's real property to gain access to the petitioner's own real property for the purpose of making repairs or improvements, after such permission has been requested and denied.")

Sunrise Jewish Ctr. of Val. Stream, Inc. v Lipko, 61 Misc 2d 673, 675 [Sup Ct 1969] ("The statute was enacted in recognition of the fact that property owners often build right up to the building line and in furtherance of the public interest in preventing the urban blight which results when such a building, for want of a license, cannot be repaired, 1966 Report Law Rev.Comm. (Leg.Doc. (1966) No. 65) 102. Thus, the fact that petitioner created the problem by building within one inch of the line has no bearing.")

Chase Manhattan Bank (Nat. Ass'n) v Broadway, Whitney Co., 57 Misc 2d 1091, 1095-96 [Sup Ct 1968], *affd sub nom. Chase Manhattan Bank v Broadway, Whitney Co*., 24 NY2d 927 [1969] ("The same equitable doctrines may be relied upon in establishing adequate guidelines for the court in the application of the statute here in dispute. The statute does not direct the court to grant a license to every applicant. On the contrary, it may be granted only 'in an appropriate case'. In accordance with the foregoing principles of law, it should be granted only when necessary, under reasonable conditions, and where the inconvenience to the adjacent property owner is relatively slight compared to the hardship of his neighbor if the license is refused. Moreover, the statute affords the adjoining property owner adequate 'legal rights and remedies' (Forstmann v. Joray Holding Co., Inc., supra), in that it subjects the licensee to full liability for 'actual damages occurring as a result of the entry'. In effect, it is no more than a codification of the well settled principles of jurisprudence expounded by the courts of this state and in other jurisdictions dealing with conflicting interests of adjacent property owners.")

Stuck v Hickmott, 158 AD3d 1331, 1333 [4th Dept 2018] ("Respondent contends that the work for which the license was sought is beyond the scope of RPAPL 881 because painting a wooden fence does not constitute an improvement or a repair to real property within the meaning of the statute. We reject that contention. While the statute must be construed narrowly inasmuch as it stands in derogation of common-law property rights (*see MK Realty Holding, LLC v Scneider*, 39 Misc 3d 1209[A], 2013 NY Slip Op 50551[U], [Sup Ct, Queens County 2013]; *see generally Matter of Bayswater Health Related Facility v Karagheuzoff*, 37 NY2d 408, 414 [1975]; *Hay v Cohoes Co*., 2 NY 159, 161-163 [1849]), we conclude that, in the absence of a statutory definition, the usual and commonly understood meaning of the words "improvement" and/or "repair" encompasses the painting of the wooden fence in this case (see Black's Law Dictionary 875-876, 1490 [10th ed 2014]; *Sunrise Jewish Ctr. of Val. Stream v Lipko*, 61 Misc 2d 673, 675 [Sup Ct, Nassau County 1969]; cf. *Chase Manhattan Bank [Natl. Assn.] v Broadway, Whitney Co*., 59 Misc 2d 1085, 1086-1087 [Sup Ct, Queens County 1969]; *see generally Yaniveth R. v LTD Realty Co.*, 27 NY3d 186, 192 [2016]). That interpretation is supported by the legislative history, which establishes that the legislature—in recognition that the nature of abutting properties often requires property owners to access the neighboring property in order to make improvements or repairs to their own—intended to encourage such improvements or repairs by removing unreasonable obstacles to efforts to prevent blight and deterioration (Introducer's Mem in Support, Bill Jacket, L 1968, ch 220; *see Sunrise Jewish Ctr. of Val. Stream*, 61 Misc 2d at 675).")

Deutsche Bank Tr. v 120 Greenwich Dev. Assoc., 7 Misc 3d 1006(A) [Sup Ct 2005] ("The statute was enacted in recognition of the fact that property owners often build right up to the building line. Consequently, unless the court has the authority to grant licenses in appropriate cases, buildings could

lose their value or utility, for want of an ability to make improvements or repairs. The possible result could be urban blight. *See: Sunrise Jewish Center of Valley Stream, Inc. v. Lipko, supra*. Constructing a new building at the site is certainly an improvement which will enhance the value of the lot. *Rosma Development LLC v. South*, 5 Misc.3d 1014(a) (Kings Co. Sup.Ct.2004). The statute does not limit improvements to existing structures. More importantly, in many circumstances, demolition, whether it be partial or complete, is a necessary element of making improvements to property.")

Petition must be brought by owner

340 W. LLC v Spring St. Garage Condominium, 31 Misc 3d 1230(A) [Sup Ct 2011] ("Necessarily implied in the February Judgment then is the determination that the Board owns the Parcel. See also R.P.A.P.L. x 881 ("When an owner ... seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner ... without entering the premises of an adjoining owner ... the owner ... seeking to make such improvements or repairs may commence a special proceeding for a license[.]") (emphasis added).")

Must establish need to gain entry

Mehdi Dilmaghani & Co., Inc. v Spa Health Clubs, Inc., 45 AD2d 1021 [2d Dept 1974] (Where defendant's power transformer for its building was positioned so that access thereto could only be from plaintiff's property, defendant would be entitled to make an application for appropriate relief under RPAPL §881.)

Lincoln Spencer Apartments, Inc. v Zeckendorf-68th St. Assoc., 88 AD3d 606 [1st Dept 2011] ("RPAPL 881 is the means by which a landowner seeking "to make improvements or repairs" to its property may seek a license to enter an adjoining landowner's property when those "improvements or repairs cannot be made" without such entry. Here, the court erred by granting petitioner a license to access Copley's roof because petitioner failed to "state the facts making such entry necessary," as the statute requires.")

In re Tory Burch LLC v Moskowitz, 146 AD3d 528, 529 [1st Dept 2017] ("The petitioner failed to make a showing as to the reasonableness and necessity of the trespass referenced in the order where, at the time of its petition, none of the items sought had been memorialized in specific plans filed and approved by the Department of Buildings, and the project was under a stop work order.")

Refusal of access must be shown

Sunrise Jewish Ctr. of Val. Stream, Inc. v Lipko, 61 Misc 2d 673, 675 [Sup Ct 1969] ("Likewise without significance are the facts that no request in writing was made (under the statute it is enough that 'permission so to enter has been refused') and that a second abutting owner has not been joined in this proceeding (his affidavit shows his willingness to consent on specified conditions, but in any event nothing in the statute or the CPLR proscribes separate proceedings or mandates joinder of all abutting owners whose property must be entered upon to complete the proposed improvement or repair).")

444 E. 86th Owners Corp. v 435 E. 85th St. Tenants Corp., 32 Misc 3d 1232(A) [Sup Ct 2011], affd, 93 AD3d 588 [1st Dept 2012] ("[I]t does not dispute 85th St. Tenants' allegations that it has refused to participate in negotiations regarding a license agreement, pursuant to RPAPL 881, permitting 86th Owners access to 85th St. Tenants' premises to investigate and repair.")

Conversion of injunction action into an RPAPL 881 proceeding

Mindel v Phoenix Owners Corp., 210 AD2d 167, 167-68 [1st Dept 1994] ("The court's conversion of this action, commenced by plaintiffs for injunctive relief, into a proceeding by defendant for leave to enter plaintiffs' properties for repairs under RPAPL 881, was unusual but proper (CPLR 103 [c]), in view of (1) defendant's affirmation in opposition to the original application for a preliminary injunction giving early notice that

defendant was seeking relief under RPAPL 881; (2) the presentation, in what were already protracted proceedings, of all the evidence that would be adduced in an RPAPL 881 proceeding; and (3) the substantive claims made in support of defendant's asserted need to enter plaintiffs' properties.")

Ponito Residence LLC v 12th St. Apt. Corp., 38 Misc 3d 604, 612 [Sup Ct 2012] ("A court may convert an action for a preliminary injunction into a proceeding under RPAPL 881 where such conversion is appropriate.")

Amalgamated Dwellings, Inc. v Hillman Hous. Corp., 299 AD2d 199, 200 [1st Dept 2002] ("The causes of action for an injunction and easement by necessity for repairs to plaintiff's western facade, which abuts the park, were properly dismissed on the ground that plaintiff has a statutory right to seek such access through a special proceeding (RPAPL 881), and, accordingly, is asserting a mere right of convenience, not necessity.")

Sakele Bros., LLC v Safdie, 302 AD2d 20, 28 [1st Dept 2002] ("[W[e address the branches of the motion and cross motion seeking summary judgment on defendant's first counterclaim to the extent it requests a declaration that defendant is entitled, purportedly pursuant to RPAPL 881, to enter upon plaintiff's property to demolish, repair or rebuild the party wall, based on the wall's allegedly poor condition. Although defendant's reliance on RPAPL 881 is misplaced, we deem this prong of the first counterclaim to be based on the principle that a seriously deteriorated party wall may be torn down and rebuilt by either party, upon reasonable notice to the other (10 Warren's Weed, New York Real Property, Party Walls § 9, at 15 [4th ed]).")

McMullan v HRH Const., LLC, 38 AD3d 206, 207 [1st Dept 2007] ("defendants' utter failure to show facts making the entry necessary would require denial of any such RPAPL application").

Std. Realty Assoc., Inc. v Chelsea Gardens Corp., 105 AD3d 510 [1st Dept 2013] ("The motion court properly dismissed the portion of plaintiff's claim based on the temporary use of airspace to hang scaffolding while installing signs in the past as de minimis. Defendants could have sought a license for the use of airspace during the installation of each sign (see RPAPL 881). At that time, if appropriate, plaintiff could have requested injunctive relief.")

Chiu Cheuk Chan v 28-42 LLC, 22 Misc 3d 1110(A) [Sup Ct 2009] ("In the instant case, defendants do not dispute the allegations of trespassing upon plaintiffs' property as well as the damage to the abutting concrete walkway albeit for the stated purpose of carrying out a construction project on their own property. Defendants acknowledge that RPAPL 881 provides a mechanism for adjoining landowners to seek court intervention to make improvements to their premises which by necessity require entry on to a neighboring property, when permission to do so has been refused. Upon the institution of a special proceeding, a court in an appropriate case, may grant a license upon such terms as are just. (*See, McMullan v. HRH Constr., LLC,* 38 AD3d 206 [2007]; *Matter of Broadway Enters. v. Lum*, 16 AD3d 413 [2005].) Here, as in McMullan, defendants have declined to pursue available legal remedies. Defendants have instead unilaterally entered plaintiffs' property, destroyed a concrete walkway, removed a fence, caused a temporary shutdown of electricity and left construction materials and debris. Plaintiffs have, therefore, established a clear right to relief (*McMullan v. HRH Constr., LLC* at 206) which is not ameliorated by defendants' declaration that they are responsible for all damages incurred and have adequate insurance.")

22 Irving Place Corp. v 30 Irving LLC, 57 Misc 3d 253, 257 [Sup Ct 2017] ("Based upon the circumstances in this matter, the Court declines to "convert" this matter. Further, if the Court were to convert this matter, the Court would find that just terms require that no license fee be imposed. First, the Court finds that defendant has acted in good faith and has erected the sidewalk shed not because it simply wished to perform repairs, but because it was required to do so. The regulation that requires the sidewalk bridge, specifically requires that certain cutouts and provision for access be made. The regulation clearly made provision for the avoidance of interference and required the sidewalk shed to be extend 20 feet

towards and within one inch of an adjacent building, without requiring any form of compensation. Further, in seeking the conversion, plaintiff has not specified any damages that it will suffer. The fact that the shed is built on the portion of the public sidewalk that is within plaintiff's property line is without consequence as that portion is traveled on by the public, utilized by the public and plaintiff has not claimed that it has lost any use of that area. Thus, plaintiff has no loss of enjoyment to its property.")

Reasonable measures must be taken to protect the adjacent property

Mindel v Phoenix Owners Corp., 210 AD2d 167 [1st Dept 1994] ("We adopt a standard of reasonableness in concluding that defendant is prepared to do all that is feasible to avoid injuries resulting from its entry upon plaintiffs' properties.")

Bd. of Managers of Artisan Lofts Condominium v Moskowitz, 114 AD3d 491, 492 [1st Dept 2014] ("In determining whether or not to grant a license pursuant to Real Property Actions and Proceedings Law § 881, courts generally apply a standard of reasonableness.")

Queens Coll. Special Projects Fund, Inc. v Newman, 154 AD3d 943, 944 [2d Dept 2017], lv to appeal denied, 31 NY3d 901 [2018] ("The factors which the court may consider in determining the petition include the nature and extent of the requested access, the duration of the access, the protections to the adjoining property that are needed, the lack of an alternative means to perform the work, the public interest in the completion of the project, and the measures in place to ensure the financial compensation of the adjoining owner for any damage or inconvenience resulting from the intrusion.")

MK Realty Holding, LLC v Scneider, 39 Misc 3d 1209(A) [Sup Ct 2013] ("The court must balance the competing interests of the parties and should issue a license when necessary, under reasonable conditions, and where the inconvenience to the adjacent property owners is outweighed by the hardship of their neighbors if the license is refused.")

2225 46th St., LLC. v Giannoula Hahralampopoulos, 55 Misc 3d 621, 624 [NY Sup 2017] ("In this regard, it must be remembered that section 881 compels a property owner to grant access for the benefit of another. The respondent to an RPAPL 881 petition has not sought out the intrusion and does not derive any benefit from it. The court must be mindful of the fact that it is called upon to grant access after the parties have failed to reach an agreement, and must not allow either party to overreach and use the court to avoid negotiating in good faith.")

23-31 Astoria Blvd v Villegas, 60 Misc 3d 1217(A) [Sup Ct 2018] ("Nonetheless, the court is not limited to requiring bonds and insurance to ensure that the petitioner will able to compensate Respondent for any damage. Justice also requires that the terms of the license provide for safeguards to prevent damage from occurring (*537 West 27th St. Owners LLC v. Mariners Gate LLC*, 2009 NY Slip Op. 32360(U), 2009 WL 3400277 [Sup. Ct NY County]).")

N. 7-8 Inv'rs, LLC v Newgarden, 43 Misc 3d 623, 628 [Sup Ct 2014] ("The risks and costs involved in the use that a Petitioner makes of its neighbor's property should be wholly borne by the Petitioner. Equity requires that the owner compelled to grant access should not have to bear any costs resulting from the access, including steps necessary to safeguard their property.")

Rosma Development, LLC, LLC v South, 5 Misc 3d 1014(A) [Sup Ct 2004] ("Therefore, the court concludes that petitioners should be entitled to exercise their statutory right to gain the necessary access in order to proceed with the construction project without unreasonable interference (*see Matter of Massa v. City of Kingston*, 235 A.D.2d 947, 949 [1997]). Respondents may not be permitted to frustrate petitioners' plans to develop their land when, in the balancing of the interests involved, the inconvenience and any resultant damages to respondents can be remedied (*see Sunrise Jewish Ctr. of Valley Stream*, 61 Misc.2d at 676).")

License fees

DDG Warren LLC v Assouline Ritz 1, LLC, 138 AD3d 539, 539-40 [1st Dept 2016] ("Although the determination of whether to award a license fee is discretionary, in that RPAPL 881 provides that a "license shall be granted by the court in an appropriate case upon such terms as justice requires" (emphasis added), the grant of licenses pursuant to RPAPL 881 often warrants the award of contemporaneous license fees (*see e.g. Columbia Grammar & Preparatory Sch. v 10 W. 93rd St. Hous. Dev. Fund Corp.*, 2015 NY Slip Op 31519 [U] [Sup Ct, NY County Aug. 13, 2015]; *Snyder v 122 E. 78th St. NY LLC*, 2014 NY Slip Op 32940[U] [Sup Ct, NY County 2014]; *Matter of North 7-8 Invs., LLC v Newgarden*, 43 Misc 3d 623 [Sup Ct, Kings County 2014]; *Ponito Residence LLC v 12th St. Apt. Corp*., 38 Misc 3d 604 [Sup Ct, NY County 2012]; *Matter of Rosma Dev., LLC v South*, 5 Misc 3d 1014[A], 2004 NY Slip Op 51369[U] [Sup Ct, Kings County 2004]). After all, "[t]he respondent to an 881 petition has not sought out the intrusion and does not derive any benefit from it . . . Equity requires that the owner compelled to grant access should not have to bear any costs resulting from the access" (*North 7-8 Invs*., 43 Misc 3d at 628; see also *Matter of 25 Tenants Corp. v 7 Sutton Sq., LLC*, 2015 NY Slip Op 30526[U], *3 [Sup Ct, NY County 2015]).")

10 E. End Ave. Owners, Inc. v Two E. End Ave. Apt. Corp., 35 Misc 3d 1215(A) [Sup Ct 2012] ("While RPAPL provides that the court may issue a license "upon such terms as justice requires", this court does not construe such provision to warrant the imposition of a monetary license fee or award to the licensor, in exchange for access, given that, the statute speaks to monetary damages separately later in the statute, and limits such damages to "actual damage occurring as a result of the entry".")

N. 7-8 Inv'rs, LLC v Newgarden, 43 Misc 3d 623, 633-34 [Sup Ct 2014] ("One unreported decision has held that RPAPL 881 does not authorize the imposition of a fee as a condition of a license. *10 East End Owners Inc. v. Two East End Ave Apartment Corp*., 35 Misc.3d 1215(A) 951 N.Y.S.2d 2 84 (Sup.N.Y.2012). The court in 10 East End Owners, held that the language in the statute that a license shall be granted "upon such terms as justice requires" does not warrant imposition of a license fee. Id at *3. The Court reasoned that the statute provided for damages but limited them to actual damages occurring as a result of the entry. Id at *3.

However, this analysis ignores the fact the recovery for actual damages and a license fee compensate two entirely different things. Unlike damages, a license fee compensates the owner for the use the Petitioner makes of their property and their temporary loss of enjoyment of a portion of their property.

Further, the Court in *10 East End Owners*, distinguished the decision in the *Matter of Rosma*, on the grounds that in *Rosma* involved a "voluntary project by a developer erecting a new structure", while in the case before it the petitioner was seeking access because it was required, by NYC Local Law 11 of 1998, to undertake the repairs which necessitated access. Id. The present case involves a voluntary project by a developer to build a new building, and thus is distinguishable from the facts in *10 East End Owners*.")

Rosma Dev., LLC v South, 5 Misc 3d 1014(A) [Sup Ct 2004] ("[T]he court is mindful of the resultant inconvenience to respondents, it finds that respondents should receive compensation for petitioners' utilization of their property during the time period of the license in a fair and equitable sum as set forth below. Additionally (as herein below stated), respondents shall have the remedy of damages, and other terms and conditions, including the maintenance of substantial insurance coverage, must be imposed."

Bond and Insurance

DDG Warren LLC v Assouline Ritz 1, LLC, 138 AD3d 539, 540 [1st Dept 2016] ("The court had the authority to order a bond (*see e.g. North 7-8 Invs*., 43 Misc 3d at 633), even though respondents were covered by petitioner's insurance (*see 125 W. 21st LLC v ARC Assoc. GP LLC*, 2007 NY Slip Op 31658 [U], [Sup Ct, NY County 2007]).")

Attorney's and Engineer's fees

Firemen's Ass'n of State of New York v 99 Washington, LLC, 73 AD3d 1320, 1322-23 [3d Dept 2010] ("As we will avoid construing an agreement in a manner that would produce "unreasonable or unfair results" (*Barrow v Lawrence United Corp.*, 146 AD2d 15, 20 [1989]), and we find that an alternate construction would create *1323 such an injustice in this case, we agree with Supreme Court that the requirement that plaintiff prevail in the litigation may be reasonably inferred (*see generally Corrigan v Breen*, 241 AD2d 861, 863 [1997]; *A. J. Cerasaro, Inc. v State of New York*, 97 AD2d 598, 598-599 [1983]).") ("it appears undisputed that defendants made every effort to complete the project in a timely manner, including expending hundreds of thousands of dollars in overtime. Indeed, the relatively minor delay in completing the air space phase of the project apparently stemmed from weather conditions and safety concerns; plaintiff has not alleged that it was the result of any negligence of defendants. By the time the first court order was issued in this action, defendants had completed the air space work and were back on schedule within the time frame of the license agreement to vacate the parking area, rendering plaintiff's requested relief moot. As we view plaintiff's decision to commence this action to have been unnecessary under the circumstances and, therefore, unreasonable, we will not interfere with Supreme Court's decision to deny counsel fees.")

Van Dorn Holdings, LLC v 152 W. 58th Owners Corp., 149 AD3d 518, 519 [1st Dept 2017] ("Supreme Court also did not abuse its discretion in granting respondents attorneys' and engineers' fees. "A property owner compelled to grant a license should not be put in a position of either having to incur the costs of a design professional to ensure petitioner's work will not endanger his property, or having to grant access without being able to conduct a meaningful review of petitioner's plans" (*Matter of North 7-8 Invs.*, 43 Misc 3d at 630).")

North 7-8 Investors, LLC v Newgarden, 43 Misc 3d 623, 630 [Sup Ct 2014] ("A property owner compelled to grant a license should not be put in a position of either having to incur the costs of an design professional to ensure Petitioner's work will not endanger his property, or having to grant access without being able to conduct a meaningful review of Petitioner's plans. Justice in this case requires that Petitioner pay the Respondent's architects reasonable fees incurred in reviewing Petitioner's plans and making counter proposals, as well as ongoing monitoring of the work during the term of the license.")

N. 7-8 Inv'rs, LLC v Newgarden, 43 Misc 3d 623, 631 [Sup Ct 2014] ("RPAPL 881 authorizes that Court to grant the license on such terms as justice requires. This language is broad and allows for the flexibility and full scope upon which equity depends. It is sufficient statutory authority to award reasonable attorney fees as a condition of a license, where the circumstances warrant it.

Respondent's request for attorneys' fees, both for negotiating a proposed license agreement, and for opposing the this petition, is not based on being the prevailing party in this action. The attorneys' fees are sought as a condition of license rather than as an incident of litigation.

Respondent's opposition to the Petition was that he has not refused Petitioner access, but that Petitioner had refused to agree to reasonable terms for the license, to protect Respondent's property and to reimburse him for costs he would in incur because of the license. The attorneys' fees incurred in opposing the petition in this case are not an incident of litigation but a continuation of the process of negotiating a license agreement.")

Resultant damages must be proven

E. 77 Owners Co, L.L.C. v King Sha Group, Inc., 40 Misc 3d 1205(A) [Sup Ct 2013] ("Where a building is damaged by the negligent removal of lateral support by its neighbor, as here, the proper measure of damages is "reasonable cost of restoration," including the cost of repairs and "reasonable value of the services of engineers employed to ascertain the extent and cause of the injury." 1 N.Y.Jur.2d Adjoining Landowners § 33 (2013). Owners are also entitled to loss in rental

value during the time repairs are being made. 36 N.Y.Jur.2d Damages § 77.")

Wohl v Fequiere, 104 AD3d 861, 862 [2d Dept 2013] ("appellant failed to establish any damages resulting from the petitioner's entry upon the appellant's real property pursuant to an order granting the petitioner a license to enter and make improvements to that real property.")

Van Dorn Holdings, LLC v 152 W. 58th Owners Corp., 149 AD3d 518, 519 [1st Dept 2017] ("However, we modify so much of the order as imposed a $500 daily penalty on petitioner for each day beyond the license term that work is not completed, to instead allow respondents, if the work is not completed within the license period, to move for a determination of the proper amount of any penalty, or increase or continuation of the licensing fee, or any other relief available to them.")

PB 151 Grand LLC v 9 Crosby, LLC, 58 Misc 3d 1219(A) [Sup Ct 2018] ("Given the speculative nature of the claims, and since the work will not proceed pursuant to the schedule respondent had contemplated, the issue of whether respondent sustains damages as a direct result of the issuance of the license (and is thus entitled to reimbursement pursuant to section 881), as well as the amount of actual damages sustained, must await the conclusion of the license period, at which time a Special Referee shall make such determination based on the rules of evidence.")

License cannot create an encroachment or direct affirmative injunction against neighbor

AREP Fifty-Seventh, LLC, v PMGP Assoc., L.P., 101 AD3d 440, 441 [1st Dept 2012] ("In this proceeding, petitioner sought a license directing that respondent remove a five-foot section of a sidewalk construction bridge, properly placed in front of petitioner's property, to allow petitioner to erect a crane for its construction project. The court erred in granting the petition. RPAPL 881, the means by which a landowner seeking to make improvements or repairs to its property may seek a license to enter an adjoining landowner's premises when those improvements or repairs cannot be made without such entry, has no application here. Petitioner did not seek a license for "entry" onto respondent PMGP's "premises"."")

Broadway Enterprises, Inc. v Lum, 16 AD3d 413, 414 [2d Dept 2005] (underpinning of a foundation on the respondents' premises could constitute a permanent encroachment, and the court denied the application in order to explore alternative methods of construction that the petitioner could utilize in constructing its property).

Foceri v Fazio, 61 Misc 2d 606, 608 [Sup Ct 1969] ("This petitioner seeks a license to create an encroachment now not in existence. The relief sought transcends the statute and, even though the encroachment be deemed slight, it is contrary to elementary principles of equity. (*Moran v. Gray*, 257 App.Div. 999, 13 N.Y.S.2d 581; *St. Vincent's Orphan Asylum v. Madison Warren Corp*., 225 App.Div. 379, 380, 233 N.Y.S. 364, 365.) A court cannot sanction the performance of such an unlawful act.")

McLennon v Serv. 31 Corp., 9 Misc 3d 1109(A) [Sup Ct 2005] ("RPAPL 881 only provides for temporary license to enter another's property to perform work on one's own property. It does not allow for an owner to encroach on the adjoining property")

Standard Realty Associates, Inc. v Chelsea Gardens Corp., 105 AD3d 510 [1st Dept 2013] ("Defendants' submissions show that the western wall of defendant Chelsea's building was leased to a nonparty for the purpose of posting an advertising sign, which protruded into plaintiff's airspace without plaintiff's consent or permission. While the encroachment of the four-inch bolts and the advertising sign is small, it remains a trespass where defendants are liable for the use of plaintiff's property rights (cf. *Sakele Bros. v Safdie*, 302 AD2d 20, 27 [1st Dept 2002]; *Salesian Socy. v Village of Ellenville*, 121 AD2d 823, 824 [3d Dept 1986]). We reject defendants' contention that dismissal of the trespass claim was warranted because the encroachment of four inches was minimal. An invasion of another's property or airspace need not be more than de minimis in

order to constitute a trespass (cf. *Hoffmann Invs. Corp. v Yuval*, 33 AD3d 511, 512 [1st Dept 2006]; *Wing Ming Props. [U.S.A.] v Mott Operating Corp.*, 172 AD2d 301 [1st Dept 1991], affd 79 NY2d 1021 [1992]).")

Sample Order granting License

Taken from *Rosma Dev., LLC v South*, 5 Misc 3d 1014(A) [Sup Ct 2004]:

Accordingly, petitioners are hereby granted a license, pursuant to RPAPL 881, to enter upon a portion of respondents' land for the limited purpose of erecting sidewalk bridging, which will abut approximately ten feet onto the sidewalk in front of respondents' real property, and certain protection on the roofs of respondents' property, pursuant to the copies of the proposed bridge plans and roof plans as set forth in the petition. The granting of such license is subject to the following terms and conditions:

(1) petitioners shall be entitled to such license for a period of 12 months, commencing upon the entry of this order and judgment,

(2) petitioners are directed to pay the sum of $2,500 per month to respondent, and the same sum to respondents, jointly, until the work under the license is completed,

(3) petitioners shall not unreasonably interfere with respondents' necessary access to their fire escape or their access to their chimney, and shall take the necessary steps, measures, and precautions to prevent and avoid any further damage to the backyard of respondents; petitioners shall remove and cure any issued and outstanding violations,

(4) petitioners shall notify respondents in writing when they have completed the work under the license,

(5) upon the completion of the term of the license, respondents' land within such license area shall be returned to its original condition, and all materials used in construction and any resultant debris shall be removed from the license area,

(6) petitioners shall save respondents harmless for any damages occurring within the license area, during the period of this license, and a policy of liability insurance in an amount of not less than $2 million which names respondents as additional insureds shall be maintained by petitioners during the period of this license,

(7) petitioners shall be held liable to respondents for any damages which they may suffer as a result of the granting of this license and all damaged property shall be repaired at the sole expense of petitioners. A hearing shall be held before this court at the expiration of the term of the license granted herein to determine the actual damages incurred by respondents as the result of petitioners' entry upon respondents' land pursuant to said license. Alternatively, respondents may submit any present or future claim for damages directly to petitioners' insurer, without prejudice to their rights to later seek damages before the court, and

(8) any such other terms and conditions that petitioners and respondents may agree to in writing.

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Please feel free to contact me with any questions.

— *Richard A. Klass*