# Court Allays Tensions in Underpinning Dispute

**By Virginia K. Trunkes** | August 13, 2019

For years, New York developers, particularly in New York City, have faced a legal quagmire when needing access to adjacent properties in order to safely perform excavation or other below-ground structural work. A developer that compromises the foundations of neighboring properties is strictly liable for the resultant damages. Underpinning is a method used to prevent that from occurring. Underpinning reinforces and stabilizes a foundation and enables it to withstand heavier weights above ground.

Despite the strict liability imposed on a developer, until recently Appellate Division precedent indicated that a statute commonly used to compel licensed access to neighboring properties could not be used to compel a neighbor's consent to underpinning. A new dispute has prompted the Supreme Court to give a much-needed fresh, new look at the case law and relevant statutory and regulatory framework. But whether this new Supreme Court decision serves as a victory for every developer is now a new question.

**An RPAPL §881 License and Its Reach.** Under New York's Real Property Actions and Proceedings Law (RPAPL) §881, a landowner intending to make improvements or repairs to its property may seek from the court a license to enter an adjoining landowner's property if access is necessary to effectuate the improvements or repairs. Section 881 provides, in full, that:

> [w]hen 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.

(emphasis added). RPAPL §881 reflects the well-founded principle that where a party has permits approved by the Department of Buildings (DOB) to begin construction, adjoining landowners "cannot derail such 'as of right' development by withholding their permission to access their property." *Rosma Dev. v. South*, 2004 WL 2590558, at * 3 (Sup. Ct., Kings Co. Oct. 19, 2004). Thus, the statute gives the developer the remedy to obtain a court-ordered license to access a neighbor's property.

In the law, a license is considered a grant of permission to perform some act which, without such authorization, would be either illegal or a tort—such as trespass. It is often contrasted with the term "easement," which is the right of one property owner to make use of the land of another, and which is considered permanent, versus a license, which is considered at the will of the licensor, or temporary.

RPAPL §881's inclusion of the word "license" has resulted in appellate courts' interpretation that the statute was created to permit *temporary* access, versus a more permanent encroachment like underpinning. See, e.g., *Broadway Enterprises v. Lum*, 16 A.D.3d 413 (2d Dep't 2005) (holding that underpinning is an impermissible permanent encroachment not allowed under

RPAPL §881). This interpretation has created a real dilemma for some New York City developers that intend on performing excavation.

**The NYC Building Code's Requirements for Excavation and Reference to RPAPL §881.**Pursuant to the New York City Building Code §3309.4, a developer or owner "who causes an excavation or fill to be made shall, at all times and at his or her own expense, preserve and protect from damage any adjoining structures ... ." Section 3309.5, which pertains to underpinning specifically, likewise provides that "[w]henever underpinning is required to preserve and protect an adjacent property from construction or excavation work, the person who causes the construction or excavation work shall [do so] at his or her own expense ... ." Thus, there is no question that absolute liability and the duty to protect falls on parties whose excavation work damages an adjoining property, "rather than those whose interest in adjoining property is harmed by the work." *Madison 96th Associates*.

That said, both §§3309.4 and 3309.5 contain the caveat "provided such person is afforded a license ... to enter and inspect the adjoining buildings and property, and to perform such work thereon as may be necessary for such purpose ... ." This principle was the basis of the decision in *Madison 96th Associates v. 17 East 96th Owners*, 121 A.D.3d 605 (1st Dep't 2014). When reversing the Supreme Court's order granting dismissal of a neighbor's trespass claims relating to underpinning, the Appellate Division held that the developer "did not have the right, in the absence of an agreement with 17 East Owners, to erect permanent structures extending beyond the property line, either above or below the surface, and thus encroaching on 17 East Owners' property."

Building Code §3309.2 as well emphasizes that a license is necessary to enter adjoining property even to protect it. Notably, the section then references RPAPL §881 in stating: "Nothing in this chapter shall be construed to prohibit the owner of the property undertaking construction or demolition work from petitioning for a special proceeding pursuant to [RPAPL §881]." But nothing in the Building Code explicitly confirms that underpinning is one of the methods for which the statutory license may be sought.

There is likely a presumption that underpinning will be the appropriate method to protect an adjacent property during excavation. Building Code §1814.1 provides, in relevant part, that "[w]here the protection and/or support of a structure or property adjacent to an excavation is required, ... [t]he engineer shall determine the requirements for underpinning or other protection ... ." (There is, incidentally, an alternative method known as a "secant wall," but the need to install it with a large drill rig, which drills holes into the subsurface, coupled with the tendency to value every extra square foot at a premium, often makes it incompatible in urban areas with tight spaces.) Yet, until recently, the minimal case law in this area has prevented developers from using RPAPL §881 to obtain an order permitting underpinning on a neighbor's property.

**The Jurisprudence's Hidden Exception Authorizing RPAPL §881's Use for Permanent Encroachments.** Meanwhile, in light of the exact language used by the court in *Broadway Enterprises*, there was always the possibility that an exception existed to permit court-ordered underpinning. In its only rationale for affirming the Supreme Court's order, the Appellate Division wrote: "The Supreme Court properly denied the petition since the underpinning could constitute a permanent encroachment, *and* there are alternative methods of construction that the petitioner may utilize in constructing its property" (internal citations omitted, emphasis added). Thus, the court's use of the conjunctive "and" versus the disjunctive "or" always left open the possibility that were a developer to demonstrate that one of the criteria could be met, i.e., that there is no viable alternative, even though the trespass would be a permanent encroachment, that would satisfy the test to obtain a license to perform underpinning. Indeed, when, in *Matter of Tory Burch v. Moskowitz*, 146 A.D.3d 528 (1st Dep't 2017), the Appellate Division held that the Supreme Court should *not* have granted an RPAPL §881 license to perform underpinning— aside from noting that this method of protection is a permanent encroachment—it determined that "[t]he 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 ... ."

An untested argument had thereafter been that the purpose of the license is to temporarily permit a developer to access the adjacent property during the underpinning, which a developer is obligated to do to protect the adjacent property so long as underpinning is "required" to do so. In fact, regardless of one's understanding of how the term "license" is commonly used, nothing in RPAPL §881 explicitly restricts its application to temporary encroachments or precludes a license for a permanent encroachment. It simply provides that the circumstances must be "appropriate," and the terms of the license must be "just."

Indeed, in *Chase Manhattan Bank (Nat. Ass'n) v. Broadway, Whitney Co.*, 57 Misc.2d 1091 (Sup. Ct., Queens Co. 1968), aff'd sub nom., *Chase Manhattan Bank v. Broadway, Whitney Co.*, 24 N.Y.2d 927 (1969), the first reported case involving the construction of the just-enacted §881, the court granted a license to enter an adjoining property pursuant to the then-version of Building Code §3309.4, which regulation the Supreme Court understood as serving the "purposes of shoring up to prevent caving before permanent supports are provided." Id. at 1094. The court underscored the materials of the Law Revision Commission (Legislative Document, 1966, No. 65(B), (20)), in which the Commission justified its decision to support the statute's enactment by quoting the Building Code. Id. at 1094. The court also noted the Commission's additional reference "to the doctrine of 'private necessity' adopted in numerous jurisdictions, authorizing entry upon private premises in cases of necessity." Id. And, further supporting its award to the petitioner, the court observed the following rationale used in *McCann v. Chasm Power Co.*, 211 N.Y. 301, 304 (1914):

> (W)hen one without right attempts to appropriate the real property of another by acts or results which will create an easement or ripen into a permanent right, a court of equity will compel the trespasser to undo as far as possible what he has wrongfully done. This rule, however, is *not rigid*. There are many authorities declaring and applying *exceptions* to it. *** The ownership of property will be protected *unless there are other considerations which forbid, as inequitable, the remedy of the prohibitive or mandatory injunction.* A court of equity can never be justified in making an inequitable decree. If the protection of a legal right even would do a plaintiff but comparatively little good and would produce great public [o]r private hardship, equity will withhold its discreet and beneficent hand and remit the plaintiff to his legal rights and remedies.
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> Id. at 1095 (emphasis added).

Thus, both the fact that the Building Code required the entry and that entry was necessary, coupled with the rationale of the Law Revision Commission and settled jurisprudence, merited the *Chase Manhattan Bank* court's use of RPAPL §881 to permit the shoring work to proceed over the adjoining owner's objection. The problem in thereafter relying on Chase Manhattan Bank for underpinning access, however, was that the actual shoring work proposed to be performed was waterproofing and repointing the exterior brick work of the petitioner's building's wall, not underpinning its neighbor's building's wall, which is more intrusive. Although arguably a distinction without a difference in the case of a "party wall," this fact has no doubt stifled developers' licenses ever since.

**Revisiting the Jurisprudence's Hidden Exception.** The recent case of *CUCS Housing Development Fund Corp. IV v. Clifford S. Aymes* (Sup. Ct., N.Y. Co., 2019 NY Slip Op 30450(U)) offers hope that RPAPL §881 *can* be used to effect underpinning, although developers need to be aware of its limitations. The petitioner was a not-for-profit organization that develops affordable housing with integrated health and social services for low-income individuals and families. It explained the structural bases for why it needed to perform underpinning in order to begin constructing its building. It proffered testimony that other alternatives, such as sheet piling, were inappropriate, i.e., sheeting would be more intrusive and dangerous, as it would cause excess vibrations to the neighbor's already unstable property.

Citing much of the above case precedent, the court interpreted it as permitting underpinning so long as a petitioner demonstrates that it is "virtually 'unavoidable,'" which in *CUCS Housing* was the case because "[t]he options respondent's expert suggested are not actual options." The court explained that it did "not read the case law to preclude a license for a permanent encroachment altogether." It reasoned that "[s]uch an interpretation runs counter to the language of RPAPL §881 that allows for an encroachment 'as justice requires,'" and further, "the DOB's regulations (§§3309.2 and 3309.5), when read together, clearly anticipate a legal proceeding under RPAPL §881 to obtain a license for an underpinning."

Notwithstanding this perceived victory for developers, they should remain leery about employing RPAPL §881 for underpinning permission. To justify its possible disregard of appellate case law, after distinguishing it, the *CUCS Housing* court used three paragraphs to cite stark statistics of the city's homelessness epidemic, with the emphasis on the petitioner's objective in providing affordable housing. In contrast, the court noted that the adjacent property was vacant, and that the owner's refusal of the access was based solely on, "'I don't have to have a reason ... I just don't want underpinning.'"

**CONCLUSION**

Statistically speaking, it is not likely that the next developer to seek underpinning consent through RPAPL §881 will have as noble an objective as affordable housing with supportive services. It is also not likely that the next neighbor to refuse access for underpinning will lack any articulable justification. So a court's decision on whether to grant a statutory license to perform underpinning may involve a more complicated analysis.

It is often said that cases are won on either good law or good facts—rarely do litigants have both. Before relying on RPAPL §881 to seek underpinning permission, *CUCS Housing* is a reminder that developers should carefully scrutinize where their facts stand.

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