

**FILED & RECORDED
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COUNTY CLERK
QUEENS COUNTY**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Present: **HONORABLE CHEREÉ A. BUGGS**

Justice

-----X
In the Matter of the Application of:

BEACH 21ST LIMITED PARTNERSHIP, BEACH 21ST
AFFORDABLE, LLC, and TCB FAR ROCKAWAY
HOUSING DEVELOPMENT FUND CORPORATION,

Petitioners,

For an Order and Judgment pursuant to Section 881 of
the Real Property Actions and Proceedings Law for
access to adjoining property,

-against-

1025 BEACH LLC,

Respondent.
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IAS PART 30

Index No.: 712401/2020

Motion

Date: November 18, 2020

Motion Cal. No.: 8

Motion Sequence Nos.: 1

DECISION/ORDER

This is a special proceeding brought on by Petitioners’ Order to Show Cause, seeking relief pursuant to Real Property Action and Proceedings Law (RPAPL) §881. In this action, Petitioners seek to obtain a license or permission to enter upon the adjoining property located at 1025 Beach 21st Street, Far Rockaway, New York and designated in the Tax Map of the City of New York as Block 15705, Lot 81. Petitioners seek access to the Respondent 1025 Beach LLC’s (hereinafter “Respondent”) property in furtherance of a construction project which it has undertaken on its property located at 1047 Beach 21st Street, Far Rockaway, New York, and designated in the Tax Map of the City of New York as Block 15705, Lots 59 & 69.

Petitioners are engaged in the construction of affordable housing units at the subject location. Respondent is the owner of the adjoining property at 1025 Beach 21st Street, which operates as a Best Western Hotel. In his affidavit in opposition to Petitioner’s papers, Tejpal Sandhu, the managing member of Respondent limited liability company, said Respondent “...is not attempting to prevent Petitioner from taking reasonable and necessary steps to develop their new building...” but instead, seek to have “...Petitioners...perform construction in a reasonable manner that does not unnecessarily interfere with the use and enjoyment of...” Respondent’s property.

The parties disagree about the type of scaffolding which should be used for the construction, and about access fees to be paid from the Petitioner to the Respondent.

Pursuant to an Order of the undersigned dated December 14, 2020, a hearing was held on January 27, 2021 to make a determination on Petitioner's request for relief. Benjamin Fox Tracy, Esq., of Braverman Greenspun, P.C. appeared for Petitioners; Michael Caruso, Esq., of Michael V. Caruso, P.C. appeared for Respondent. Petitioners' witnesses were Peter Simon ("Simon"), a certified safety professional who has provided consulting services on the subject building project; and Jesse Batus ("Batus"), senior project manager with The Community Builders, the project developer. Testifying for Respondent was the aforementioned Tejpal Sandhu ("Sandhu").

Granting of Licenses Under RPAPL §881

RPAPL §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.

In considering the granting of a license under RPAPL §881, "courts generally apply a standard of reasonableness" (*Mindel v. Phoenix Owners Corp.*, 210 A.D.2d 167 [1st Dept 1994]) Further, the Court "...should issue a license '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'" (*Chase Manhattan Bank v. Broadway, Whitney Co.*, 57 Misc 2d 1091 at 1095 [Sup Ct, Queens County 1968], *aff'd* 24 NY2d 927 [1969]). The factors which the court may consider...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" (*Queens College Special Projects Fund, Inc. v Newman*, 154 AD3d 943 at 944 [2d Dept 2019] [internal citations omitted]).

According to the Batus' affidavit in opposition to respondent's counterclaim, the purpose of the project is to create 224 affordable housing units, along with a job training center and a day care center. A regulatory agreement attached as Exhibit A of the Order to Show Cause reflects that a portion of the project cost is underwritten by the New York City Housing Development Corp (a

public benefit corporation) and the Department of Housing, Preservation and Development, a New York City agency. The project, part of a revitalization effort of the downtown Far Rockaway area, was originally slated to last for eighteen (18) months, but Petitioners now say it can be completed within twelve (12) months.

Certified public safety professional Simon testified about the safety measures the Petitioners must take during the construction, including the erection of New York City Building Code-mandated overhead and roof protections in the form of sidewalk sheds. Respondent managing member Sandhu testified that cantilevered or needle scaffolding would be a less intrusive form of protection, in that it does not require anchoring to the ground on his property, but is affixed on the building façade. Simon testified that the sidewalk shed protection is required by the Building Code for the specifications of the project. Notwithstanding Sandhu's testimony about his own experience in using cantilevered scaffolding in building projects, at the hearing, the Court recognized Simon as an expert in building safety matters, and finds him to be more knowledgeable about what kind of scaffolding must be employed in the construction of the instant affordable housing project.

Sandhu states that he will lose two parking spaces as a result of the scaffolding; Petitioners' attorney Mr. Fox stated on the record at the outset of the hearing that Petitioners will configure the scaffolding in such a way to avoid or minimize any issues Respondent has with parking spaces because of the scaffolding. In his affidavit in opposition to Petitioners' papers, Sandhu also claims that "...the overhead protections and pipe scaffolding installed block the views out of the windows from several rooms in the hotel."

License Fees

Although RPAPL contemplates only actual damages arising from entry upon the adjoining premises, an appellate court has given its approval to license fees, notwithstanding the lack of any statutory provision: "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..." (*DDG Warren LLC v Assouline Ritz, LLC, et al.*, 138 AD3d 539 at 540 [1st Dept 2016][internal citations omitted]).

Petitioners and Respondent entered into an interim six-month agreement in August 2020 which, among other things, set license fees at \$8,000 per month. The interim agreement ends February 6, 2021. The second paragraph of the License Fee section of the agreement reads as follows:

The License Fee is hereby agreed upon by Project Owner due to the urgent need for the Adjacent Premises Access in order to complete the affordable housing project in a timely manner and avoid delays costs that would adversely affect the public fisc. *Project Owner disputes the reasonableness of the License Fee and is entering into this Agreement without prejudice to its right to seek a court-ordered license for any additional access upon reasonable terms and conditions* (emphasis added),

Sandhu, in both his opposing affidavit, and his hearing testimony, relates that his companies have at times paid more than \$20,000 month for license fees during construction. In his affidavit, he references the financing the Petitioners have received for this affordable housing project (“approximately \$95 million”). In his testimony, he likewise refers to funds available to petitioners—as if the amount of funding is a basis to determine what license fee he should be paid. Sandhu gives no other rationale for why a license fee paid to him should be in any specific amount.

However, what the Court must consider in determining a license fee amount is that such 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” (*North 7-8 Investors, LLC v Newgarden*, 43 Misc.3d 623 at 634 [Sup Ct, Kings County 2014]). What Sandhu might have paid for license fees in unrelated matters, and that Petitioners have a particular amount of funding for the project (deriving primarily from taxpayer dollars) are of no moment in the Court’s determination of the amount of a license fee.

The Court notes that precedent in which license fees have been considered grant far more modest sums than the \$8,000 in the interim agreement (*see PB 151 Grand LLC v 9 Crosby LLC*, 58 Misc3d 1219 [A] [Sup Ct, Kings County 2018]; *North 7-8 Investors* 43 Misc.3d 623; *Ponito Residence LLC v 12th St. Apt. Corp.*, 38 Misc3d 604 [Sup Ct, New York County 2012]; *Matter of Rosma Dev. LLC*, 5 Misc3d 1014 [A] [Sup Ct, Kings County 2004]).

Counterclaim

In Respondent’s counterclaim, it seeks “...\$8,000 per month until completion of the development project on the Premises and for damages attributable to the devaluation and impairment of the marketability of the Adjoining Premises believed to exceed \$100,000...” as well as costs, disbursements and attorney’s fees for the action herein.

Respondent’s effort to incorporate damages into the license fee, however, “ignores the fact that recovery for actual damages...and a license fee compensate two entirely different things” *PB 151 Grand LLC*, 58 Misc3d 1219 citing *North 7-8 Investors*, 43 Misc.3d 623. (Even if damages could be considered in determining the amount of a license fee, the Court notes that Respondent offered no evidence to substantiate his request for \$8,000 monthly.)

Conclusion

Based on the evidence at the hearing and upon the papers submitted, the Court grants Petitioners a license under RPAPL §881 for a period of twelve (12) months, from February 7, 2021 to February 6, 2022. “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” (*MK Realty Holding LLC v Schneider*, 39 Misc3d 1209 [A][Sup Ct, Queens County 2013]). Additionally, one of the many factors to be weighed in considering whether to grant a license is “public interest in completion of the project” (*Queens College Special Projects Fund, Inc.* 154 AD3d 943). There is substantial public interest in the creation of affordable housing, particularly in the Far Rockaway area of Queens County.

The court also finds that petitioners have presented a strong case that the sidewalk shed scaffolding provides the necessary protections for the construction work and is compliant with the New York City Building Code.

Regarding a license fee, the Court grants a license fee to the Respondent in the amount of \$2,500 per month. While there will be inconvenience and intrusion that Respondent will bear during the construction, the degree of such inconvenience and intrusion does not merit the \$8,000 he is demanding.

As for Respondent's counterclaim, it is granted to the degree of allowing a license fee as stated above. The Court denies Respondent's request for costs and attorney fees for this proceeding, which was brought on by Respondent's unreasonable demands.

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED, that Petitioners are granted a license from February 7, 2021 to February 6, 2022 to enter onto Respondent's property to perform work adjacent to Respondent's building and to install scaffolding necessary to conduct such work, working to minimize the intrusion to Respondent's property; and it is further

ORDERED, that Petitioners are directed to pay Respondent a monthly license fee in the sum of \$2,500 for a period of twelve (12) months, from February 7, 2021 to February 6, 2022; and it is further

ORDERED, that if Petitioners do not complete their work adjacent to Respondents' property by February 6, 2022, then they shall apply for an extension of their license, which shall be granted only for good cause shown; and it is further

ORDERED, that Petitioners shall notify Respondent in writing when work has been completed and they have removed all protection from Respondent's property; and it is further

ORDERED, that Petitioners are solely responsible for the installation, maintenance, and removal of the temporary protection; and it is further

ORDERED, that at the completion of the term of the license, Respondents' property within the 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; and it is further

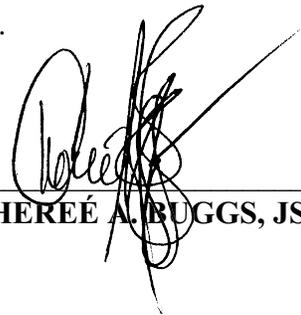
ORDERED, that for the period of the license or (or until completion of work, in the event construction is completed before the end of the license period), Petitioners shall continue to name Respondent as an additional insured on the insurance policies covering the Project, as set forth in the August 2020 interim agreement, and it is further

ORDERED, that Respondent's counterclaim is granted only to the extent of granting a license fee, which shall be in the sum of \$2,500 per month, and it further

ORDERED, that all other relief sought in Respondent's counterclaim is denied.

The foregoing constitutes the Decision and Order of the Court.

February 3, 2021



HON. CHEREÉ A. BUGGS, JSC

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