

STOP WORK ORDERS, LICENSES AND RPAPL SECTION 881

Prepared and Presented By:

Vincent T. Pallaci, Esq.

Kushnick | Pallaci PLLC

(631) 752-7100

vtp@kushnicklaw.com

Types of Stop Work Orders



Full Stop Work Order: All work on the construction site must immediately stop. This includes remedial work.

Partial Stop Work Order: Certain types of work or working on a certain area of the project is prohibited. Work on non-prohibited areas and non-excluded areas may continue.

Lifting a Stop Work Order

Step One: Correct the violating condition that caused the Stop Work Order to be issued. This may involve meeting with the plan examiner and other Building Department Officials.

Step Two: Request a re-inspection from the unit that issued the Stop Work Order so that remediation of the offending condition can be verified.

Step Three: Pay the applicable penalties and fines, if any. Note that this may involve attending a hearing.

Step Four: Contact the unit that issued the Stop Work Order and request that it be rescinded.

Stop Work Orders and “Major Buildings”

Section 3310.2 of the Building Code provides that a “major building” is one that:

- Is constructed at a height of 10 or more stories; or
- Is constructed to a height of 125 feet or more; or
- Has a lot coverage of 100,000 square feet or more (regardless of building height) ; or
- Is a building that has been designated a “major building” by the commissioner of buildings



Removing a SWO From a “Major Building”

In addition to the four steps involved with removing a Stop Work Order from any other building, when the building is designated as a Major Building, you must also certify correction of any outstanding ECB violations by submitting a Certificate of Correction to the Department of Buildings' Administrative Enforcement Unit.

The Certificate of Correction

- The Certificate of Correction is an affidavit attesting to the correction of any outstanding violations issued by the Environmental Control Board (“ECB”)
- Any of these individuals may sign the affidavit: the respondent named in the violation, the contractor, the building owner or the managing agent for the property (if a notarized letter of designation from the owner is presented)
- The affidavit must attest to when and how the work was completed and by whom. Photographs and copies of the proper permits may also be required.

Fines for Violating A Stop Work Order in NYC:

First Violation

• \$5,000.00

Subsequent Violations

• \$10,000.00
(in addition to first fine)

The Stop Work Order Patrol performs random rolling visits to NYC sites that have been issued Stop Work Orders.



Orders to Vacate

- The NYC Administrative Code authorizes the Commissioner of Buildings to order any building that he or she deems dangerous to public health, life or property to be vacated and sealed.
- Ignoring a vacate order or negligently failing to prevent or prohibit the occupancy or use of a building that has been ordered to be vacated may result in a civil penalty of **up to one million dollars** if someone suffers serious physical injury or death as a result of the use or occupancy of the building
- If more than one person suffers serious physical injury or death then the penalty shall be recoverable for each person

Environmental Control Board (ECB) Violations

Stop Work Orders typically arise from either an ECB violation or a Department of Buildings violation. However, ECB violations are the most common type of violations issued that can lead to a SWO.

ECB Violations Continued

There are three types of ECB violations:

Class 1: The most severe ECB violation. Almost always relates to an immediately hazardous condition. Requires a hearing to resolve.

Class 2: These are intermediate violations but still usually the result of a major problem. May be resolved by a pre-hearing stipulation.

Class 3: The lowest category of ECB violation. These are usually easily resolved and may involve a small fine. May be resolved by a pre-hearing stipulation.

**MAKING AN APPLICATION
PURSUANT TO REAL PROPERTY
ACTIONS AND PROCEEDINGS LAW
SECTION 881**

What is RPAPL Section 881?

When it becomes necessary to enter upon the land of the adjoining land owner either for purposes of making new improvements or for purposes of making repairs, but the adjoining landowner will not provide voluntary consent for the work to proceed on his or her property, RPAPL Section 881 provides the party seeking entry with a mechanism to seek judicial permission to enter the property without consent.

RPAPL Section 881:

“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.”

Procedure for Obtaining a Judicial License

- RPAPL Section 881 requires that an application for a judicial license be made through a special proceeding.
- A “special proceeding” is a lawsuit commenced by filing a “petition” with the Supreme Court of the County where the property at issue is located. The limited purpose of the lawsuit is the determination of whether a license will be granted.
- The petition must be accompanied by an Order to Show Cause (signed by a judge) or a Notice of Petition (signed by an attorney) and may also be accompanied by supporting affidavits.
- In general, special proceedings are intended to be more efficient and faster than other litigation. A judicial license may be granted or denied within a few days of the application being made.

Elements of the Section 881 Petition

The petition must contain allegations, and evidence, of the following:

Repairs or
improvements to
your property are
necessary

The repairs cannot
be made without
entering upon the
property of the
adjoining
landowner

Permission to enter
upon the adjoining
landowner's
property has been
requested and
denied.

Factors the Judge Will Consider:

1. **The reasonableness of the actions of the party seeking the license**
 - i. Did the party seeking the license take sufficient steps, or is the party proposing to take sufficient steps, necessary to protect person and property in connection with the proposed work?
 - ii. Are there alternative methods of proceeding with the work that would reduce the intrusion onto the adjoining property?

2. **If the necessity of the repairs or improvements is in dispute, do you have expert affidavits supporting the need for the proposed work?**
 - i. Has the expert explored alternate means and ruled them out?
 - ii. Is your expert qualified in the field in question?
 - iii. Courts prefer to see safety concerns weighing in favor of the proposed work and against alternatives. Cost factors are considered but not are usually not given significant weight.

3. The timing of the application.

i. Application submitted before the work begins are always viewed more favorably than ones made after the work began on the adjoining property without permission.

ii. It is better to make the application sufficiently in advance of the proposed work in order to allow the Court time to make a determination and to allow you time to satisfy any pre-construction conditions that the Judge may set in connection with a granted application.

4. **The period of time necessary for the repairs (shorter is always better)**
5. **The benefit to the party requesting the license weighed against the detrimental effect on the adjoining land owner.**

The Terms of the Judicial License:

If the Judge grants your application and provides you with a judicial license to enter the adjoining property, these terms should be included in the order:

- Dates and times of day when entry are permitted
- Exact descriptions of the areas of the adjoining property where entry will be permitted
- Required means of protecting the adjoining property (sidewalk bridge, protective barricades, netting, etc.)
- The licensee should be specifically required to repair any damage done to the adjoining property as a result of the work
- Insurance obligations should be specified (types of insurance required as well as dollar amounts needed)

Underpinning and Section 881

- Most experts agree that a leading cause of major construction failures and damages to adjacent properties is inadequate and improper underpinning.
- In NYC a special unit is designated for excavation inspections and assuring proper protection of adjacent structures
- Each lot generally has at least three adjoining lots, meaning that a project could potentially require three or more separate judicial licenses

➤ The leading case on Section 881 and underpinning is Broadway Enterprises, Inc. v. Lum, 16 A.D.3d 413, 790 N.Y.S.2d 402 (2nd Dept. 2005).

- Broadway Enterprises found that a Section 881 license was not proper in an underpinning situation because the encroachment: 1) could be permanent; and 2) there are alternative methods of construction that the petitioner could have utilized in construction
- No other decisions have expanded upon the Broadway Enterprises Court's use of the conjunction "and" when considering the two factors in denying the application
- Questions remain over whether a Section 881 application would be proper even if the encroachment could be permanent in a situation where there are not alternative means of construction

License Agreements

- A voluntary agreement between the party performing the construction and the owner of the adjacent building.
- Outlines the rights and responsibilities of each party
- Should always be in writing
- Usually involves the payment of a license fee to the owner of the adjacent property

Terms of the License Agreement

1. Specific dates or range of dates on which entry will be permitted
2. Times of day during which entry will be permitted
3. Definition of the areas within the adjacent property where entry will be permitted
4. Limitations on the number of people that can enter at any given time

5. Limitations on the type of equipment that can enter the adjacent property
6. Specification of the types of protection that will be required (sidewalk bridge, protective barricades, netting)
7. Identification of any testing or monitoring that must be done in connection with the work (crack monitors, load capacity testing, soil borings, etc.)
8. Provisions requiring the licensee to repair any damage that is caused to the adjacent property during construction (a thorough pre-construction survey and inspection should be performed to prevent disputes about what damage was caused by the work)
9. A hold harmless clause providing that the licensee will fully defend and indemnify the adjacent property owner (and all tenants) against any claims made against them arising out of the work performed by the licensee

10. Specification of what insurance requirements will be placed upon the licensee including the types and amounts of coverage

Insurance Considerations for the License Agreement

The license agreement should always contain a description of the insurance obligations of the parties. However, the “cross suit”, “cross liability”, “cross claim” and “insured vs. insured” exclusion can be a hidden land mine. Be sure you understand these exclusions and their ramifications for your coverage.



THE CHANGING LIABILITY LANDSCAPE IN NEW YORK CITY:

**UNDERSTANDING YENEM v. 281 BROADWAY
HOLDINGS ,18 N.Y.3D 481, 941 N.Y.S.2D 20
(2012)**

Former §27-1031(b)(1) of the NYC Administrative Code

When an excavation is carried to a depth of more than ten feet below the legally established curb level the person who causes such excavation to be made shall, at all times and at his or her own expense, preserve and protect from injury any adjoining structures...

The History of §27-1031(b)(1)

“The primary object of the statute was to case upon the party making an excavation on his land, exceeding ten feet in depth, the risk of injury resulting therefrom to the wall of an adjoining owner, and the burden of protecting it. The liability imposed is not made to depend upon the degree of care exercised by the person making the excavation.” - the Court of Appeals in Yenem

§27-1031(b)(1) is Replaced by §3309.4

Regardless of the excavation or fill depth, the person 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...

Will §3309.4 Be Treated the Same as §27-1031(b)(1)?

ARGUMENTS FOR

- 3309.4 is simply the latest reincarnation of a 150 year old principle in the State of NY that those who cause an excavation to be made will be held responsible for resulting damages
- The Court of Appeals acknowledged that the key to the statute was the “shifting of the risk of injury from the injured landowner to the excavator”

ARGUMENTS AGAINST

- 3309.4 is more broad than 27-1031(b)(1)
- 3309.4 removes the ten foot (10') threshold that was present in 27-1031(b)(1)
- The Court of Appeals specifically noted that they were not passing upon the strict liability of 3309.4

What Yenem means for you

- If §3309.4 is treated the same as §27-1031(b)(1) then everyone that “causes an excavation to be performed” will be strictly and absolutely liable for damage caused to adjacent properties.
- Owners, general contractors and excavators will all be those that “cause an excavation to be performed.” Arguably, engineers and architects too if they require excavation as part of their plans.

What Yenem means con't.

- Strict and absolute liability means there is no defense to liability. Owners cannot blame contractors, contractors cannot blame architects and subcontractors cannot blame general contractors. All are liable to the damaged party.
- Consideration of the building's prior condition does not factor into a proximate cause analysis (i.e. even if the building was crumbling before the excavation you are still liable for the damage) but you can still defend on damages

THANK YOU!

Kushnick | Pallaci PLLC
445 Broad Hollow Road, Suite 124
Melville, New York 11747
(631) 752-7100
www.nyconstructionlaw.com