

# ANDERSON KILL Co-Op, Condo & Real Estate Advisor

## Collaborating with the Construction Next Door

*By Bruce A. Cholst*

**A**s New York's construction boom continues apace, co-op and condo boards are increasingly faced with the specter of demolition of buildings to make way for new ones, or erection of additions to existing structures on the property next door.

When an adjacent lot becomes a construction site due to such activity, boards are presented with two huge risks: (1) the prospect of damage to their building and its structure, and (2) the potential for unanticipated out-of-pocket costs attributable to professional fees and repairs. The threshold dilemma for boards faced with these issues is whether to be collaborative with or confrontational toward their neighboring developers. We suggest the former because the law (e.g., RPAPL § 881) favors developers' rights to build on their sites, assuming their compliance with zoning and building codes. Thus, a collaborative approach affords the opportunity to minimize the risk of damage and expense presented by neighboring development — on the board's own terms, and without the expense and disruption incurred through litigation. Furthermore, the vast majority of developers, who are usually pragmatic and want to complete their

projects with maximum speed and minimal cost, are receptive to collaboration.

This article offers boards a primer for implementing a collaborative strategy when faced with construction next door.

### **Mobilize the Right Professionals**

The first step is to mobilize a team of professionals: a construction savvy attorney, an architect, a structural engineer and an insurance broker. Counsel should initiate dialogue with the developer, suggest an introductory meeting, and request advance review of the developer's plans, specifications and insurance policies related to the project. Once the attorney, architect and engineer have reviewed the relevant documents to determine the nature and extent of the contemplated project and ascertained any potential concerns, and the insurance broker has evaluated the nature and extent of the coverage contemplated by the developer, the introductory meeting should be scheduled. A board representative, the developer, and the association's and developer's respective counsels, architects and engineers should attend the meeting. The meeting has the twofold pur-

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pose of establishing a basic trust level among the parties and negotiating a licensing agreement, which will govern the parties' relationship through completion of the developer's construction.

### **Negotiating a Licensing Agreement**

The objectives of a licensing agreement should be (1) to minimize the risk of damage to the association's building arising from the developer's demolition and/or construction, (2) to create a system of redress for damages actually incurred from the construction, and (3) to reimburse the association for its out-of-pocket costs due to the neighboring construction. The licensing agreement can also address the following issues:

- Proactive design modifications resulting from the association's professionals' pre-meeting review of the developer's plans and specifications.
- A protocol for the association's engineer's review and approval of design decisions as the project is implemented to ensure safe procedures.
- Participation of the association's engineer in regular construction site meetings, and preservation of their right of inspection during the course of the project to confirm compliance with the approved design.
- Confirmation and documentation of the agreed upon insurance coverage.
- A "stop work" protocol in the event of impending damage to the building (i.e., from "settlement").
- Indemnification provisions and a security escrow deposit in the event of actual damage to the building.
- An "access fee" to compensate the association for the developer's inevitable entry upon its property during the course of work.
- Reimbursement of the association's professional fees.
- Construction time deadlines with financial penalties for noncompliance.

The agreement should also feature a provision for reimbursement of attorneys' fees incurred in the course of enforcing its terms, in the event of breach by the developer. The fee provisions of a licensing agreement should be

used to make the association whole for its actual damages accessed by the next door construction, not to extract a windfall from the developer.

### **Monitor, Monitor, Monitor**

Licensing agreements arm boards with the ability to cushion themselves against disaster arising from construction next door. However, these protections are worthless unless the board's structural engineer exercises their right to aggressively monitor the developer's construction. Such monitoring will enable the engineer to spot potential or pending problems before they unfold into disasters and act to contain resulting damage. For example, if in the course of actually excavating the new construction site, it becomes apparent to the board's engineer that the building's foundation is being undermined, the board's engineer can press the developer to stop work before the building shifts and its walls crack, leading to possible collapse.

Thus, there are three steps to a successful collaborative response by boards to the risks presented by new construction next door: (1) immediately mobilize a strong professional team, (2) negotiate an airtight licensing agreement, and (3) maintain unrelenting vigilance during the course of construction. Each of these elements is indispensable. ▲

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## About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estates, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA for Client Service and Commercial Awareness, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. The firm has offices in New York, NY, Stamford, CT, Newark, NJ, Philadelphia, PA, Washington, D.C., and Los Angeles, CA.

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