SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART __07____

----------X

HIGHBRIDGE FACILITIES

Index №. 810953-2021E

-against-

Hon. WILMA GUZMAN

CROMWELL AVENUE INVESTORS, LLC.

Justice Supreme Court

----------X

The following papers numbered 1 to _____ were read on this motion (Seq. No. _E #001_)
for ___MISC. SPECIAL PROCEEDINGS ___ noticed on _____.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the Decision and Order annexed hereto.

Motion is Respectfully Referred to Justice: _____
Dated: _____

Dated: 2/23/22

Hon. _____ **J.S.C.**
WILMA GUZMAN

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX IAS Part 7
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Index No. 810953/2021E
Motion Sequence No. 001
Motion Date: 11/9/21

In the Matter of the Application of
Highbridge Facilities, LLC,

Petitioner,

For a Judgement Pursuant to Section 881of the Real Property Actions and Proceedings Law

-against-

Cromwell Avenue Investors, LLC,

Respondent.
----------x

Decision/ Order
Present:
Hon. Wilma Guzman
Justice Supreme Court

Recitation as required by CPLR 2219(a), of the papers considered in the review of this application:

Papers	**Numbered**
Verified Petition, Affirmation in Support, and Exhibits thereto	**1**
Verified Answer with Counterclaims, Affidavits and Affirmations in Support, and Exhibits thereto	**2**
Petitioner's Affidavit in Support and Exhibits thereto	**3**
Memorandum of Law in Support	**4**
Memorandum of Law in Opposition	**5**
Reply Affirmation and Exhibits thereto	**6**
Reply Memorandum of Law in Further Support	**7**
Reply to Counterclaims	**8**
Correspondence to the Court in Further Support	**9**
Affidavits in Further Opposition	**10**
Affidavit in Support and Exhibits thereto	**11**
Attorney Affirmation in Further Support	**12**
Affirmation in Further Opposition and Affidavits thereto	**13**

Petitioner Highbridge Facilities, LLC, (hereinafter referred to as "Petitioner") herein, moves by **VERIFIED PETITION**, and all the papers in connection therewith, for a judgment, pursuant to RPAPL § 881, granting Petitioner a license to enter upon Respondent Cromwell Avenue Investors, LLC's (hereinafter referred to as "Respondent") land for an extended period of time. Respondent opposes Petitioner's application and moves by counterclaim seeking reimbursement of their experts' professional fees and attorney's fees and costs. Upon due deliberation having been had, the motions are decided as follows:

Background

The instant action is an application for a judgment pursuant to RPAPL §881 brought by Petitioner seeking the grant of a license to enter Respondent's land to make necessary improvements to Petitioner's property for the construction of a new charter school (hereinafter referred to the "Project") on Petitioner's adjacent property (hereinafter referred to as "Project Property").

The property owned by Respondent, located between Inwood Avenue and Cromwell Avenue (Block 2857, Lot 6), in Bronx County (hereinafter referred to as "Respondent Property"), is adjacent to and adjoining the property owned by Petitioner, 1400 Cromwell Avenue (Block 2857, Lot 1), in Bronx County (hereinafter referred to as "Petitioner Property"). According to the Deed for the Respondent's property recorded in the Office of the city Register of the City of New York, Respondent's property measures 50' on the west side of the property, 174.71' on the north side of the property, 50.07' along the east side of the property, and 172.05' along the south side of the property. It is registered as a non-residential vacant parcel of land. NYSCEF Doc. 3.

Respondent's Property and Petitioner's Property share a common wall (hereinafter referred to as "south wall"), which is the subject of a property dispute, that runs along the southern border of Respondent's property and northern border of Petitioner's property.

The Petition and Opposition

Petitioner's verified petition for limited license to access Respondent's property, filed August 12, 2021, describes construction that will take place along the east, south and west sides of the Respondent's property. NYSCEF Doc. 1, ¶ 43. The work would entail removal of the south wall and trees that "straddle the south side of the Adjacent Property and the north side of the Project Property and support of excavation and foundation work associated with this removal…" pursuant to the NYC Building code. NYSCEF Doc. 1, ¶ 45. The south wall will be removed in sections, and any soil displacement will be replace with backfill followed by the installation of timber lagging to stabilize the backfill, which would encroach approximately 7" onto the Respondent's property. NYSCEF Doc. 1, ¶¶ 45-47. *The timber lagging "will remain on" the Respondent's property "after the Project is complete,"* and there is "no other reasonable alternative to stabilize the [Respondent's property's] soil then [sic] to replace the disturbed soil and install timber lagging to keep the soil in place." NYSCEF Doc. 1, ¶ 47 (emphasis added). The west wall is to be stabilized by installing bracing along approximately 20' of the west wall, and the machinery required to install the bracing system would need to enter the east side of the Respondent's property and travel the length of the entire property to access the west wall, and that access across the property will be required during the duration of the construction to monitor the bracing system. NYSCEF Doc. 1, ¶¶ 50-52. "*It has not yet been determined what permanent reinforcement the West Wall will require after the Project is completed if, in fact, any is required.*" NYSCEF Doc. 1, ¶ 53 (emphasis added). The project would also entail the installation of sidewalk sheds on the east and west public right-of-ways adjacent to Respondent's property, and construction fencing will be erected, extending 20' into the Respondent's property to create a temporary protection area. NYSCEF Doc. 1, ¶ 55. Construction would also require installation of an egress door and fence on the west side of the Respondent's property, and a gate on the east side, requiring that existing fencing on Respondent's property would need to be removed. NYSCEF Doc. 1, ¶¶ 57-59. Petitioner further seeks to install

temporary pipe scaffolding which would encroach 8-10' into Respondent's property. NYSCEF Doc. 1, ¶ 61. "The improvements constituting the Work are *mostly temporary in nature* and all are intended to safeguard the Project Property, the Adjacent Property, and/or the public, during construction activities associated with the Project and permit the Project to be constructed." NYSCEF Doc. 1, ¶ 64 (emphasis added). Petitioner's petition indicates an extensive and lengthy negotiation for license fees and reimbursement to Respondent, which ultimately failed, and that the breakdown in communication effectively amounts to a refusal by Respondent to permit access to Respondent's property by Petitioner. NYSCEF Doc 1. Petitioner further claims that "Respondent will not suffer any loss of use or enjoyment of the Adjacent Property if the license sought herein is granted because the Adjacent Property is unimproved and vacant." NYSCEF Doc. 1, ¶ 99. In support of the Petition, Petitioner submits the affidavit of Neil Heyman, Vice President Area Manager of Gilbane Building Company, the design builder hired by Petitioner to construct the new charter school. NYSCEF Doc. 11.

Respondent filed a Verified Answer to Petitioner's Verified Petition on September 1, 2021, asserting a counterclaim in conjunction with various affirmative defenses, seeking reimbursement of professional fees and expenses incurred by Respondent in the negotiation of a license agreement with Petitioner. In support of its answer, Respondent submits the affidavit of Daniel George, a licensed professional engineer at Geotechnical Engineering Services, P.C. NYSCEF Doc. 18. Mr. George asserts that Petitioner's plans "call for permanent encroachments onto the Respondent's property…[in the form of] timber lagging…as well as steel braces and concrete heel blocks placed below ground…" NYSCEF Doc. 18, ¶ 7. Mr. George further asserts that a test pit dug on Petitioner's property revealed the existence of a basement slab approximately 7" thick and located approximately 11' below sidewalk level, once belonging to a building located on Petitioner's property, and that "four or five oil tanks are buried at Petitioner's site and will be removed, but their locations and depths are" unknown. If the tanks are located beneath the slab, it would require excavation that potentially could be deeper and encroach further onto Respondent's property, causing the loss of ground and erosion and destabilization of soil on Respondent's property. NYSCEF Doc. 18, ¶¶ 8-10. Respondent further supplied the affidavit of Kendra Logan, a registered architect and owner of KELRA Consultants, which indicates that the Petitioner's construction plans consistently changed, whereby she expresses safety concerns regarding the west wall, concerns about the east wall gate, and tree removal. NYSEF Doc. 17.

Respondent further filed a memorandum of law in opposition to Petitioner's RPAPL §881 petition, alleging: (1) that Respondent has never refused access to Petitioner; (2) Petitioner's construction seeks to place permanent encroachments upon Respondent's property; (3) there are unresolved boundary disputes between the parties; (4) Petitioner has "cavalierly responded to requests for information necessary to effect a license agreement"; and (5) in doing so Respondent has been restrained from the ability to market and sell its property to another entity. NYSCEF Doc. 21, P. 2. Specifically, Respondent argues that Petitioner is not being refused access; the breakdown in negotiations as to proper reimbursement for the inability to access the property and denial of Respondent's use of the property has caused an impasse which, upon agreement, will result in Petitioner being afforded access. NYSCEF Doc. 21, P. 3. In support of its argument that the construction would result in permanent encroachments, Respondent refers the Court to the affirmation of Mr. George, and argues that the steel braces and concrete heel blocks as well as the timber lagging will permanently remain on Respondent's property after construction. NYSCEF

Doc. 21, P. 5-6. Further, Respondent argues that the plans for the project are not clear or precise, and that subsequent new plans have been created by Petitioner which Respondent has not been provided, including the scope and the duration of the construction work to be completed. NYSCEF Doc. 21, P. 6-7. Respondent asserts that Petitioner's application to the Court does not contain dates and times for the many stages of the project. NYSCEF Doc. 21, P. 8. Respondent alleges that Petitioner attempted to alienate the Respondent's property rights by accusing Respondent of being "unreasonable" when Petitioner was informed that Respondent had secured a buyer for its property who required review of a license agreement by filing the instant Petition rather than continuing discussions in good faith. NYSCEF Doc. 21, P. 10. Respondent further argues they are entitled to reasonable attorney fees and professional fees, and in the event a license is granted Respondent's property should be adequately protected. NYSCEF Doc. 21, P. 11-14.

In reply, Petitioner challenges Respondent's argument that Respondent never refused access and Respondent's allegations of missing or incomplete construction plans, stating, "[i]t is clear that the undersigned was repeatedly providing respondent's counsel with up to date documents in an attempt to finalize an access agreement." NYSCEF Doc. 22, ¶12. Petitioner further discusses that the depth and complexity of the tree roots will not be known until the tree on Respondent's property is removed. In further reply, Petitioner filed a memorandum of law stating that the oil tanks alleged to be on Petitioner's property have been previously removed, citing Mr. Heyman's Reply Affidavit at ¶¶ 27-31. Petitioner further argues that the timber lagging "will be installed to stabilize the backfill that is currently being held up by the South Wall…The timber lagging *will be abandoned in place and will continue to serve this function unless and until the Adjacent Property is developed – it will not inhibit Respondent's ability to utilize the 7" of its property in a future development."* NYSCEF Doc. 30, P. 5 (emphasis added). Petitioner argues that "Despite criticizing the Petitioner's emphasis on the fact that the Adjacent Property is vacant, Respondent does not dispute that the Adjacent Property is, in fact, vacant. As a result, there is no business or residence that would suffer interruption or disruption as a result of the access sought by Petitioner." NYSCEF Doc. 30, P. 9 (emphasis supplied).

In a letter to the Court dated October 4, 2021, Petitioner informs the court that a "sidewalk shed was recently constructed over the sidewalk surrounding the Project over the sidewalk surrounding the Project Property, and a portion of the sidewalk in front of the Adjacent Property along Inwood and Cromwell Avenues…the Sidewalk Shed is constructed entirely within and above the public right-of-way, including portions of the roadway and sidewalk. No portion of the Sidewalk Shed was constructed within the bounds of Respondent's Adjacent Property." NYSCEF Doc. 32, P. 1-2. The letter further states that "the 7 inches of timber-lagging will no longer remain on Respondent's property and *it is believed that Respondent's west-wall only needs to be braced temporarily.*" NYSCEF Doc. 32, P. 3 (emphasis added).

Respondent replied with the affidavit of Robert Castillo, L.S., the managing partner of BLD Land Surveyors LLP, who Respondent retained to determine whether the sidewalk shed in question encroached on Respondent's property in any way. He reports that pursuant to an October 1, 2021 survey of the east property line of Respondent's property, the survey revealed that "the Sidewalk Shed encroaches and trespasses between 3 ¾ inches and 8 ¾ inches onto Respondent's property." NYSCEF Doc. 33, ¶¶ 4-7. He encloses his report as NYSCEF Doc. 34. Respondent also sumbitted the further affidavit of Ms. Logan, Respondent's architect. Ms. Logan reports that the sidewalk

shed in question conflicts with Petitioner's application for a license, because the license seeks, in part, to remove a portion of Respondent's east fence to install a double swing gate to allow construction vehicles to enter Respondent's property during construction, but the design and layout of the sidewalk shed would prohibit those plans because the "vertical posts and bracing barricades the area where Petitioner requested egress for its vehicles." NYSCEF Doc. 35, ¶¶ 3-5. This provides, as Ms. Logan reports, "another example of what Respondent has repeatedly encountered with Petitioner and what license it seeks – since the onset of negotiations, Petitioner's plans have been incomplete and inconsistent, and have holes in them." NYSCEF Doc. 35, ¶ 7.

Respondent further submits an affidavit of Ziad Maad, M.S., P.E., D. GE, a licensed professional engineer at Geotechnical Engineering Services. He expresses significant concerns about the project, which he considers raises "more questions than answers regarding what work Petitioner actually intends to perform, and what licensed areas is requested of Respondent." NYSCEF Doc. 36, ¶ 4. Mr. Maad reports that an email from Tom Smith, Esq. forwarded to Mr. Zaad on September 30, 2021 reports, in part, that "the west wall on your client's property is, in all likelihood, not integrated into the south wall between the properties and the bracing of the west wall will only be required during construction…If upon removal of the south wall, it is determined that support of the west wall is required, support designed by a licensed engineer in compliance with DOB requirements will be installed entirely on our property." NYSEF Doc. 36, ¶ 6 (emphasis supplied). Mr. Maad also indicates that elimination of the timber lagging from Petitioner's plans will require removal of a 4' deep, 4' wide portion of the Respondent's property's soil to be replaced with clean fill, requiring the removal of "at least 1,400 cubic feet of soil from Respondent's property based on the length of this site." NYSEF Doc. 36, ¶¶ 12-13. Mr. Maad raises concerns about the amount of soil to be removed as well as the presence of soil contaminants, which may raise unique liability and insurance concerns that have not yet been considered. NYSCEF Doc. 36, ¶¶ 16-21. Mr. Maad alleges that "Petitioner's conclusion that the West Wall will not require bracing is also entirely speculative, and problematic." NYSCEF Doc. 36, ¶ 36. He further states that "[t]here is no bracing system available for Respondent's West Wall that could be installed entirely on Petitioner's property – it is logistically unfeasible and impossible." NYSEF Doc. 36, ¶ 39.

To address these concerns, Petitioner submits the affidavit of Mr. Heyman, who asserts the "configuration of the Sidewalk Shed as currently constructed is different than its configuration will be once Petitioner secures a license." NYSEF Doc. 41, ¶ 7. In addition, Mr. Heyman addresses the altered plans with respect to the timber lagging, stating, "[i]nstead of installing timber lagging, Gilbane (and/or its subcontractors), will excavate approximately 9 feet horizonally onto the Adjacent Property to the Project Property (1 ½ foot horizontal to 1 foot vertical). During the excavation, the slope will be maintained by Gilbane (and/or its subcontractors)." NYSEF Doc. 41, ¶ 19. During the excavation, Mr. Heyman reports that a portion of the east fencing will be removed and "impacted," and upon conclusion of construction, the section of the fencing in question will be replaced in-kind during restoration of the Respondent's property. NYSEF Doc. 41, ¶¶ 30-31. Further, Mr. Heyman asserts that under "this new plan, bracing/shoring will not be placed in the area of excavation related to the South Wall," and that a concrete deadman would be installed to work in conjuction with excavation. NYSEF Doc. 41, ¶ 39. He goes on to state, *"[i]t is possible that bracing/shoring of the West Wall will be temporary."* NYSCEF Doc. 41. ¶ 42 (emphasis added).

In the affirmation of Stephen B. Kaufman, Esq., co-counsel attorney for Petitioner, Mr. Kaufman asserts, in part, that bracing of the west wall is necessary to protect the wall, and argues that "[a]ny such 'steps' – including but not limited to leaving the bracing on the West Wall – are not 'encroachments' but are rather 'protections' for the benefit of [Respondent's property.]" NYSEF Doc. 45, ¶ 16. In support of Mr. Kaufman's assertions, Petitioner submits the affidavit of Erik J. Draijer, a Qualified Environmental Professional and project manager of PVE, LLC. Mr. Draijer explains that his work on the project on behalf of the Petitioner included due diligence services for the acquisition of the project site, preparation of a Remedial Action Work Plan, and a Noise Remedial Action Plan. NYSEF Doc. 47, ¶¶ 7-8.[1] Mr. Draijer explains that the soil being excavated from the Project Property will be disposed of pursuant to environmental regulations, and Mr. Draijer "*expect[s] the soil on the Adjacent Property to have characteristics similar to that identified on the Project Property, and the soil will be handled* in the same fashion as the soil excavated on the Project Property…*It is expected that OER will either* approve the reuse of the soil in both instances…*or* have the contractor dispose of the soil displaced on the Adjacent Property." NYSEF Doc. 47, ¶¶ 16-27 (emphasis added).

Finally, Respondent files an affirmation in further opposition, arguing again that the plans are constantly changing and the majority of the areas of concern remain uncertain, the Petitioner's use of essentially the entirety of the Respondent's property for an unknown duration places a severe hardship and inconvenience upon Respondent, and again requests professional fees. A further affidavit by Mr. Maad echoes the concerns of the Respondent.

Analysis

RPAPL § 881 states:

> 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.

"The granting of a license under this section 'is addressed to the sound discretion of the court, which must apply a reasonableness standard in balancing the potential hardship to the applicant if the petition is not granted against the inconvenience to the adjoining owner if it is granted.'" *Queens Theater Owner, LLC v. WR Universal, LLC,* 192 A.D.3d 690 (2d Dept. 2021); *Mindel v Phoenix Owners Corp.*, 210 AD2d 167, 620 NYS2d 359 (1994); *Matter of EXG 159W48 LLC v Benyetta* 148 LLC, ___ Misc 3d ___, 2017 NY Slip Op 31479[U] (Sup Ct, NY County 2017); *MK Realty Holding, LLC v Scneider*, 39 Misc 3d 1209(A), 971 NYS2d 72, 2013 NY Slip Op 50551[U] (Sup Ct, Queens County 2013). In determining whether to grant a license under RPAPL §881, the

[1] Attached as Exhibit 1 to his affidavit is "a document further outlining my expertise, education and professional credentials…" NYSEF Doc. 47, ¶ 9. Notably, on the summary of Mr. Draijer's experience, under the heading "Relevant Project Experience," he lists this project first and foremost.

court must properly weigh: "'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 a.d.3d 943 (2d Dept. 2017) (citing *Chirichella v BCBS Lorimer LLC*, ___ Misc 3d ___, 2017 NY Slip Op 31665[U] [Sup Ct, Kings County 2017]; *Deutsche Bank Trust v 120 Greenwich Dev. Assoc.*, 7 Misc 3d 1006[A], 801 NYS2d 232, 2005 NY Slip Op 50467[U] [Sup Ct, NY County 2005]; *Matter of Rosma Dev., LLC v South*, 5 Misc 3d 1014[A], 798 NYS2d 713, 2004 NY Slip Op 51369[U] (Sup Ct, Kings County 2004). Where a Petitioner seeks a license to create a permanent encroachment now not in existence, however slight, the "relief sought transcends the statute...[and] it is contrary to the elementary principles of equity." *Foceri v. Fazio*, 306 N.Y.S.2d 1016, 61 Misc. 2d 606; citing *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. Where a Petitioner fails to provide items sought that had been memorialized in detailed, specific plans approved by the Department of Buildings, a Petitioner has failed to make a showing of reasonableness and necessity of the trespass. *In Re Tory Burch, LLC v. Moskowitz,* 43 N.Y.S.3d 901, 2017 Slip Op. 00243 (2017).

Petitioner's application for a temporary license to access Respondent's property pursuant to RPAPL §881 must be denied. In weighing the potential hardship to Petitioner against the inconvenience to the Respondent, the Petitioner has not provided the Court with a clear-cut, detailed, and specific plan about how they intend to use Respondent's property, nor the duration of the use. While both Petitioner and Respondent have indicated in their papers that the duration of the Petitioner's use of Respondent's property is approximated at 24 months, the Court is concerned about the ever-changing and unreliable construction plans Petitioner has provided in support of their application. Specifically, the Court is concerned about the bracing of the south wall and west wall, what it would ultimately entail and the permanency of the eventual solution.

It is well settled that a RPAPL §881 application must be denied if the access will create a permanent encroachment not currently existing on a Respondent's property, however slight it will be. Petitioner first indicated that timber lagging would be in stalled that would encroach 7" into Respondent's property, and that the timber lagging would remain on Respondent's property after the construction project would be completed. Petitioner states further in the Petition that the work would be "mostly temporary in nature," *supra*. Respondent immediately objected due to the permanent nature of the encroachments Petitioner would make on Respondent's property, and when it became a concern to Petitioner, they then modified their plans, making the bracing of the west wall only "temporary," and the timber lagging would not be required; however, Petitioner then asserted that the west wall was "in all likelihood" not integrated into the south wall, and the west wall would not be required to be braced during construction. Further, when Petitioner notified the court that the timber lagging would not be necessary, Petitioner explained the alternative, which would include excavation of nearly 20% of Respondent's property, and that installation of a concrete deadman working in conjunction with the excavation would make it "possible that bracing/shoring of the West Wall will be temporary." Further, Petitioner submits an environmental professional's purely speculative report of what will be done with the soil from Respondent's property; Mr. Draijer's *expectation* that the soil will be handled in the same fashion as the soil

from the project property and the *expectation* that the soil will have characteristics similar to the soil on Petitioner's property, and that it is *expected* that OER will *either* approve the soil to be reused, *or* have the contractor dispose of the soil.

It is clear that the scope and nature of the Petitioner's use of access to Respondent's property is ambiguous with respect to the substantial alterations Petitioner plans to make to Respondent's property, specifically the timber lagging which Petitioner first argued was not permanent but would remain on Respondent's property after the project completion, then changed to exclude the timber lagging in exchange for extensive excavation, in conjunction with bracing, that may or may not be permanent to a large portion of the Respondent's property for an unknown duration of time. The Court does not accept that any permanent changes to Respondent's property would entail mere "protection" rather than "encroachment" of Respondent's property. Further, while Petitioner seeks to excavate 20% of Respondent's property, it appears that the access Petitioner would need to Respondent's property to complete this project would require access to and use of 100% of Respondent's property. Further, this court does not subscribe to Petitioner's argument that because Respondent's property is a vacant lot, there would be "no business or residence that would suffer interruption or disruption as a result of the access sought by Petitioner." *Supra.* Respondent proffered evidence that Respondent intended to sell the property, and that such sale could not progress due to the continued negotiations and uncertain nature of the work to be done to the property. The fact that Respondent's property is an unused commercial lot does not permit the Petitioner to use the property however and whenever they see fit, and to make permanent changes to the property in the process.

"Case law is clear that '[b]efore it can grant a license pursuant to [RPAPL 881], it is critical that the [c]ourt be apprised of the 'exact nature, timing and extent of the [work] requiring the license.'"" *In re 419 BR Partners LLC v. Elizabar,* 2022 N.Y. Misc. LEXIS 519 *11, 2022 NY Slip Op 30357(U), 4 (*citing Matter of Pav-Lak Indus., Inc. v Wilshire Ltd.*, 2009 NY Slip Op 33110[U], *5 (Sup Ct, NY County 2009), *quoting Deutsche Bank Trust v 120 Greenwich Dev. Assocs.*, 801 N.Y.S.2d 232, 7 Misc. 3d 1006[A], 2005 NY Slip Op 50467[U], *4 (Sup Ct, NY County 2005). The constant unapproved changes to the construction plans do not rise to the level of proof required pursuant to RPAPL §881, and the permanence of the changes to Respondent's property requires that the Court deny Petitioner's application. As such, Petitioner's application for a license pursuant to RPAPL §881 is hereby denied.

Respondent's Application for Fees and Expenses

Respondent has cross-moved for professional fees, costs and attorney's fees expended to defend against this Petition. Although it is settled that, "[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," *In re 419 BR Partners LLC v. Elizabar*, 2022 N.Y. Misc. LEXIS 519, *12-13, 2022 NY Slip Op 30357(U), 5 (*citing Matter of Van Dorn Holdings, LLC v 152 W. 58th Owners Corp.*, 149 AD3d 518, 519, 52 N.Y.S.3d 316 (1st Dept 2017) (internal quotation marks and citation omitted; *see also Matter of House 93, LLC v Lipton*, 178 AD3d 545, 546, 112 N.Y.S.3d 483 (1st Dept 2019)), "if a respondent is successful in opposing an 881 petition and no license is granted then that respondent would not be entitled to attorneys' fees

for successfully opposing the petition." (*Matter of N. 7-8 Invs. LLC v. New Garden,* 43 Misc 3d 623, 631, 982 N.Y.S.2d 704 (Sup Ct, Kings County 2014)).

As such, Respondent's application for attorney's fees and reimbursement of Respondent's experts' professional fees is hereby denied.

Accordingly, it is

ORDERED AND ADJUDGED that Petitioner Highbridge Facilities' Order to Show Cause for a temporary license pursuant to RPAPL §881 is denied and the Petition is hereby dismissed. It is further,

ORDERED AND ADJUDGED that Respondent's application for reimbursement for Respondent's experts' professional fees, costs and attorney's fees is denied. It is further,

ORDERED AND ADJUDGED that Petitioner shall serve a copy of this Order together with the Notice of Entry within thirty (30) days of entry of this Order.

This constitutes the Decision and Order of the Court.

Dated: 2/23/22

Hon. Wilma Guzman, J.S.C.