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MEMORANDUM OF SUPPORT

BILL: S.8430-A (Comrie) / A.9564-A (Rajkumar)

SUBJECT: Access to Adjoining Property to Make Improvements or Repairs

DATE: May 26, 2022

The Associated General Contractors of New York State, (AGC NYS) the leading statewide trade association representing union and open shop construction companies supports S.8430-A (Comrie) / A.9564-A (Rajkumar) which provide real property actions to adjoining property to make improvements or repairs and ensure efficient resolutions to protection of public safety during demolition, excavation, and constructions activities; and promoting the redevelopment and improvement of buildings to prevent disrepair.

AGC NYS concurs with the bill sponsors justification for the passage and enactment of S.8430-A (Comrie) / A.9564-A (Rajkumar).

Protection of private property rights is a fundamental part of American law. However, there are numerous circumstances when safely undertaking construction on one's property may require access to an adjoining owner's land. Whether and under what terms adjoining owners may be required to grant such access is a critical policy question that implicates property rights as well as public safety. Unfortunately, in New York City today, the regulatory regime that governs the terms under which neighbors grant a property owner with access to their land needs reform. Addressing this issue is particularly time sensitive in light of a recent Supreme Court decision that raises concerns as to whether the existing State regime is constitutional. While, in some cases, owners and their neighbors can quickly and amicably work out a solution without going to court, in many instances, property owners are required to go to court in order to resolve the questions of whether and under what terms adjoining property owners can access their property. The principal law that establishes the terms under which adjoining property owners may be required to grant access to their property is the Real Property Actions and Proceedings Law, enacted in 1968, Section 88 1 of this law governs efforts to compel access to adjoining property in order to undertake improvements on one's own property. Under this provision of law, the Supreme Court is authorized to grant a license to an owner (or lessee) that allows the licensee to have temporary access to adjoining property, in aid of "improvement or repairs" to the licensee's property.

This proposal would create a more predictable framework that will protect adjacent property owners and ensure construction projects can safely move forward. Property owners seeking access to an adjoining lot should be required to provide the adjoining owner and tenant, if applicable, with a copy of all relevant approved documents pertaining to construction prior to the commencement of work. Owners and their contractors should be required to provide reasonable prior notice of actual entry (except in cases of emergency posing an immediate threat to the safety of persons or property). Prior to entering an adjoining owner's property, owners should provide the anticipated duration of time that access to the adjoining owner's property will be required. Owners should be required to make best efforts to adhere to those anticipated times.

These clarifications should make adjoining owners more aware of the specifics of the work that is occurring and ensure that such action is needed. Further consideration should be given to adding clarifications into the law as it relates to a developer's ability to lawfully undertake the performance of support of excavation ("SOE") activities, access to a neighboring property for the undertaking of lot line/party wall protections such as tiebacks or either forms of protection necessary to ensure safety, and access to ensure code compliant chimney and/or flue-related work may be performed.

Any consultant or contractor who seeks to enter an adjoining property on behalf of the licensee developer to maintain commercial general liability (CGL) insurance that provides coverage to third parties for damage to persons or property and provide evidence of such insurance to the adjoining property owner. Doing so would effectively ensure that any damage to adjoining property and personal injury to persons present on adjoining property are covered. The CGL coverage requirements will nearly always, barring an exceptional circumstance, provide adequate monetary coverage for damage caused to a neighboring property. Providing such insurance should negate the need for a court to establish an escrow fund or place a surety bond to cover future claims of damage. Ensuring such a requirement was carried out could be monitored through the City's Department of Buildings. The Department of Buildings already requires minimum, mandatory insurance limits to pull certain permits on the development site, and these requirements could be expanded to include evidence that neighboring property owners have been included as additional insureds on the relevant CGL policies of insurance. A submission of a certificate of insurance showing appropriate legal entities named as additional insureds. As part of the written notification to a neighboring property owner (as contemplated below), the statute should require the licensee or the party entering the adjoining property (e.g., a consultant or contractor) on behalf of the licensee to provide a written confirmation that it will agree to include the neighboring owner and affected lessees as additional insureds on such licensee's and/or consultant/contractor's CGL insurance.

Authorize the court, where appropriate, to require the licensee to pay reasonable fees incurred by the neighbor to engage an architect or engineer to review and comment upon protection plans. To encourage solutions to the process, the statute should stipulate that the failure by an adjacent property owner to substantively respond to the information provided by the owner required above (i.e. pre-construction survey, proof of insurance, plans, predicted schedules) should be permissible evidence in weighing the award of future license for access to a developer via an RPAPL 881 proceeding.

This bill will explicitly empower the court to award attorneys' fees against a party who has acted unreasonably or in bad faith in connection with the refusal to grant access to entities seeking access to install property protections require by the New York City Construction Code and/or New York City Department of Buildings, which refusal results in the commencement of litigation and award of license. Furthermore, the court can award fees to either party for acting unreasonably or in bad faith.

This bill will ensure that new construction owners and adjacent property owners have very clear rights associated with construction. Passage of this bill will improve transparency for adjoining owners, better protect adjoining owners and encourage resolutions to disputes that protect all parties.

Therefore, AGC NYS supports S.8430-A (Comrie) / A.9564-A (Rajkumar) and urges the Legislature to approve this proposal.