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Turning the Tables: The Rise of the 'Reverse' RPAPL §881 Proceeding

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For decades, Section 881 of the Real Property Actions and Proceedings Law ("RPAPL") has been understood as a developer's statute. When an owner needs to enter a neighbor's property to make improvements or repairs to its property and the neighbor refuses access, the developing owner may commence a special proceeding for a court-ordered license. The classic RPAPL §881 petitioner is the party doing the construction work; the respondent is the adjoining owner asked to accommodate it.

A growing body of New York decisions is inverting that paradigm. Increasingly, it is the *aggrieved* adjoining owner—the neighbor whose property has been burdened by a sidewalk shed, roof protection or other temporary protection installed without permission—who is turning to the courts.

Some are commencing their own affirmative RPAPL §881 petitions against the developer that has already entered or burdened the adjoining property without permission; in other cases, courts are converting the aggrieved owner's plenary injunction action into an RPAPL §881 special proceeding. Practitioners call this the "reverse" RPAPL §881 proceeding. This article surveys the leading decisions, examines the related conversion cases, and offers guidance for owners and developers alike.



A New York city building with scaffolding.

The Statutory Backdrop

RPAPL §881 provides that when an owner or lessee "seeks to make improvements or repairs to real property" that cannot be made without entering an adjoining owner's premises, and "permission so to enter has been

refused," the owner or lessee "may commence a special proceeding for a license" to enter.

The license "shall be granted by the court in an appropriate case and upon such other terms as justice requires." The proceeding is addressed to the sound discretion of the court, and equitable principles generally counsel that an owner compelled to grant access should not bear the costs generated by that access.

On its face, the statute contemplates a forward-looking request by the owner or lessee performing the work. Courts applying the statute's remedial and equitable principles, however, have permitted an adjoining owner already burdened by an unauthorized incursion to invoke Section 881 affirmatively. That judicial development supplies the foundation for the emerging reverse-881 procedure.

'Only Properties, LLC v. The Sylvia Wald & Po Kim Art Gallery'

An early illustration of an aggrieved owner affirmatively invoking RPAPL §881 is *Only Properties, LLC v. The Sylvia Wald & Po Kim Art Gallery* (Sup Ct, NY County, Index No. 150805/2019), arising from two abutting Lafayette Street buildings in Manhattan. Following an inspection under New York City's Façade Inspection and Safety Program, commonly known as Local Law 11, the Department of Buildings ordered the owner of 417 Lafayette Street to correct "unsafe" exterior walls and to install and maintain a sidewalk bridge—which necessarily extended onto neighboring property, including 415 Lafayette Street, owned by Only Properties, LLC.

Rather than sit as the passive respondent to its neighbor's access demands, the *burdened* owner proceeded affirmatively and pursued relief under RPAPL §881 for the protective structure encroaching on its building.

The Supreme Court (Kalish, J.) issued a series of decisions addressing the financial terms associated with the encroachment, including license, expert, and attorney fees. The First Department later affirmed the parties' obligation under their second amendment to submit disputes over legal and expert fees to a Special Referee or Judicial Hearing Officer. Although the appellate holding was limited, the litigation illustrates how an owner burdened by adjacent construction protection may invoke Section 881 affirmatively rather than merely await a petition by the developer.

'DTBG 390 Fifth Avenue Owner LLC v. Victory Holding Corporation'

If *Only Properties* hinted at the reverse-881 device, *Matter of DTBG 390 Fifth Ave. Owner LLC v. Victory Holding Corp.*, 2024 NY Slip Op 33601(U) (Sup Ct, Kings County Oct. 7, 2024) (Maslow, J.), makes the mechanics explicit. There, the encroached-upon owner petitioned under RPAPL §881 for an order compelling Victory Holding Corporation to accept a license to maintain a longstanding sidewalk shed.

The shed had occupied the petitioner's property at 390 Fifth Avenue in Brooklyn since October 2019. Victory had never obtained a license, and there was no projected removal date. The respondent had never obtained a license, and the shed had remained for years with no projected removal date, impairing orderly access to the petitioner's building.

Justice Maslow granted the petition and expressly confronted the procedural anomaly, observing that "while the procedural posture of this RPAPL §881 special proceeding is unusual

in that it was commenced by the owner of the realty encroached upon, petitioner does possess standing."

The court anchored that conclusion in the same authorities that recur throughout this area—*Mindel v. Phoenix Owners Corp.*, *Mehdi Dilmaghani & Co. v. Spa Health Clubs, Inc.*, and *Ponito Residence LLC v. 12th St. Apt. Corp.*—confirming that their equitable logic supplies standing to the burdened owner.

The relief the court fashioned is a template for the reverse 881. Victory was granted a 12-month license to maintain the shed on court-imposed terms and, critically, was directed to pay a monthly license fee—retroactive to Oct. 1, 2019, when the shed was first installed—along with insurance and additional-insured requirements, indemnification, restoration of the property to its original condition, quality-of-life protections, and reimbursement of the petitioner's reasonable attorney and professional fees.

In short, the license-fee, fee-shifting, and protective machinery long associated with the developer's petition was imposed on the developer at the aggrieved owner's instance.

DTBG thus confirms that RPAPL §881 is not a one-way street: an owner saddled with another's temporary protection may go on offense as petitioner, obtain a license on court-imposed terms, and recover fees plus a retroactive license payment for the burden it has borne.

'Kelman v. Chen'

Similarly, in *Matter of Kelman v. Chen* (Sup Ct, Kings County, Index No. 530998/2023, NYSCEF Doc No. 81 [Aug. 18, 2026] [Swern, J.]), the aggrieved owner commenced a reverse-881 proceeding after respondent undertook DOB-required emergency façade repairs at 419 Pacific Street without first obtaining a license from the adjacent owners at 421 Pacific Street.

For approximately 16 months, scaffolding and plywood covered the petitioners' window, their air conditioner was removed, and the work affected their brickwork and party wall.

As a result, the petitioners commenced an RPAPL §881 proceeding, and the court referred the calculation of the compensation and reimbursable expenses resulting from the unauthorized access to a Special Referee.

The Special Referee awarded $68,306.50, comprising license fees calculated at $1,250 per month, $30,187.50 in professional oversight expenses, and $36,869 in attorneys' fees arising from the respondent's failure to obtain a license. Justice Swern confirmed the award.

Although the court found that the repairs were legally required, served the public interest, and could not have been performed by other means, it held that compensation was nonetheless appropriate. The court emphasized the petitioners' efforts to negotiate a license and obtain plans and assurances, the respondent's refusal to cooperate, and the absence of rebuttal expert testimony. *Kelman* thus confirms that DOB-directed emergency work does not insulate the owner performing it from the financial consequences of proceeding without a license.

Conversion of Plenary Actions Into RPAPL §881 Proceedings

A closely related mechanism—producing a similar practical result—is the court's power to *convert* a plenary action into an RPAPL §881 special proceeding. Where an owner sues for an injunction to stop a neighbor's unauthorized construction work, courts have, "under appropriate circumstances," converted the action into

an RPAPL §881 proceeding under CPLR 103(c), which authorizes conversion rather than dismissal of a matter brought in an improper form.

'Rennie-Walker v. Weiss'

The recent trial and appellate decisions in *Rennie-Walker v. Weiss* are pivotal to understanding both the availability and the limits of conversion. (*Rennie-Walker v. Weiss* (Sup Ct, Kings County, Index No. 535119/2023 [Frias-Colón, J.]) and *Rennie-Walker v. Weiss* (2026 NY Slip Op 04219 [2d Dept July 1, 2026])

There, the Weiss defendants, renovating their Brooklyn property, caused their contractors to saw-cut and drill into the plaintiff's adjoining wall and remove and replace weatherproofing—all without the plaintiff's consent and without an RPAPL §881 license. The plaintiff sued for injunctive relief, trespass, and private nuisance and moved for a preliminary injunction; the defendants cross-moved to dismiss, arguing that their Building Code §3309.9 weatherproofing obligation privileged the incursion and required no license.

The trial court rejected that defense, granted the preliminary injunction, denied the cross-motion, and—*sua sponte*—converted the plenary action into an RPAPL §881 proceeding, explaining that "New York courts have held that, under appropriate circumstances, an action for injunctive relief based on unauthorized construction work by a neighboring property owner can be converted into an RPAPL §881 proceeding for a license agreement," and grounding that conclusion in the line of decisions discussed below.

On appeal, the Second Department affirmed the substantive rulings—upholding the denial of dismissal on the trespass and nuisance claims and confirming that the §3309.9 weatherproofing duty "did not justify performing this work without a license from the plaintiff"—but it *modified* the order by *deleting* the conversion provision.

The reasoning is instructive: conversion into an 881 proceeding "wherein the defendants are the petitioners" was an improvident exercise of discretion because the defendants had never sought 881 relief and had expressly contended they needed no license at all.

A court cannot unilaterally place a developer that has not requested a license into the procedural posture of an RPAPL §881 petitioner. The matter was remitted to fix an undertaking under CPLR 6312, and the injunction otherwise stood. Conversion thus remains a legitimate tool, but it must fit the parties' actual postures.

The Conversion Authorities Cited in 'Rennie-Walker v. Weiss'

The trial court in *Rennie-Walker* anchored its conversion analysis in four authorities, each of which helps define the permissible scope of conversion.

In, *Stuck v. Hickmott*, 158 AD3d 1331, 1332 (4th Dept 2018), the Fourth Department treated the application initiated by order to show cause as a special proceeding under RPAPL §881, illustrating that courts may look to the substance of the requested relief rather than its procedural label.

In *Mindel v. Phoenix Owners Corp.*, 210 AD2d 167, 167 (1st Dept 1994), *lv denied* 85 NY2d 811 (1995), the First Department held that "the court's conversion of this action, commenced by plaintiffs for injunctive relief, into a proceeding by defendant for leave to enter plaintiffs' properties for repairs under RPAPL §881, was unusual but proper." *Mindel* is the doctrinal cornerstone. Notably, the *Rennie-Walker* panel distinguished it precisely because there the party benefiting

from the conversion had actually sought leave to enter, whereas the Weiss defendants had not.

In *Ponito Residence LLC v. 12th St. Apartment Corp.*, 38 Misc 3d 604, 612 (Sup Ct, NY County 2012), the court held that "a court may convert an action for a preliminary injunction into a proceeding under RPAPL §881 where such conversion is appropriate," confirming that the power is available at the trial level under an appropriateness standard.

In *Quinn v. 20 E. Clinton, LLC*, 193 AD3d 893, 896 (2d Dept 2021), the Second Department held that "as no license is necessary at this juncture, the Supreme Court properly denied that branch of the plaintiff's motion which was to convert the motion to a proceeding" for a license pursuant to RPAPL §881. *Quinn* supplies the limiting principle: conversion is warranted only where a license is actually necessary—the same principle the Second Department deployed in *Rennie-Walker*.

The Financial Calculus: Commencing an RPAPL §881 Proceeding Versus Seeking Conversion

For the aggrieved owner, the choice between commencing its own RPAPL §881 proceeding and suing for an injunction in the hope of conversion is, at bottom, a financial one.

The Reverse-881 Petition. As an initial matter, a special proceeding is designed to be streamlined. It proceeds on the petition and responsive papers and is generally designed to produce a more expedited resolution than a plenary action. Notably, the petitioner places itself squarely within the statute's compensatory framework.

As *DTBG* and *Kelman* illustrate, the court may require the developing owner to reimburse to pay the aggrieved owner (i) license fees, including retroactively to the date of the original incursion; (ii) the cost of the architects, engineers, and other professionals reasonably retained to protect its property; and (iii) its reasonable attorney fees—an item that a plaintiff in an ordinary trespass or nuisance action generally cannot recover under the typical American Rule. The petitioner also frames the license itself, proposing the insurance, indemnification, restoration, and quality-of-life conditions it wants the court to impose.

The Injunction Action and Conversion. A plenary action offers different tools, at a different price. Injunctive relief carries a cost the 881 petitioner does not bear: under CPLR 6312(b), a plaintiff granted a preliminary injunction must post an undertaking—as the remittal in *Rennie-Walker* underscores—potentially requiring the plaintiff to post cash or obtain a bond while the preliminary injunction remains in effect.

In trespass and nuisance, the plaintiff's monetary recovery is generally limited to the damages it can prove, and, absent a contractual or statutory basis, the plaintiff ordinarily bears its own attorneys' fees. Conversion can bring the 881-fee machinery into play, but only if the court agrees to convert—a discretionary step that *Quinn* and *Rennie-Walker* show may be refused, or reversed on appeal, where a license is not necessary or the developer disclaims any need for one. An owner that budgets for conversion and does not obtain it may find that it has litigated a plenary action, posted an undertaking, and absorbed its own legal fees, with a damages recovery that does not account for the professional oversight costs it incurred.

Weighing the Options. Where an encroachment is ongoing, such as a shed, scaffold, or other protection that will remain in place, and

the adjoining owner's principal objectives are compensation and protective license terms, an affirmative Section 881 petition may provide the more direct and cost-efficient path. It offers a direct procedural route for seeking license fees and reimbursement of reasonable professional and attorneys' fees. Where neighboring work is causing imminent physical harm and must be stopped immediately, however, a plenary action seeking injunctive relief may remain necessary.

Practical Takeaways

For Aggrieved Owners. An owner whose property has already been burdened by temporary protection or unauthorized work is no longer confined to reactive defense. Depending on the facts, it may commence its own affirmative RPAPL §881 petition to compel the developer to take a license on court-imposed terms—as in *Only Properties*, *DTBG*, and *Kelman*, potentially recovering retroactive license fees, professional fees, and attorneys' fees—or sue for an injunction and seek conversion, keeping in mind that conversion works best where the neighbor genuinely needs a license.

For Developing Owners. Unlicensed self-help—leaving a shed in place indefinitely on the theory that the Building Code compels the work—is perilous. As *Rennie-Walker* confirms, a Code obligation to weatherproof does not excuse entering a neighbor's property without a license, and proceeding without one invites injunctions, trespass and nuisance liability, retroactive license fees, and fee-shifting.

The prudent course is to negotiate a written license agreement, or commence an RPAPL §881 proceeding, *before* installing protection or touching the adjoining wall. And while a developer that denies needing a license may avoid being recast as a petitioner, it will not escape the injunction and tort exposure that flow from having proceeded without one.

Conclusion

The reverse-881 proceeding reflects an evolving application of a statute long viewed primarily as a developer's tool. Whether through an affirmative petition by the burdened owner, as in *DTBG*, or through conversion of an injunction action where procedurally appropriate, the cases demonstrate that courts may place the financial and practical burdens of adjacent construction protection on the party responsible for the encroachment.

Section 881 is no longer necessarily a one-way street: an owner that disregards its neighbor's property rights may ultimately be required to accept and pay for court-imposed license terms.

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