

## Protecting your property from adjoining property damage in NY

New York is old and that means that construction, especially in high density areas like New York City, can take place in tight spaces and around old structures. Often, when new construction takes place next to old construction the building code (and common sense) will require the developer to protect the adjoining property from damage. This protection can take many forms including roof protection, shoring, underpinning, sidewalk bridges and more. Because protecting an adjoining property often means your neighbor has to enter your property, there are a number of legal issues that come up. The property is yours after all and your neighbor cannot just enter your property and perform any construction it pleases without your permission. This permission should *always* be in writing. The writing is in the best interests of the developer and the neighboring property that needs protection.

The written agreement allowing the developer to protect the adjoining property is called a “license agreement.” The license agreement should contain all of the terms necessary to protect both parties’ best interests. Some of the basic terms that should be in all license agreements are:

### Scope of protection

How is the developer going to protect the property? Where is the protection going to be placed? Who is going to install it and how long will it remain in place?

### Indemnification

The agreement should provide that the developer performing the protection work will “indemnify” the neighboring owner from any damage that occurs as a result of installing the protective work and/or from the construction itself. Any damage caused should be repaired by the developer.

### Insurance

This largely ties into the indemnification provisions. The developer should name the neighboring owner as an “additional insured” under its insurance. The agreement should also specify the amounts of insurance that will be required. The more dangerous the work, the higher the coverage should be. Likewise, the more valuable the property being protected, the higher the coverage should be.

### Reimbursement for fees

The developer will typically agree to reimburse the neighbor for the fees they incur in connection with the work and the license agreement. This can include reimbursing the neighbor’s legal fees and engineering fees associated with reviewing the proposed protection work.

### License fee

Often, the developer will have to pay the neighbor a “license fee” for the right to enter the neighbor’s property and perform the work. The fee can be periodic (monthly, weekly, etc.) or a lump sum. There is no set formula for figuring out the license fee. Every project is different and depends on a number of factors including the type of work, whether there are other options, and the parties involved.

### Pre-construction survey

This is a critical component that is often overlooked. The pre-construction survey is in the best interests of all parties involved. The neighbor wants the survey done so pre-existing conditions are documented and there is no dispute later on if damage occurs. Likewise, the developer wants to document pre-existing conditions so that if the neighbor later claims damage, the survey will show whether it existed before the work started. The survey should **always** include photographs of the conditions that are documented.

### Inspections and monitoring

The license agreement should provide that all pre-existing conditions are monitored. The monitoring needed will be determined by the construction professionals involved but often includes crack monitors, vibration monitors, tell-tale monitoring and more. In addition to the monitoring, the agreement should specify when, how and by whom inspections of the property will be performed. There should be a protocol for documentation and distribution of inspection reports.

The above is just a very brief overview of some important concepts to address in a license agreement. Adjoining property damage is an increasingly common occurrence in New York and it is strongly recommended that all parties involved consult with legal counsel to make sure their rights are fully and properly protected **before** work begins.

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