

CLIENT ADVISORY

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THE PROPERTY OWNER'S NEW RESPONSIBILITY FOR SIDEWALK INJURIES

Recent modifications of the City's Administrative Code have significantly increased the responsibility of adjacent property owners for injuries that may result from unsafe sidewalks. The new statutes constitute a marked change from prevailing law, under which owners were required to maintain the sidewalks in front of their buildings but it was the City that was potentially liable for injuries resulting from defects or unsafe conditions that had previously been brought to the City's attention.

Local Laws 49 and 54 of 2003, NYC Admin. Code §§ 7-210, 211, 212, which became effective on September 15, 2003, do more than place on the property owner the obligation to "install, construct, reconstruct, repave, repair or replace defective sidewalk flags" and to "remove snow, ice, dirt or other material from the sidewalk." They also provide that the owner, and not the City, is liable for any injury to person or property that is caused by the failure to maintain the sidewalks as required. The owner is now required by law to carry appropriate liability insurance for such injuries and the City does not become liable if the owner fails to carry such insurance. Excepted from these new rules are owner-occupied, exclusively residential, one, two or three family properties, as well as properties owned by the City itself.

Given these new laws, building owners should inspect their sidewalks regularly and, if any defects are found, repairs should be effected as soon as possible. The owner must also make sure that its insurance policies include coverage for such injuries.

THE IMPORTANCE OF WATCHING THE CALENDAR

In a case of first impression, a favorable decision recently obtained by our firm illustrates the risk of permitting disputes between neighbors to continue too long before suing. **Mindel v. Phoenix Owners Corp., Index No. 118488/02 (Sup. Ct. N.Y. Co.)**, arose from the provision in the New York City Building Code ("the Code") that requires the owner of a building that is constructed taller than the chimneys of an adjoining building to alter its neighbor's chimneys to conform to the chimney height requirements of the Code and to maintain and repair the altered chimneys. (**NYC Admin. Code §§ 27-859, 860**). Earlier litigation over this issue had resulted in a 1988 settlement in which the defendant, owner of a cooperative apartment building, acknowledged its obligation and promised to maintain and repair the chimneys of plaintiffs' neighboring brownstone to the extent required by the Code. Between 1996 and 1998, the plaintiffs renovated their house, including a major modification of the design and appearance of the chimney flues and flue extensions, which they claimed were not working properly. They commenced an action in 2002, claiming that the defendant was obligated under both the Code and the 1988 settlement agreement to reimburse the cost of the chimney modifications.

The Court dismissed the action, holding it time-barred by the three year statute of limitations applicable to actions upon "a liability created or imposed by statute," rather than the six year statute that normally applies to contract actions. The Court reasoned that the plaintiffs' right to demand

reimbursement for renovation of their chimneys arose exclusively from § 27-860 of the Code and that the stipulation of settlement in 1988 added no rights that plaintiff did not already have under the Code section. Since the plaintiffs had completed their renovation work in 1998, their claim arose at that time and the three year statute of limitations had expired by the time they commenced their suit.

NO ADVERSE POSSESSION OF AIR SPACE FROM OVERHANGING AIR CONDITIONERS

On the other hand, in **1380 Madison Avenue, LLC v. 17 East Owners Corp.**, NYLJ October 17, 2003, p. 18, col. 1 (Sup. Ct. N.Y. Co.), the owner of a small building successfully sued its neighbor over air conditioners that had projected over the plaintiff's building for more than ten years. In this case, the plaintiff had contracted to sell its two story building and property, upon which the purchaser intended to erect a high rise. The plaintiff's contract of sale, however, was conditioned on the removal of window air conditioners that for many years had protruded over plaintiff's property from the residential cooperative apartment building next door. The cooperative corporation argued that it had acquired ownership of plaintiff's air space for purposes of the air conditioners by "adverse possession" or, alternatively, the right to use it by "prescriptive easement."

The doctrine of "adverse possession" (see, **Real Property Action and Proceedings Law ["RPAPL"] §§ 501-551**) generally permits a party to establish ownership rights in the property of another upon proof that it has had possession of the property for more than ten years that was "actual, hostile, under claim of right, open and notorious, exclusive and continuous." A "prescriptive easement" requires the same elements as adverse possession, except that it is addressed to the right to use, as opposed to ownership. The Court found that although the defendant's air conditioners had protruded into plaintiff's air space for years, it was not under any claim of right, and that defendant had failed to show "actual possession," which must be proved by either cultivation or improvement of the property or its protection by substantial enclosure. (**RPAPL § 522**). Moreover, the Court noted that "one can never adversely use the light and air from an adjacent property" because such use does not diminish those benefits to an adjacent owner or notify it of any antagonistic claim. The Court found that the air conditioners had never conflicted with plaintiff's interest at all until 2003, when it entered into the contract of sale.

The Court also held that the cooperative could not claim that it had relied upon oral representations that the neighboring property would not be built higher than its two story building, since a restrictive covenant to that effect in an old deed had expired in 1948. Nor could it rely on the protection accorded by **RPAPL § 611**, which provides that an exterior wall that projects less than six inches into a neighbor's property may continue to stand if the neighbor does not sue within one year after its completion. The Court held that statute did not apply to air conditioners, which it declared to be violations of the plaintiffs' rights.