

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
In the Matter of the Application of  
MB-REEC Houston Property Owner, LLC,

Petitioner,

FOR AN ORDER AND JUDGMENT PURSUANT TO  
ARTICLE 4 OF THE CIVIL PRACTICE LAW AND  
RULES AND SECTION 881 OF THE REAL  
PROPERTY ACTIONS AND PROCEEDINGS  
LAW FOR ACCESS TO ADJOINING  
PROPERTY,

Index No. 158050/2015

Assigned Justice:  
Hon. David Cohen

-against-

THE BOARD OF MANAGERS OF 179 LUDLOW  
STREET CONDOMINIUM, and 179 LUDLOW  
STREET CONDOMINIUM,

Respondents and Third  
Party Petitioners,

Amended  
ORDER

-against-

Index No.: 595808/2015  
Mot Seq 1, 2 and 3

ELIZABETH MILONOPOULOS, JOHN DOE #1-100  
and JANE DOE #1-100, the identities of said persons  
presently being unknown and intended to be all persons  
claiming that Petitioner's proposed work will or may  
adversely affect their respective Limited Common  
Element in the Condominium building known  
as and located 179 Ludlow Street in New York County,

Third Party Respondents

-----X  
Based on this Petition seeking access to premises located at 179 Ludlow Street, New  
York New York as set forth therein, and the supporting papers filed in this proceeding by the  
Petitioner (Docket No. 1-20), the Affirmations in Opposition filed on Behalf of the Respondents  
(Docket Nos. 26-31, 46-52), the Respondents' Answer and Third Party Petition (Docket No. 32-  
35), the Notice of Third Party Petition (Docket No. 42), the Supplemental Affirmation of

Petitioner (Docket Nos. 53-64); the Answer to the Third Party Petition filed by Third Party Respondent, Elizabeth Milonopoulos (Docket No. 65); the Affidavit and Affirmation in Opposition filed on behalf of Elizabeth Milonopoulos (Docket Nos. 66-71), and all the prior proceedings held to date in this matter and the Interim Order of this Court (Mills, J.) dated October 22, 2015 (Docket No. 40),

IT IS HEREBY ORDERED, that the application of the Petitioner for access pursuant to E.P.A.P.L. §381 pursuant to the terms and conditions set forth in this Order is hereby granted. The parties do not dispute that the Project being constructed by Petitioner constitutes an improvement to Real Property under E.P.A.P.L. §381. The Court also finds that the terms and conditions of the annexed Court Order for Access are just and reasonable under the circumstances, providing for reasonable access by the Petitioner to 179 Ludlow Street, New York, New York, for a reasonable period of time, with sufficient protections as to indemnity and insurances. Accordingly Petitioner is granted immediate access pursuant to this Order. The Court has reserved decision as to whether the Respondent and Third Party Respondent are entitled to a fee from Petitioner for the access granted, and if so, the amount of such fee.

This Court Order, dated as of April 14, 2016 requires that MB-REEC Houston Condominium Board, LLC, a Delaware limited liability company duly authorized to transact business in New York State, having an address at c/o Magnum Real Estate Group, 594 Broadway, Suite 1010, New York, New York 10012 (the "Developer") be provided certain access, by the 179 Ludlow Street Condominium (the "Condominium") by its Board of Managers (the "Board"), having an office at 179 Ludlow Street, New York, New York and by Elizabeth Milonopoulos, residing at 179 Ludlow Street, Unit 2, New York, New York (the "Unit Owner") (each a "Party" and, collectively, the "Parties").

### **Statement of Facts**

Developer owns the real property located at 194 Orchard Street, New York, New York, identified as Block 412, Lots 12, 13, 14 and 16 (the "Developer's Property"), and intends on performing certain excavation and construction work to construct an 11 story mixed use building at the site (the "Project"). The owners of the residential and commercial units (the "Units") located in the building located at 179 Ludlow Street, New York, New York ("179 Ludlow") collectively own the common elements of 179 Ludlow. The Unit Owner is the owner of Unit 2 (Unit "2") on the second floor of 179 Ludlow, which Unit includes as a limited common element, a terrace or courtyard, which is adjacent to the Developer's Property (the "Courtyard"). The owner of Unit 2, has the exclusive use of the Courtyard, as described in the Condominium's offering plan, subject to the oversight and rights of the Board of Managers as set forth in the Condo Declaration and the rules and regulations of the Board of Managers;

The Board contends that the Courtyard is a limited common element as defined by the Offering Plan of the Condominium ("Limited Common Elements"). The Board further contends that it does not have the authority and power to grant access to the Developer for the Protection Work (defined below), in the Common Elements and Limited Common Elements without the consent, express or implied of Unit Owner. In connection with the work to be performed at the Project, the Developer's construction manager, contractors, consultants and others (the "Workers") must enter upon 179 Ludlow, including Unit 2 thereof, which property is adjacent to the Development;

The Developer has requested that the Board grant a licence to provide access to 179 Ludlow, including Unit 2 thereof, in order to, among other activities, conduct certain inspections and monitoring and furnish and install certain protection and other work, as more fully set forth in

Exhibit B to this Order, and to protect 179 Ludlow and its occupants from the ongoing construction activities related to the Project. The Board contends that it is unable to grant the Developer access to the Courtyard as required to install the Protection Work described herein without the consent of the Unit Owner.

The Developer commenced the instant Petition against the Board seeking to compel access ("the Action"). The Board then commenced a third-party petition naming, the Unit Owner and other third-parties who may be affected by the Protection Work set forth in Exhibit B. The Unit Owner has appeared in the Action with counsel and no other third party has appeared.

#### **Access Order**

The Board and the Unit Owner are ordered to provide access, subject to the terms and conditions of this Order, for the sole purpose of performing the work set forth in Exhibit B, which is attached and incorporated into this Order, along with any reasonably inferable work and any work otherwise identified in this Order (the "Protection Work"). Prior to performing any portion of Protection Work, or work under this Order, that will require access to 179 Ludlow, the Developer will provide the Board with no less than five (5) days written notice. Prior to performing any portion of Protection Work, or work under this Order that will require access to Unit 2 and the Courtyard therein, the Developer will provide the Unit Owner with no less than five (5) days written notice.

Previously, the Board granted Developer access to conduct, at its sole cost and expense, visual, photographic and video property condition surveys (including a pre-construction property condition survey) ("Condominium Condition Surveys") in order to establish the condition of 179 Ludlow before, during or after the installation of the Protection Work; and (b) install vibration and crack monitors at 179 Ludlow. The Developer will provide (a) the Board and the Unit Owner with

copies of any pre-construction property surveys and/or reports; and (b) the Board with copies of the reports of the vibration and crack monitoring. The Board and the Unit Owner acknowledge that the Developer shall not be liable for any existing conditions identified in any Condominium Condition Survey occurring prior to the Protection Work, unless it is demonstrated that such existing conditions were caused by the Developer. The Developer shall reimburse the Board the reasonable cost of an engineer to review the crack and vibration monitoring reports, at a rate not to exceed \$200.00 per hour and not to exceed the total cost of \$3,000.00 per annum.

The Developer shall use its best efforts to minimize interference with the use and occupancy of 179 Ludlow as is practicable under the circumstances. During the course of the Protection Work and the work at the Project, the Developer shall take all necessary and reasonable measures to ensure the safety of the occupants, employees, and licensees of 179 Ludlow, and shall use its best efforts to minimize dust, dirt and other debris. The Protection Work shall be performed in compliance with approved plans and specifications and in compliance with all legal requirements, including the New York City Building Code and good construction practice (i.e., the generally accepted construction standards and practices for projects of similar size, design and complexity), and shall not unreasonably interfere with the use and operation of 179 Ludlow Street. The Board, Unit Owner and the Developer shall cooperate with each other so that the measures and Protection Work anticipated by this Order can be implemented and maintained in a safe and secure manner.

This Order granted by the Board and the Unit Owner shall, automatically and without any further notice required, take effect on April 14, 2016. The Developer shall use all reasonable efforts to complete the Protection Work in a commercially reasonable manner and so as to minimize any interference with the occupants of 179 Ludlow Street. The parties anticipate, but

understand that Developer does not guarantee, that the Protection for Unit 2 shall remain until at least March 31, 2017 (the "Anticipated Completion Date").

The Developer shall provide copies of all filings and approved plans and drawings related to the Protection Work to the Board and the Unit Owner. During the course of the Protection Work, the Developer shall provide copies of any revised or amended plans, and inspection and test reports relating to the Protection Work to the Board and the Unit Owner (as applicable to 179 Ludlow and Unit 2, respectively) for its review, in a reasonable time after such plans and reports are available to the Developer, but in any event no later than ten (10) days after such documents have been made available to Developer.

The Developer shall obtain all necessary licences, permits, approvals, or variances to perform the Protection Work which may be required by any legal requirements and shall pay all fees related thereto. The Board and the Unit Owner shall cooperate with the Developer in connection with obtaining such licences, permits, approvals or variances, at the Developer's sole expense, and shall execute any appropriate applications or other documents that require the Board's or the Unit Owner's signature.

Pending and upon completion of the Project, the Developer shall, in a good and workmanlike manner, restore the portions of 179 Ludlow in any way affected by the Project, the Protection Work and any work related to the Project to a condition at least as good as its condition immediately prior to the commencement of the Protection Work, including, without limitation, removal of the Courtyard Unit protection, scaffolding, debris and equipment, repair of any damage, and cleaning the exterior of 179 Ludlow, and, if necessary, the interior of Unit 2, to remove all dust and other material resulting from the Protection Work. The Developer shall clean the exterior

of the building located at 179 Ludlow Street one time per year during the construction of the Project, and shall clean the windows of the entire building every four months.

Neither the Board or the Unit Owner shall remove or interfere with the Protection Work installed by Developer pursuant to the terms of this Order and promptly shall advise the Developer if the Board or the Unit Owner becomes aware that the Protection Work has been disturbed.

The Board and the Unit Owner will provide access to 179 Ludlow and Unit 2, as is reasonably required by Developer and/or the Workers, for the sole purpose of installing, maintaining, monitoring, repairing, replacing, and removing the Protection Work. The Developer shall coordinate with the Board's onsite representative/property manager for all such access and with the Unit Owner's counsel for any access to Unit 2 and/or the Courtyard. Where the Protection Work must be installed and/or accessed by the Developer and/or the Worker's in non-common elements/areas of the Condominium, it is the obligation of the Board to secure access from the occupants and the Unit Owner shall provide such access to Unit 2, if required.

The Developer, and/or the Workers, shall be permitted to enter upon 179 Ludlow to install and maintain the Protection Work, including regular and/or monthly maintenance inspections, between the hours of 8:00 A.M. (with mobilization commencing no earlier than 7:30 A.M.) through 5:00 P.M. on Monday through Friday, and on Saturdays upon prior notice to the Board, and between the hours of 9:00 A.M. (with mobilization commencing no earlier than 8:30 A.M.) through 5:00 P.M. on Monday through Friday with respect to Unit 2 and on Saturdays upon prior notice to the Unit Owner. Notwithstanding the foregoing, access to the interior of 179 Ludlow (other than Unit 2, including the Courtyard), by the Developer and/or Workers, shall be limited to the hours of 8 a.m. to 5 p.m., unless the Developer receives prior consent from the Board, such consent not to be unreasonably withheld. In the event of an emergency relating to the health, safety

or welfare of persons or the threat of damage to 179 Ludlow, including Unit 2 or the Project, the Developer and/or Workers shall be permitted access to 179 Ludlow, including Unit 2, during hours other than the work hours set forth in this paragraph, provided the Developer uses reasonable efforts to minimize any disturbance to the occupants of the Condominium and provides as much advance notice as is reasonably practicable under such circumstances. In the event that emergency circumstances prohibit advance notice, counsel for the Board and for the Unit Owner shall be provided notice of such entry at the earliest practicable moment, including by telephone and email, as well as all other methods required under this Order. The Board shall forthwith provide a name and phone number for an emergency contact person.

To the fullest extent permitted by law, the Developer shall defend, indemnify and hold harmless the Condominium, including the unit owners, tenants and residents; the Board and the managing agent, including their employees and agents; and the Unit Owner, including their executors, administrators, successors and/or assigns of each of them (collectively, the "Condo Indemnified Parties") for any losses, costs, expenses, claims and/or damages (including, without limitation, reasonable attorneys' and expert fees incurred by the Condo Indemnified Parties), including but not limited to any personal injury, death, or property damage or casualty claim, arising from the Protection Work. This indemnity shall not include any liability for any losses, costs, expenses, claims or damages (including reasonable attorneys' fees or expert fees) incurred as a result of the Condo Indemnified Parties' negligence or willful misconduct, as the case may be, and the same shall be apportioned based on each parties' respective percentage of negligence. If any action or proceeding shall be brought against the Condo Indemnified Parties that is within the scope of this indemnity, Developer, upon notice from the Condo Indemnified Parties, as the case may be, shall promptly defend such action or proceeding, at Developer's expense, by counsel



reasonably satisfactory to the Condo Indemnified Parties, or by the attorney for Developer's applicable insurer. Developer shall cause any liens, mechanics' liens and violations arising out of the Protection Work or the Project issued against 179 Ludlow, the Condominium and/or any unit owner thereof to be removed, settled, satisfied and/or discharged, as the case may be within thirty (30) days of written notice by any of the Condo Indemnified Parties of such lien, mechanic's lien or violation. The indemnification obligations of Developer contained herein shall survive termination or expiration of this Order, or completion of the Protection Work and the Project, whichever date is the event latest to occur.

The Condo Indemnified Parties shall be not liable for any damage to property of the Developer located in or at 179 Ludlow, nor for the loss of or damage to any property of the Developer by theft located in or at 179 Ludlow unless such damage or loss is caused by the action or inaction of one or more of the Condo Indemnified Parties, in which case, the Condo Indemnified Party(ies) causing such loss or damage shall defend, indemnify and hold harmless the Developer for such loss or damage.

Throughout the performance of the Protection Work, the Developer shall maintain, and cause any contractor performing the Protection Work (the "Contractor") to maintain, in full force and effect: a commercial general liability insurance policy covering bodily injury (including death) and property damage, written on an occurrence basis, with limits of not less than \$12,000,000 per occurrence, through primary and umbrella/excess policies, insuring the Developer's operations and protecting the Condo Indemnified Parties for property damage and personal injury (including death) and which policies and any renewals thereof shall name the Condo Indemnified Parties as additional insureds (the "Additional Insureds"). All policies as required under this paragraph shall be endorsed to provide location-specific coverage and such insurance shall be primary and non-

contributory to the insurance of the Additional Insureds, regardless of whether such insurance is maintained on a primary, excess or umbrella basis. The Developer's insurer shall be rated A-VII or better. Developer and its contractors shall maintain automobile and worker's compensation insurance as required by law.

Such insurance policies shall provide that they may not be terminated or modified without at least thirty (30) calendar days' written notice to the Board and the Unit Owner. Developer shall provide a Certificate of Liability Insurance from the Developer (form Acord 855) to the Board and the Unit Owner prior to the commencement of the Protection Work. Renewal certificates shall be delivered by the Developer to the Board and the Unit Owner at least ten (10) calendar days prior to the expiration of any such policies, or within ten (10) calendar days of the Developer's receipt thereof from the insurer, whichever is earlier.

If any additional work, labor or services are required by the New York City Building Code, the DOB or other governmental agencies, departments, subdivisions, bureaus or offices thereof, or of any other governmental, public or quasi-public authorities in connection with the Project or the Protection Work, the same shall be performed by the Developer at its sole cost and expense, under the access granted under this Order.

The question of whether and in what amounts Petitioner shall pay the Condo or the Unit Owner for an access fee and/or reasonable attorney's and expert fees (collectively, the "Access Fee") shall be determined at a later date by the Court.

All notices given by the Parties to each other shall be in writing and shall be sent by nationally recognized overnight delivery service providing a receipt (such as FedEx) to counsel for the Parties as they appeared in the Action. Notices shall be deemed delivered as of the business day following service of such notices in accordance with the provisions of this paragraph. In the

event the Developer seeks emergency access pursuant to this Order, additional notifications shall be made both by telephone and by email to counsel for the Parties, and such additional notices shall be deemed made when successfully transmitted.

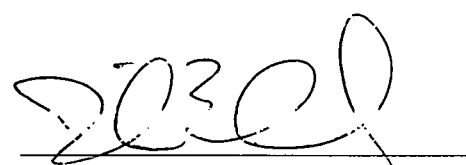
This Order can only be modified by a writing signed by the Parties or subsequent court order.

This Order is intended to confer rights and benefits and be binding only upon the Board, the Unit Owner and the Developer and their respective successors and assigns (and upon the Condo Indemnified Parties solely to the extent of the Developer's indemnification obligations), (and the Contractor to extent of the joinder), and not upon any other person or entity, and no other person or entity shall have any enforceable right arising out of or relating to this Order. If at any time any of the Parties, or their successors and/or assigns, elects to lease or sell their respective property or any portion thereof, the parties mutually agree that any such lease or sales contract shall specifically provide that any conveyance contemplated therein is subject to the terms of this Order and any such tenant or purchaser shall continue to be bound by the terms hereof.

The Parties shall execute such other and further documents as may be reasonably required to effectuate the terms, conditions and intent of this Order.

This is the decision and order of the Court.

Dated: April 14, 2016  
New York, NY



Hon. David B. Cohen, A.J.S.C

EXHIBIT A – DESCRIPTION OF OWNER'S PROPERTY

The Condominium is located at 179 Ludlow Street, New York, New York:

Block 412, Lot 26 and now lots 1101-1107.

It is a six (6) story mixed residential and commercial building.

EXHIBIT B – SCOPE OF WORK FOR WHICH ACCESS IS GRANTED

1. Monitoring:

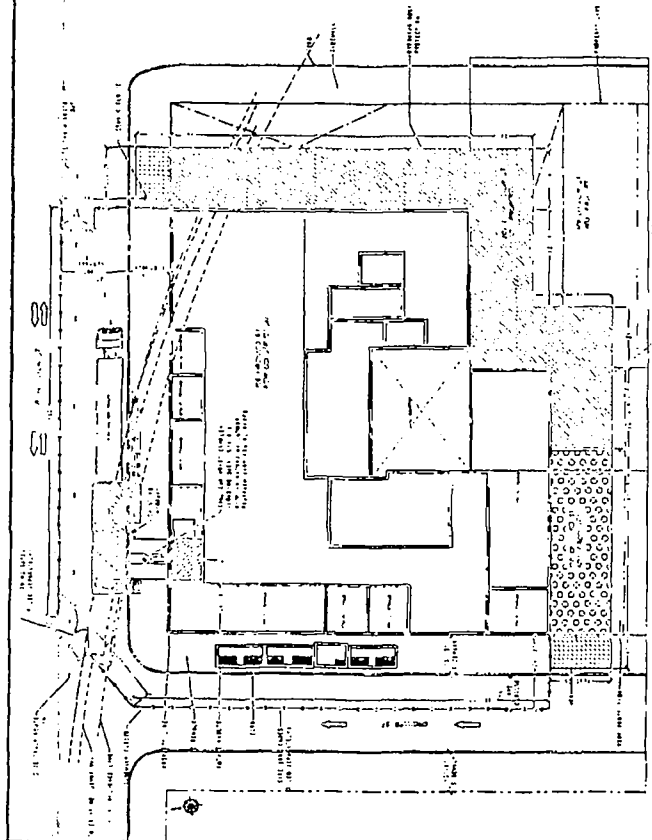
Developer has already installed vibration and crack monitors in the basement of the Premises. Developer is granted all necessary access to maintain and read the monitors and to perform periodic data downloading. Developer shall provide monitoring reports to Board.

2. Courtyard Protection:

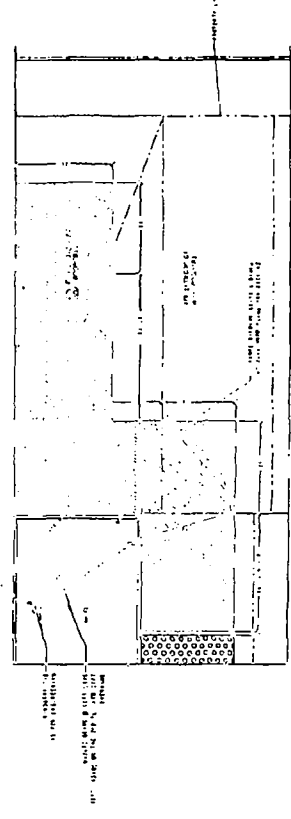
Developer shall be permitted to install Courtyard Protection as depicted in Exhibit 1 hereof, Option 2.

3. Additional Protection:

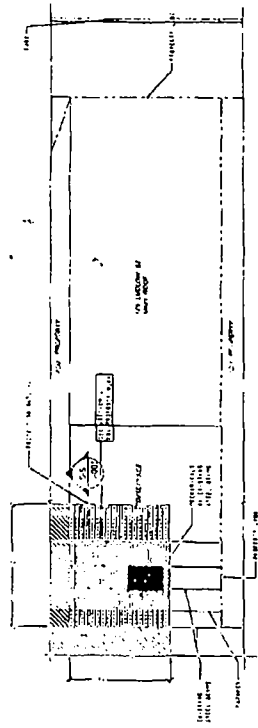
Subsequent to the date of this Order, Developer may be required by design and/or by Code to install and maintain other protection for 179 Ludlow Street and/or Unit 2 and/or the Courtyard thereof as may be determined to be required subsequent to the date of this Order (“Additional Protection”). In such event that Additional Protection is required, Developer will provide the Board (and the Unit 2 Owner if the Additional Protection affects Unit 2) with copies of all plans for any such Additional Protection no later than 15 days prior to the time of installation. If the Board and/or the Unit Owner do not agree with any aspect of the plans for the Additional Protection, they shall notify the Developer within five (5) days. If there is no objection to the plans for Additional Protection, the Additional Protection shall be subject to the same terms and conditions as the Protection Work herein. If there is an objection to the Additional Protection, the parties shall confer within three (3) days after receipt of the objection in an effort to resolve such objection. If the parties cannot reach an agreement regarding the Additional Protection, at any time any of the parties may apply to the Court in the Action for relief. Each party shall bear their own fees for the cost of such application.



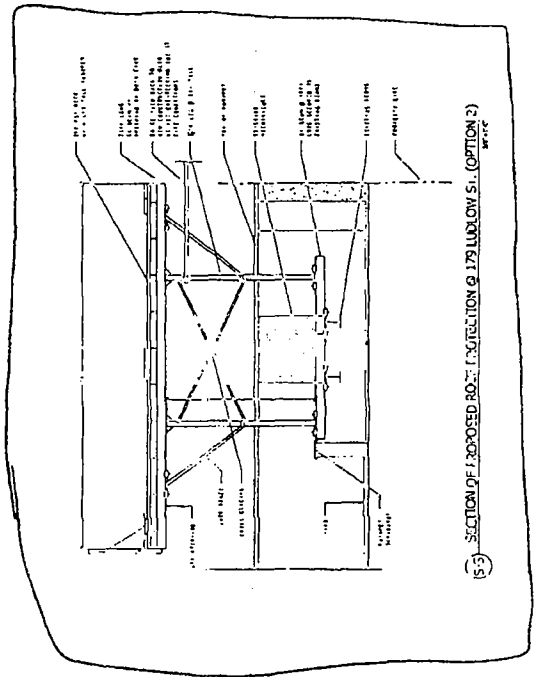
1. LOGISTICS PLAN  
SCALE: 1/8" = 1'-0"



2. PLAN OF PROPOSED ROOF STRUCTURE @ 179 LUDLOW ST. (OPTION 1)  
SCALE: 1/8" = 1'-0"



3. PLAN OF PROPOSED ROOF STRUCTURE @ 179 LUDLOW ST. (OPTION 2)  
SCALE: 1/8" = 1'-0"



4. SECTION OF PROPOSED ROOF STRUCTURE @ 179 LUDLOW ST. (OPTION 2)  
SCALE: 1/8" = 1'-0"

PROJECT: 179 LUDLOW ST. - PROPOSED ROOF PROTECTION - PLANS AND SECTION		DATE: 11 MAR 2010	
SCALE & REVISED		DESIGNED BY: CAT	CHECKED BY: SC
DRAWN BY: [Signature]		DATE: 11 MAR 2010	
PROJECT NO: SK-001.00		SHEET NO: 1 OF 1	

