

<b>CUCS Hous. Dev. Fund Corp. IV v Aymes</b>
2019 NY Slip Op 30450(U)
February 26, 2019
Supreme Court, New York County
Docket Number: 159303/2018
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

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CUCS HOUSING DEVELOPMENT FUND  
CORPORATION IV, CUCS WEST 127th  
STREET LLC, and CENTER FOR URBAN  
COMMUNITY SERVICES, INC.,

Petitioners,

Index No.: 159303/2018

-against-

Mot. Seq. No. 001

CLIFFORD S. AYMES,  
Respondent.

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**MELISSA A. CRANE, J.S.C.:**

Background

This case arises from an action that CUCS Housing Development Fund Corporation IV, CUCS West 127th Street LLC, and the Center for Urban Community Services, Inc. (collectively, the “petitioners”) brought under RPAPL § 881 to access respondent Clifford S. Aymes’s (“respondent”) property at 316 W 127th Street, New York, New York (“respondent’s property”) for the purpose of underpinning it.

Motion sequence 001, 002, and 003 are consolidated for disposition.

Petitioners are trying to begin a construction project to provide New York City’s homeless population with affordable housing. Respondent is the owner of the one-story, unoccupied building adjoining petitioners’ project. NYC Building Code Sections 3307 and 3309 require petitioner to take careful measures to protect public safety and to prevent damages to respondent’s property during the building’s construction. Section 3309.5 of the Code, which necessitates underpinning further provides:

Whenever underpinning is required to preserve and protect an adjacent property from construction, demolition or excavation work, the person who causes (the construction or excavation) such work shall, at his or her own expense, underpin the adjacent building provided such person is afforded a licenses in accordance

with the requirements of section 3309.2 to enter and inspect the adjoining buildings and property, and to perform such work thereon as may be necessary for such purpose. If the person who causes the construction, demolition, or excavation work is not afforded a license, such duty to preserve and protect the adjacent property shall devolve to the owner of the adjoining property, who shall be afforded a similar license with respect to the property where the construction, demolition, or excavation is to be performed.  
(see NYC BC 3309.5).

Section 3309.2 states:

The responsibility of affording any license to enter adjoining property shall rest upon the owner of the adjoining property involved. . . Nothing in this chapter shall be construed to prohibit the owner of the property undertaking construction or demolition work from petitioning for a special proceeding pursuant to Section 881 of the *Real Property Actions and Proceedings Law*.

Petitioners claim that, to continue with the housing project, they need to install fixtures on respondent's property that include underpinning, a sidewalk bridge, scaffolding, health and vibration monitoring, shoring, and roof protection ("protective work"). Starting in July 2018, respondent has refused to give petitioners access to his property.

After months of unsuccessful negotiations and petitioners' repeated attempts to convince respondent to grant them access to his property, petitioners commenced this action (October 15, 2018 Tr., p. 7). Once in court, respondent ultimately consented to non-permanent encroachments, such as the placement of scaffolding and nets, but continued to refuse access for underpinning.

On October 15, 2018, this court held a hearing to determine access rights for the underpinning pursuant to RPAPL § 881. The court heard testimony from Doug James, COO of CUCS, Bruno Frustaci, COO of Bruno Frustaci Contracting, contractor for petitioners, and from respondent. Mr. Frustaci testified for the plaintiff that no reasonable alternatives to the underpinning exist:

Because our bottom of footings – the building that's being constructed... abuts the property line. And, our bottom of footings are, approximately, 14 feet below grade. And, his adjacent footing is – we don't know for

Sure. There were reasonable assumptions made. But, we're assuming, right now, that his property is, approximately, minus eight or minus nine below grade. So, we would have to extend his footings down further (October 15, 2018, Tr. pgs. 28-29).

Mr. Frustaci also testified that petitioners had to ensure the footing of respondent's property and their shelter were the same, because petitioners' building included a full cellar with space for mechanical equipment, as well as medical offices. If the footings were not the same, respondent's building would collapse (October 15, 2018 Tr. pgs. 29-30). Mr. Frustaci also said that the underpinning would cause no damage to respondent's property, and that petitioner went through a two-year approval process with the Department of Buildings, City Planning (October 15, 2018 Tr. p. 39). There was additional testimony regarding the ongoing homelessness crisis in New York City.

Respondent opposed the underpinning, and provided the court with a letter from James Cohen, PE, an engineer who stated that sheeting and bracing were viable alternatives to underpinning (Respondent's memo of law in opp, Exh 2). Petitioners have consistently insisted on underpinning versus other alternatives, like sheet piling. Mr. Frustaci testified that sheeting is actually more intrusive, and an unrealistic and dangerous option, as it would cause excess vibrations to respondent's already unstable property.

After the October 15 hearing, the court granted an interim order on consent for the protective work, including, *supra*, roof protection, vibration and optical monitoring, and shed work to commence. The court did not rule on whether petitioners could access respondent's property for underpinning. The court scheduled a subsequent court appearance for November 1, 2018.

At the November 1 hearing, both sides provided additional expert testimony and statements under oath. The court now must determine whether to grant petitioners request for a license to access respondent's property for an underpinning.

#### Discussion

Real Property and Procedures Law (RPAPL) applies to this case. It provides:

When an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms *as justice requires*. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry.

“In determining whether or not to grant a license pursuant to real Property Actions and Proceeds Law § 881, courts generally apply a standard of reasonableness” (*In re Board of Managers of Artisan Lofts Condominium*, 114 AD3d 491, 492 [2014]). RPAPL § 881 requires the balancing of conflicting interests: “Courts are required to balance the interests of the parties and should issue a license ‘when necessary, under reasonable conditions, and where the inconvenience to the adjacent property owner is relatively slight compared to the hardship of his neighbor if the license is refused” [id. Citations omitted]). “Where a license pursuant to RPAPL § 881 is sought, the license can be compelled even though no agreement is reached, and in that situation, the terms of the license are set in the discretion of the court” (*Matter of N.7-8 Invs. LLC v Newgarden*, 43 Misc. 3d 623 [Sup. Ct., Kings County 2014]). The factors a court should consider are “the nature and extent of the requested access, the duration of the access, the protections to the adjoining property that are needed, the lack of an alternative means to perform

the work, the public interest in the completion of the project, and the measures in place to ensure the financial compensation of the adjoining owner for any damage and inconvenience resulting from the intrusion” (*Queens College Special Projects Fund, Inc v Newman*, 154 AD3d 943, 944 [2d Dep’t 2017] [intrusion permitted where project, an educational center, served the public interest).

Because an underpinning is a permanent encroachment, a petitioner must demonstrate that the underpinning is virtually “unavoidable” (see *Madison 96<sup>th</sup> Associated LLC v 17 East 96<sup>th</sup> Owners Corp*, 121 AD3d 605, 608 [1<sup>st</sup> Dep’t 2014]). Here, petitioner has demonstrated that the underpinning is “virtually unavoidable.” The options respondent’s expert suggested are not actual options. First, petitioners expert testified that the nature of the building caused a 3-inch space between respondent’s building and petitioners, and, therefore, there is no alternative to underpinning (October 15, 2018 Tr. 47). Second, an alternative to underpinning would require petitioners to reconfigure the entire project at great expense and petitioners would lose important space in the basement intended for a social services office. Petitioners purposefully put these offices in the basement to maximize the amount of residential affordable housing above ground (October 15, 2018 Tr., p. 29). It is important to house the social services office on site to afford this vulnerable population direct access to the services they so desperately need. Moreover, petitioner demonstrated that the underpinnings were necessary to keep the property from collapsing. Finally, DOB and other agencies had conducted a two-year review of the project plans as part of building protocols and approved the plan with the proposed underpinning.

Contrary to respondent’s position, the court does not read the case law to preclude a license for a permanent encroachment altogether. Such an interpretation runs counter to the language of RPAPL § 881 that allows for an encroachment “as justice requires.” Moreover,

courts generally afford deference to administrative agencies' interpretation of the relevant statute. (See *Matter of Peyton v. New York City Bd. Of Stds. & Appeals*, 166 AD3d 120, 135-136 [1<sup>st</sup> Dept 2018][internal quotation marks and citations omitted]). [An Administrative Agency's interpretation of a statute is typically entitled to deference..., particularly where the interpretation involves specialized knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom." ] Here, the DOB's regulations (sections 3309.2 and 3309.5), when read together, clearly anticipate a legal proceeding under RPAPL § 881 to obtain a license for an underpinning.

The cases where the courts have denied a license to underpin do not necessarily stand for the proposition that a license for an underpinning is never allowable. For instance, in *Madison 96<sup>th</sup>*, the Appellate Division First Department's primary focus was the extent to which the adjoining property owner had consented to the underpinning. In denying a license, that court found that petitioner had failed to show the underpinning was unavoidable or that *Madison 96<sup>th</sup>* had even considered "other, non-encroaching alternatives." By contrast, here, petitioner has considered alternatives and demonstrated there is no viable alternative to underpinning. Although the Appellate Division, First Department reversed the grant of a license to underpin in *In re Tory Burch LLC v. Moskowitz*, 146 A.D.3d 528 201 (2017), the court reasoned that "petitioner failed to make a showing as to the reasonableness and necessity of the trespass. . .where, at the time of the petition, none of the items sought had been memorialized in specific plans filed and approved by the Department of Buildings, and the project was under a stop work order." *Id.* at 529. Likewise, in *Broadway Enterprises v. Lum*, 16 AD3d 413, 414 (2d Dep't 2005) the court reasoned that "there are alternative methods of construction that the petitioner

may utilize.” If an underpinning was never allowable, it would have been unnecessary for these decisions to discuss how petitioners failed to carry their burden.

In stark contrast to these cases, petitioners have demonstrated the lack of reasonable and practical alternatives, the necessity of the underpinning, and the specific plans and procedures filed and approved by the NYC Department of Buildings.

In recent years, homelessness in NYC have reached staggering highs. In December 2018, there were 63,498 homeless people, including 15,485 homeless families with 22,899 homeless children, sleeping each night in NYC’s municipal shelter system.<sup>1</sup> Families make up three-quarters of the homeless shelter population and currently account for the largest number of people in NYC’s municipal shelters.<sup>2</sup>

Many of these families have school aged children. As a result, the number of students in temporary housing rose to 114,659 as of 2018; a dramatic increase from 69,244 children that were homeless in 2010.<sup>3</sup> One out of every ten students in NYC will sleep in a homeless shelter or in the homes of relatives (*id*). The number of homeless children continues to swell, and the City has yet to see a significant increase in public or private dollars spent to support these students (*id*).

Homeless shelters in Manhattan are overcrowded, overpopulated, and under sourced. These individuals have nowhere to go to receive services and aid. Many of NYC’s homeless are people who have jobs and simply cannot afford to pay rent.<sup>4</sup> Others are families with small

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<sup>1</sup> See *Coalition for the Homeless*, Basic Facts About Homelessness: New York City, <http://www.coalitionforthehomeless.org/basic-facts-about-homelessness-new-york-city/>

<sup>2</sup> See [www.nytimes.com](http://www.nytimes.com), by Nikita Stewart, The Wait. The Paperwork. The Shelters. We Followed Families Looking for Home. February 18, 2018

<sup>3</sup> See [www.nytimes.com](http://www.nytimes.com), Eliza Shapiro, *Homelessness in New York Public Schools Is at a Record High: 1214,659 Students*, October 15, 2018

<sup>4</sup> See [www.nytimes.com](http://www.nytimes.com), Nikita Stewart, *Homelessness, Step by Step*, February 18, 2018

children. Research shows that the primary cause of homelessness, particularly among families, is lack of affordable housing.<sup>5</sup> The lack of affordable housing in NYC is a persistent and troubling epidemic that has reached a crisis point.<sup>6</sup> A scarcity of resources has caused people to live outside on the streets, in NYC's subway system, and in other public spaces.

At the hearing, it became clear that respondent's property is currently vacant, unused and empty without utilities including electricity, or a secure front entrance to keep trespassers and vandals out. In fact, when questioned about what damage, if any, the underpinning would cause, respondent never answered the question and simply stated: "I don't have to have a reason... I just don't want underpinning" (October 25, 2018 Tr. p. 50).

The court has compared respondent's notable lack of basis for his objection to underpinning his one-story building to petitioners' more compelling reasons for underpinning, including that there are no feasible alternatives to underpinning, the loss of social services space if underpinning were not permitted, testimony at both hearings that establish the need for underpinning, and the affordable housing that NYC's homeless shelter system stands to gain from the project. The court finds, after a hearing, petitioner has demonstrated that access to perform the underpinning is both just and appropriate in this case.

However, while RPAPL's § 881 may compel respondent to grant petitioners' access to his property, justice requires that respondent not be compelled to incur costs to protect his property from the access. Courts in the past have awarded licensing fees as a condition of grating a license pursuant to RPAPL § 881 (*see North 7-8 Investors, LLC v Newgarden*, 43 Misc3d at 633). The granting of the license in our case, therefore, warrants the award of contemporaneous

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<sup>5</sup> See *Coalition for the Homeless*, Basic Facts About Homelessness: New York City, <http://www.coalitionforthehomeless.org/basic-facts-about-homelessness-new-york-city/>

<sup>6</sup> See *NYC Housing*, Our Current Affordable Housing Crisis, <https://www1.nyc.gov/site/housing/problem/problem.page>

licensing fees to the respondent in the matter (*Matter of Van Dorn Holdings, LLC v 152 W. 58th Owners Corp.*, 149 AD3d 518 [1st Dept 2017]). A respondent, similar to the one in the case at hand, is entitled to these fees because “they have not sought out the petitioners intrusion onto their property.” *Id.* at 518. Equity further requires that the respondent who is compelled to grant access should not have to bear any costs resulting from the access to his or her property. *Id.* at 518.

Accordingly, it is

**ORDERED** that the court grants the petitioner’s request for a license to enter respondent’s property for the purposes of installing protective works, including underpinning, pursuant to RPAPL § 881; and it is further

**ORDERED** that the court grants respondent’s request for an award of reasonable license fees to be paid for by petitioner in an amount to be determined at a hearing on April 5, 2019 at 12:00pm at 71 Thomas Street, New York, New York; and it is further

**ORDERED** that the court grants respondent’s motion (Motion Sequence No. 2) for petitioner to cover all expenses and costs relating to the installation, maintenance, or removal of all temporary encroachments, including the on-site supervision of respondent’s licensed professional engineer; and it is further

**ORDERED** that the court denies that part of Motion Sequence No. 2 where respondent asks that the court take judicial notice that petitioners conceded during the hearing on October 20, 2018 that they have no right to demand that respondent allow the petitioners to install underpinning on respondent’s property, and the court denies respondent’s request to make findings of facts requested in its motion; and it is further

**ORDERED** that the court denies respondent's motion (Motion Sequence No. 3) for a default judgment against petitioner, for respondent's counterclaims under CPLR 3215, or in the alternative, for summary judgment of respondent's counterclaims, and partial summary judgment denying petitioners a license to underpin respondent's building under CPLR 3212.

ENTER:

2/26/2019



HON. MELISSA A. CRANE, J.S.C

**HON. MELISSA A. CRANE**  
J.S.C.