

362-364 Ovington LLC v Kimball
2026 NY Slip Op 31910(U)
April 29, 2026
Supreme Court, Kings County
Docket Number: Index No. 514559/2025
Judge: Heela D. Capell
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At a Term, Part 19 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brooklyn, New York, on the 29 day of April, 2026.

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

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362-364 OVINGTON LLC,

Index No.: 514559/2025
Mo. Seq. #2

Petitioner,

-against-

DAVID KIMBALL and DORCAS KIMBALL

Respondent.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondents’ order to show cause to refuse to grant petitioner a license to enter respondents’ property pursuant to RPAPL § 881, numbered as they appear on NYSCEF.

Papers

Order to Show Cause.....27
Opposing Affirmations and Exhibits Attached.....16-24, 31-35, 37-40

David Kimball and Dorcas Kimball (the “Respondents”) move this court by order to show cause pursuant to RPAPL § 881, for an order not granting 362-364 Ovington LLC (the “Petitioner”) a license to enter upon a portion of Respondent’s land. The order to show cause is decided as follows:

Respondents are owners of 360 Ovington Avenue, Brooklyn, New York 11209, Block 05891, Lot 0042. (“Respondents’ Property”). Petitioner is the owner of 362-364 Ovington Avenue, Brooklyn, New York 11209. Petitioner asserts that it intends to perform “certain construction activities” located at 362-364 Ovington Avenue, Brooklyn, New York 11209 (“Petitioner’s Property”). The Petitioner notes that the work at Petitioner’s Property includes installing “roof

protections, chimney protections, and a sidewalk shed.” Petitioner claims that, as part of the construction activities that Petitioner wants to perform, Petitioner requires temporary access to Respondents’ Property. Petitioner further claims that it seeks an Order pursuant to RPAPL § 881 authorizing access to enter upon Respondents’ Property for the purpose of performing certain construction activities and the protective measures.

RPAPL § 881 provides that the court may grant a “license so to enter” property for the purpose of making improvements to real property so situated. The court deciding a petition pursuant to RPAPL § 881 has discretion and must apply a standard of reasonableness balancing “the potential hardship to the applicant if the petition is not granted against the inconvenience to the adjoining owner if it is granted.” *Queens Theater Owner, LLC v WR Universal, LLC*, 192 AD3d 690 (2d Dept 2021); *Queens College Special Projects Fund, Inc. v Newman*, 154 AD3d 943, 944 (2d Dept. 2017).

The Respondents oppose the Petitioner’s petition pursuant to RPAPL § 881 on the grounds that: (1) A zoning challenge to Petitioner’s approved plans is pending; and (2) Petitioner fails to establish prima facie entitlement to an order pursuant to RPAPL § 881.

Respondents filed a zoning challenge to the Petitioner’s approved plans through the NYC Department of Buildings (“DOB”) NOW website on March 22, 2025. The zoning challenge was denied on May 2, 2025. The Respondents thereafter submitted an appeal on May 17, 2025. The Respondents argue that if the DOB’s denial is reversed on appeal, the Petitioner’s approvals and any issued permits will be vacated. The Petitioner argues that the zoning challenge is meritless and provides reports confirming the Petitioner’s compliance with zoning regulations by two independent licensed architects, Mr. Yuriy Menzak, RA of Menzak Architect PC on September 8,

2025, and Mr. Panos Vikatos, RA of Vikatos Architect PC on August 13, 2025, each of whom separately analyzed the project and reached the same conclusion.

In re Tory Burch LLC v. Moskowitz, 146 A.D.3d 528, 529, 43 N.Y.S.3d 901 (2017), the Supreme Court Appellate Division reversed the court order granting the petitioner a license pursuant to RPAPL § 881 to enter respondent's property for the purpose of protecting respondent's property during renovations because the petitioner failed to demonstrate reasonableness and necessity of the access, as no building plans were filed and approved by the Department of Buildings, and a stop work order was in effect. In contrast, here the Respondents have not provided proof of the Petitioner's lack of compliance with zoning regulations. The Petitioner's construction plans have been approved by the Department of Buildings in February 2025, November 2025, and two licensed architects have confirmed that the proposed building development at Petitioner's Property as of August and September 2025 is compliant with New York City Zoning Resolution. Accordingly, Respondents' claim that a zoning challenge to Petitioner's approved plans is pending is insufficient to deny Petitioner a license pursuant to RPAPL § 881 to enter Respondent's property.

The Respondents argue that the Petitioner fails to establish a prima facie entitlement to an order pursuant to RPAPL § 881. "The factors which a court may consider in determining the petition include 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 Dept. 2017).

Here, Petitioner fails to explain the nature of the construction activities on the Petitioner's Property and why performing those construction activities requires access to the Respondents' property, the extent of the requested access the nature of the protective measures other than drawings, and the duration of the access to the Respondents' Property. Further, the Respondents argue that the Petitioner fails to establish to cite to any applicable section of the New York City Building Code, or expound on what's included in the Site Safety Plan, by an expert or individual with personal knowledge of the facts. Additionally, the Respondents argue that the Petitioner fails to establish a lack of alternative means to perform the construction activities, public interest in completion of the construction activities, and measures in place to ensure financial compensation of the Respondents for any damage and inconvenience resulting from the intrusion.

The Petitioner refutes the Respondents' contention that the Petitioner has not demonstrated the necessity of the requested access. The Petitioner argues that it has made clear that it seeks access solely for the purpose of installing temporary protections, including roof protections, chimney protections, and a sidewalk shed, all of which are standard and mandated by the New York City Building Code to safeguard adjoining properties during construction. Further, the Petitioner argues that it has explained the necessity for such protections in its moving papers and in architectural and engineering documentation consistent with the Department of Building requirements. However, the Petitioner does not adequately explain how the protections comply with the New York City Building Code.

In addition, while the Petitioner has provided a site safety plan and draft Access Order Agreement (NYSCEF Doc. No. 19, 20, 41), the Petitioner does not adequately describe how the placement of the protection structures would protect Respondents' Property, the extent of the requested access, and the duration of the access to the Respondents' Property. Furthermore,

Petitioner does not provide expert affidavits in support of its application which explain the nature and extent of these protective measures. Lastly, Petitioner does not propose a time frame nor compensation amount to the Plaintiff that would enable the parties to reach a license agreement or the court to structure one.

Accordingly, it is

ORDERED that Respondents' order to show cause (in Seq. No. 2), pursuant to RPAPL § 881, to deny Petitioner's petition for a license to enter upon Respondents' Property is denied without prejudice. Petitioner may renew its petition by motion on the same index number, provided that the information that is currently lacking in its papers is sufficiently included and the issues are sufficiently briefed, including: an affidavit from a person with personal knowledge of the construction on Petitioner's property explaining the placement of the protection structures and the protection it affords to the Respondents' Property, the extent of the access required upon Respondents' Property, and the duration of the access required; any additional documentation to demonstrate the reasonableness and necessity for the requested access, and the proposed license fee as compensation to the Respondents. The Respondents may submit any appropriate opposition.

This constitutes the decision and order of the court.



J.S.C.

HON. HEELA D. CAFELL, JSC