SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, CIVIL TERM, PART 1
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GEORGE PANTELIDIS,

Petitioner,

: Index No. 110531/01

For a Judgement pursuant to Article 78 of the CPLR,

-against- **DECISION and ORDER**

NEW YORK CITY BOARD OF STANDARDS AND APPEALS and NEW YORK CITY DEPARTMENT OF : BUILDINGS,

:

Respondents,

and

JOSEPH AND ROSA SHEEHAN,

Intervenor-Respondents,
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Hon. Martin Shulman, J.S.C.:

Pursuant to Article 78 of the CPLR, the Petitioner, George Pantelidis ("petitioner" or "Pantelidis"), moved by order to show cause ("OSC") for an order "...reviewing, annulling[ ]and setting aside a final order (known as a 'R]esolution' [)] of the New York City Board of Standards and Appeals...["BSA"], BSA Calendar # 31-01A adopted April 27, 2001, on the grounds that the decision was made pursuant to error of law, ... in violation of lawful procedure, was arbitrary and capricious[3 and... in violation of the Zoning Regulations and State and Constitutional Law..." (Verified Petition at ¶ 1 as OSC Exh. C). Petitioner initially sought and obtained a temporary restraining order ("TRO") to enjoin the N.Y.C. Department of Buildings ("DOB) and BSA' (collectively

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[1] The **BSA** "...[is] a five-member body that includes at least one planner, a licensed professional engineer and a registered architect,....[and] is vested with exclusive jurisdiction to determine appeals from DOB decisions (NY City Charter §659[a],[b]; § 666 [6][a])..." In the

"respondents") from: (a) enforcing the Resolution; (b) issuing any violation orders against Pantelidis for non-compliance with the Resolution; and (c) revoking the DOB permit which previously allowed Pantelidis to add a glass enclosed exterior stairwell to the rear of the building. Pursuant to a signed stipulation (OSC Exh. A), the respondents consented to the issuance of the TRO pending the hearing of this Article 78 petition and an agreed upon briefing schedule.

Shortly thereafter, Joseph and Rosa Sheehan (the "Sheehans") moved by order to show cause ("OSC-2") for an order granting them leave to intervene as additional respondents in this Article 78 proceeding, transferring this case to the Hon. Sheila Abdus-Salaam, J.S.C., as a related case, vacating the stay of enforcement of the Resolution or, alternatively, requiring the petitioner to post an undertaking and accelerating the return date of petitioner's OSC from July 25, 2001 to an earlier date.

The parties appeared in court on June 15,2001 and this Court heard arguments in support of, and in opposition to, a continued stay to enjoin the enforcement of the Resolution pending the hearing and determination of the respective orders to show cause. This Court continued the stay pending the determination of this Article 78 petition and issued verbal bench directives granting the branch of Sheehan's OSC-2 for leave to intervene (see, discussion, *infra)* but declining to transfer this proceeding to Justice Abdul-Salaam as a related case. This Court generally took no position as to the parties' respective briefing and submission schedules for the filing of additional replies, sur-replies, if any, and correlating memoranda of law. Both the OSC and OSC-2 are

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Matter of Beekman Hill Association, Inc. et al., v. Chin, et al., 274 A.D.2d 161, 165, 712 N.Y.S.2d 471, 473 (1st Dept., 2000).

consolidated herein for disposition.

Background of the Administrative Proceedings Below

Pantelidis owns a multiple dwelling and land located at 116 East 73rd Street, New York, New York ("property" or "building"). He occupies the first floor and the rear of the second floor *of* the building as his personal residence. The Sheehans are neighboring property owners of a townhouse located 114 East 73rd Street, New York, New York ("adjoining [adj.] property" or "adj. building") and share a party wall with the petitioner. In or about December 1998, Pantelidis applied to the DOB for a building permit to construct a greenhouse[2] (the "glass extension" or "exterior stairwell ") at the rear of his property. Particularly, petitioner requested:

> ...[B]uilding [D]epartment approval and of the removal of the existing outer court and replace same with two-story greenhouse type construction.
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> The greenhouse will cover only the area of the existing inner court and will fall within the permitted FAR and open space ratio, but will fall within the 30' rear yard. The greenhouse will be set back 1' 6" from the face of the rear building line. The greenhouse will be constructed of extruded metal mullions and double thermal glass. The lot line glass will be protected by tempered glass with sprinklers at 6' 0" intervals. (OSC Exh. E).

The petitioner began constructing the glass extension in January 1999. The base of the

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[2] Right at the outset, petitioner acknowledged that he had no intention of constructing a greenhouse, but rather an " ...extension behind...[his] building, with private stairs leading from the first floor to the second floor..." (Pantelidis **Aff.** at ¶ 3) Prior to completing the construction in issue, petitioner and/or members of his family had to use the public stairwell in the building to access portions of his personal residence. The petitioner further explained that "...[t]his extension was originally called a 'greenhouse' because it was made of glass and would house plants, [but] admitted[ ]... the extension does not fit the technical requirements of a 'greenhouse'. .."(Pantelidis **Aff.** at ¶4).

exterior framework of the exterior stairwell started above grade, i.e., above the first story or basement level of the building. In June of that year, the Sheehans filed a complaint with the DOB (OSC Exh. D) essentially questioning the near completed construction of the greenhouse and deck as not being in compliance with certain zoning regulation requirements and otherwise depriving certain rent regulated tenants, who occupy the rear basement studio apartment within the building, of adequate light and air. Pantelidis subsequently met with the DOB Manhattan Borough Commissioner (Pantelidis Aff. at 75) and on June 25, 1999, Borough Commissioner Livian issued his hand-written determination of approval; to wit: "Ok[ay] to accept 2 story greenhouse. the Greenhouse is projecting 6' 0" into required rear yard. The 2 story greenhouse reduces degree of non-complying outer court." (see, OSC Exh. E, *supra).* The glass extension was completed in August 1999 at a cost of $150,000.00. (Pantelidis Aff. at 77). At the request of the Sheehans, the Borough Commissioner updated DOB's prior approval of the permit for the now completed exterior stairwell on December 28, 2000, without making any changes to his decision. (See, hand-written notation at the lower left-hand portion of this document as OSC Exh. E, *supra*)[3].

On January 24, 2001, and within 30 days of the date of issuance of the DOB's updated decision, the Sheehans filed their appeal with the BSA, *inter alia,* challenging the DOB's permit which approved the construction of the two story glass extension in

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[3] By letter dated March 16, 2001, the former Borough Commissioner clarified his initial June 25, 1999 determination (and updated without any changes on December 28,2000) and advised the Petitioner that "... [t]he proposed two-story greenhouse is acceptable for approval because it eliminates the non-complying outer court and reduces the non-complying open area along the side lot line." (OSC Exh. I).

the rear of the building as being contrary to the applicable Zoning Resolution(s) and which allowed, and continues to allow, this exterior stairwell to negatively impact on the Sheehans' quality of life as owners of the adj. building and adj. property. Both the petitioner and the DOB filed opposition papers and urged the BSA to sustain the DOB's determination.

Among the findings contained in its Resolution issued April 27, 2001 (see, OSC Exh. J), the BSA ruled that the:

> ... DOB approval now permits the western portion of the rear yard to be violated, which increases the degree of non-compliance in the rear yard; ...[that] approximately 26 square feet of the required rear yard that were previously unencumbered now contains portions of the building in the first and second floors; [that although] the western side yard at the rear of the...building was only six feet from the side lot line to the building wall[, nonetheless,] the approved enlargement is primarily in that six foot wide space, taking the building wall to the side lot line; [that] the Zoning Resolution ["ZR"] does not allow for the decrease in one non-complying condition to offset a new or increased non-compliance relating to another regulation; [that the ZR] allows for an accessory non-commercial greenhouse to be located in required rear yards as permitted obstructions, [however, the petitioner's] "greenhouse" is built above the first story (the basement) and contains two stories, one on the first floor and one on the second floor, ... rises a full three floors above grade reaching a height of 30', well in excess of the 14' maximum...[and does not] resemble[ ] the plain and obvious meaning of a greenhouse[4]; [that] the ...structure more closely resembles a glassed-enclosed extension to the building as an enclosed stairwell; [and that] the ...[DOB] acknowledges that the [extension] does not meet the definition of a

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[4] The Resolution describes a greenhouse as being a "....glass enclosure used for cultivating plants with operable windows...whose free openable area is equal to at least five percent of the combined floor area of the greenhouse."

"greenhouse"...(Bracketed matter and emphasis added).

Based on the foregoing and other recited factors, the BSA granted the Sheehans' appeal and reversed the DOB Borough Commissioner's December 28,2001 updated determination of approval of Alt Application No. 102232344. It is also apparent that the Resolution implicitly requires Pantelidis to tear down the glass extension and restore the rear of his building and property to its original condition.

The Petitioner's Article 78 Appeal

The petitioner raises a number of grounds to set aside the BSA's Resolution: (1) the **BSA** should not have ruled on the Sheehans' appeal as same was time barred because said appeal was filed on January 24,2001, more than 30 days[5] after the DOB's final determination granted the building permit for the construction work dated June *25,* 1999; (2) Petitioner constructed a fire-safe exterior stairwell (see, Exh. G[6] to Pantelidis' affidavit in opposition ["Opp. Aff."]) at the rear of his building in an "outer

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[5] Put differently, the petitioner contends that the BSA erred in failing to follow its own Rules of Practice and Procedure § 1-07 (b) which requires an appeal application to be filed within 30 days after a final determination of a Borough Commissioner of the DOB. Here, the final approval purportedly occurred on June 25, 1999, yet, petitioner claims the Sheehans were apparently allowed to file their appeal application more than 1½ years later relying on the December 29,2000 "updated" DOB determination issued at the latter's request. To counter the respondents' claim that this issue was not properly raised below (see, decision, infra), petitioner for the first time proffers a reply affidavit from petitioner's counsel before the BSA, and a noted land use expert, who implicitly concedes raising this timeliness argument for the first time on April 27, 2001, well after the BSA record was "closed" and just before the BSA Chairperson was about to issue the ruling granting the Sheehans' appeal. See, Lobel Reply Aff. at ¶2.

[6] Exhibit G contains an unsworn architect's letter. Conspicuously missing from this letter is an affirmative statement to the effect that this architect personally inspected the building and property and visually verified petitioner's purported compliance with the proposed fire safety measures (*e.g.*, installed sprinkler systems, a party fire wall of cement with specified dimensions, etc.).

court "and not a "rear yard" and, therefore, he was not required to comply with the ZR's 30' depth requirement; (3) assuming, *arguendo,* this exterior stairwell was built on a rear yard, nonetheless, Pantelidis could not have increased the degree of non-compliance with this 30' depth requirement because the existing rear of the building, even without the glass extension, left a rear yard depth of 24' 2" [7]; (4) the glass extension on/over the open space to the side of the earlier built 14' extension (otherwise legal) and abutting the side lot line seemingly made that area more compliant with the relevant ZR which otherwise disallows side yards and/or such open spaces less than 8' wide; (5) the petitioner was deprived of due process because he was not afforded the opportunity to respond to documentation the Sheehans submitted to the BSA 1 day prior to the hearing date; and (6) the DOB should be equitably estopped from revoking the permit because the petitioner, now apparently to his detriment, had completed the construction of the glass extension relying on this City agency's approval.

The BSA's and DOB's Joint Response

Essentially, the respondents supported the Sheehans' application to join as intervenor-respondents largely because the latter specifically undertook the BSA appeal challenging the DOB's June 25, 1999 permit (as updated on December 28,2000) approving the petitioner's construction of the glass extension. However, the

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[7] Before 1961, prior owners built a 14' extension (a legally non-compliant structure) to the rear of the building on the easterly side of the property. which reduced the depth of the rear yard to 24' 2". This extension apparently created an open area on the westerly portion of the property between the extension side wall and side lot line measuring a little over 6'. Petitioner describes this open space as an outer court which is not subject to any 30' depth requirements.

respondents took no position as to the Sheehans' other claims against Pantelidis. In a supporting memorandum of law[8], the Assistant Corporation Counsel, representing respondents, categorically rejected the petitioner's claim that the Sheehan's BSA appeal was untimely. Significantly, in its March 20, 2001 submission to the BSA opposing the appeal challenging the DOB's approval for the construction of the glass extension, the DOB's Asst. General Counsel, Mona Sehgal, Esq., expressly noted that "...[o]n December 28, 2000, then-Borough Commissioner Livian updated his approval without any changes to it for the purpose of enabling appellants [the Sheehans] to file the instant appeal." (R. 130). Respondents further argue that petitioner neither affirmatively raised the timeliness issue in its submissions before the BSA (R. 121, 122-127) nor raised this issue on the record during the March 27, 2001 hearing addressing the merits of the appeal (R. 154-178). Respondents claim petitioner effectively waived the timeliness argument not expressly raised before the BSA and, therefore, said issue is not preserved for judicial review.

Respondents' counsel essentially "walked" the court through the applicable ZR's making the following references to the findings contained in the Resolution (R.1-2). The property in located in an R8 zoning district which requires a rear yard with a 30' depth. Although petitioner's property had a pre-1961 constructed 14' extension at the rear *of* the building which reduced the depth *of* the rear yard to 24' 2", nonetheless, the

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[8] In addition to the memorandum of law, the respondents submitted a printed Record of the Proceedings before the **BSA** containing the documentary submissions *of* the petitioner, the Sheehans and the DOB as well as the **BSA** hearing transcripts. This decision will denominate the occasional reference to this printed Record with an "R. " followed by the relevant page number.

BSA found this legal non-complying enlargement into the rear yard not to be an issue. The gravamen of the BSA rulings rests on ZR §54-31 which "...allows for enlargements... of non-complying buildings only if such enlargement... does not increase the degree of the non-compliance of the building or structure." The BSA concluded that the exterior stairwell unlawfully increased the non-compliance of the rear yard 30' depth requirement, *viz.*, "...approximately 26 square feet of required rear yard that were previously unencumbered now contains portions of the building in the first and second floors...". The BSA disagreed with the DOB's interpretation of the factual circumstances and found that even if the glass extension arguably eliminated a non-complying outer court, nevertheless, the ZR does not permit a decrease in one non-complying condition to offset an increased non-compliance involving another ZR *(i.e.*, a rear yard with a 30' depth). Against this non-complying backdrop, the BSA clearly rejected the notion that the exterior stairwell was an accessory non-commercial greenhouse[9]. Finally, the respondents contend that Pantelidis cannot invoke the estoppel doctrine against a municipality to preclude the BSA from enforcing zoning laws even if, *arguendo,* the DOB mistakenly issued the June 25, 1999 permit approving the construction of the glass extension and even when same has been entirely completed.

The Sheehans' Response and Requested Relief

The Sheehans' request for leave to intervene has been granted (*see,* discussion, *infra)* and it is unnecessary to restate the varied grounds supporting their

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[9] Citing to ZR §23-44(b), the BSA, *infer alia,* noted that the glass extension reached 30' in height, in excess of the maximum 14' ceiling requirement, physically did not resemble a glasshouse and, as constructed, does not meet the ZR's definition of a "greenhouse".

need for intervention as of right.

The following can be gleaned from the Sheehans' varied papers in support of their OSC-2: (1) the glass extension, several stories in height, was built less than 2" from the lot line of the adj. property and has a fire resistance rating of zero (the exterior stairwell will be unable to prevent fire and heat from spreading to the Sheehans' townhouse[10]); (2) the DOB approval for the construction was purportedly grounded on Pantelidis' misrepresentation that a real greenhouse was going to be built; (3) instead, petitioner, improperly built a private, exterior stairwell to allow persons to walk between the first and second floors to petitioner's personal residence without using the public stairwell; **(4)** the Sheehans are prosecuting a separate, but related, claim against Pantelidis seeking injunctive relief and money damages emanating from petitioner's purported illegal alterations of his heating and chimney flue systems, damage to the party wall and the "illegal" construction of the glass extension"; (5) parenthetically, when the petitioner's counsel filed a request for judicial intervention in this Article 78 proceeding, he conveniently neglected to mention the pendency of the Sheehan's private action against Pantelidis; (6) Petitioner failed to satisfy the three-pronged requirements for injunctive relief warranting the vacatur of the stay or, alternatively, his posting of a sufficient undertaking if the stay is continued; (7) the petitioner's claim that

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[10] See, Engineer Weinberg's affidavit at ¶¶ 14-16, as Exh. B to Weiner Opp. Aff.

[11] In the Sheehans' private action captioned, Joseph E. Sheehan and Rosa M. Sheehan v. Georse Pantelidis, Index No.: 112555/00, petitioner brought his own third-party action against the general contractors who purportedly built the exterior stairwell captioned Georse Pantelidis v. Creative Living Enclosures, et al., Index No.: 01590112/01. This action for injunctive relief and money damages is still pending.

the Sheehans' appeal was untimely was not raised before the BSA, is waived and is not preserved for judicial review; (8) the petitioner belatedly proffers a meritless argument that the DOB lacked the authority to "update" a permit as this right purportedly belongs only to an owner of property ostensibly benefitting from the updated permit, yet, this argument must fail as it was also not raised in the proceeding before the BSA and never timely challenged in an Article 78 proceeding (4 month statute of limitations)[12]; (9) the Sheehans fully support the extensive findings and conclusions set forth in the BSA's Resolution, namely, the BSA properly interpreted the applicable, albeit complex, ZR's and correctly determined that the glass extension increased the degree of non-compliance with the rear yard's 30' depth requirement and in building a structure that was clearly not a greenhouse; and (10) case law clearly compels the petitioner to remove the exterior stairwell (built under color of DOB approval) even if it was completed well in advance of the BSA ruling rendering it illegal.

Discussion

As an adjoining property owner affected by the actions of the petitioner as well as the appellant before the BSA below, the Sheehans properly moved to intervene (CPLR §§1013 and 7802[d]) and join the respondents in opposing Pantelidis' Article 78 petition. It is obvious that the Sheehans have "... a 'direct and substantial interest' in the outcome of this litigation... and petitioner[ ]...[has] not demonstrated that ...[his]

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[12] As a matter of administrative custom and practice, the DOB commonly issues "updates" "...at the request of adjoining property owners and neighborhood associations...so that the interested party can bring an administrative appeal challenging the issuance of the permit. The practice of the BSA is to treat the 'update', not the initial issuance, as the 'final determination' under review." Hornstein Opp. Aff. at 75, see *also,* sur-reply affidavit of BSA's General Counsel at 74.

intervention would substantially prejudice ...[Pantelidis] or cause delay..." (bracketed matter added). See, Matter of Rent Stabilization Association of New York, et al., v. New York State Division of Housing and Community Renewal, et al., 252 A.D.2d 111, 116 (3rd Dept., 1998). As noted, *supra,* the branch of intervenor-respondents' OSC-2 for leave to intervene had been granted. At this juncture, it is noted that the Sheehans are not seeking an order to compel the deconstruction of the exterior stairwell, but to lend support to the respondents' opposition to the instant petition. Given the Sheehans' potential remedies for various injunctive relief and monetary damages in their private action against the petitioner (see, Footnote 11, *supra),* this Court has concluded that it was unnecessary to issue an earlier order directing an undertaking to continue the stay pending the determination of this Article 78 appeal and, therefore, denied that branch of the OSC-2 for that relief.

The standard of review in an article 78 proceeding is whether an administrative agency's determination was arbitrary, capricious or an abuse of discretion, was made in violation of a lawful procedure and/or was affected by an error of law. (CPLR §7803[3]). In the context of addressing the BSA's interpretation of the applicable ZR's, this Court must also consider the well settled rule:

> ... that local zoning boards have wide discretion ...and the judicial function in reviewing a zoning board's determination is limited (see, Matter of Fuhst v Foley, 45 NY2d 441,444; Matter of Cowan v Kern, 41 NY2d 591, 598). "A zoning board determination should not be set aside unless there is a showing of illegality, arbitrariness or abuse of discretion. (Conley v Town of Brookhaven Zoning Bd. of Appeals, 40 NY2d 309.) That is to say, the determination of [the zoning board] will be sustained if it has a rational basis and is supported by substantial evidence [citations omitted]" (Matter of Fuhst v Foley, supra, at 444). The board's

> determination is entitled to substantial judicial deference (see, Matter of Bella Vista Apt. Co. v Bennett, 89 NY2d 465, 471) and, even where a contrary determination would be reasonable and sustainable, a reviewing court may not substitute its judgment for that of the agency if the determination is supported by substantial evidence (see, Matter of Consolidated Edison Co. v New York State Div. of Human Rights, 77 NY2d 411, 417). Substantial evidence has been defined as "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (300 Gramatan Ave. Assocs. v State Div. of Human Rights, 45 NY2d 176, 180).

In the Matter of Soho Alliance v. N.Y.C. Board of Standard and Appeals, 264 A.D.2d 59, 63, 703 N.Y.S.2d 150, 154 (1st Dept., 2000)[13].

Under the circumstances here, contrary to Pantelidis' assertions, petitioner may not raise the issue of the timeliness of the Sheehans' BSA appeal for the first time in this Article 78 proceeding . Preliminarily, this Court finds the petitioner's tactical decision to assert this claim after the BSA record was closed and seconds before the BSA was to announce its ruling was a creative, albeit unsuccessful, effort to raise a non-existent timeliness issue. As noted, *supra,* petitioner had retained highly experienced and effective counsel to defend its interests in sustaining the June 25, 1999 decision (as updated on December 28, 2000) approving the permit for the "greenhouse". There was ample opportunity to assert a claim that the Sheehans' BSA

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[13] See also, New York Citv Health & Hospitals Corp. v McBarnette, 84 N.Y. 2d 194, 203, Footnote 2 (1994); and Matter of Scherbvn v Wavne-Finser Lakes Bd. of Coop. Educ. Servs., 77 N.Y.2d 753, 757-758 (1991). When there is a rational basis for the exercise of discretion by the administrative agency, a court must affirm its determination. Matter of Pell v Board of Education, 34 N.Y.2d *222,* 231 (1974). Again, couched in the language of CPLR §7803[3] is the well settled principle that " '... a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion' ". [citation omitted] (Pell, *supra,* at 232).

appeal was arguably untimely at least three months before the issuance of the Resolution. It did not require extensive research and briefs, but rather a few simple declarative sentences citing to the BSA rules of practice and presenting the time line between the initial approval and the BSA appeal filing date. Said issue could also have been raised in the April 19, 2001 letter of Sheldon Lobel, Esq. to the BSA. To the contrary, it is apparent that petitioner's counsel's April 19, 2001 adjournment request to keep the record open (R. 150) and delay the BSA's scheduled April 24,2001 decision date was for the primary purpose of restating Pantelidis' substantive arguments (raised in prior responses to the BSA) to the Sheehans' March 26, 2001 submission (R. 147). This submission filed the day before the BSA hearing reiterated and summarized the Sheehans' interpretations of the relevant ZR's and furnished simple diagrams of the exterior stairwell's enlargement into the rear yard behind the building which the Sheehans claim increased the degree of petitioner's non-compliance. And these ZR interpretations and supporting diagrams, photographs, etc., were previously asserted by the Sheehans' engineers, architects and attorneys when they filed extensive complaints and papers before the DOB in the Spring and Summer of 1999 and in their BSA appeal. The March 26, 2001 submission raised nothing new and simply could not have created any surprises for Pantelidis' counsel[14].

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[14] Parenthetically, since the Sheehans' March 26, 2001, submission contained no new evidence that the BSA relied on as dispositive of the issues raised in the administrative appeal, petitioner cannot effectively argue it was denied an opportunity to be heard, *vis-a-vis,* this submission as his earlier submissions and counsels' cogent arguments during the hearing as well as the DOB's earlier submissions and arguments during the hearing fully presented Pantelidis' position. *Cf.*, In the Matter of Sunset Sanitation Service Corp. v. Board of Zoning Appeals of the Town of Smithtown, 172 A.D.2d 755, 569 N.Y.S.2d 141 (2nd Dept., 1991).

Accordingly, the petitioner's challenge as to the timeliness of the Sheehans' BSA appeal is ineffectual as it is not preserved for judicial review. In the Matter of Wertheimer v. Town of Huntington Zoning Board of Appeals, ___A.D.2d___, 731 N.Y.S.2d 80 (2nd Dept., 2001); Hughes v. Suffolk County Department of Civil Service, 74 N.Y.2d 833, 546 N.Y.S.2d 335 (1989). Moreover, even if this challenge had been raised in the proceeding before the BSA, said claim could have been easily countered based upon the unquestioned verification of the administrative custom and practice of updating DOB decisions to allow parties with a direct and substantial interest to timely file BSA appeals (see, Footnote 12, *supra).*

Initially, the courts have recognized that "...when applying its special expertise in a particular field to interpret statutory language, an agency's [*i.e.*, the BSA) rational construction is entitled to deference [citations omitted]..." In the Matter of Raritan Development Corp., et al., v. Silva, et al., 91 N.Y.2d 98,102, 667 N.Y.S.2d 327, 329 (1997). *See also,* In the Matter of Botanical Garden, v. Board of Standards and Appeals of the City of New York, 91 N.Y.2d 413,671 N.Y.S.2d 423 (1998).

Relevant to this discussion is the ZR § 12-10 definition of an outer court:

> An "outer court" is any open area, **other than a yard or portion thereof,** which is unobstructed from its lowest level to the sky and which, except for one opening upon:
>
> (a) a front lot line;
> (b) a front yard;
> (c) a rear yard; or
> (d) any open area along a rear lot line or a side lot line having a width or depth of at least 30 feet, and which open area extends along the entire length of such rear or side lot line;

> is bound by either **building walls,** or **building walls** and one or more lot lines other than a front lot line.(emphasis added)

It seems readily apparent to this Court that when the BSA inspected the property, its Commissioners determined the open space between the building wall of the pre-1961 non-complying structure (14' extension) and the side lot line, approximately 6' in width, was not a constructed outer'court bound by two or more building walls or at least two building walls and lot line, but rather a westerly side yard "created" because of the non-complying structure's protrusion into the easterly portion of the rear yard. Further, the BSA Commissioners further concluded that under the guise of eliminating another non-complying condition (*i.e.*, the westerly side yard between the 14' extension building wall and the side lot line is less than 8' wide in violation of ZR §23-462), the DOB impermissibly allowed the construction of the glass extension without regard to the rear yard 30' depth requirement for the western portion thereof. (see, ZR §23-47). In addition, the BSA opined that the DOB's misplaced approval created a "...perception that the existence of the legal noncomplying structure [i.e., the 14' extension which reduced the rear yard's depth to 24' 2"] exempts the [remaining portion of] the rear yard from all rear yard requirements [and] is contrary to the Zoning Resolution." (bracketed matter added] (R. 1-2).

In their considered judgment and experience, the BSA Commissioners properly ruled that although the construction of the glass extension between the non-complying structure and the side lot line appears to eliminate the western side yard thereby decreasing this non-complying condition, nonetheless, this purported "cure" could not offset a new or increased non-compliance relating the exterior stairwell's encroachment

into the westerly portion of the rear yard leaving a depth of 25' 8", less than the 30' otherwise required by the ZR. As the Resolution aptly noted, this illegal construction increased the degree of non-compliance with the minimum rear yard depth requirement.

But the Resolution was sending another message. When you apply to the DOB for a construction permit, you must be truthful and should "say what you mean and mean what you say". It is glaringly obvious that the petitioner had no intention of building a "greenhouse" as the term is plainly understood and this nomenclature was improperly, albeit successfully, utilized in Pantelidis' DOB application to circumvent the applicable ZR roadblocks and gain DOB approval for the exterior stairwell. Unlike the DOB, the BSA's inspection of the building and property and review of the plans and records revealed that the exterior stairwell was not a complying green house structure, *inter alia,* "...because it was more than one story and taller than fourteen (14) feet above grade, see ZR 23-44(b) (defining 'greenhouse'), and it was clearly not a 'glass enclosure used for cultivating plants with operable windows and jalousies' ... a determination which Petitioner does not dispute." (Sheehans' Memorandum of Law in support of OSC-2 at **p.** 13).

Based upon the foregoing analysis, this Court holds the BSA's reversal of the DOB Manhattan Borough Commissioner's decision approving the glass extension is rational and supported by substantial evidence. In the Matter of Beekman Hill Association, Inc. et al.. v. James Chin, et al. *See* Footnote 1, *supra.* This article *78* Petition must therefore be dismissed.

This Court further holds that the petitioner has not shown the requisite factors to

trigger that rare exception that would otherwise permit him to invoke the estoppel doctrine against a municipality to avoid the inevitable deconstruction of the illegal exterior stairwell. In the Matter of Parkview Associates v. City of New York, et al., 71 N.Y.2d 274, 279, 525 N.Y.S.2d 176 (1988) ("...[E]stoppel is not available to preclude a governmental entity from discharging its statutory duties or to compel ratification of prior erroneous implementation in the issuance of an invalid permit...").

Accordingly, the Petitioner's OSC is denied and the remaining branch of Sheehans' OSC-2 is granted to the extent of dismissing the underlying Article 78 petition.

This constitutes the decision and order of this Court. Courtesy copies of this decision and order have been furnished to respective counsel for the parties.

Dated: New York, New York
December 26,2001

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Hon. Martin Shulman, J.S.C.