Matter of Rupp v New York City Bd. of Stds. & Appeals
2007 NY Slip Op 30736(U)
April 12, 2007
Supreme Court, New York County
Docket Number: 0109422/2006
Judge: Sheila Abdus-Salaam
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SCANNED ON 4/17/2007

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

PRESENT: HON. SHEILA ABDUS-SALAAM, *Justice* PART 13

In the Matter of William R. Rupp

- v -

New York City Board of Standards and Appeals
and
Ruppert, LLC

INDEX NO. 109422/06

MOTION DATE 11/1/06

MOTION SEQ. NO. 001

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Upon the foregoing papers, it is ordered that this petition is granted as indicated below.

Petitioner William R. Rupp owns a five-story townhouse at 19-21 Beekman Place, New York, New York. The townhouse has been enlarged with a two-story rear extension. According to petitioner, the adjacent property at 23 Beekman Place is approximately 28 feet taller than the five-story portion of his house and approximately 60 feet taller than the two-story portion of the house and is highly visible from his terraces. After acquiring the property, Mr. Rupp installed an approximately 473 square foot masonry wall along and on top of the two-story extension, to a height of 27 feet 9 inches above the roof terrace (the "First Wall") in order to enhance the privacy on his terraces. Petitioner alleges that a few years later, after he fell into a dispute with owners of the adjoining property about their failure to

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

maintain their wall, sections of which were falling onto the roofs of his property, he decided to enlarge the First Wall so that it would cover and conceal the entire southern face of the adjacent property, protect his roofs and terraces, and create a visually appealing environment for his outdoor space.

Petitioner filed an application with the DOB to enlarge the wall and a permit was granted. He then enlarged the wall. Part of the wall is an attachment of an approximately 970 square foot brick veneer to a party wall between the two buildings. This part of the wall is not in dispute in this proceeding. The other part of the wall is an approximately 470 square foot vertical extension of a wall along the northern lot line of the property, most of which is adjacent to the southern wall of the building on the adjacent property. His neighbor's lot line windows are blocked by the new construction and Mr. Rupp believes that they requested that the DOB revoke the approval for the new wall and compel removal of the wall. In its Answer, the DOB states that complaints were received on December 2, 14 and 15, 2004 but does not indicate the name of the complainant(s).

The DOB reconsidered the application and the plans filed by petitioner, and petitioner submitted additional drawings and details as requested by the DOB. The plans were reapproved in January 2005. Subsequently, the DOB reconsidered that reapproval based upon considerations of structural adequacy and reliability. By an Emergency Declaration dated February 18, 2005, the DOB ordered that the wall needed to be repaired or demolished immediately. Petitioner then commenced an Article 78 proceeding against the DOB, in which petitioner sought injunctive relief and an annulment of the DOB's Emergency Declaration. Further meetings and consultations took place between petitioner's construction professionals and the DOB personnel. Petitioner agreed to take certain measures to stabilize the structure and the DOB agreed to allow the wall to remain in place pending a final determination by the DOB setting forth its basis for revoking the permit,

which could then form the basis for an appeal by petitioner to the Board of Standards and Appeals (the "BSA").

By letter dated June 15, 2005, the DOB Manhattan Borough Commissioner Laura Osorio issued a final determination as follows:

> This is to set forth the Department's final determination, pursuant to the April 8, 2005 stipulation in Rupp v. NYC Department of Buildings ("the Stipulation") for purposes of appeal to the Board of Standards and Appeals ("BSA"). The referenced application and this determination concern construction of a brick and masonry wall ("the Wall") that rises to a height of approximately 60 feet above the roof of the second story of the Premises.
>
> By letter dated February 15, 2005, the Department set forth objections to the structural adequacy or reliability of the Wall and issued a Stop Work Order. On February 18, 2005 the Department issued an Emergency Declaration directing that the Wall be demolished. Following the commencement of an Article 78 proceeding challenging the Emergency Declaration and the issuance of a temporary restraining order on February 28, 2005 prohibiting the Department from demolishing the Wall or from otherwise interfering with Mr. Rupp's enjoyment of the Premises, Mr. Rupp's representatives and the Department have had interaction pursuant to the terms of the Stipulation regarding temporary measures to shore the Wall pending appeal to the BSA.
>
> As of this date, the Department has accepted from Louis Silbert, P.E. submissions indicating that the Wall has been temporarily stabilized by means of temporary construction. However, Mr. Silber's submissions fail to show that the Wall, as constructed, has been engineered or otherwise designed and built in accordance with the Building Code. Specifically, there is insufficient evidence that the wall as designed and built has adequate lateral support. While Mr. Silbert has submitted sketches and calculations purporting to demonstrate otherwise, these submissions are not based on the as-built construction nor on the construction proposed in the original submission and accordingly have not undergone technical review. Because construction of the Wall is questionable, pursuant to the provisions of Administrative Code § 27-597, it must be demolished.

Apart from the deficiencies detailed above, the Wall is too high. If and when the Wall is proposed to be constructed in a manner that accords with Code and other proper engineering practices, consistent with § 27-509, it will only be allowed to a height of six feet above the roof of the second story portion of the building.

This is the Department's final determination.
[Record, p. 20]

Significantly, section 27-509 of the Administrative Code, which was the basis of the DOB's finding that the wall is too high, applies to fences and it restricts the height of masonry fences in residential districts to no more than six feet above the ground. This final determination from the DOB was the first time during the process that the DOB had applied the Administrative Code provision pertaining to fences to petitioner's structure, or otherwise indicated to petitioner that this provision was applicable to his permit. In a letter to the DOB's Engineer Commissioner Shah, petitioner's construction consultant stated that in accordance with his understanding of the meaning of the term "fence" as defined by Webster's dictionary as a barrier intended to mark a boundary or prevent intrusion, and the meaning of the term "wall", which is a high, thick masonry structure, he was presenting a proposal that he remove only the portion of the wall that acted as a fence between Mr. Rupp's property and the adjacent property. Commissioner Shah responded that details were needed, that "masonry work in front of and directly against the adjoining building is considered a wall. The portion of masonry wall which is free-standing is a fence." The Commissioner indicated that the existing free-standing masonry fence should be lowered to a height of six feet above the roof.

Petitioner alleges that "[n]othwithstanding this ruling by the Chief Engineer of the entire Department, when Petitioner's expediter attempted to follow up with Engineer Shah to review requested drawings, he was advised that DOB would not reverse the Final Determination and that Engineer Shah's

independent consideration of the fence issue should be disregarded." (Petition, ¶ 57) Respondent denies this allegation.

In his appeal to the BSA, petitioner argued that the structure should not be considered a fence within the meaning of the Administrative Code, but instead should be considered a "privacy wall" or "screen wall". The DOB made a submission explaining its analysis and its reasoning for concluding that the structure is a fence within the meaning of the Administrative Code. That submission discussed the language of the Code section, as well as the definitions of "wall" and "fence" found in Ballentine's Law Dictionary. Petitioner took the contrary view, and argued that the structure is a wall and not a fence. He also submitted photographs of other buildings in Manhattan that had what he claimed were privacy walls that were higher than six feet.

In a 3-1 vote, the BSA denied petitioner's appeal. It found, among other things, that the definitions of a screen wall and a fence "are not mutually exclusive: a screen wall may be a fence and vice versa"; "that the Building Code does not define "fence or wall"; that the "DOB is at liberty to apply a reasonable definition of a term, and may take into account the context in which said definition is applied"; that the structure "functions as a fence, in that it sets off and separates the 19 Beekman property from the 23 Beekman property"; and "the fact that it is made of masonry, is of a certain thickness, and looks like a wall and was referred to as such by DOB [in a February 15, 2005 letter, the February 18 declaration, and the Final Determination] is not relevant.

This Article 78 proceeding challenges respondent's determination. Petitioner asserts that the decision is arbitrary and capricious and flies in the face of decades of practice by the DOB, illustrated by the approval of dozens of similar structures in Manhattan.

In opposition to this petition, respondent asserts that it had a rational basis for its determination and argues that this court must defer to its " . . . expertise in

the use and interpretation of specialized terms." (Memorandum of law, p. 3). Presumably, respondent is referring to the terms "fence" and "wall". However, as is pointed out by petitioner, the Board's interpretation " . . . is not entitled to unquestioning judicial deference, since the ultimate responsibility of interpreting the law is with the court." (Matter of Exxon Corporation v. Board of Standards and Appeals, 128 AD2d 289, 296 [1987]). In Raritan Development Corp v. Silva (91 NY2d 98 [1997], the Court of Appeals reiterated its consistent application of the same standard of review for agency determinations, as follows:

> Where "the question is one of pure legal interpretation of statutory terms, deference to the BSA is not required" (Matter of Toys "R"Us v. Silva, 89 NY2d 411, 419). On the other hand, when applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference (see, Matter of Jennings v. New York State Off. of Mental Health, 90 NY2d 227, 239; Kurcsics v. Merchants Mut. Ins. Co., 49 NY2d 451, 459). Even in those situations, however, a determination by the agency that "runs counter to the clear wording of a statutory provision" is given little weight (Kurcsics v.Merchants Mut. Ins. Co., 49 NY2d, at 459; see also, Matter of Toys "R" Us v. Silva, 89 NY2d, at 418-419).
> [91 NY2d 98, 102-103]

Furthermore, in this case, neither the DOB nor the BSA appear to have relied on any technical or specialized expertise in concluding that the structure is a fence and not a wall. Rather, they used the language of the Administrative Code provision referring to fences and the definition of the terms fence and wall set forth in Ballentine's Law Dictionary. This court is equally well equipped to read the Code provision and the dictionary. "While deference is generally given to an agency's interpretation of a statute that the agency is responsible for administering, courts need not give any deference to the agency's interpretation where no specialized expertise is involved and the question is simply a matter of reading and analyzing the statute to determine its intent (citations omitted)."(United University Professions v. State of New York, 36 AD3d 297 [2006]).

Finally, with respect to the matter of due deference, although due

consideration should be given to " . . . an agency's practical construction of a statute over a period of time (citation omitted)"(Matter of Exxon, supra, p. 296), respondent has not pointed to any other instances where it deemed a similar structure to be a fence and not a wall. Nor is there any policy or procedure memorandum, regulation or any other indication showing that the practice of this agency is to treat similar structures as fences pursuant to Administrative Code § 27-509.

Respondent's determination rests upon its adoption of the DOB's conclusion that the Fence Regulation of the Administrative Code applies to the structure when read in conjunction with the definition of fences and walls found in Ballentine's Law Dictionary. This court finds that this determination lacks a rational basis.

Administrative Code § 27-509 provides, in pertinent part:

> In residence districts, no fences, whether of masonry, steel, wood, or any other materials shall be erected to a height of more than six feet above the ground, except that fences used in conjunction with nonresidence buildings and public playgrounds, excluding buildings accessory to dwellings, may be erected to a height of fifteen feet. Higher fences may be permitted by the commissioner where required for the enclosure of public playgrounds, school yards, parks and similar public facilities.

According to the DOB, Ballentine's " . . . defines a "fence", in pertinent part, as 'a visible or tangible obstruction which may be a hedge, ditch, wall, trestle, frame of wood, wire, rails or any line of obstacle interposed between two portions of land so as to part off and shut in the land and set it off as private property or for the purpose of using it separately from the adjacent land of the same owner.'"(The DOB's letter dated November 15, 2005, submitted to the BSA). The DOB additionally told the BSA that in contrast to the definition of "fence" found in Ballentine's, a wall is defined as "'an upright structure of wood, stone, brick, or other hard and durable material, serving as the side of a building or as a partition inside a building, sometimes as a support holding land in place, sometimes as a fortification protecting against attack by a military or other hostile force.'"

The DOB explained to the BSA that "Administrative Code § 27- 509 applies to the wall because it serves no purpose other than a "fence"'', that "[t]he function of the wall is clearly to present a line of obstacle from the property at 23 Beekman Place" and therefore "clearly functions as a fence", and that the wall does not satisfy Ballentine's definition of a wall because it is a freestanding masonry structure, which "does not serve as the side of a building, is not a partition inside a building and certainly does not support anything."(The DOB's November 15, 2005 letter).

The Administrative Code provision states that with certain exceptions, no fence shall be erected more than six feet above the ground. Thus, the Code clearly contemplates that a fence is a structure which is based on the ground. There is nothing in the language of this law that indicates that it regulates structures that are not erected on the ground. The structure built by petitioner is not erected on the ground, but on the fifth and second floors of his building. This notwithstanding, petitioner's construction consultant made an offer during the appeal process to lower a portion of the wall that "acts as a fence between our client and his neighbor." (Construction Consulting Associates, Inc., letter dated July 15, 2005). That is the portion of the structure that was not adjacent to the side wall of the neighbor's property, but only to its terraces, a length of approximately 11 feet (Petition, ¶ 55). In that letter, petitioner's construction consultant noted that Webster's dictionary defines a fence as a barrier intended to prevent escape or intrusion or to mark a boundary, and defines a wall as a high, thick, masonry structure. The reasoning behind this proposal was apparently based on the theory that if any portion of the structure could possibly be considered a fence despite the fact that none of the structure was on ground level, it could be only the portion that was next to the adjacent terraces, which in some respects may be considered "vacant land", and that the remainder of the structure, which was in front of and directly against the adjoining building, could not conceivably be a fence under any definition because a fence is intended to mark a boundary.

Commissioner Shah's handwritten notation to this proposal indicates that he

evidently believed that the portion next to the terraces is considered a fence, but that the other portion directly against the adjoining building is considered a wall. But in reading the definitions used by respondents to conclude that the entire structure is a fence, the court finds that none of the structure can reasonably be considered to be a fence. The fact that petitioner made this proposal to lower a portion of the structure during the course of the proceedings in an effort to settle this dispute does not bar him from challenging respondent's determination in its entirety.

Petitioner has demonstrated here that the definition of "fence" employed by the BSA to justify its decision is a definition that reflects the notion that a fence is a structure that provides a line of obstacle between two pieces of land. That does not describe the structure at issue here. The structure simply does not, as the BSA has stated, function as a fence, "in that it sets off and separates the 19 Beekman property from the 23 Beekman property." Rather, it is erected in front of the neighbor's lot line wall.

Whether the definition of fence found in Ballentine's is used, or the definition found in other dictionaries is used, the structure is not a fence.[1] Additionally, the court rejects the BSA's proposition that "the fact that it is made of masonry, is of a certain thickness, and looks like a wall and was referred to as such by DOB [in a February 15, 2005 letter, the February 18 declaration, and the Final Determination] is not relevant." It *is* relevant because it was not obvious or apparent to the DOB that the structure they were having problems with was a fence. Indeed, it is evident from the comments made by Commissioner Babar during the hearings that he did not accept the DOB's characterization of the structure as a fence, and he ultimately

[1] Oxford's University Press dictionary defines a fence as "a barrier enclosing an area, typically consisting of posts connected by wire, wood, etc." The Cambridge Advanced Learner's Dictionary defines a fence as "a structure which divides two areas of land, similar to a wall but made of wood or wire and supported by posts."

dissented when the BSA voted to deny petitioner's appeal [2].

The concept that the structure was a fence seems to have come out of the blue, and been formulated while the DOB was dealing with safety concerns and complaints about the wall. Petitioner himself describes the structure as blocking his neighbor's lot line windows. And there have been ongoing concerns about the structural soundness of the wall. However, if the DOB and the BSA were trying to correct a mistake in permitting the structure to be built, they did so in an improper and arbitrary manner by applying a tortured construction of the fence provision of the Administrative Code.

Furthermore, the BSA expressed a concern about "allowing such structures to be built by private parties without any height regulation whatsoever as of right" and found that "requiring Commissioner approval when free-standing masonry fences exceed six feet comports with DOB's public safety enforcement mandate. . ." (Determination, p. 6). However, the structure need not be deemed a fence in order for the Commissioner to ensure that it is safe. As is pointed out by petitioner, there are regulatory provisions found in both the Building Code and the Zoning Resolution which protect against the threat of unsafe structures.

Additionally, regarding the examples of other similar structures in Manhattan that were presented to the BSA, the BSA may be correct that some of the 38 examples provided by petitioner might be veneers that are attached to party walls,

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[2] Petitioner alleges that on June 5, 2006, the Board members met in a pre-hearing review session during which Commissioner Babar stated that he believed the wall was a free-standing, nonbearing wall that was legal provided it complied with zoning. Petitioner further alleges that he attempted to submit a letter to the Board memorializing the statements made by Commissioner Babar but that the Board's administrative staff declined to accept the letter. Respondent neither admits nor denies these allegations, noting that there was no record of what was said at that meeting, and further noting that the referenced discussion is outside the record that is before the court. Petitioner also comments in his reply memorandum of law that under the Open Meetings Law, the BSA is supposed to keep minutes of the proceedings, that upon information and belief, the Board does not do so, and that if there was to be any written record of the dissent registered by Commissioner Babar it had to be made by those in attendance.

or are required as parts of public plazas, or otherwise are not comparable to petitioner's structure. But the BSA did acknowledge that "only a few [of the structures pointed to by petitioner] are arguably comparable to the Structure in terms of function, location between buildings, and free-standing status."(Determination p. 7). Its finding that the existence of similar structures does not support a policy that it approves such structures, and its suggestion that these other existing structures may not comply with the Building Code, is not sound reasoning. The BSA can certainly ascertain whether these similar structures were constructed legally with the necessary permits, or whether they are in violation of the law.

The court notes that during the hearing process, petitioner addressed the claim by the DOB that perhaps some of the buildings cited by petitioner as having similar structures might not be legal. Petitioner provided certificates of occupancy for all but two of his examples. The DOB's Assistant General Counsel Gaylard responded that "[t]he fact that Certificates of Occupancy were issued to the buildings cited by Petitioner also does not demonstrate that the department approved these structures as "walls""(Letter dated March 21, 2006). Astoundingly, the DOB took the position that it "does not have the resources to confirm or disaffirm whether or not the Department in fact reviewed and approved those structures. Moreover, the Department does not have the ability to review each application to potentially distinguish the circumstances that might have resulted in the approval of said structures as compared to the instant structure in dispute." (Letter dated January 24, 2006). However, as between the petitioner and the DOB, the agency certainly has more ready access to those approval submissions and other business records, and it made no showing that the structures were not approved as walls. In any event, the significance of the certificates of occupancy is that the structures were approved, no matter what their designation. Petitioner argues persuasively here that "[c]hallenging the legality of the construction of these walls in the face of such certificates of occupancy requires this Court (and required BSA) to assume either that the presumption of regularity is overturned or that all of these highly visible

structures along the public way were illegally constructed in the dead of night, so that the DOB's inspection forces simply missed them and failed to write violations. DOB provided no evidence to rebut the presumption of regularity."(Memorandum of Law, p. 36).

In sum, petitioner came forth with evidence indicating that similar structures had been approved and permitted in Manhattan and respondent did not controvert that evidence or explain in defense of this petition why it reached a different result here. This is indicative of respondent's arbitrariness in dealing with petitioner's structure. "A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious."(Matter of Field Delivery Serv. (Roberts), 66 NY2d 516, 517 [1985]; see also Klein v. Levin, 305 AD2d 316 [2003], lv denied 100 NY2d 514 [2003]).

Accordingly, the petition is granted to the extent that the BSA's determination is annulled to the extent that it sustained the DOB's determination that the structure is a prohibited fence under Administrative Code § 27-509, and the matter is remanded to respondent for continued proceedings on the issue of structural soundness and related safety concerns.

ADJUDGED that the petition is granted as indicated.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: April 12, 2007

J.S.C.

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