

Brimberg v New York City Bd. of Stds. & Appeals
2007 NY Slip Op 31011(U)
April 27, 2007
Supreme Court, New York County
Docket Number: 0100319/2007
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 100319/2007

INDEX NO. _____

BRIMBERG, BARNETT J.

MOTION DATE 4/13/07

vs

NYC BD. OF STANDARD & APPEALS

MOTION SEQ. NO. _____

Sequence Number : 001

MOTION CAL. NO. _____

ARTICLE 78

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 141E).

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered ^{and a judge petition} that this motion is decided as follows:

This article 78 proceeding concerns the owners of three adjoining private homes mid-block on the south side of East 83rd Street, between Lexington and Third Avenues, in Manhattan. The western-most property is owned by petitioner Schmidt. That property is 77 feet deep and is improved with a house that takes up almost the entire depth of the property. Next is the property of petitioner Brimberg, also 77 feet deep, in which a recently renovated shallow house sits with a 25 foot rear yard.

The third owners are the O'Mara respondents. When they acquired their property in June 2005, it was improved with a house that was about 77 feet deep. Their property, however, is configured differently from its neighbors, because not only does it front 83rd Street, it extends another 45 feet south towards 82 Street (in other words, it is 122 feet deep), and goes back west for 55 feet behind the Brimberg property and past Schmidt's as well. The O'Mara property is known as a flag lot. Over the petitioners' objections, the O'Maras have been permitted to build an imposing addition along the common property line, the effect of which is to convert the Brimberg yard into something resembling an air shaft.

page 1 of 5

Dated: _____

JANE S. SOLOMON
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

The question before me is whether the permitting was effected lawfully. I must conclude that it was.

Petitioners challenge two aspects of the underlying decision of the Board of Standards and Appeals. The first pertains to an interpretation of Section 23-47 of the Zoning Resolution which states:

In all districts, as indicated, one rear yard with a depth of not less than 30 feet shall be provided on any zoning lot except a corner lot and except as otherwise provided in Sections 25-52 (Special Provisions for Shallow Interior Lots), 25-53 (Special Provisions for Through Lots), or 23-54 (Other Special Provisions for Rear Yards).

Petitioners argued to the BSA that Section 23-47 requires that a rear yard of at least 30 feet must be maintained abutting both the north wall of the proposed structure (i.e., the side nearest the Brimberg yard, and referred to in the BSA decision as the "near side") and the south wall ("far side"). As proposed and as built, the O'Mara structure maintains a 30 foot yard only on the "far side", away from petitioner's property. Brimberg argues that since his yard is only 25 feet deep, the O'Maras should not be allowed to build on the flag lot within 5 feet of the property line.

For all of the reasons stated in the BSA determination, most particularly that the zoning resolution requires on its face only one 30 foot stretch, this aspect of the challenge must fail.

The second prong of petitioners' attack presents a more difficult question. They persuasively argue that the Department of Buildings overstepped its authority in approving a waiver of Section 27-291 of the Administrative Code. Section 27-291 relates to Fire Department access, and provides that every building shall have at least eight per cent of the total perimeter of the building fronting directly upon a street. The O'Mara townhouse is 18 feet, 5 inches wide, which is significantly less than eight per cent of the combined perimeters of the townhouse and new structure.

The BSA is authorized to hear and decide appeals from any order, requirement, decision or determination of the DOB. City Charter Section 666(6)(a). BSA is empowered, on appeal from an adverse DOB determination, to vary or modify any rule, regulation or provision of any law relating to construction, use,

etc., of any building "where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the law, so that the spirit of the law shall be observed, public safety secured and substantial justice done." Charter Section 666(7).

Charter Section 645(b)(2) sets forth the power of the DOB to waive legal requirements and regulations, including provisions of the Administrative Code, subject to review by the BSA. DOB is empowered to require that the construction of a building be in accordance with the applicable provisions of law, regulations and orders, but where there is a practical difficulty in carrying out the strict letter of the law "in respect to methods of construction and where equally safe and proper materials or forms of construction may be employed in a specific case, [DOB] may permit the use of such materials or such other forms of construction, provided that the spirit of law shall be observed, safety secured and substantial justice done."

Administrative Code Section 27-107 permits the DOB to waive provisions of the Administrative Code pursuant to Charter Sections 645(b)(2) and 666. BSA contends that it interprets Section 27-107 to authorize DOB to waive any provision of the Administrative Code, even where the particular code section contains mandatory language.

As relevant here, Section 27-291 is a mandatory requirement that eight per cent of a building perimeter front directly upon a street. Under BSA's interpretation of Section 27-107, DOB was authorized to waive that mandatory requirement if the O'Maras established a practical difficulty in strict compliance, provided that the spirit of Section 27-291 was observed, safety was secured and substantial justice done.

Petitioners challenge this interpretation on a threshold basis that Section 27-107 is not a blanket authorization for DOB to waive any provision of the Administrative Code. Each section of the code, they argue, requires a separate provision stating whether it is subject to waiver, and in the absence of such language, no waiver is allowed if it contains mandatory language. This argument is rejected because the BSA's interpretation of Section 27-107 effectuates its plain language, and is rational.

Next, petitioners challenge BSA's determination that the O'Maras demonstrated a practical difficulty in complying with Section 27-291. Respondents argue that the O'Maras cannot expand their frontage on East 83rd Street, and without a waiver, they

would be unable to build on the flag portion of their property. To which petitioners say "Exactly" - the Code exists to regulate property owners and to prevent them from doing certain things.

If only it were that simple. BSA found that the DOB properly considered the O'Maras inability to utilize their land, due to the configuration of the lot, as a practical difficulty. Moreover, Section 27-291 is addressed to fire safety. DOB's waiver is conditioned upon the O'Maras installing a sprinkler system, and the plan was approved by the Fire Department. The spirit of Section 27-291 is to secure fire safety, and the conditional waiver requiring the O'Maras to install an enhanced fire suppression system is consistent with that spirit and with securing safety. In light of all this, the BSA determination that substantial justice was served by the waiver is not arbitrary and capricious. Obviously, petitioners have a different notion of "justice," to which the court is not unsympathetic. But there is a rational basis for the BSA's determination, and the court may not substitute its judgment for that of the BSA absent proof of arbitrary and unreasonable action. Cowan v Kern, 41 NY2d 591, 599 (1977); Pecararo v Bd. Of Appeals, 2 NY3d 608, 613 (2004).

Petitioners invoke the statutory canon noscitur a sociis, ("it is known from its associates", Black's Law Dictionary 1209 [rev. 4th ed. 1968]) in arguing that DOB's waiver was improper under Charter Section 645(b)(2). That section permits DOB to waive strict compliance with the letter of the law with respect to "the use of prescribed materials, or the installation of service equipment, or methods of construction and where equally safe and proper materials or forms of construction may be employed in a specific case, [DOB] may permit the use of such materials or of such forms of construction, . . ." Petitioners contend that the enumerated waivable defects are materials and methods, but the City Charter does not empower DOB to waive compliance where the offense is the overall design of the finished product. Petitioners do not challenge BSA's authority to grant a waiver, rather they challenge DOB's power in the first instance.

BSA counters that whether the O'Mara structure complies with the frontage requirement presents a question of methods and form of construction. The Administrative Code broadly defines "construction" to include the finished product of construction work or operations. Section 27-232. BSA found that this broad definition reasonably includes the frontage requirement in the present case, noting that the "frontage requirement does not exist in a vacuum", and factors to be considered include whether

the application is made for a new building or to enlarge an old one; and whether the goal of fire department access and fire safety are met by other means. Resolution, 17.

A literal reading of Section 645(b)(2) favors petitioners' argument, but BSA has a rational basis for broadly construing the Administrative Code definition of "construction" to permit DOB to waive strict adherence with the frontage requirement, so its determination must be sustained. Cowan, 41 NY2d at 599. Accordingly, it hereby is

ORDERED and ADJUDGED that the petition is denied, and the proceeding is dismissed.

Dated: April 27, 2007

ENTER:



J.S.C.

H:\070427 BRIMBERG Art 78.wpd

JANE S. SOLOMON

UNFILED JUDGMENT
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