

Matter of Reznikov v Srinivasan

2007 NY Slip Op 31122(U)

May 2, 2007

Supreme Court, Kings County

Docket Number: 0018203/2006

Judge: Michael A. Ambrosio

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, CIVIL TERM PART 31**

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IN THE MATTER OF THE APPLICATION OF,

MICHAEL REZNIKOV AND ALINA MARGULIS,
A/K/A ALINA REZNIKOV,

PETITIONER,

FOR A JUDGMENT PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES

- AGAINST -

MEENAKSHI SRINIVASAN, CHAIRPERSON SATISH K. BABBAR,
RA VICE CHAIRMAN, JAMES CHIN AND CHRISTOPHER
COLLINS, COMMISSIONERS, CONSTITUTING THE BOARD OF
STANDARDS AND APPEALS OF THE CITY OF NEW YORK AND
THE DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK,

RESPONDENT.

INDEX No.:18203-2006

MOTION, SEQ. # 001

DECISION AND ORDER

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In this Article 78 proceeding, petitioners, Michael Reznikov and Alina Margulis, seek to set aside a determination of respondent Board of Standards and Appeals of the City of New York (BSA) which denied petitioners' application for a special permit to enlarge their family residence located at 229 Coleridge Street in the Manhattan Beach section of Brooklyn (District 15). BSA unanimously determined that petitioners failed to demonstrate compliance with the statutory conditions for a special permit pursuant to New York City Zoning Resolution ("ZR") §73-622. Petitioners claim that the denial of their application was arbitrary, capricious, beyond the scope of its authority and unsupported by substantial evidence.

The petitioners purchased the subject property on May 28, 2002. In October, 2002, they submitted an application to the Department of Buildings ("DOB") for an Alteration Type II permit "for exterior masonry veneer and interior rehab." As part of their application, petitioners submitted to DOB architectural plans prepared by Mozer Architect Design PC ("Mozer"). DOB approved the

permit. Petitioners then failed to construct in accordance with the Mozer plans and the DOB approved permit. Petitioners concede that the work performed resulted in a “significant intrusion into the rear yard” contrary to the DOB permit.

In any event, petitioners applied to BSA for the enlargement permit under ZR §73-622 after DOB issued “objections” to the current building. Among other things, DOB concluded that the floor area ratio (FAR), the lot coverage, open space and rear yard of the current building were not in compliance with the ZR for a one-family residence in a R3-1 zoning district. Harold Weinberg, a professional engineer, submitted the application to BSA for the special permit on behalf of the petitioners.

The BSA application was technically for a “legalization” requesting a special permit for work already performed without a proper permit. As part of that application, Weinberg prepared a zoning analysis and a revised zoning analysis. Weinberg’s first BSA zoning analysis indicated that the current building had a perimeter wall height (PWH) of 21 feet which complied with the ZR. His revised zoning analysis changed the PWH to 24' 9", or 17.9% non-compliant. Other areas of non-compliance included the FAR (63.3%), open space (9.8%) and rear yard (23.3%). Two further revised BSA zoning analyses then listed the PWH at 25 feet or 19% non-compliant.

Weinberg, who testified before the BSA disclaimed his initial zoning analysis which listed the PWH at 21 feet. He stated that the PWH was based upon the Mozer plans which he claimed were inaccurate. He then asserted that the PWH was in compliance with the statutory conditions under ZR§73-622 which allowed permissive noncompliance of the PWH as long as it was “. . . equal to or less than the height of the adjacent building’s noncomplying perimeter wall facing the street

...” It is undisputed that the adjacent building had PWH of 24’9”.

The issue of the PWH evolved yet again in Weinberg’s “amended zoning analysis” which changed the PWH to 25 feet, a height which not only exceeded the maximum PWH allowable as of right under the ZR (21 feet) but also exceeded that parameters of what was authorized pursuant to ZR §73-622 for an “enlargement” permit. Weinberger claimed that the PWH of 25 feet was “grand fathered” as a legal pre-existing non-conforming condition. Weinberg submitted a certificate of occupancy for the subject property from 1976 which, according to him, indicated the subject property had the 25-foot PWH.

BSA denied petitioners’ application on two main issues. BSA’s resolution unanimously adopted on May 16, 2006 states in relevant parts:

“WHEREAS, . . . , the applicant has failed to convince the Board that the proposed legalization meets the parameters of the special permit; and
WHEREAS, specifically, the applicant did not adequately address the two following concerns, which were raised by the Board during the public hearing process: (1) whether the existing building reflects an actual enlargement of the prior building, or instead, is a new building; and (2) whether the existing perimeter wall height is allowed by the special permit; . . .
WHEREAS, because the 25 ft. high perimeter wall exceeds the perimeter wall height of the neighboring building, this non-compliance cannot be remedied through the special permit; and
WHEREAS, accordingly, even assuming that the applicant had submitted sufficient evidence that the existing home is actually an enlargement of a prior home, the special permit would still not be available; and
WHEREAS, in conclusion, the Board finds that it is without authority to grant the requested special permit pursuant to ZR § 73-622; . . .
Therefore it is Resolved that . . . this application for a special permit pursuant to ZR § 73-622 is hereby denied.”

Local zoning boards have substantial discretion in considering applications for special permits and judicial review of a zoning board determination is limited to whether the action taken

by the zoning board is illegal, arbitrary or an abuse of discretion (Conley v Town of Brookhaven Zoning Bd of Appeals, 40 NY2d 309). The determination of the zoning board will ordinarily be sustained if the determination has a rational basis and if it is supported by substantial evidence (Sasso v Zoning Board of the Town of Henderson, 86 NY2d 374 [1995]).

Special use permits such as the one in this case authorize the use of property in a manner expressly permitted by the zoning ordinance under stated conditions (Matter of JPM Properties v Town of Oyster Bay, 204 AD2d 722) and an applicant who applies for a special use permit has a much lighter burden of proof than an applicant who applies for a variance (Matter of Leon Petroleum v Board of Trustees of Mineola, 309 AD2d 804). Nevertheless, “[e]ntitlement to a special exception is not a matter of right . . . the stated standards in the ordinance guiding the board’s consideration of special exception applications condition availability of a special exception, and compliance with those standards must be shown before any exception can be secured” (see, Matter of Tandem Holding Corp v Board of Zoning Appeals of Town of Hempstead, 43 NY2d 801). Moreover, the Town Board is without authority to waive or modify any of the conditions specified in the zoning ordinance (see, Vergata v Town Board of Oyster Bay, 209 AD2d 527), and the failure to comply with any condition is a sufficient ground for denial of the permit (see, Burke v Village Board of Orchard Park, 6 AD3d 1163).

In this case, there was a rational basis for BSA’s determination and sufficient evidence to support the conclusion by BSA that the petitioners failed to comply with the legislative conditions of ZR§73-622, and thus were not entitled to the special permit. Pursuant to ZR§73-622, BSA may issue a special permit allowing for the “enlargement” of a single or a two-family detached of semi-

detached residence located within Community District 15. However, any “enlargement resulting in a noncomplying perimeter wall height shall be permitted in . . . R3 . . . Districts, and only where the enlarged building is adjacent to a single of two-family detached or semidetached residence with an existing noncomplying perimeter wall facing the street. The increased height of the perimeter wall of the enlarged building shall **be equal to or less than the height of the adjacent buildings noncomplying perimeter wall facing the street** . . . [and] the board shall find that the enlarged building will not alter the essential character of the neighborhood or district in which the building is located nor impair the future use or development of the surrounding area .” An “enlargement” is defined by ZR §12-10 as “an addition to floor area of an existing building . . . [emphasis added].

Petitioners sought approval of construction work that had already taken place without prior BSA approval and not in accordance with the Mozer plans which were approved by DOB. Petitioners concede they engage in significant alterations outside of the parameters of the DOB permit issued to them in 2002. The BSA, which is comprised of experts in land use and planning could not determine based upon the submissions and presentation of the petitioners whether the current building was indeed an enlargement of a pre-existing building as opposed to a building construction from the ground up. Petitioners had the burden to prove it was actually an enlargement of an existing building. In doing so, they relied on the Mozer plans although at the hearing, Weinberg conceded both that the Mozer plans were inaccurate in some respects (i.e., PWH of 21 feet) and that the construction that occurred did not follow those plans. It was entirely rational for BSA to disregard those plans as proof of an enlargement to an existing building. The BSA also compared photographs of the current building with the building that existed in 1940 and found

absolutely no resemblance to the current building. BSA also gave Weinberg every opportunity to present additional evidence indicating what portions of the current building constituted the building as it existed prior to the 2002 construction. Weinberg could not produce that evidence. It is also noteworthy that Mozer never appeared before BSA to testify as to the type of construction work performed after the issuance of the 2002 permit and Weinberg had no first hand knowledge of that construction. That being the case, Petitioners failed to meet the most basic threshold requirement of ZR §73-622, which is proof that they enlarged an “existing building.”

However, even assuming *arguendo*, petitioners met that threshold, they still failed to comply with another condition for the issuance of the special exception, namely, that the PWH of the current building not exceed the adjacent building’s non-complying PWH facing the street. Weinberg claimed based upon his expertise that the certificate of occupancy he prepared in 1976 indicated the building had a PWH of 25 feet and was thus a legal pre-existing non-conforming condition not subject to review under ZR§73-622. Vice Chair Babbar, a registered architect and a former Commissioner of DOB, concluded in his expert opinion that a certificate of occupancy was insufficient to demonstrate a buildings’ perimeter wall height. Deference must be given to that expert determination (see Matter of Retail Property Trust v Board of Zoning Appeals of Town of Hempstead, 98 NY2d 190, 196). It was reasonable for the BSA to reject Weinberg’s claims with respect to the PWH given the ever-changing and evolving contentions presented by the petitioners to the BSA regarding the current building’s PWH. Having failed to establish that the illegally constructed building was in conformity with two conditions imposed by ZR §73-622, the BSA was obligated by law to deny petitioners’ application for a special permit (Vergata v Town Board of

Oyster Bay, 209 AD2d 527; Sullivan v Town Board of Riverhead, 102 AD2d 113; L&M Realty v Village of Millbrook Planning Board, 207 AD2d 346). Finally, contrary to petitioners' contention, BSA's determination was not solely based on generalized objections and concerns expressed by the community's residents (c.f. Leon Petroleum v Board of Trustees of Mineola, 309 AD2d 804).

Based on the foregoing the petition is denied and the proceeding is dismissed.

This constitutes the Decision and Order of the Court.

DATED: **MAY 2, 2007**



Michael A. Ambrosio