

Barone v New York City Landmarks Preserv. Commn.

2007 NY Slip Op 33556(U)

October 29, 2007

Supreme Court, New York County

Docket Number: 0111043/2007

Judge: Shirley W. Kornreich

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

PRESENT: KORNREICH
Justice

PART 54

BARONE, FRANK A.,
ET AL

INDEX NO.

111043/07

MOTION DATE

8/23/07

MOTION SEQ. NO.

01

MOTION CAL. NO.

THE NEW YORK CITY
LANDMARKS PRESERVATION COMMISSION,
ET AL

The following papers, numbered 1 to 6 were read on this motion to/for Article 78

PAPERS NUMBERED

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

1, 2, 4, 5, 6

Answering Affidavits — Exhibits

3

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
NOV 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/6/07

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----- X
FRANK A. BARONE, JEAN BARONE and
NINA BARONE,

Petitioners,

Index No.: 111043/07

-against-

DECISION
and ORDER

THE NEW YORK CITY LANDMARKS
PRESERVATION COMMISSION and
ROBERT J. TIERNEY, CHAIR

Respondents.

----- X
KORNREICH, SHIRLEY WERNER, J.:

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

Petitioners Frank and Jean Barone ("petitioners"), owners of real property located at 20 Ridge Road, Douglaston, N.Y. ("the premises"), bring this Article 78 proceeding and seek a judgment vacating and annulling respondent The New York City Landmarks Preservation Commission ("LPC") issuance of a "Notice of Violation and Hearing" ("NOV") on the ground that the LPC proceeded without jurisdiction. Respondent opposes and cross-moves for dismissal pursuant to CPLR § 3211(a)(7).

I. *Background*

A. *LPC Organization & Regulations*

The LPC is the administrative agency responsible for designating and regulating landmark and historic sites inside New York City. The Landmarks Law requires that the LPC review and approve changes made to buildings and structures inside a historic district. The LPC issues three types of permits for such work. Certificates of No Effect on Protected Architectural

Features (“CNE’s”) are issued for any work that requires a Department of Buildings (“DOB”) certificate. Generally, minimal restorations and/or interior work will fall into this category. Permits for Minor Work (“PMW’s”) are issued for work similar to CNE’s but which do not require DOB approval. The issuance of CNE’s and PMW’s are reviewed by the LPC and do not require a public hearing. The third type of permit, Certificates of Appropriateness (“COA’s”), pursuant to Administrative Code § 25-307, are granted if the LPC determines that the “proposed work would be appropriate for and consistent with the effectuation of the purposes” of the Landmarks Law. A public hearing is held on every COA request, and the LPC must render a decision within 90 days after the request is filed.

Administrative Code § 25-305, entitled “Regulation of construction, reconstruction, alterations and demolition,” states that no person in charge of improving or altering land or property inside of an historic district may do so “unless the [LPC] has previously issued a [CNE], a [COA] or a notice to proceed authorizing such work.” Administrative Code § 25-317.1 governs the LPC’s issuance of NOV’s to those who violate the regulations governing permits for construction and renovation at landmark sites and historic districts. Pursuant to this section, anyone who violates sections 25-305, 25-310, 25-311 or 25-317(c) “shall be liable for a civil penalty which may be recovered in an administrative proceeding before the office of administrative trials and hearings, the environmental control board or other administrative tribunal having jurisdiction.”

The Environmental Control Board of the City of New York (“ECB”) is empowered to conduct adjudicatory hearings, impose penalties and enter judgements involving violations of LPC laws and regulations. Following an alleged LPC violation, the aggrieved party is entitled to

a fair and impartial hearing before an ECB hearing officer. The hearing officer will then issue a ruling, and if the aggrieved party wishes to appeal, ECB procedures provide for an appellate process where the entire ECB board will review the hearing officer's decision and make a final determination. Following appellate review by the ECB board, the aggrieved party may seek judicial review via an Article 78 proceeding.

B. The Instant Action

The premises is located within New York City's Douglaston Historic District. On August 25, 2003, the LPC issued PMW # 04-1433 to petitioner Nina Barone ("the Barone PMW") authorizing petitioners to alter the premises as follows: "[t]he approved work consists of removing a portion of the existing retaining wall adjacent to the driveway, and widening the driveway; and paving the new portion of the driveway with cobblestone to match the existing, as shown in two site plans labeled 'Existing Conditions,' and 'Proposed Conditions,' ...and photographs of the existing conditions." The Barone PMW states that upon written notice, the LPC reserves the right to change or revoke the permit if the building or site conditions are "materially different" from those outlined in the application. The Barone PMW also put petitioners on notice that any work or improvements not delineated must be reviewed and approved separately. Therefore, "performing or maintaining any work not explicitly authorized by [the] permit may make the applicant liable for criminal and/or civil penalties, including imprisonment and fines."

On or about November 12, 2004, the LPC issued a Warning Letter to petitioners stating that LPC staff members believed the improvements being made to the premises violated the parameters set forth in the Barone PMW. Petitioners were given 20 working days to apply to the

LPC to amend their PMW in order to cure the violation, otherwise, they would be issued an NOV. The letter also provided a phone number to contact an LPC Compliance Officer regarding any questions or concerns.

Petitioners failed to cure the alleged violation and, therefore, were issued an NOV (“the Barone NOV”) in May 2006. The Barone NOV stated that petitioners violated Administrative Code § 25-305 by “performing, authorizing or permitting, or by maintaining work without obtaining or in noncompliance of a [COA] or [CNE] from the [LPC].” It further stated that in order to avoid a formal hearing and possible civil penalty for a first offense, petitioners had to submit a Certificate of Correction and any other additional proof of compliance to the LPC by the close of business on May 22, 2006. If the Certificate of Correction was not received by this date, petitioners were directed to appear for a formal hearing at the ECB on June 5, 2006 (“the ECB Hearing”). Petitioners defaulted on their June 5, 2006 ECB Hearing, but the LPC agreed to vacate the default judgment and adjourn the hearing until March 5, 2007. The ECB Hearing was subsequently adjourned three more times in May and July 2007, until a final hearing date was set for August 20, 2007. At the ECB Hearing, the administrative law judge held that petitioners were in violation of Administrative Code § 25-305.

II. *Conclusions of Law*

A court reviewing an Article 78 proceeding must judge the propriety of an administrative action solely on the reasons cited by the administrative body. *See Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). Such an action must be upheld unless it “shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law.” *See Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000). CPLR section 7803

states that the following questions may be raised in an Article 78 proceeding: “Whether a determination was made in violation of lawful procedure, was effected by error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed.”

A writ of prohibition is available to address “whether [a] body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction.” CPLR 7803(2); *Town of Huntington v. New York State Div. Of Human Rights*, 82 N.Y.2d 783, 786 (1993). The writ is usually not granted to correct common procedural and substantive errors and will not be available where the proponent has access to other adequate legal remedies. *Huntington*, 82 N.Y.2d at 786. “But even where the writ may be technically appropriate, the court must consider other factors such as the gravity of the potential harm caused by the threatened excess of power or whether other proceedings in law or equity could correct the flaw, in determining whether a proponent’s request should ultimately be granted.” *Id.*

Petitioners argue that the LPC issued them an NOV without properly reading and interpreting the parameters set forth in the Barone PMW. They claim that the LPC did not reference the photographs attached to the permit when it was issued and found them in violation only based upon the attached site plans. Consequently, petitioners claim that the LPC proceeded in excess of their jurisdictional mandate by not taking a complete look at their permit when they issued the Barone NOV. However, the Barone PMW states the LPC reserves the right to change or revoke their permit if the building or site conditions are “materially different” from those outlined in the application. The Barone PMW also puts petitioners on notice that any work or improvements not outlined in the PMW must be reviewed and approved separately. Petitioners


were further put on notice that the performance of any unauthorized work might subject them to criminal and/or civil penalties. LPC staff members believed that petitioners widened their driveway in violation of their PMW and thus issued them a Warning Letter on November 12, 2004. Petitioners failed to cure this alleged defect within the allotted time set forth in the Warning Letter and, thus, were issued the NOV. None of these decisions violated any of petitioners procedural or jurisdictional rights. Furthermore, petitioners were afforded a formal hearing on August 20, 2007. ECB procedures provide for an appellate process where the entire ECB board will review the hearing officers decision and make a final determination. If aggrieved by this final determination, petitioners can then seek judicial review via an Article 78 proceeding. Consequently, the ECB ruling is not ripe for Article 78 review.

In addition, petitioners argue that since the Warning Letter and Barone NOV fail to specifically identify exactly how their work violated the Administrative Code, they were not provided with adequate notice of the charges against them in violation of due process. This constitutional issue cannot be addressed until petitioners complete the ECB grievance procedure. *See YMCA v. Rochester Pure Waters Dist.*, 37 N.Y.2d 371, 375 (1975) (doctrine of exhaustion of administrative remedies requires "litigants to address their complaints initially to administrative tribunals, rather than to the courts, and to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts"). *See also Fichera v. City of New York*, 145 A.D.2d 482, 483-84 (2nd Dept 1988) quoting *Dozier v. City of New York*, 130 A.D.2d 128, 135 (2nd Dept 1987) (exhaustion of administrative remedies is not required where an agency determination is challenged as unconstitutional, however, this exception is subject to a qualification that a constitutional claim which "hinges upon factual issues reviewable at the

administrative level must first be addressed to the agency so that a necessary factual record can be established"). Accordingly, it is

ORDERED that the application by petitioners seeking to vacate and annul the determination by respondents is denied and the proceeding is dismissed.

ENTER



J.S.C.

DATE: October 29, 2007
New York, NY

FILED
NOV 01 2007
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