

Matter of Gordon v Tierney

2008 NY Slip Op 30107(U)

January 14, 2008

Supreme Court, New York County

Docket Number: 0105852/2007

Judge: Shirley W. Kornreich

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

Index Number : 105852/2007
GORDON, ALLAN S.
 vs.
TIERNEY, ROBERT B.
 SEQUENCE NUMBER : 001
 ARTICLE 78

PART 54

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
 JAN 17 2008
 NEW YORK
 COUNTY CLERK'S OFFICE

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

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

Dated: 1/14/08


 HON. SHIRLEY WERNER KORNEICHH
 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

Application of

ALLAN S. GORDON,

Petitioner,

Index No.:105852/2007

For a Judgment Pursuant to Article 78 of the C.P.L.R.,

-against-

**DECISION and
ORDER**

ROBERT B. TIERNEY, PABLO E. VENGOECHEA,
STEPHEN BYRNS, JOAN GERNER, ROBERTA
BRANDES GRATZ, CHRISTOPHER MOORE,
RICHARD OLCOTT, MAGERY PERLMUTTER, REV.
THOMAS F. PIKE, JAN HIRD POKORNY and
ELIZABETH RYAN, as Members of the New York City
Landmarks Preservation Commission,

-and-

ERIC J. GLEACHER,

Respondents.

-----X

FILED
JAN 17 2008
NEW YORK
COUNTY CLERK'S OFFICE

KORNREICH, SHIRLEY WERNER, J.:

Petitioner Allan S. Gordon (“petitioner”), owner of the land and five-story residential brownstone located at 41 East 74th Street, New York, New York (“petitioner’s brownstone”), brings this Article 78 proceeding for a judgment cancelling, annulling, and setting aside a Certificate of Appropriateness (“COA”) (No. 07-6968) approved by respondent members of the New York City Landmarks Preservation Commission (“Commission”) on January 23, 2007, and issued to respondent Eric J. Gleacher (“Gleacher”), owner of the land and five-story residential brownstone located at 39 East 74th Street, New York, New York (“Gleacher’s brownstone”).

Both brownstones are located in New York City's Upper East Side Historic District. Petitioner alleges that the Commission's issuance of the COA was irrational, arbitrary and capricious, and a gross abuse of discretion. Respondent Commission has filed a verified answer seeking to dismiss the petition.

I. *Background*

A. *Commission Organization & Regulations*

The Commission is the administrative agency responsible for designating and regulating landmark and historic sites inside New York City. The Landmarks Law requires that the Commission review and approve changes made to buildings and structures inside a historic district. The Commission issues three types of permits for such work. Certificates of No Effect on Protected Architectural Features ("CNE") 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 Commission and do not require a public hearing. The third type of permit, Certificates of Appropriateness ("COA"), pursuant to Administrative Code § 25-307, are granted if the Commission 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 Commission 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 [Commission] has previously issued a

[CNE], a [COA] or a notice to proceed authorizing such work." Administrative Code § 25-317.1 governs the Commission's issuance of Notice(s) of Violation ("NOV") 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."

B. *Statement of Fact*

Gleacher's brownstone is a rowhouse built in 1879 and altered in the neo-Georgian style in 1936 by Aymar Embury. Administrative Record ("AR"): 1, 3/20/07 COA. The Commission noted that "the building's style, scale, materials, and details are among the features which contribute to the special architectural and historic character of the Upper East Side Historic District." *Ibid*. In 2004 the prior owner of Gleacher's brownstone received a permit (a CNE) to construct a rooftop addition to his brownstone. At that time, the Commission determined that the addition would not be visible from the street. AR: 37. Gleacher purchased the property in 2005 and then extended an existing chimney without first notifying the Commission. On September 30, 2005 the Commission issued a Warning Letter for "construction of a rooftop addition in noncompliance with the September 10, 2004 Certificate of No Effect." In 2006 Gleacher applied for a COA to legalize the extended (and more obtrusive) chimney, which the Commission denied. AR: 31-32, Attachment 2. The Commission found, among other things, that the illegally constructed chimney was "highly visible from directly across the street and from the west," that it "interrupts a relatively uniform roof-line," that its "light stucco finish and boxy form ... calls

further attention to this installation; and that the work diminishes the special architectural and historic character of the building and the Upper East Side Historic District.” *Ibid.* At that time some of the commissioners recognized there were other chimneys on the Upper East Side that were visible from the street and made suggestions about sloping the chimney back to reduce visibility. AR: 38. No civil penalties were assessed.

On October 8, 2006 Gleacher filed an application (for a CNE) to modify the illegally constructed chimney by offsetting the top three feet of the front of the chimney facing East 74th Street by angling it back. By letter dated November 17, 2006, petitioner urged the Commission to deny Gleacher’s new application. AR: 20-21 and attachments. Before the Commission held a public hearing to consider Gleacher’s application, the City of New York Manhattan Community Board 8 passed a resolution to disapprove the application. SR: 36.

The Commission held a public hearing on January 23, 2007. At the outset, John Graham of the Landmarks Staff summarized the application and its basis. AR: 37-39. Both parties had an opportunity to present testimony and respond to questions from the Commission members. After the hearing, the Commission approved Gleacher’s application, converting it from a Certificate of No Effect to a Certificate of Appropriateness. A.R.: 1-2, Permit issued 3/20/07. The permit was issued “on the basis of the building and site conditions described in the application and disclosed during the review process.” *Ibid.*

III. 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 with respect to 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."

In deciding whether an agency's determination was arbitrary, capricious, or an abuse of discretion, courts are limited to an assessment of whether a rational basis exists for the administrative determination, "without disturbing underlying factual determinations." *Heinz v. Brown*, 80 N.Y.2d 998, 1001 (1992); *see Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974) ("Arbitrary action is without sound basis in reason and is generally taken without regard to the facts."). A rational or reasonable basis for the agency's determination exists if there is evidence in the record to support its conclusion. *See Sewell v. New York*, 182 A.D.2d 469, 473 (1st Dept. 1992). As the agency charged with implementing the Landmarks Law, the Commission is presumed to have developed an expertise that requires courts to accept its interpretation of that law if not unreasonable. *Teachers Ins. & Annuity Ass'n v. City of New York*, 82 N.Y.2d 35, 41 (1993). *See Kurcsics v Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459.

Specifically, the Commission here found that:

[N]o significant architectural features of this building were altered or damaged by the construction of the roof-top addition and the extension of the chimneys; that the occupiable portion of this rooftop addition is set back from the parapet in a location which is not visible from the street; that angling the chimneys to the north, away from the front of the building, will reduce their visibility; that chimneys and flue enclosures are frequently seen above the primary facades of row-houses in this and many other historic districts, and that the proportions of the

flue enclosure will resemble those of historic chimneys and flue enclosures; that the muted color of the stucco cladding of the new enclosure will help the chimneys to blend into the streetscape and the sky; and that for these reasons the roof-top addition and the flue extension are in keeping with the architectural and historic character of this building, the street, and the Upper East Side Historic District.

A.R.: 1-2, Permit issued 3/20/07. These factual findings satisfy the applicable section of the Landmarks Law, which provides that when determining whether a COA should be issued, the Commission:

...shall consider (a) the effect of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done, and (b) the relationship between the results of such work and the exterior architectural features of other, neighboring improvements in such district.

Landmarks Law, Administrative Code § 25-307. The record here, consisting of the hearing transcript and submissions (plans, photographs and a mock-up of the addition), provides a rational basis for the Commission's finding that the addition complied with the law. As one of the Commissioners explained, "[the modification is] an extension of an existing chimney. So in fact that it's a historical location for a chimney to be, toward the front...." A.R.: 15. Moreover, the Commission held a public hearing, allowed the public and the parties to appear and make appropriate submissions and presentations, and considered the findings of the City of New York Manhattan Community Board 8. This was exactly what the law required, as the Commission had converted the COE to COA and the latter requires a public hearing if the issue being resolved is the appropriateness of a rooftop addition. 63 RCNY § 2-19(f) provides,

(f) The Landmarks Preservation Commission shall consider any application for a proposed rooftop addition that does not meet the criteria for a CNE set forth above as a request for a CoFA and shall hold a public hearing on such application.

Petitioner also argues that the finding of reduced visibility is not supported by the

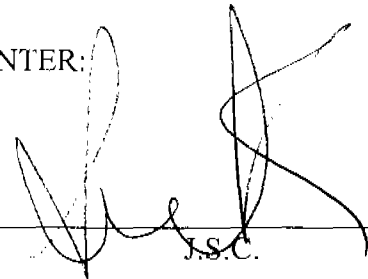
evidence, and the process engaged in by the Commission was unreasonable and an abuse of discretion. Neither argument has any merit. Respondent correctly points out that “there is no requirement for purposes of the issuance of a CofA that the chimney be invisible.” (City Respondent’s Memo of Law at 16.) Here, the Commission exercised its discretion and worked with the building owner to reduce the visibility of the addition and ensure that it would blend in as much as possible with the historical character of both the applicant’s building and the neighborhood. The Commission noted that, “chimneys and flue enclosures are frequently seen above the primary facades of row-houses in this and many other historic districts.” A.R.: 2. The Commission concluded that the modified plans reduced the visibility of the chimney and that the modification by the applicant was historically appropriate. A.R.: 2. The record supports this conclusion. Petitioner disagrees, but that alone does not render the Commission’s finding without support in the record or an abuse of discretion.

Nor was there anything untoward about the process engaged in by the Commission. Petitioner refers in particular to the Commission’s prior denial of a COE for approval of the illegal chimney, the Commission Chairman’s absence from the hearing and the vote, Commissioner Gratz’s abstention from the vote, and Commission staff member Graham’s “presentation” on behalf of the applicant. The first point ignores the fact that during the first hearing on the application for approval the Commission had suggested ways that the applicant could reduce visibility of the illegal chimney. After the applicant implemented those suggestions he re-filed his application for approval, which the Commission then granted. That application is the only one subject to review at this time as petitioner never sought review of the Commission’s prior denial. Nor is the Commission Chairman’s absence from the hearing and the vote

dispositive. All that is required is that at least six Commissioners vote to approve the application. 63 RCNY § 2-19(h)(4). Seven Commissioners voted to approve, which was more than sufficient. Nor did Commissioner Gratz's abstention from the vote somehow render the proceedings illegal. The record arguably shows she was concerned about the precedent set by approval, as well as the vote to disapprove that had been made by the Community Board.¹ Yet her vote would not have resulted in the Commission's disapproval of the COA. Finally, Commission staff member Graham did not make a presentation *for* the applicant. The record shows that he merely summarized the application and supporting materials for the Commission members. Accordingly, it is

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

Date: January 14, 2008
New York, N. Y.

ENTER: 
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¹It seems to the court that Commissioner Gratz's concerns would have more logically resulted in a vote to disapprove the COA rather than a decision to abstain entirely from the vote, but the record is unclear as to whether her concerns were the sole basis for the abstention decision.