

**Matter of Puckett v City of Glen Cove**

2008 NY Slip Op 30508(U)

February 15, 2008

Supreme Court, Nassau County

Docket Number: 7826-07/

Judge: Daniel Martin

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Respondents Len Baron, the City's Building Department Administrator and the Zoning Board of the City of Glen Cove (hereinafter "Zoning Board") cross-move to dismiss the petition on the bases, *inter alia*, that petitioner failed to exhaust her administrative remedies.

For the reasons set forth below, the court finds that respondents have demonstrated that petitioner failed to exhaust her administrative remedies and the petition is dismissed.

The following facts are not in dispute. On August 10, 2007 respondent Baron, the City's Building Department Administrator, issued a building permit to respondent Frog Hollow, a developer, to expand and renovate a two family residential dwelling located at 6 Prospect Avenue, Sea Cliff, New York. Petitioner owns and resides at the premises located across the street from the premises for which the building permit was issued.

Prior to the issuance of the permit:

- 1) On May 8, 2007 respondent Baron had approved Frog Hollow's building permit application to renovate the structure at the subject premises;
- 2) on that same date the City adopted certain amendments to its Zoning Code which would have made the proposed structure set forth in Frog Hollow's application non-conforming had the amendments been in effect on the date the permit was issued;
- 3) said amendments took effect on May 27, 2007;
- 4) on June 11, 2007 respondent Baron issued a stop work order to Frog Hollow on the grounds that its architect was unlicensed, resulting in the submitted plans and application being rendered invalid;
- 5) respondent Taranto, the City Attorney, determined that the amendments to the Zoning Code which would have made Frog Hollow's application non-conforming had said amendments been adopted prior to the approval of the application were invalid;
- 6) Frog Hollow submitted a new application that conformed with the old code sections and not with those newly adopted code sections that Mr. Taranto found to be invalid; and
- 7) Said second application was approved and a building permit issued in accordance therewith on August 10, 2007.

Petitioner commenced the instant proceeding and seeks the relief set forth above in her petition upon the grounds that the amendments adopted on May 8, 2007 were still valid and in effect on August 10, 2007, the date on which the subject building permit was issued and that as a result, the work authorized in the permit was non-conforming with the May 8, 2007 sections of the Code. First, petitioner argues that the reason that Mr. Taranto found for the May amendments to be invalid is incorrect. Mr. Taranto found that notice of the public hearing regarding the amendments were to be given to neighboring municipalities if there is a change to any zoning district in the City within 500 feet of the neighboring municipality pursuant to Glen Cove Code §280-23(e). Petitioner contends that General Municipal Law §239-nn, which has been in effect since 2006 sets forth the circumstances under which notices of public hearings must be given to neighboring municipalities, none of which include amendments to the local zoning ordinance. Further, petitioner asserts that the subject amendments are not rendered

invalid merely based upon the determination by the City Attorney, respondent Taranto, that same were not properly adopted. Further, petitioner also claims that pursuant to Glen Cove City Code §280-13, the work at the subject property required site plan approval due to an intensity in use, which was not obtained in this matter.

The court shall first determine the motions to dismiss upon the grounds that petitioner failed to exhaust her administrative remedies. Respondents City, Taranto, Zoning Board and Baron all argue that petitioner was required to first submit an appeal of the Building Department's approval of the permit to the City's Zoning Board pursuant to Glen Cove City Code §154-22(B). Pursuant to said section "the zoning board of appeals shall hear and decide appeals when it is alleged there is an error in any requirement, decision or determination made by the local administrator in the enforcement or administration of this chapter." Said section further provides for those who are aggrieved by a determination in such a proceeding for an appeal to the Supreme Court pursuant to CPRL, Article 78. Glen Cove City Code §154-22[C].

In opposition petitioner asserts that she is not required to exhaust her administrative remedies because she is alleging herein that her equal protection rights have been violated and also that each of the exceptions to the requirement of exhaustion of administrative remedies applies here. Those exceptions are: 1) to appeal the decision would be futile; 2) respondents acted beyond the scope of their authority; and 3) petitioner would be irreparably harmed were she required to first appeal the approval of the permit to the zoning board.

One who is aggrieved by the determination of an administrative agency must exhaust available administrative remedies before being permitted to litigate the issue in a court of law. See, Watergate II Apartments v. Buffalo Sewer Authority, 46 N.Y.2d 385 (1978); Brunjes v. Nocella, 40 A.D.3d 1088 (2<sup>nd</sup> Dep't 2007); Parkway Hospital v. Axelrod, 178 A.D.2d 644 (2<sup>nd</sup> Dep't 1991). As set forth above, there are certain exceptions to the requirement that one aggrieved by the determination of the administrative body or officer exhaust said remedies. See, e.g., Watergate II Apartments v. Buffalo Sewer Authority, supra.; Martin v. Ambach, 85 A.D.2d 869 (3<sup>rd</sup> Dep't 1981); Matter of Kostick v. Del Castillo, 133 A.D.2d 759 (2<sup>nd</sup> Dep't 1989).

As set forth above, the City's Code provides an administrative remedy to one who is aggrieved by the Building Department's administrator "in any requirement, decision or determination...in the enforcement of the [zoning] chapter." Glen Cove City Code §154-22(B). General City Law §81-a(4) provides that the City Zoning Board's jurisdiction shall be "appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation or determination made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this article." This section also requires that any such appeal be taken by "any person aggrieved, or by an officer, department, board or bureau of the city." Id. General City Law §81-a(5) through (9) sets forth the procedure and requirements on both the aggrieved and the zoning board for such an application. It is undisputed here that petitioner did not file an application to the Glen Cove Zoning Board based upon the administrator's August 7, 2007 issuance of the building permit.

Petitioner's first position, that the city either violated petitioner's equal rights or that the

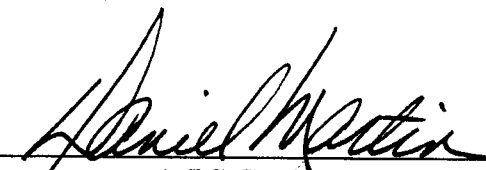
issue which would have been submitted to the zoning board was wholly outside the scope of the board's authority is unavailing. Although petitioner makes an extensive argument in opposition to the motions to dismiss that the issues herein involve equal protection issues, nowhere in her petition itself does petitioner allege a violation of her constitutional equal protection rights. Neither does the court view this matter as being subject to the exception based upon the zoning board's wholly lacking authority to hear this application. As set forth above, General City Law §81-a(4) authorizes the zoning board to hear appeals of "any ...decision, interpretation or determination made by an administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this article." It appears that the administrator's determination not to apply the provisions of the ordinance to Frog Hollow's application which petitioner alleges should have been applied is precisely what is authorized by the General City Law. Further, as set forth by respondents City and Zoning Board, even where petitioner asserts that the zoning board lacked the authority to hear her application, the exhaustion of remedies doctrine requires submission to that board prior to petitioner's availing herself of the court's intervention. See, New York Institute for the Blind v. United Federation of Teachers, 83 A.D.2d 390 (1<sup>st</sup> Dep't 1980).

Neither is the futility exception applicable herein. Such exception should be sparingly used. See, Martin v. Ambach, supra. Petitioner argues that to submit an appeal to the Zoning Board would have been futile and proof of same is that respondent Zoning Board has argued in its opposition to the petition that Baron was correct in his determination to grant the building permit application and that both parties have submitted motions to dismiss on the same grounds. A party may not use the position of the particular board in a later commenced proceeding as proof of the futility of required application to same. Such to this court constitutes at best speculation as to what the Zoning Board would have ruled at the time an appeal would have been submitted to petitioner. Further, petitioner must demonstrate a long standing, definitively stated policy on the issue which would have been appealed to the Zoning Board. See, Lehigh Portland Cement Co. v. New York State Department of Environmental Conservation, 87 N.Y.2d 136 (1995); Waterways Developmental Corp. v. LaValle, 28 A.D.3d 539 (2<sup>nd</sup> Dep't 2006). Petitioner has submitted no evidence of such a long standing policy on the Zoning Board's part on the issue upon which her appeal would have been based.

Accordingly, based upon the foregoing, it is the finding of this court that petitioner failed to exhaust the administrative remedy available to her prior to commencing the instant proceeding and the motion and cross-motion to dismiss are hereby granted. It is directed that the petition is dismissed in its entirety.

So Ordered.

Dated: February 15, 2008

  
A.J.S.C.

**ENTERED**

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**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**