

Matter of Retoske v Grossman

2008 NY Slip Op 31209(U)

April 16, 2008

Supreme Court, Nassau County

Docket Number: 2089-07/

Judge: Ute W. Lally

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M E M O R A N D U M

SUPREME COURT, STATE OF NEW YORK
 In the Matter of the Application of
 ROBERT RETOSKE and KAREN RETOSKE,

By LALLY, J.
 IAS/TRIAL PART 6

Petitioner(s),

NASSAU COUNTY
 INDEX NO. 22089/07
 MOTION DATE: 2/25/08
 MOTION SEQ: 1
 X X X

- against -

STUART GROSSMAN, DAN VALANCE, DREW
 LAWRENCE, JEFFREY UNGER, LINDA DARBY,
 TERRI MOSCHETTA, and JOHN PERRONE,
 constituting the Board of Zoning Appeals
 of the City of Glen Cove,

Respondent(s).

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This is an Article 78 proceeding seeking to review the determinations of the Board of Zoning Appeals of the City of Glen Cove which denied the Petitioners' application for a determination that they have a vested right in respect to a certain building permit issued by the City of Glen Cove Building Department dated August 3, 2001, and also in a garage located at the premises, built pursuant to the building permit, and denied the Petitioners' application for an area variance for the garage, and to thereafter direct the City of Glen Cove to issue a building permit and certificate of occupancy for the garage.

The Petitioners are the owners of a parcel of land in the City of Glen Cove known as 34 Titus Road, Glen Cove, New York. This is an approximately 30,000 square foot parcel in an area zoned R-2 by the City of Glen Cove, which requires a minimum of one-half acre per residential building plot. By application dated July 25, 2001, the Petitioners applied for a building permit to construct a garage at the northeast corner of the premises. The proposed dimensions of the garage were 40' x 70'. After the issuance of the permit number C15688 dated August 3, 2001, the Glen Cove Building Code was amended to limit the size of garages to 500 square feet. The effective date of this legislation was November 27, 2001.

The Petitioners proceeded with the construction without any intervention by the Building Department, or application by anyone for a temporary restraining order or injunction. In August, 2003 they submitted a final survey and requested the issuance of a Certificate of Occupancy. At or about the same time the Petitioner was issued a Notice of Violation by the City of Glen Cove for using the garage for a commercial purpose in violation of the zoning ordinance. The Building Department withheld the issuance of a Certificate of Occupancy pending the outcome of the charges against the Petitioners. After completion of the trial for the use violation, in which there was a conviction of some, and dismissal of other charges, the Building Department issued a Certificate of Occupancy on November 18, 2005.

A neighbor, Maureen Bythrow Moynihan, thereafter appealed the issuance of the Certificate of Occupancy to the Board of Zoning Appeals on the ground that the certificate was not issued within two years of the date of the building permit, as required by § 111-11B of the Code, and that the permits were null and void upon expiration of the two-year period.

By decision dated September 14, 2006, the Board of Zoning Appeals revoked the Certificate of Occupancy for the garage on the grounds that it was not issued within two years of the building permit, and thereafter denied an application by the Petitioners for a size variance for the completed garage. In declaring the Certificate of Occupancy invalid, the Board determined that the Building Department was without authority to issue it after the two-year term commencing with the issuance of the permit. The Board further determined that the Building Department was within its rights to withhold a Certificate of Occupancy pending the outcome of the use violation issued to the Petitioners in August 2003. This authority is stated to be found in § 111-5 of the Building Code of the City of Glen Cove, which gives the Building Department Administrator the responsibility of "enforcing all of the provisions of . . . this code and laws and regulations applicable to the construction, alteration, repair, removal and demolition of buildings and structures."

In a subsequent application the Petitioners requested a determination that they had a "vested right" to maintain the 2,800 square foot garage because it was built "as of right pursuant to a building permit which expired by operation of law." In its Findings of Fact and Decision, the Board determined that the Petitioners did not have a "vested right" to maintain the garage because the Petitioners failed to provide "persuasive proof and a time line proving that construction of the garage was timely commenced under the permit and that substantial construction and expenditures had been made before the Zoning Ordinance was amended in November, 2001, to prohibit a garage of this size."

Alternatively, the Petitioners sought an area variance to maintain the garage as built, which was in violation of City of Glen Cove Zoning Ordinance § 280-56(D)(4), effective November 2001, limiting the size of a garage in the R-2 zoned area to 500 square feet. The Board determined that the proof submitted in support of the application for a variance was not sufficient, and does not outweigh the significant detriment to the community caused by the garage. The Petitioners were directed to reduce the size of the garage to conform to the ordinance as amended.

This Article 78 proceeding followed. The Petitioners seek an Order vacating and annulling the Notice of Decision and Order and Findings of Fact and Decision dated and filed November 15, 2007, for a determination that the Petitioners have vested rights in the building permit issued by the City on August 3, 2001 and the garage which was constructed pursuant to the permit, vacating the denial of the Petitioners' application for area variance with respect to the garage, and directing the City to issue a building permit and certificate of occupancy for the garage.

The issue of the propriety of the Respondents withholding the issuance of a Certificate of Occupancy because of the pending proceedings involving the use of the garage is not before the Court. The Petition is limited to whether the determination by the Board in its November 15, 2007 Decision and Findings of Fact is illegal, arbitrary and capricious, or an abuse of discretion, to wit: whether the action by the Board had a rational basis and was supported by substantial evidence (*Matter of Rendely v. Town of Huntington, et al.*, 44 AD3d 864, 865).

The timing of the amendment of the zoning ordinance within approximately three months of the issuance of the building permit is undoubtedly not coincidental. Allowing the construction to continue and thereafter rejecting a timely application for a certificate of occupancy under the guise of the City's obligation to enforce all provisions of the Building Code, despite having already filed a use violation, is not before the Court. The issue before this court is limited to whether there was a rational basis for the November 15, 2007 determination and findings.

It is beyond cavil that had the Respondents not been in litigation with the Petitioner about the use of the garage for a commercial purpose, in violation of the City Ordinance, that the certificate of occupancy would have been issued within two years of the issuance of the building permit. As of July 2003, this 2,800 square foot garage was completed in accordance with the approved building plans.

Thus, the question before the court is whether the Petitioners acquire a vested right in the lawfully issued building permit, and the garage which they constructed in conformity to that permit, or should they be compelled to raze the structure on which they have expended in excess of \$126,000, without any dissuasion by the Building Department from doing so, or efforts to enjoin them by their neighbors?

A vested right is the right to initiate or continue the establishment of a use or construction of a structure which, when completed, will be contrary to the restrictions or regulations of a recently enacted zoning ordinance. If a vested right to initiate the use or complete construction is found to exist, the use or structure will generally be allowed to continue as a protected nonconforming use [4 Rathkopf, *The Law of Zoning and Planning* § 50-02(1)].

With respect to the acquisition of a vested right, New York adheres to the majority view,

which may be stated as follows:

A landowner will be held to have acquired a vested right to continue and complete construction of a building or structure, and to initiate and continue a use, despite a restriction contained in an ordinance or as an amendment thereof where, prior to the effective date of the legislation and in reliance upon a permit validly issued, he has, in good faith, (1) made a substantial change in position in relation to the land, (2) made substantial expenditures, or (3) incurred substantial obligations [*Id* at § 50-34(3)(a)].

In the Findings of Fact and Decision the Board lays out the basis for its conclusion that the Petitioner did not meet its burden of establishing that construction pursuant to the permit was timely commenced and that substantial expenditures had been made before the Zoning Ordinance was amended in November 2001. They further concluded that construction or expenses after the amendment could not be considered or deemed to have been made under a valid permit, and cannot be used to establish "vested rights."

The Petitioners have annexed a breakdown of the \$126,712 incurred by them in connection with the construction of the garage. While the face sheet would seem to indicate that 50% of the total cost of the garage was incurred before November 27, 2001, a careful review of the attached documentation reflects that the vast majority of this sum was for "proposals," "quotes" or "estimates." It does not appear that the Petitioners can establish, nor did they to the Board, that they "made substantial change in position relative to the land, made substantial expenditures, or incurred substantial obligations." Consequently, they did not acquire a "vested right" to construct a 2,800 square foot garage after the implementation of a 500 square foot limit on garages in R-2 zoned areas. In short, there was a rational basis for the Board's determination in this regard.

The second aspect of the Petitioners' application to the Board of Zoning Appeals was for a variance to permit the maintenance of the 2,800 square foot garage, which was built pursuant to a lawfully issued permit. In considering such an application, the Board must weigh the benefit of the grant to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted [General City Law § 81-b (b)(4)]. The standards for consideration of an area variance are set forth in Zoning Ordinance of the City of Glen Cove § 280-28(B)(2). They are as follows:

1. Whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created in the granting of an area variance.
2. Whether the benefit sought by the Applicant can be achieved by some method feasible for the Applicant to pursue, other

than an area variance.

3. Whether the requested area variance is substantial.
4. Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.
5. Whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the Board of Appeals, but shall not necessarily preclude the granting of an area variance.

The garage in question, of course, is the one for which the City issued a building permit in 2001, and which representatives of the City acknowledge would have received a Certificate of Occupancy were it not for the unlawful use of the garage, for which they cited the Petitioners. It was only the pendency of the prosecution for the use violation which prevented the issuance of a Certificate of Occupancy within the two-year requirement.

The Decision of the Board concluded that the area variance request was substantial, that it would produce an undesirable change to the character of the adjacent residential neighborhood and cause significant detriment to those properties. The Board set forth some of the detriments raised by the neighbors relevant to the denial of the area variance.

These include : (i) the constant noise from vehicles moving back and forth from the garage through the driveway onto Titus Road; (ii) the fact that neighbors must now look at a large nonconforming structure that is out of character with the surrounding residential neighborhood; and (iii) the severe flooding that occurs from rain running off the roof of the garage and the lack of a porous surface at the premises to absorb the rain water.

Lastly, the Board concluded that the "Applicant's difficulty was entirely self-created." The Applicant failed to complete the construction and obtain a Certificate of Occupancy within the required two (2) years, and allowed the permit to lapse.

The Court's role is to determine whether or not the Board of Zoning Appeals of the City of Glen Cove abused its discretion, as a matter of law, in denying the Petitioner's application for an area variance.

"A zoning board is vested with 'broad discretion in considering applications for area variances, and . . . (c)ourts may set aside a zoning board determination only where the record reveals

that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure” (*Marro v. Libert*, 40 AD3d 1100, 1101, quoting *Matter of Pecoraro v. Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613). A zoning board’s determination should be sustained if it has a rational basis. It must be based on some objective factual basis and not rest on subjective considerations such as general community opposition (*Id.*).

On a considerably smaller scale, the subject proceedings bear resemblance to the controversy over the development of Lefrak City in Kew Gardens, Queens. The Long Island Railroad was the owner of a parcel of property, part of its right of way, which it agreed to sell to Adson Industries, Inc. in March, 1961. Effective December 15, 1961, a new zoning resolution prevented the erection of high-rise apartments in the Forest Hills-Kew Gardens area. It authorized the issuance of building permits for construction permitted under the old law, and in 1963, that authority was extended for the construction of a major development. The matter was the subject of significant public outcry, and, after the 1971 denial of a further extension of the permits by the Board of Standards and Appeals of the City of New York, an Article 78 proceeding to annul the determination of the Board was commenced.

In *Lefrak Forest Hills Corp. v. Galvin*,(40 AD2d 211, 212) the Court framed the issue before it as

... whether the Board of Standards and Appeals of the City of New York improperly denied the applications of the petitioners Lefrak Forest Hills Corp. And Lefrak Kew Gardens Corp. (hereafter called Lefrak) for a further extension of permits first issued in 1963 and successively extended until December 15, 1971 to build an apartment house project on property located in the Kew Gardens-Forest Hills area in Queens County.

But the Court did not fail to recognize the reality of the matter, and stated as follows:

(t)he simplicity of the question cannot veil the complexity of the facts revealed by the history of the project. The ultimate legal issue, however, in our view, is whether the reciprocal actions of the board in granting the past extensions and of Lefrak and the predecessor owners of the property in making improvements to the property and incurring obligations in reliance on the permits have given rise to the vesting of rights and equitable considerations which now cannot be abrogated (*Id.*).

In the instant case, the Petitioners received a valid building permit and completed the construction in accordance with the approved plans within two years of the issuance of the permit. The language of the Decision of the Board is notable. The Board finds that the Petitioners’

difficulty was “entirely self-created” because they “failed to complete the construction of the garage and receive a Certificate of Occupancy within the required two (2) years.” Of course, they did complete the construction within two years, but were denied a Certificate of Occupancy for an extraneous reason, that is, the pendency of a violation charging illegal use of the garage.

The improvement which the Board now finds so distasteful because of excessive noise from vehicles entering and leaving the garage, the view that the neighbors now have of a large, nonconforming structure which is out of character with the surrounding neighborhood, and the severe flooding that occurs because of the rain running off the garage roof and the lack of porosity of the footprint of the structure is the precise one for which they gave a permit and allowed the Petitioner to construct at a cost of \$127,712.

The issue of traffic in and out of the garage is presumably resolved by the conviction of the Petitioner for carrying on an unlawful use. Any further illegal use should be met with similar enforcement. The issue of runoff of rain from the roof can be resolved by simply requiring the installation of gutters and a dry well. There is no doubt but that such a requirement would be fully consistent with the authority of the Board of Zoning Appeals. General City Law § 81-b(5). The structure is large and is nonconforming. But it was constructed with a lawful permit issued by the Building Department.

While the structure is certainly large for a garage, there is no evidence that it is any greater in size than a typical single family residence in the community. The Petitioners’ plot is 50% larger than the one-half acre required by the R-2 zone. This significantly reduces the impact of the structure on the surrounding community. It is not insignificant that there was no action by the City or the neighbors to terminate the construction from the date of the zoning amendment to the completion of the project.

As stated in *Lefrak* “[i]f we were to look only at the board’s action before us, we would blind our eyes to the equities and rights upon which Lefrak and Franklin might justifiably depend in dealing with the property” (*Id.* at 217 — 218, 938). A vested right to finish a nonconforming building matures when substantial work is performed and obligations are assumed in reliance on a permit legally issued (*Id.* at 218, 939). Here the Petitioners not only performed substantial work, but actually completed the project in conformity with a lawfully issued permit, which gave them two years within which to complete construction.

In *Ellington Construction Corp. v. Zoning Board of Appeals of the Incorporated Village of New Hempstead* (152 AD2d 365, 372, 549), the Court took particular note that statements by courts to the effect that an amendment of a local zoning ordinance constitutes, ipso facto, a revocation of any building permit issued up to that time for a use or structure prohibited by the amendment, were contained in dicta. The positions taken by the Respondents in this case, are to the effect that the permits had continued viability up to two years from the date of their issuance, but the failure of the Petitioner to obtain a Certificate of Occupancy caused them to lapse.

The inequity of this position is obvious. The Board's determination that the Petitioner was not entitled to an area variance for the building completed within two years in conformity with approved plans, coupled with a finding of adverse impact on the community because of the size of the nonconforming building which the City approved, the runoff of rain from the roof of the garage, capable of remedy by a condition requiring gutters and dry well, and excess noise from traffic, which has been, and can be in the future, resolved by enforcement of the illegal use prohibitions in the ordinance does not have a rational basis.

Accordingly, the relief in the form of an area variance sought by the Petitioners is warranted, the determination to deny a size variance to the Petitioners is annulled, and the Respondents are directed to take such further actions as mandated by this decision.

Settle judgment on notice.

Dated: APR 16 2008

Michael J. ...
J.S.C.

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APR 21 2008
NASSAU COUNTY
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