

**Matter of 515 E. 5th St., LLC v New York City
Bd. of Stds. & Appeals**

2008 NY Slip Op 31406(U)

May 6, 2008

Supreme Court, New York County

Docket Number: 0113745/2007

Judge: Marylin G. Diamond

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

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

Matter of 515 EAST 5TH STREET, LLC,

INDEX NO. 113745/07

Petitioner,

MOTION DATE

For a Judgment pursuant to Article 78 of
The Civil Practice Law and Rules,

MOTION SEQ. NO. 001

-against-

MOTION CAL. NO.

NEW YORK CITY BOARD OF STANDARDS
AND APPEALS and THE CITY OF NEW YORK

Respondent

FILED
MAY 20 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: Motion sequence numbers 001-003 are consolidated herein. In this article 78 proceeding, petitioner challenges a resolution of the respondent New York City Board of Standards and Appeals (“BSA”), dated September 11, 2007, which determined, *inter alia*, that penthouses installed on the roofs of buildings should always be included in the measurement of a building’s height when determining whether the building exceeds the maximum height permitted under section 23-692 of the New York City Zoning Resolution (commonly known as the “Sliver Law”). Petitioner contends that the determination was arbitrary and capricious, an abuse of discretion and not supported by substantial evidence in the record.

Background

Petitioner owns a five-story residential apartment building located on East 5th Street in Manhattan (the “Building”). At some point, petitioner decided to renovate the Building and construct four new duplex apartments by adding a sixth floor and a penthouse. According to the petition, the upper levels of the newly constructed duplexes at the Building are contained in a penthouse that is a nine-foot high structure on the roof, set back approximately 20 feet from the front parapet of the Building. The penthouse covers less than one-third of the area of the roof and is not visible from the street directly below. The New York City Department of Buildings (“DOB”) approved the construction of the penthouse and issued work permits to that effect on or around March 31, 2006.

During the period of construction, the Tenants’ Association of the Building, with support from various elected officials, asked the DOB to reconsider and/or revoke its approval of the renovation plans on the ground that the addition of the penthouse caused the Building to exceed the maximum height permitted by the Sliver Law. The Sliver Law provides, *inter alia*, that in certain designated zones, “if the width of a street wall of a new building or an enlarged building is 45 feet or less. . . no such new or enlarged building shall exceed a height equal to the width of the abutting street on which it fronts or 100 feet, whichever is less...” It is undisputed that East 5th street is 60 feet wide so that the height of the Building may not exceed 60 feet under the Sliver Law. It is also undisputed that with the addition of the sixth floor, the Building reached a height of 60 feet from the ground to the roof.

In its attempt to have the DOB revoke its approval of the renovation plans, the Tenants' Association argued that the construction of the nine-foot high penthouse on top of the roof would violate the Sliver Law since the height of the Building would thereby reach 69 feet. The DOB rejected this argument and issued a final determination allowing the construction to go forward. The DOB agreed with the petitioner that the height of the penthouse should be excluded from the calculation of building height under the Sliver Law. In its determination, the DOB held that:

It has been the Department's practice to allow the building height (which is not a defined term in the Zoning Resolution) of penthouses to exceed the width of the street for buildings covered by the Sliver Law in instances similar to the project in question, particularly in cases such as this where the penthouse is not visible from the street. It would be inconsistent with these prior decisions to overturn the approval of the penthouse here. It is the Department's position that the addition of a penthouse at the building in question does not violate the Sliver Law as the continuity of the street wall has been maintained. In accordance with this interpretation, the penthouse, as constructed with a twenty foot setback from the street wall, complies with ZR §23-692.

The Tenants' Association appealed the DOB's final determination to the BSA on March 16, 2007. A hearing was held before the BSA on July 17, 2007. Testimony was taken from counsel for the Tenants' Association, DOB and the petitioner, as well as representatives of various elected officials and civic associations who had objected to the renovations. Following the hearing, the BSA voted to grant the Tenants' Association's appeal and, on September 11, 2007, adopted a Resolution which concluded that the construction of the penthouse violated the Sliver Law. In the Resolution, the BSA rejected the petitioner's argument that it should exercise its jurisdiction under § 666(7) of the Charter of the City of New York to create a variance or waiver permitting the penthouse to remain despite its noncompliance with the Sliver Law. This article 78 proceeding, brought under motion sequence number 001, then followed. In motion sequence number 002, the petitioner has moved to amend the certified record so as to include a submission which it unsuccessfully attempted to make to the BSA on September 7, 2007. In motion sequence number 003, the Tenants' Association moves for leave to intervene in this proceeding.

Discussion

A. Intervention of Tenants' Association – As already noted, in motion sequence number 003, the Tenants Association has moved to intervene in this proceeding. The motion is granted without opposition and the papers served by the Association in support of the BSA's determination are hereby deemed its answer to the petition. The court notes that the petitioner has already responded in its reply papers to the Association's arguments. Under the circumstances, the BSA's argument that the petition should be dismissed for failure to join the Tenants' Association as a necessary party is moot.

B. Amendment of Certified Record – In motion sequence number 002, the petitioner moves, pursuant to CPLR 7804(e), for an order directing the respondents to amend the certified record in this proceeding to include a submission that the petitioner attempted to make to the BSA on September 7, 2007. The motion is denied. The administrative record was closed on August 28, 2007 and the BSA denied the petitioner's September 7, 2007 effort to reopen the record and submit documents which confirm that the DOB had previously approved the construction of similar penthouses. Since the cited submissions are thus outside the record which the BSA considered when making its determination, it would be improper for this court to include them in the record on review.

C. The BSA's Interpretation of the Sliver Law – In this proceeding, petitioner argues that the BSA, in denying it the right to expand its property by the addition of the penthouse, improperly interpreted the language of the Sliver Law. The term “building height” is not defined anywhere in the Sliver Law. Indeed, the Sliver Law is silent as to how building height is to be measured and as to whether penthouses should be included in measuring building height. The Sliver Law is contained within section 23-69 of the Zoning Resolution, which is comprised of two sections. The first section is 23-691, which provides a maximum height for a building or “other structure” that is located within a Limited Height District, a designation that is not applicable to the Building herein. The second section is 23-692, the Sliver Law, which, as detailed above, provides that a building on a lot of 45 feet or less width may not exceed a specified height. Unlike section 23-691, the Sliver Law only refers to buildings as opposed to buildings or “other structures.” Petitioner argues that the absence of the term “other structure” in the Sliver Law suggests that a structure such as a penthouse should not be included in the measurement of a building's height.

Petitioner also argues that provisions in the New York City Building Code which relate to building height support its position. Thus, it notes that a penthouse is defined under the Building Code as “an enclosed structure on or above the roof of any part of a building which is designed or used for human occupancy.” See New York City Administrative Code § 27-232. In addition, section 27-306(c) of the Administrative Code provides that in applying the provisions of the Building Code governing height limits, a penthouse should not be included in the measurement unless it exceeds one-third of a building's roof area. Indeed, in finding that the petitioner's penthouse should not be included in measuring the building's height, the DOB applied this second Building Code provision, as it had previously in numerous other cases. Nevertheless, the BSA found that the Sliver Law requires that the height of the penthouse be included in measuring the height of the enlarged property and that, as such, the inclusion of the penthouse violated the Sliver Law.

It is well settled that local zoning boards such as the BSA have broad discretion and judicial review is limited to a determination as to whether the zoning board's action was illegal, arbitrary and capricious, or an abuse of discretion. See *Matter of Pecoraro v. Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 (2004); *Matter of B.Z.V. Enterprise Corp., v. Srinivasan*, 35 AD3d 732 (2nd Dept. 2006). In particular, since the BSA is comprised of experts in land use and planning, its interpretations of the Zoning Resolutions are entitled to deference and should be upheld as long as they are neither irrational, unreasonable nor inconsistent with the governing statute. See *Matter of New York Botanical Garden v. Board of Stds. and Appeals of City of NY*, 91 NY2d 413, 418 (1998).

Here, the court agrees that it was reasonable for the BSA to conclude, in the absence of any express definition under the Sliver Law, that a penthouse is part of a “building” within the commonly-accepted meaning of that word so that its height is included in the calculation of the “building height.” See *Raritan Development v. Silva*, 91 NY2d 98, 106-07 (1997). Indeed, this interpretation is supported by Zoning Resolution 23-62, which lists various permitted obstructions such as balconies, chimneys, bulkheads and water tanks that are allowed to exceed the maximum height limits of the Sliver Law. Notably, penthouses are not listed among these permitted obstructions, a strong indication that the BSA properly included the height of the penthouse in its calculation of the height of the petitioner's building. The fact that other statutory provisions outside of the Zoning Resolutions, such as provisions under the Building Code, may exclude penthouses from the calculation of a building's height are not dispositive since they involve different regulatory areas and the BSA reasonably determined that it should look only to the Zoning Resolutions themselves, as well as the plain meaning of the word “building,” to interpret the Sliver Law.

At the very least, the BSA has established that its interpretation is reasonable and comports with the statutory purpose. Although the penthouse may not be visible from the street directly below, there is nothing irrational about the BSA's conclusion that the Sliver Law was intended to serve not only an aesthetic

purpose, but also to restrict bulk and density. The fact that the DOB had concluded otherwise and had previously approved the construction of similar penthouses was neither binding on the BSA nor dispositive of the issues before the court. Since the BSA's interpretation of the Sliver Law was rational, it must be upheld. *See Matter of Toys "R" Us v. Silva*, 89 NY2d 411, 418-19 (1996).

D. Hardship Waiver – Section 666(7) of the Charter of the City of New York provides that the BSA has the power to review and “vary or modify a rule or regulation or the provisions of any law relating to the construction ... of buildings” provided that it finds there “[a]re practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the law, so that the spirit of the law shall be observed, public safety secured and substantial justice done . . .” When it appeared before the BSA, petitioner argued that even if the construction of the penthouse was in violation of the Sliver Law, such a violation should be waived pursuant to section 666(7) since the DOB had already approved the work and it would be onerous to have to remove the structure. The BSA rejected petitioner's argument, holding that it lacked the authority to issue such a waiver so as to essentially apply the Sliver Law prospectively. In this proceeding, petitioner argues that the BSA's refusal to consider its request for a hardship waiver was erroneous and an abuse of discretion. The court disagrees.

In rejecting the petitioner's request that it exercise its jurisdiction under section 666(7) so as to create a waiver permitting the penthouse addition to the building to remain despite its noncompliance with the Sliver Law, the BSA held that the proper procedure to request such relief from a Zoning Resolution is a variance application made pursuant to Zoning Resolution § 72-01(b). Such an application would allow the BSA, after public notice and a hearing, to consider whether the petitioner meets the various requirements for a variance set forth in Zoning Resolution § 72-21. Petitioner objects to having to apply for a variance in which it must satisfy these requirements and urges the court to direct the BSA to entertain its application for a hardship waiver pursuant to the City Charter.

Section 666 of the City Charter lists the areas in which the BSA has authority. Subdivision 5 specifically provides that the BSA has the power to grant a variance to a Zoning Resolution. Subdivision 7, on the other hand, provides the BSA with the general authority to vary or modify a rule or regulation relating to a wide range of areas, including the construction of buildings or structures. Although the general language of subdivision 7 would thus appear to include an application to the BSA to vary a Zoning Resolution such as the Sliver Law, the language of subdivision 5 is particular in that it is limited to applications for a variance of a Zoning Resolution. It is a rule of statutory construction that whenever there is a general and a particular provision in the same statute, the general applies only where the particular enactment is inapplicable. *See McKinney's Cons Laws of NY, Book 1, Statutes, § 238*. It was thus reasonable for the BSA to conclude that the general provision authorizing it to vary a rule or regulation is inapplicable to the variance of a Zoning Resolution since such variances are specifically provided for in another provision under section 666. Although the petitioner has referred to instances in which the BSA has granted a hardship waiver under section 666(7), none of those cases involved a variance or modification of a Zoning Resolution.

Notably, the parties have not cited any cases or regulations, and the court has found none, which address the relationship between a hardship waiver and a variance application. In their absence, there is no basis for this court to conclude that the BSA's determination that petitioner should proceed by way of a variance application rather than a hardship waiver is irrational or arbitrary. The court notes that petitioner has not yet sought a variance even though the procedure remains open to it. There is no indication that the equitable concerns raised by the petitioner, such as its good faith reliance on the work permit issued by the DOB and the hardship that would be entailed in having to remove the penthouse, cannot be addressed in the context of a variance application with the appropriate public notice and hearing. Although the hardship waiver process may be more advantageous to the petitioner than the process for obtaining a variance, it has

failed to show that the BSA's refusal to entertain a hardship application was irrational.

Accordingly, in motion sequence number 002, the petitioner's motion to amend the certified record is denied. In motion sequence number 003, the Tenant Association's motion to intervene is granted without opposition and the Association is hereby added as an intervenor-respondent to this proceeding. In motion sequence number 001, the petition is denied and the proceeding dismissed.

The Clerk Shall Enter Judgment Herein

Dated: 5/6/08



MARYLIN G. DIAMOND, J.S.C.
 NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

FILED
MAY 20 2008
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