

**Mosley v New York City Landmarks Preserv.  
Commn.**

2008 NY Slip Op 32455(U)

September 5, 2008

Supreme Court, New York County

Docket Number: 0110625/2007

Judge: Edward H. Lehner

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
EDWARD H. LEHNER

PRESENT: \_\_\_\_\_

PART 19

Index Number : 110625/2007

MOSLEY, KEVIN L.

vs

NYC LANDMARKS PRESERVATION

Sequence Number : 001

ARTICLE 78

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

motion is decided in accordance

with accompanying memorandum decision

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

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419).

SEP 05 2008

Dated: \_\_\_\_\_



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 : IAS PART 19

-----X  
KEVIN L. MOSLEY and DIANA CECCACCI,

Petitioners,

Index No.  
110625/07

For a Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules

-against-

NEW YORK CITY LANDMARKS PRESERVATION  
COMMISSION, and its Commissioners, and the CITY  
OF NEW YORK,

Respondents.

-----X  
EDWARD H. LEHNER, J.:

Before the court is an application under Article 78 by the petitioners Kevin L. Mosley and Diana Ceccacci ("the Mosleys") to set aside the determination by respondents New York City Landmarks Preservation Commission ("LPC") and its Commissioners and the City of New York to include their home, located at 41-45 240th Street, Douglaston, New York ("41-45"), in the Douglaston Hill Historic District. There are also disclosure requests by the Mosleys under the New York State Freedom of Information Law ("FOIL").

**UNFILED JUDGMENT**  
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The Mosleys purchased 41-45 in October 2004. In December 2004, the LPC designated 31 houses, including 41-45, as the Douglaston Hill Historic District. The Mosleys subsequently petitioned the Supreme Court to overturn LPC's designation of the historic district, and specifically 41-45 for relying on incorrect information in determining the age and historical significance of the house. By order dated December 7, 2005, Justice Feinman denied the request to invalidate the Douglaston Hill Historic District, but remanded the matter of 41-45 for "a de novo consideration of all evidence" so that the LPC could issue a new determination as to "whether the building is properly designated as included in the historic district."

In July 2005, while the first proceeding was pending, the Mosleys received a Certificate of Appropriateness from the LPC for a comprehensive renovation of 41-45 (Petition, ¶ 16). In February 2006, the Mosleys acquired a permit from the Department of Buildings ("DOB"), allowing the owners to proceed with extensive renovations (Id., ¶ 18). In March 2007, following the order of Justice Feinman, the LPC held a public hearing regarding the inclusion of 41-45 in the historic district (Id., ¶ 29), and in April 2007 it voted to amend the historic district to include 41-45 after receiving an Amended Designation Report dated April 3, 2007 (the "Report") (Id. ¶¶ 30-

32). The Report recommended the inclusion of 41-45 because, among other things, its alterations were consistent with the Certificate of Appropriateness, it retained significant architectural attributes, and is positioned at the rear of the original undivided 200 by 200 foot lot. Subsequently, the designation was recommended by the City Council Landmarks Sub-Committee, then approved by the Council's Committee on Land Use, and ultimately passed upon by the full City Council.

In this proceeding, the Mosleys assert that LPC's determination was predetermined, biased and illegal. They claim that in designating 41-45 as part of the historic district, LPC: predetermined the matter; engaged in "illegal downzoning" (Petition, ¶43); provided an after-the-fact rationalization (Tr., p. 26); and inappropriately bowed to public pressure. Furthermore, they maintain that LPC acted *ultra vires* and had no jurisdiction to designate 41-45 because the Mosleys had a valid DOB permit, precluding designation according to § 25-321 of the New York City Administrative Code (the "Code"). The parties agree that the issue before the court relates to the action of the LPC and not that of the City Council (Tr. pp. 27-28).

Respondents contend: that their amendment to include 41-45 within

the historic district was reasonable and proper based on the Report; that a DOB permit for specific work does not preclude designation under said § 25-321; and that LPC's determination was not based on improper factors.

"It is well established that landmark designations are administrative rather than quasi-judicial in nature ... (and LPC's) public hearings, rather than being adversarial or adjudicative, was strictly information gathering in nature ... (and) (a)s such, review is limited to whether the administrative determinations were rationally based, or whether they were arbitrary and capricious" [Gilbert v. Board of Estimate of the City of New York, 177 AD2d 252 (1<sup>st</sup> Dept. 1991). See also, Teachers Insurance and Annuity Association of America v. City of New York, 185 AD2d 207 (1<sup>st</sup> Dept. 1992), aff'd. 82 NY2d 35 (1993). The "judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body" [Ostrer v. Schenck, 41 N.Y.2d 782, 786 (1977)].

The LPC has the statutory authority to designate landmarks and historic districts within New York City, and to identify and amend its boundaries. Moreover, "the interpretation given a statute by the administering agency 'if not irrational or unreasonable should be upheld'"[Ostrer v. Schenck, supra at p. 786].

The Report found that 41-45 "retains many of the attributes that support its inclusion (within the Historic District), including its architecture based upon Colonial style precedents, its massing, its detailing ... (and it retains) the original foundation and brick chimney of the 1920s house" (p. 10). "Deferring as (the Court) must to the expertise of the Landmarks Preservation Commission and taking into consideration the comprehensive and voluminous record which supports the designation, (the Court) cannot conclude that the designation was arbitrary or capricious" [*Teachers Insurance and Annuity Association of America v. City of New York*, supra, at p. 208.

The argument of petitioners that the issuance of an alteration permit by the DOB after consent thereto by the LPC deprived the LPC of jurisdiction to make a landmarks designation lacks merit. While under § 25-321 of the Code the issuance of a DOB permit authorizes the alteration to be performed without further consent of the LPC, the statute does not prohibit a subsequent landmark designation as the inapplicability of the landmarks law referred to in said section only relates to the work authorized by the permit.

In response to Mosleys' FOIL disclosure requests for LPC files they were given access to LPC's office files and all documents requested by them

were produced. Consequently, their request for relief under FOIL is denied as moot.

Since the court concludes that the LPC's inclusion of 41-45 in the Historic District had a rational basis and was not arbitrary or capricious, the petition is dismissed. This decision constitutes the judgment of the court.

Dated: September 5, 2008

  
\_\_\_\_\_  
J.S.C.

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