

**Matter of Gruson v Department of City Planning of
City of N.Y.**

2008 NY Slip Op 32791(U)

October 3, 2008

Supreme Court, New York County

Docket Number: 106396/2008

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. PAUL G. FEINMAN PART 52
J.S.C.

Andreas Gruson

INDEX NO. 106396/08

MOTION DATE 9-10-08

✓
The Department of City Planning
of the City of New York
et al.

MOT. SEQ. NO. 001

MOT. CAL. NO. 61

The following papers, numbered 1 to 4 were read on this motion to/for Article 78

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Answering Affidavits — Exhibits
Replying Affidavits

PAPERS NUMBERED

1, 1A, 1B

2, 3

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 1415).

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that the motion bearing sequence no. is decided in accordance with the annexed decision and order.

ADJUDGED and ORDERED that the petition bearing sequence no. 001 is decided in accordance with the annexed decision, order and judgment.

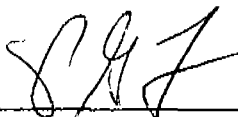
ORDERED that the cross motion bearing sequence no. is decided in accordance with the annexed decision and order.

ADJUDGED and ORDERED that the cross petition bearing sequence no. is decided in accordance with the annexed decision, order and judgment.

ORDERED that the motion bearing sequence no. is resolved pursuant to the terms of the parties' stipulation dated and annexed hereto.

ADJUDGED and ORDERED that the petition bearing sequence no. is resolved pursuant to the terms of the parties' stipulation dated and annexed hereto.

Dated: 10/3/08



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X
In the Matter of the Application of

ANDREAS GRUSON,
Petitioner,

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

-against-

Index No. 106396/2008
Mot. Seq. No. 001
Submission Date Sept. 10, 2008

THE DEPARTMENT OF CITY PLANNING
OF THE CITY OF NEW YORK and THE CITY
PLANNING COMMISSION OF THE CITY OF
NEW YORK,

Respondents.
-----X

Appearances:

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Papers considered in this Article 78 proceeding:

Order to Show Cause, Annexed Verified Petition, Exhibits, Memorandum of Law	1, 1A, 1B
Verified Answer, Memorandum of Law	2, 3
Reply Memorandum of Law	4

PAUL G. FEINMAN, J.:

Petitioner Andreas Gruson brings this Article 78 proceeding to vacate a determination of respondent Department of City Planning of the City of New York (DCP), in which the DCP refused to consider petitioner's application to allow for a parking curb cut in front of petitioner's home. Petitioner also seeks an order in the nature of a mandamus requiring respondent The City

* 3]
Planning Commission of the City of New York (CPC) to grant the authorization for the curb cut, or for an order compelling CPC to reinstate petitioner's authorization application for the curb cut, and issue a determination on that application.

I. Background

Petitioner owns a three-story townhouse located at 161 East 94th Street in Manhattan. In 2007, petitioner sought to obtain a 9'2" curb cut and one off-street accessory parking space, which would be located in the basement of his home, by filing an Authorization Application (Application) with the DCP, which would authorize CPC to issue a permit for the cut, pursuant to Zoning Regulation (ZR) § 13-551. Petitioner's attorney attended a pre-application meeting in 2007, and submitted requested materials to DCP in August 2007. The Application was filed with DCP in September 2007.

Petitioner was subsequently informed that review of the Application was being terminated, because, purportedly, the grant of the Application would fall afoul of ZR § 25-633. Despite petitioner's attorney's efforts to counter DCP's arguments, the DCP, in a letter dated March 5, 2008, stated that the application had been "accepted in error," and that the application fees would be refunded. Petition, Ex. E. This proceeding ensued.

II. Arguments

ZR § 13-551, under which petitioner seeks the curb cut, refers to "Accessory off-street parking spaces." It states as follows:

The City Planning Commission may, by authorization, subject to otherwise applicable zoning district regulations, allow onsite enclosed accessory¹ off-street parking facilities with a maximum capacity of 15 spaces in existing buildings, provided that the Commission finds that:

¹All emphasized words in the ZR are defined in ZR § 12-10.

- (a) the *building* does not have accessory off-street parking spaces;
- (b) such parking spaces are needed for or will be used exclusively by the occupants of the *use* to which they are *accessory*;
- (c) the parking spaces will not create or contribute to serious traffic congestion and will not unduly inhibit surface traffic and pedestrian movement; and
- (d) the parking spaces will not be incompatible with, or adversely affect adjacent *uses* including *uses* within the *building*.

ZR § 25-633, which respondents insist curtails ZR-551, concerns “prohibition of curb cuts in certain districts” (listed as district R4B, R5B, R6B, R7B, and R8B²), and states “[i]n the districts indicated, curb cuts are prohibited for *residential developments* on *zoning lots* having a width of less than 40 feet along a *street* and existing on the effective date of establishing such districts on the *zoning maps*.”

Petitioner responded to respondents’ claim that the Application was unacceptable under ZR 25-633 by reference to ZR § 12-10, which defines “Development, or to develop” as follows; “[a] ‘development’ includes the construction of a new *building* or *other structure* on a *zoning lot*, the relocation of an existing *building* on another *zoning lot*, or the *use* of a tract of land for a new *use*.” Petitioner argues that, since his building is not new, but is an existing structure, it does not fall within the term “residential developments” in ZR § 25-633.

Upon presenting this argument to respondents, petitioner was told, in an e-mail dated November 21, 2007, that

[i]n DCP’s view, ZR Section 25-633 is triggered because the premises is a “residential development.” Once something has been “developed” it remains a “development.” The fact that time has passed does not change the fact that a development was created and continues to exist. This interpretation of the word

²Petitioner’s property is located in an R8B district.

[* 5]

“development” as defined in ZR Section 12-10 is consistently applied to the term as it appears in other sections of the Zoning Resolution, and is not specific as to ZR section 25-633.”

Petition, Ex. C.

After petitioner objected to this interpretation of the Zoning Resolution, DCP responded with a somewhat different take on the situation. According to a letter dated March 2008, the word “includes” in ZR § 12-10 “is intended to extend its meaning to all other circumstances of a like character. ZR § 12-01 (1). The change of use of the basement of the building into a garage, as described in the application, is consistent with this definition.” Petition, Ex. E, at 2. The March 5 letter concluded by stating that:

[f]inally, common sense dictates that once a building is developed, it remains a “development” for a lifetime. This principle is well established in practice. To find otherwise would be to render most of the provisions of the Zoning Resolution inapplicable to the approximately 900,000 existing buildings in New York City.

Id. Petitioner contends, on the other hand, that it is DCP’s interpretation of the Zoning Resolution which is anomalous, as, according to petitioner, the holding that once something is developed, it remains a “development” for all time “would dictate that every existing building in the City of New York would now be considered a *development*.” Petition, Ex D., Letter to DCP, dated December 28, 2007. This interpretation, petitioner contends, is illogical and irrational.

III. Discussion

In reviewing the determinations of administrative agencies, the court looks only to whether the determination is “supported by a rational basis, and is neither arbitrary nor capricious” *Nehorayoff v Mills*, 95 NY2d 671, 675 (2001); *see also Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222 (1974). An agency’s interpretation of its own statutes must be given deference, if

the matter is one which involves an agency's special expertise. *Raritan Development Corporation v Silva*, 91 NY2d 98 (1997). However, "where the question is one of pure legal interpretation of statutory terms [internal quotation marks omitted]," no deference is required. *Id.* at 102.

Where the interpretation of statutes is involved, the court "should attempt to effectuate the intent of the legislature ..." (*Beekman Hill Association, Inc. v Chin*, 274 AD2d 161, 166-167 (1st Dept 2000)), and "[w]here the statutory language is clear and unambiguous, the court should construe it to give effect to the plain meaning of the words used." *MERSCORP, Inc. v Romaine*, 8 NY3d 90, 102 (2006).

The present matter is one of pure statutory construction, requiring the court to look to the plain meaning of the applicable sections. In doing so, this court finds that "development" as defined in ZR § 12-10, and used in ZR § 25-633, does not refer to each and every already existing structure in the City, as respondents would have it, but, instead, refers to "new" construction in District R8B, or the use of land in a new manner. As such, the Zoning Resolution cannot be read to deny petitioner's right to apply for authorization to make the curb cut.

ZR § 12-10's definition of "development" uses the word "includes" to expand the types of situations set forth in the statute. As respondents point out, ZR § 12-01 provides that the word "includes" "shall not limit a term to the specified examples, but is intended to extend its meaning to all other instances or circumstances of *like kind and character* [emphasis added]." Thus, "development," pursuant to ZR § 12-10, is not necessarily limited to "new" buildings, the "relocation" of buildings, or "the use of a tract of land for a new use."

However, pursuant to the foregoing, no rational expansion of "development" could include a previously existing structure whose use has not changed, as in the present case. Such a reading of the section would, in fact, turn the definition of development on its head, because it would make all

existing, older, structures “new,” no matter how old they were.

Respondents also impermissibly stretch the concept of a “new use” of a “tract of land” when they attempt to include in that concept the mere alteration of a basement into a garage. Implicit in the idea of the change of use of “tract of land” is a change of some magnitude comparable to that of building a new structure. That is because, pursuant to ZR 12-01, the word “includes” means of “like kind and character.” Therefore, a “development” must, as a matter of statutory construction, mean something more extensive than what is, essentially, a change in the use of a room. It cannot be read to include all existing buildings.

The logic of this interpretation is further demonstrated by the fact that there is a term for a residence that is not new: “building.” Under ZR § 12-10, a “building” is defined as, in short, “any structure which: (a) is permanently affixed to the land;” This definition covers all of the buildings in New York City at any given time, without reference to the newness of the structure. There is no need to expand “development” to mean all existing buildings.

Respondents direct the court to ZR § 13-12, a section involving the “accessory off-street parking” in Districts 1-7, in which the statute refers to “new *residential developments*.” Insofar as this section incongruously implies that there can be “new” “new” construction under ZR § 12-10, as opposed to, presumably, old “new” buildings, it is ambiguous. Ambiguous language in the Zoning Resolution must be construed against the drafter. *See Toys R Us v Silva*, 89 NY2d 411, 421 (1996) (“zoning restrictions, being in derogation of common-law property rights, should be strictly construed and any ambiguity resolved in favor of the property owner”). Therefore, this court finds that the definition of “new construction” in ZR 12-10 trumps the perceived ambiguity in ZR § 13-12, and does not turn “developments” into existing structures.

In the absence of statutory support for their refusal to consider petitioner’s application,

respondents turn to legislative history. They maintain that the Legislature's intention to maximize parking in the districts covered by ZR § 25-663 establishes that the section be read to deny essentially all applications for curb cuts, as, according to respondents, under this section, all 900,000 structures in New York City would be considered to be "developments." This argument is not persuasive.

Respondents cite *Long v Adirondack Park Agency*, (76 NY2d 416, 422 [1990]), which holds that, in the interpretation of statutes, "[t]he Legislative intent is the great and controlling principle [internal quotation marks and citations omitted]." See also *Sutka v Conners* (73 NY2d 395, 403 [1989]). And of course, this is so. As a result, the Courts have found that statutory language must not always be "literally or mechanically applied." *Doctors Council v New York City Employees' Retirement System*, 71 NY2d 669, 675 (1988). As the Court concluded in *Doctors Council v New York City Employee's Retirement System*, such a mechanical approach would be inappropriate "when, due to significantly changed circumstances, such application would cause an anachronistic or absurd result contrary to the contextual purpose of the enactment." *Id.* Thus, respondents argue that the language of ZR § 25-633 must not be misapplied to allow petitioner to even apply for a curb cut.

Respondents' argument is flawed. If the Legislature had intended to maximize parking spaces in District R8B, by barring curb cuts to every building in the district (which is what respondents are saying), there would be no need for ZR § 25-633 at all. The Legislature could, logically, have legislated that no curb cuts were allowed in District R8B without exception. The Legislature did not enact a law prohibiting all curb cuts, and to interpret the statute in a manner that would have such a result would be inconsistent with the statutory language and legislative history.

A last concern of respondents' is that the Zoning Resolution does not state when a

development ceases to be “new” construction, so that the statute might require denial of a curb cut application to a “new” structure, but later, when, at some point, the structure was no longer “new,” consideration of an application could be had. However, this question should not provide ground to arrive at the impermissible result that all old structures remain new forever. The statute should be approached with an eye towards reasonableness, (*see McKinney’s Cons Laws of New York Book 1, Statutes § 143*), and “it will be presumed that the legislature did not intend an absurd result to ensue from the Legislation enacted.” *Id.*, § 145. “[C]ourts will not construe statutes ... of a government agency in such a manner to thwart the legislative intent and reach absurd and unexpected consequences.” *Friedman-Kien v City of New York*, 92 AD2d 827, 828 (1st Dept 1983), *affd* 61 NY2d 923 (1984); *see also Wetzler v Roosevelt Raceway, Inc.*, 208 AD2d 120 (1st Dept 1995).

With this rule in mind, the question of “newness” would have to be handled in a reasonable manner. However, the issue does not come up in the present case, because, from the parties’ papers, it appears that the petitioner’s premises has been in existence for some time. It is not “new.”³

As a result of the foregoing, petitioner is entitled to have his Application considered under ZR § 13-551. However, to direct respondents, in mandamus, to grant the Application would be an inappropriate displacement of the CPC’s role to consider the merits of the application. Mandamus is an “extraordinary remedy” (*Barnwell v Breslin*, 46 AD3d 990, 991 [3d Dept 2007]), which

³It should also be noted that ZR § 25-633 indicates that the development must be “existing on the effective date of establishing such district on the *zoning maps*.” This implies that the date upon which a building is new may date from the date of the zoning maps, which have been, for the most part, been recently updated. This fact would also militate against finding that plaintiff’s premises is “new.”

should be used “only in limited circumstances.” *Klostermann v Cuomo*, 61 NY2d 525, 537 (1984). In fact, “[i]t is hornbook law that a mandamus to compel may not force the performance of a discretionary act, but rather only purely ministerial acts to which a clear right exists.” *Anonymous v Commissioner of Health*, 21 AD3d 841, 842 (1st Dept 2005).

Here, the agency must under these circumstances accept the Application – and this aspect of the process is therefore a ministerial act. However, a determination on the Application’s merits is discretionary. Of course, that discretion must be reasonably employed. Therefore, respondents will only be compelled to accept petitioner’s Application for reasonable review under ZR 13-551.

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted to the extent that the Department of City Planning of the City of New York is directed to accept the petitioner’s application for a curb cut, and all requisite fees, for reasonable review.

This constitutes the decision, order and judgment of the court.

Dated: October 3, 2008

ENTER :



J.S.C.

HON. PAUL G. FEINMAN