SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.: 102033/2007

ISLAND REALTY HOLDINGS, LLC

Petitioner

against

NEW YORK CITY DEPARTMENT OF BUILDINGS, and
JAMES MOLINARO, Borough President

Respondents

DECISION & ORDER

HON. JOSEPH J. MALTESE

The plaintiff seeks an order of mandamus pursuant to CPLR Article 78, directing the New York City Department of Buildings to issue a Certificate of Occupancy for a Dunkin Donuts retails tore at 995 Manor Road, Staten Island, New York. The defendants have moved to dismiss the plaintiff's petition.

Findings of Fact

This court finds that the plaintiff, Island Realty Holdings, through its registered architect, Daniel Ryan, filed an A-I-1 form on April 21, 2005 to alter part of the interior of a building used to change oil and make auto repairs at an existing gas station located at 995 Manor Road at the corner of Ocean Terrace in Staten Island, New York (P Ex. 3). The architect's plan was to convert the space to a drive-in Dunkin Donuts retail store (P Ex.1).

The building had been granted a variance to operate as a gas station, lubratorium and auto repair shop in a residential area in 1960 (P Ex. 2). The certificate of occupancy indicates that its use is for the "gasoline service, lubritorium, minor repairs with hand tools only, service room, car wash (non-automatic), office and parking area for more than five cars awaiting service." (D Ex. D.)

On July 25 and 26, 2006, the New York City Department of Buildings issued two work permits at the direction of Werner DeFoe, the Borough Buildings Commissioner , who issued an approval of the application to renovate without approval of the New York City Board of Standards and Appeals (P Ex. 3). In reliance of the approval to proceed with alterations, the plaintiff, which operates 24 Dunkin Donuts on Staten Island, did their own alterations and completed the work on the premises within three weeks at a cost of over $100,000, and had already started stocking the store with food and coffee. The lease from the gas station owner, 995 Manor Road LLC, to the Island Realty Holdings, LLC, the owner of the Dunkin' Donuts store commenced on July 15, 2006 (P Ex. 9), wherein the petitioner obligated itself to pay base rent in the amount of $72,000 per year, plus pro rata real estate taxes and common area charges for 15 years.

On August 10, 2006, in response to letters dated June 16, 2006 (D Ex. A) and July 16, 2006 (D Ex. B) from NYC Councilman James Oddo, who stated that some of his undisclosed constituents were complaining about the proposed "demolition" of the gas station and the erection of a new Dunkin Donuts building, the Building Department issued a letter to the petitioner advising that it was reviewing the application and intended to revoke the approval and work permits (D Ex. G).

However, at the time of the alleged issuance of the letter of August 24, 2006, the work was already completed and the Dunkin' Donuts store was already operating. The store utilized the space of the existing one story brick building of the gas station that continued to operate as a gas station. More importantly, no demolition of the gas station building ever took place. This was merely an interior renovation of part of the gas station building, leaving a small portion of the building as the operating office of the gas station. The only exterior work performed was the erection of a Dunkin' Donuts sign on the building and the erection of a door and windows.

The clarification of questions by the Department of Buildings were addressed by the petitioner's professional engineer, Frank Vaccaro, to the Borough Building Department

Commissioner, Walter DeFoe (P Ex. 7). However, in late October Mr. DeFoe left the Borough office and was replaced by the Acting Borough Commissioner, Ira Gluckman, a registered architect, who on November 13, 2006 issued a letter to the owner and engineers of the premises advising that "pursuant to Section 27-197 of the Administrative Code of the City of New York the permits are hereby revoked" and that "In the event an order to stop work is not currently in effect, you are hereby ordered to stop all work immediately." (P Ex. 5). But at that time, all the work was completed as per the work permits and the stop work order was a moot issue.

Petitioner's counsel, Howard File, Esq., asserted that the dispute between the petitioner and the respondent Building Department was apparently triggered by the respondent, James Molinaro, the Borough President of Staten Island. As reported in the Staten Island Advance newspaper of October 18, 2006 (P Ex. 8) the Borough President had concerns about various convenience stores opening up in existing gas stations, which he believed was creating additional traffic congestion at busy intersections such as the Dunkin' Donuts store at the corner of Clove Road and Victory Boulevard, which is attached to a Getty gas station. That Dunkin' Donuts store is also owned by the petitioner, but is not the subject matter of this proceeding, but the newspaper article was introduced to show the concern of the Borough President, which the petitioner herein asserts is the only reason why his building permits were revoked. Petitioner's counsel claims that the new Acting Borough Commissioner, Ira Gluckman, who is located in Borough Hall with the Borough President, was complying with the wishes of the Borough President and Councilman James Oddo in revoking the work permits for the Dunkin' Donuts stores. Ira Gluckman was subsequently promoted to the rank of Borough Commissioner of the Department of Buildings. Other than the assertions of the petitioner's counsel, who claims this is all political, no proof has been submitted that Mr. Gluckman was following the direction of either Borough President Molinaro, nor Councilman James Oddo, in closing the Dunkin' Donuts store, nor is their any proof of any *quid pro quo* in Mr. Gluckman being promoted to Borough Commissioner.

It must be noted that the Borough President, while represented by the New York City

Corporation Counsel, did not appear to testify, nor was he subpoenaed by either side in this matter. Other than the aforesaid newspaper article, no evidence has been presented documenting any wrongdoing on the part of the Borough President and consequently, he shall be dismissed from this action.

It is interesting to note that notwithstanding the alleged constituent complaint to Councilman Oddo, the petitioner testified that he was approached by neighbors who asked that he make the Dunkin' Donuts a Kosher facility, which he did. Petitioner claims that the Dunkin' Donuts which is the subject of this matter is only one of two Kosher Dunkin' Donuts in the area.

The essence of this technical dispute is whether the petitioner was required to go to the Board of Standards and Appeals to amend the 1960 variance, or whether that prior approval was "grandfathered" in and requires no further review. The petitioner submits that the Zoning Resolution allows for "incidental alterations," which include "...(3) alterations of interior non-load bearing partitions in all other types of buildings or other structures; and (b) changes or replacements in the structural parts of a building or other structures, limited to the following examples or other similar character or extent: (1) making windows or doors in exterior walls; (2) replacement of building facades..." (P Ex. 6). That is all that the plans covered (P Ex. 1).

The Building Department points to a document entitled "Establishment of Controls, and Interpretation of Regulations which states in part:

> **Exceptions, Variances, Authorizations or Permits**
> **11-412 Alterations, extensions or enlargements**
> Repairs or *incidental alternations* may be made an din appropriate cases the authorizing agency may permit structural alterations, *extensions* or *enlargements* limited to the *zoning lot* that was granted a variance, exception or permit prior to **December 15, 1961.** However, the *use* of any *building or other structure* shall not be *extended*, and the *building or other structure* shall not be *enlarged*, in excess of 50 percent of the *floor area* of such *building* (or size of such structure) occupied or utilized by the use on **December 15, 1961**, and, except as otherwise provided in Article VII, no structural alterations, *extensions* or *enlargements* shall be authorized for a new *non-conforming use* authorized under the provisions of Section 11-413 (Change of use).

11-413
Change of use
Such *use* may be changed to a conforming *use* and in appropriate cases the authorizing agency may permit such *use* to be changed to another non-*conforming use* which would be permitted under the provisions applicable to *non-conforming uses* as set forth in Sections 52-31 to 52-36, inclusive, relating to Change of Non-Conforming Use, provided that the authorizing agency finds that such change of *use* will not impair the essential character or the future use or development of the surrounding area.

In permitting a change to another *non-conforming use*, such authorizing agency may impose appropriate conditions and safeguards to minimize any adverse effects upon the character of the surrounding area.

For the purposes of this Section, a change of *use* is a change to another *use* listed in the same or any other Use Group. A change in ownership or occupancy shall not, by itself, constitute a change of *use*. (D Ex. K.)

The petitioner highlights the Building Departments Technical Policy and Procedures Notice #10/99 which covers "Retail Convenience Stores Accessory to Automotive Service Stations Use Group 16," which highlights *Exxon v. BSA*, 151 AD2d 348 (1989), an Appellate Division, First Department case which states that:

[T]he Zoning Resolution (ZR) definition of "automotive service station" (ZR §12-10) does not provide an exclusive list of uses permitted on the same zoning lot as an automotive service station but, rather, permits "uses accessory" thereto. Therefore, the ZR §12-10 definition of "automotive service station" does not prohibit a retail convenience store on the same zoning lot as the automotive service station, if it is determined that the convenience store qualifies as an accessory use.

Following that decision, Technical Policy and Procedure Notice ("TPPN") #8/94 (superseding TPPN #3/94) was issued to provide guidelines for determining whether a retail convenience store qualified as an accessory use to an automotive service station. Since the issuance of that TPPN, the automotive service station industry has changed such that the typical retail convenience store accessory to a service station has substantially more than 600 square feet of selling area. Accordingly, the Department is now amending its interpretation of "uses accessory: to "automotive service stations" and TPPN #8/94 is superseded. Examiners should be guided by the considerations set forth below to determine whether the proposed retail convenience store qualifies as an accessory use and whether the application may be approved.

1. **A proposed retail convenience store** will be deemed accessory to the automotive service station located on the same zoning lot if the following guidelines are met:

a. The accessory retail use shall be located on the same zoning lot as the service station and it shall be contained within a completely enclosed building.

b. The accessory retail use shall have a maximum retail selling floor area of either 2500 square feet or twenty-five percent (25%) of the zoning lot area, whichever is less. Selling area is all floor area of the accessory retail convenience store that is accessible to the public. If an applicant contends that a proposed retail use with selling area in excess of twenty-five percent (25%) of the zoning lot area or 2500 square feet (whichever is less) should be classified as a permitted accessory use, the application in question shall be referred to the Borough Commissioner for reconsideration.

Failure to comply with the above criteria requires that an objection be issued that the proposed use and plans do not comply with the ZR §12-10 definition of "accessory use."

If the proposed retail convenience store is deemed an accessory use, then it shall be designated in the same use group (Use Group 16) as the automotive service station and should not be designated as a Use Group 6 store.

2. In addition to the considerations of (1) above, the examiner must consider the specific zoning requirements of the underlying zoning district, including the following:

a. In C8, M1, M2 and M3 zoning districts, automotive service stations are permitted as-of-right. Therefore, accessory retail convenience stores may be approved as-of-right as an accessory use, provided the considerations of (1) above are met.

b. In C2, C4, C6 and C7 zoning districts, plans submitted seeking approval of a new retail convenience store accessory to an automotive service station should receive an objection indicating that a special permit must be obtained from the Board of Standards and Appeals ("BSA"), pursuant to ZR §73-211.

c. In C1, C3, C5 and R1-R10 zoning districts, plans submitted seeking approval of a new retail convenience store accessory to an automotive service station should receive an objection indicating that a variance from the BSA must be obtained.

3. Applications to establish a new retail convenience store which is accessory to an existing automotive service station that was established under a BSA resolution on or after December 15, 1961 should be referred to the BSA.

If the existing automotive service station was established under a BSA variance, exception or permit prior to December 15, 1961, the application shall be reviewed to determine if the plans comply with the ZR§12-10 definition of incidental alteration and whether such incidental alteration is permitted pursuant to ZR§11-412. If it is determined that the proposed alteration is not permitted pursuant to ZR§ 11-412, the application shall be referred back to the BSA or other authorizing agency. If the alteration is permitted, the application may be approved provided the considerations of (1) above are met.

4. In any zoning district where a legal non-conforming automotive service station exists, a new retail convenience store which is accessory to the existing automotive service station may be established within an existing legally non-conforming automotive service station building, subject to Article 5 of the Zoning Resolution and subject to the considerations of (1) above.

Approval by the Board of Standards and Appeals (BSA) is not required in this zoning area as the original variance was obtained in 1960, well before the operative date of December 15, 1961. Nonetheless, here the operative issue is that the petitioner's Dunkin' Donuts store comprises only 1,500 square feet, well below the maximum 2,500 square feet allowable space provided for an "incidental alteration," which is on the "same zoning lot" as the service station and is contained within an existing "completely enclosed building." Moreover, the retail space is only 600 square feet, where a maximum of 1,200 square feet may be allowed.

Therefore, this is not a case requiring BSA approval as has been Commissioner Gluckman's contention after his predecessor, Commissioner DeFoe of the Department of Buildings approved the work, which was performed in reliance of the permits and before a stop work order was issued.

The counsel for the respondents has cited to the New York Court of Appeals decision of *In the Matter of Parkview Associates v. City of New York, et al.* [71 NY2d 274(1988)], for the principle that equitable estoppel is not available to preclude enforcement of provisions of the

zoning law where a building permit was erroneously or mistakenly issued by the Department of Buildings in contravention of existing zoning laws. This court recognizes and adheres to the holding of *Parkview v. City of New York*. However, the petitioner here is not violating the zoning laws, but is in compliance with them as outlined above. The petitioner has complied with the other Department of Buildings' objections, therefore, it is entitled to a Certificate of Occupancy, which the Building Department should issue forthwith.

Accordingly, it is hereby:

ORDERED, that the motion of the respondent, New York City Department of Buildings, to dismiss this action is denied; and it is further

ORDERED, that the action against James Molinaro, the Borough President of Staten Island, is dismissed; and it is further

ORDERED, that the New York City Department of Buildings is ordered to issue a new Certificate of Occupancy for the premises 995 Manor Road, Staten Island, New York, recognizing the addition of the Dunkin' Donuts convenience store at that location.

ENTER,

DATED: April 15, 2009

Joseph J. Maltese
Justice of the Supreme Court