

**Joint Parent Teachers Assn. v New York City Bd. of
Stds. & Appeals**

2010 NY Slip Op 31072(U)

April 5, 2010

Sup Ct, Queens County

Docket Number: 12117/2009

Judge: Orin R. Kitzes

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MEMORANDUM

SUPREME COURT: QUEENS COUNTY
IA PART 17

x

JOINT PARENT TEACHERS ASSOCIATION,
etc., et al.

INDEX NO. 12117/2009

MOTION DATE: JANUARY 13, 2010

MOTION CAL. NO. 32

MOTION SEQ. NO. 1

-against-

BY: KITZES, J.

NEW YORK CITY BOARD OF STANDARDS
AND APPEALS, et al.

DATED: APRIL 5, 2010

x

In this hybrid Article 78 proceeding and action for declaratory judgment, petitioners Joint Parent Teachers Association for the Springfield Educational Complex, Michael R. Duncan, Julia Ryles, seek an order declaring that the respondent Board of Standards and Appeals of the City of New York (BSA) and its Commissioner Meenakshi Srinivasan, have a duty to act so that the spirit of the law shall be observed, public safety secured and substantial justice be done; that the BSA failed to perform a duty enjoined upon it by law; that the subject permit was not lawfully issued; that the BSA's decision is not supported by substantial evidence; that respondent Airport Hotels, LLC did not complete excavation or make substantial progress on the foundation as of the enactment date of the new zoning; and that BSA's decision was arbitrary or capricious; and a judgment directing the BSA to deny the application of respondent Airport Hotels, LLC and/or Springfield Hotel, LLC, BSA Calendar No. 245-08-BZY. Respondents Airport Hotels, LLC and Springfield Hotel, LLC cross-move for an order striking the new documents consisting of the property listing of Bel-Site Realty Corp., and BSA Resolutions for

Calendar No. 152-08-A/177-08-A, which are attached to petitioners' reply affirmation, and striking from the pleadings all arguments concerning the lapse of the permit extension granted by BSA, and granting an opportunity to respond to any new arguments raised in the reply.

Petitioner Joint Parent Teachers Association for the Springfield Educational Complex (JPTA) is the combined PTA for all four high schools located within the Springfield Educational Complex, located at 143-10 Springfield Boulevard, Springfield Gardens, New York. Petitioner JPTA states that there are over 1,000 students attending these four schools. Petitioner Michael R. Duncan is the Chairperson of the JPTA, and his daughter attends one of the schools within the Springfield Educational Complex. Petitioners JPTA, and Mr. Duncan allege that the students at the Springfield Educational Complex, including Duncan's daughter, will be adversely affected by the respondents' actions as a result of "(i) exposure to the distraction and attention of a hotel across the street from the place where over 1,000 impressionable teenagers attend school five days a week; and (ii) exposure to the reasonably foreseeable crime and illicit activity that the hotel will attract, including but not limited to drug use, drug selling, under age drinking of alcohol, statutory rape, prostitution and soliciting."

Petitioner Julia Ryles is a senior citizen who owns and resides in the real property located at 219-49 144th Avenue, Springfield Gardens, New York, which is within 200 feet of the site of the proposed transient motel. She alleges that she will be directly and adversely affected as a result of respondents' actions, which will result in a diminution of property values due to the proximity of her home to a transient motel; noise and diminished parking availability; and other disturbances due to the increased volume of cars and patrons frequenting the proposed hotel; excessive lighting entering her premises at night due to the 24 hours a day operations at the proposed hotel; and safety concerns to the 24 hours a day operations at the proposed hotel.

Petitioners seek judicial review of the BSA's decision dated April 7, 2009 which granted an application by respondent Airport Hotels, LLC under Section 11-331 of the Zoning Resolution of the City of New York, for renewal of a building permit. On October 17, 2005, the New York City Department of Buildings (DOB) issued a building permit which authorized the construction of a three-story transient hotel with two sub-cellars on the real property known as 219-05 North Conduit Avenue, Queens New York (Lot 4, Block 13085). The property is bounded by 144th Avenue to the north, Springfield Boulevard to the west and North Conduit Avenue to the south. The total lot area is approximately 18,383 square feet, with a frontage of approximately 283 feet on 144th Avenue, 120 feet on Springfield Avenue, and 303 feet on North Conduit Avenue. The owner of record of said real property is Airport Hotels, LLC and the proposed hotel is to be operated by Springfield Hotel, LLC.

Excavation commenced on October 25, 2005 and 240 piles were driven between December 29, 2005 and January 6, 2006. After that work was completed, it was evident that the water table was higher than anticipated, and the plans were revised to eliminate the sub-cellar. The revised plans were filed with the DOB on August 27, 2007 and May 15, 2008.

The DOB issued the current permit on May 15, 2008 and authorized the construction of said three-story transient hotel without a sub-cellar. At the time the current permit was issued, the zoning district in which the property is located was designated as an R3-2 residence district with a C2-2 commercial district overlay. A transient hotel was permissible under the Zoning Resolution.

On September 4, 2008, the New York City Council adopted various amendments to the Zoning Map which re-zoned the Laurelton neighborhood in Queens. As a result of this re-zoning, the zoning designation of the subject property was changed to R3X with a C1-3 commercial overlay. Zoning Resolution § 32-14 provides that "[i]n a C1-1, C1-2, C1-3 or C1-4 District, a transient hotel shall not be permitted." Therefore, based upon

said prohibition and the fact that the foundation work for the proposed hotel was not completed as of September 4, 2008, the current building permit lapsed by operation of law. The DOB issued a stop work order on September 9, 2009.

On October 3, 2008, Airport Hotels, LLC filed an application with the BSA pursuant to Zoning Resolution § 11-331 for a renewal of the current building permit and an extension of the time to complete the foundations. A public hearing was held on the renewal application on January 13, 2009, and was continued on February 24, 2009. During the hearing, representatives of the Springfield Gardens Taxpayers & Citizens Association, Federated Blocks of Laurelton, the Jamaica Chapter of the NAAC, and the Concerned Citizens of Laurelton testified in opposition to the application. The opponents argued that the excavation was not completed; that substantial progress on the foundation was not made; that construction work took place after working hours or when work was stopped; that the proposed sewer system may not comply with applicable regulations; and that the proposed hotel is incompatible with the neighborhood character. The BSA addressed each of these issues in its determination. After considering the submission and testimony, and after site and neighborhood examination, the members of the Board unanimously voted on April 7, 2009 to grant the application for renewal of the subject building permit, and the time in which to complete the required foundations was extended for one term of six months from the date of the resolution, to expire on October 7, 2009.

Petitioners commenced the within hybrid Article 78 proceeding and action for declaratory judgment on May 8, 2009, and allege that at the time the current permit was issued, Airport Hotels, LLC was the record owner of the real property; that the application for the building permits was submitted to the DOB by Springfield Hotel, LLC by Jack Surawala; that there is no proof that Springfield Hotel, LLC or Mr. Surawala are the owners of record of the subject real property; that this misrepresentation as to ownership was noted in the papers submitted by the opposition during the hearings before the BSA and were made part of the record; that upon information and belief, the principal officer and owner of

Airport Hotels, LLC is Gandhi Sailesh; that testimony was submitted to the BSA demonstrating that Mr. Sailesh is the “sole and/or part owner or principal of other hotel locations in New York that have characteristically attracted prostitution activity”; and that in 2006, another motel on North Conduit Avenue, located a half mile from the subject real property, that was attracting prostitution was closed, and was only reopened pursuant to a consent judgment.

Petitioners further allege that at the time the permit was issued, the subject property was located within a C2-2(R3-2) zoning district; that on September 4, 2008 the City Council enacted the Laurelton Rezoning which changed the zoning district to C1-1(R3X); that the building permit lapsed by operation of law; that the DOB issued a stop work order on September 9, 2008, as the proposed use does not conform to permitted uses in the zoning district; that an application was made by Airport Hotels, LLC to rescind a stop work order and to renew the building permit, and extend the time in which to complete the foundation of the proposed motel; and that the BSA granted said application.

In their first cause action, petitioners allege that the BSA failed to consider the legality and completeness of the application for a permit, despite testimony and evidence that the application contained false information. Petitioners assert that the BSA did not verify whether the correct owner of the premises was named on the applications giving rise to the building permit, the BSA relied upon a one-line conclusory statement from the DOB that the permit was lawfully issued. Petitioners allege that the BSA had a duty under Section 666 of the City Charter to review the determination of the DOB and pass on the question of whether the applications were duly authorized by the correct owner. Petitioners assert that the BSA failed to pass on this question, and, therefore, they are entitled to judgment declaring that the BSA failed to perform a duty enjoined on it by law and that the permit was not lawfully issued.

In the second cause of action, petitioners allege that the BSA’s determination is not supported by substantial evidence, in that the building permit was not lawfully issued

and, therefore, any excavation work and construction work performed at the premises must be disregarded. Petitioners, therefore, assert that they are entitled to judgment declaring that the BSA's determination was not supported by substantial evidence, and that Airport Hotels, LLC did not complete excavation work or make substantial progress on the foundation as of the enactment date of the new zoning.

The third cause of action alleges that the BSA failed to consider the safety and welfare of the students attending high school across the street from the site of the planned transient motel, despite ample testimony from owners, resident groups, elected officials and local community board members. It is alleged that under Section 666(7) of the Charter of the City of New York, the BSA has the duty to act "so the spirit of the law shall be observed, public safety secured and substantial justice be done," and that instead of addressing the issue of public safety the BSA overtly trivialized the issue stating that "the property owner's rights may not be negated merely because of concerns about neighborhood character and speculation about future illegal activities." It is asserted that the education and welfare of hundreds of youth at Springfield High School is of far greater importance and priority than mere "neighborhood character" and that the BSA must weigh this public interest against that of the property rights of the owner of the premises in rendering a proper decision. It is asserted that in light of criminal activities that have taken place at other motels associated with Mr. Gandhi, and at another motel located in the same area, future illegal activities at the subject site are reasonably foreseeable and not speculative. Petitioners allege that the BSA's unconditional renewal and extension of the permit is a breach of its duty under Section 666(7) of the Charter, and seek a judgment declaring that the BSA failed to perform a duty enjoined upon it by law.

Petitioners, in their fourth cause of action, allege that the BSA's determination of April 7, 2009 is arbitrary and capricious in that the Board in a similar case denied a renewal permit under Zoning Resolution § 11-331, and that the Board departed from its own precedent in that it failed to consider the public health, safety and general welfare here, and

offered no rational basis for said departure. Petitioners seek a judgment declaring the BSA's determination to be arbitrary and capricious.

Petitioners seek declaratory judgment on all four causes of action and a judgment pursuant to Article 78 directing the BSA to deny the application of respondent Airport Hotels, LLC and/or Springfield Hotel, LLC for a renewal permit.

Respondents BSA and Commissioner Srinivasan, in their answer, assert that petitioners' claims should be dismissed for failure to timely serve the pleadings on these respondents in compliance with CPLR 306-b; that the determination to grant the renewal application was rational and lawful, supported by the record as a whole, is in accordance with the provisions of Zoning Resolution § 11-331, and that the BSA did not fail to perform a duty enjoined upon it under Section 666(7) of the Charter of the City of New York.

Respondents Airport Hotels, LLC and Springfield Hotel, LLC, in their answer, have interposed four affirmative defenses, and assert that the BSA's determination was neither arbitrary nor capricious, and is supported by substantial evidence in the record.

At the outset, where, as here, a party seeks both CPLR article 78 relief and declaratory judgment, the latter of which is not governed by a particular limitations period, the court must examine the substance of the underlying claim and determine “whether the rights the parties are seeking to have adjudicated in the declaratory judgment action could have been raised in an action or proceeding having a statutorily prescribed limitation period” (*Matter of Save the Pine Bush v Town Bd.*, 272 AD2d 689, 691 [2000], quoting *Matter of Frontier Ins. Co. v Town Bd.*, 252 AD2d 928, 929 [1998]). If that inquiry is answered in the affirmative, the specific limitations period identified will govern rather than the catch-all limitations period set forth in CPLR 213(1).

An examination of the petition reveals that petitioners have alleged that the BSA failed to perform a duty enjoined by law; that the determination is not supported by substantial evidence; that the BSA acted contrary to law; and that the BSA's determination is arbitrary and capricious. These allegations all relate to specific actions taken by the BSA

during the course of the application hearings, and specific determinations made by BSA in the subject Resolution. Therefore, although couched in language seeking declaratory relief, these claims are properly subject to Article 78 review (*see Aubin v State*, 282 AD2d 919, 921-922 [2001]).

The statute of limitations for seeking judicial review of the BSA's determination is 30 days after the filing of said determination, pursuant to Section 27-205(a) of the Administrative Code of the City of New York. Here, the BSA's Resolution of April 7, 2009 was filed on April 9, 2009, and as the 30th day thereafter fell on a Saturday, the statute of limitations expired on May 11, 2009. Petitioners timely commenced the within proceeding by filing on May 8, 2009, and pursuant to CPLR 306-b, were required to serve a copy of the pleadings on the respondents no later than 15 days after the expiration of the applicable statute of limitations.

Petitioners served a copy of the pleadings on Airport Hotels, LLC and Springfield Hotel, LLC on May 22, 2009, pursuant to Section 303 of the Limited Liability Corporation Law. The BSA was served with process on June 4, 2009. No affidavit of service has been submitted with respect to Commissioner Srinivasan.

The court notes that the petition has an original return date of June 17, 2009. Therefore, as the BSA was not served with process until June 4, 2009, the original, the June 17, 2009 return date set forth in the notice of petition did not comply with CPLR 7804(c). The within proceeding did not appear on the court's calendar until June 24, 2009, was adjourned numerous times, and the respondents were given ample opportunity to submit an answer and all supporting documents, and to serve the cross motion. The petition and cross motion were fully submitted on January 13, 2010. Therefore, as respondents did not suffer any prejudice, the original short notice of the petition is a mere irregularity (*see Griswald v Village of Penn Yan*, 244 AD2d 950 [1977]; *Marmo v Department of Environmental Conservation*, 134 AD2d 260 [1987]).

CPLR 7804(f) provides that a “respondent may raise an objection in point of law by setting it forth in his answer or by a motion within the time to dismiss the petition...”. An objection in point of law is “akin to an affirmative defense raised by motion to dismiss,” (Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 7804:7). Respondents BSA and Srinivasan preserved their objection to timely service of the pleadings in their answer, and have now raised the same objection in point of law in opposition to the petition. CPLR 306-b provides, in pertinent part, that “[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time of service” (emphasis added).

The requirements of CPLR 306-b concern personal jurisdiction and are subject to waiver if not asserted in a pre-answer motion or in the answer as required by CPLR 3211(e) (*see Maikish v Town of Clarkstown*, 2002 NY Misc LEXIS 776, 2002 NY Slip Op 40285[U] [2002]). CPLR 3211(e) provides, in pertinent part, that “an objection that the ... petition and notice of petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship.” The statute makes no distinction between an objection based upon the method of service and an objection based upon the failure to timely serve a party with the pleadings within the time frame set forth in CPLR 306-b. Therefore, a respondent in an Article 78 proceeding who has raised an objection in point of law to the service of the notice of petition and petition in its answer, is required to move for judgment on that ground within 60 days after serving the answer.

Here, the BSA raised its objection to the service of the notice of petition and petition in its answer, which it served on October 26, 2009. Since the 60-day period expired on Friday, December 25, 2009, a holiday, the time in which to serve a motion for summary judgment dismissing the petition was extended until Monday, December 28, 2009

(General Construction Law § 20). The BSA, however, did not move for relief on this ground and only raised it as an objection in point of law in opposition to the petition. In view of the fact that the BSA failed to affirmatively move for summary judgment dismissing the petition on the grounds of improper untimely service of the pleadings, and have failed to demonstrate undue hardship, the request to dismiss the petition on this ground is denied.

Respondents' Airport Hotels, LLC and Springfield Hotel, LLC's designation of their motion as a "cross motion" rather than a motion in this special proceeding is a mere irregularity. Since the appellation used here does not prejudice the substantial rights of the parties, this irregularity shall be disregarded (CPLR 2001).

Judicial review is limited to the record before the BSA (*see generally Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]). Therefore, as the property listing of Bel-Site Realty Corp. (attached to petitioners' reply papers as Exhibit B), and BSA Resolution for the Calendar No. 152-08-A/177-08-A (attached to petitioners' reply papers as Exhibit C), post-date BSA's determination and were not part of the administrative record, these documents will not be considered by the court. In addition, the arguments advanced by petitioners in their reply papers which rely on those documents will not be considered by the court.

Although petitioners now assert that the instant dispute might be moot, they have not withdrawn the within petition. Rather, petitioners improperly assert new arguments pertaining to the alleged lapse of the permit and Zoning Resolution § 11-331 which were not included in the petition. These issues were improperly raised in the reply papers and, thus, will not be considered by the court (*see Matter of Town of Pleasant Val. v Town of Poughkeepsie Planning Bd.*, 289 AD2d 583, 583-584 [2001]). In view of the foregoing, respondents' motion to strike the new documents and arguments raised in the reply papers is granted.

Turning now to the petition, the BSA consists of experts in zoning and planning, and is the ultimate administrative authority charged with enforcing the New York

City Zoning Resolution (*see Matter of Menachem Realty, Inc. v Srinivasan*, 60 AD3d 854 [2009]; *Matter of Mainstreet Makeover 2, Inc. v Srinivasan*, 55 AD3d 910 [2008]). Judicial review of a determination by the BSA is limited to whether its determination was illegal, arbitrary, or an abuse of discretion, and whether it had a rational basis and is supported by evidence in the record (*see Matter of SoHo Alliance v New York City Bd. of Stds. & Appeals*, 95 NY2d 437 [2000]; *see also Matter of Vomero v City of New York*, 13 NY3d 840 [2009]; *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 [2004]).

The BSA, pursuant to Section 666(10) of the Charter of the City of New York, has the power to “issue such special permits as the [BSA] is authorized to issue under the [Z]oning Resolution.” Zoning Resolution § 73-01(c) grants the BSA the power to “permit the renewal of revoked building permits as provided in Sections 11-31 to 11-33, inclusive, relating to Building Permits Issued before Effective Date of Amendment; ... provided that, in each specific case, the requirement for findings as set forth in this Chapter (or in the Sections referred to in paragraph (c) or (d) of this Section) shall constitute a condition precedent to the grant of such special permit, modification, or renewal...”.

Section 11-331 of the Zoning Resolution addresses an applicant’s right to continue construction after a building permit has lapsed due to an amendment of the Zoning Resolution when foundations are not yet completed. In order for such a permit to be renewed under Section 11-331, the BSA must find that (a) the permit was “lawfully issued” as defined by Zoning Resolution § 11-31; (b) excavation had been completed by the effective date of the amendment; and (c) substantial progress had been made on the foundations by the effective date of the amendment.

Section 11-31 provides, in pertinent part, that “If, before the effective date of an applicable amendment of this Resolution, a building permit has been lawfully issued as set forth in Section 11-31 paragraph (a), to a person with a possessory interest in a *zoning lot*, authorizing a minor development or a major development, such construction, if lawful in other respects, may be continued provided that: (a) in the case of a minor development, all

work on foundations had been completed prior to such effective date; or ... In the event that such required foundations have been commenced but are not completed before such effective date, the building permit shall automatically lapse on the effective date and the right to continue construction shall terminate. An application to renew the building permit may be made to the Board of Standards and Appeals not more than 30 days after the lapse of such building permit. The Board may renew the building permit and authorize an extension of time limited to one term of not more than six months to permit the completion of the required foundations, provided that the Board finds that on the date the building permit lapsed, excavation had been completed and substantial progress made on foundations” (emphasis in the original).

Section 11-332(d) of the Zoning Resolution provides that “[i]f judicial proceedings affecting the validity of the building permit have been instituted, the rights or obligations that accrue or are created by this Section shall commence upon the date of entry of the final order in such proceedings, including all appeals.”

Section 11-31 of the Zoning Resolution defines “minor development” as including “(i) construction of any *single building* which will be *non-conforming* or *non-complying* under the provisions of any applicable amendments to this Resolution”; (emphasis in the original).

Petitioners do not challenge the BSA’s findings that excavation of the premises had been completed and that substantial progress was made on the foundations by the enactment date of the amendments in the subject zoning district. Rather, petitioners challenge the BSA’s findings as to the threshold requirement under Zoning Resolution § 11-331, that the current permit was “lawfully issued as set forth in Section 11-31 paragraph (a).”

Section 11-31(a) provides that a building permit shall be considered to be “lawfully issued prior to amendment” when it is “based upon an approved application showing complete plans and specifications, authorizes the entire construction and not merely

a part thereof, and is issued prior to any applicable amendment to [the Zoning Resolution].” This section further provides that “[i]n the case of dispute as to whether an application includes ‘complete plans and specifications’ as required by this Section, the Commissioner of Buildings shall determine whether such requirement has been met.”

Here, the evidence in the record establishes that the BSA was notified by the DOB that the current permit was lawfully issued, as the plans and specifications for the proposed hotel were approved prior to the enactment date. Petitioners’ attack on the lawfulness of the permit does not concern the plans and specifications filed with the DOB. Rather, petitioners assert that the application to the DOB for the current permit contained an “illegal misrepresentation of ownership” because Springfield Hotel, LLC was listed as the owner on the application, and there is “no proof in the record of this matter ... that Springfield Hotel, LLC ... are owners of the [property] under section 27-232 of the New York City Administrative Code.”

Although the petition makes reference to a letter dated February 6, 2009 by Patrick Evans, President of the Springfield Gardens Taxpayers and Citizens Association, said letter makes no reference to the DOB permit application and made no claim of “illegal misrepresentation.” Rather, Mr. Evans stated that the BSA application “lists the wrong applicant for vest[ed] Rights.” At the BSA hearing on February 24, 2009, the vice-chair of the Board, Mr. Collins, explained to Mr. Evans that vested rights are associated with the land and not the person who owns it, so that if the property was sold in the middle of the process, or if there were multiple owners, or if one entity owns the property and another entity shares in the construction costs, the BSA would look at the physical construction that had taken place on the property in order to determine whether the conditions for a renewal permit had been met. Mr. Evans accepted the BSA’s explanation, and stated that “[o]n that I rest” [R 605-606].

Since petitioners’ claim that the DOB permit contained an “illegal misrepresentation” of ownership of the subject property was not raised during the

proceedings before the BSA, it may not be raised here for the first time in a proceeding for judicial review (*Matter of Featherstone v Franco, supra*; *Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]; *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 58 NY2d 952 [1983]).

Petitioners' claim that the BSA's determination is arbitrary and capricious in that it did not adhere to a prior decision in which it denied a renewal application under Zoning Resolution § 11-331, is rejected. A determination of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious (*see Knight v Amelkin*, 68 NY2d 975, 977 [1986]; *Matter of Menachem Realty, Inc. v Srinivasan, supra*). In the prior BSA decision relied upon by petitioners, Cal. No. 354-05 BZY, a developer had failed to advise the BSA that it had performed an illegal mechanical demolition in violation of the DOB permit. When confronted with the evidence, the developer conceded that it had received a notice of violation, but asserted that the demolition activity had occurred only on the day of the violation. In view of the video evidence submitted by neighborhood residents that illegal demolition activity had occurred over the course of 10 days, the developer conceded that the construction activity had occurred on more than one day. The BSA concluded that the developer had made significant misrepresentations under oath concerning facts that had a fundamental bearing on the BSA's analysis of the renewal application and, therefore, denied the application for a renewal permit.

Here, petitioners have failed to establish that the applicant made any misrepresentations to the BSA, and, thus, have not established that the BSA did not follow its own precedent in rendering a determination in the instant matter.

Petitioners' claim that the BSA failed to perform a duty enjoined upon it under Section 666(7) of the Charter of the City of New York, is rejected. Section 666(7) of the Charter states as follows: "In passing upon appeals, to vary or modify any rule or regulation or the provisions of any law relating to the construction, use, structural changes, equipment,

alteration or removal of buildings or structures, or vaults in sidewalks appurtenant thereto, where there are 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, provided that the provisions of the housing maintenance code and of any regulation or order issued under such code may be varied or modified only to the extent permitted by such code and only in the manner and subject to the conditions therein specified.” Thus, while this section is applicable to an appeal from a decision of the DOB, it is not relevant here, as the applicant applied for a renewal of the permit in the first instance and was not appealing an order of the DOB.

Finally, contrary to petitioners’ assertions, Zoning Resolution § 11-331 does not vest the BSA with the discretion to deny a renewal permit to an applicant whose rights have vested based upon a possible future illegal use of the premises (*see Matter of 9th & 10th St. L.L.C. v Board of Stds. & Appeals of the City of New York*, 10 NY3d 264 [2008]; *see also Faymor Development v Board of Standards & Appeals*, 57 AD2d 928 [1977]).

In view of the foregoing, respondents’ motion to strike the new documents and arguments raised in the reply papers is granted. Petitioners’ request to vacate the BSA’s Resolution of April 7, 2009 is denied and the petition is dismissed.

Settle one order and judgment.

J.S.C.