

Schuman v New York City Dept. of Transp.

2017 NY Slip Op 30087(U)

January 13, 2017

Supreme Court, New York County

Docket Number: 156580/2015

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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GARY SCHUMAN, CORI SCHUMAN, STEPHEN
McCALL, YEE JEAN LEE, OLIVER LEMAIGRE,
PAMELA KIERNAN, KEVIN McGRATH, MARGARET
HANSENS, JESS LATHAM, JOANNA LATHAM,
THADDEUS NEWCOMB, ROBINSON A. SAWYER,
AYESHA M. MENON, DARIN McATEE, JACK DeHOVITZ,
LISA GOLDFARB, ANDRE DUA, STEPHANIE DUA,
MACON JESSUP, MIKE JESSUP, ANDREW SCRUTON,
LOUISE WHITTET, JENNIFER KELLOGG, STODDARD
SENNOTT, LUKE GUNNELL, TERRI GUNNELL,
JARED HECHT, CARRIE WEPRIN, NICHOLAS GAO,
TIFFANY G. CHU, ANGUEL G. ZAPRIANOV,
SEBASTIEN THIEBAULT, ROBERT DUNPHY AND
HELEN SHIRAH DUNPHY,

Petitioners,

Index No. 156580/2015

**Decision, Order, and
Judgment**

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

-against-

THE NEW YORK CITY DEPARTMENT OF
TRANSPORTATION and THE CITY OF
NEW YORK,

Respondents.

-----X
JOAN B. LOBIS, J.S.C.:

Petitioners are the owners of residential townhouses located in Kings County. A portion of the stairs that allow petitioners access to their homes extends onto the sidewalk that is the property of the City of New York. The City of New York, through the Department of Transportation (DOT), issued revocable consents which require petitioners to pay a fee to allow the stairwells as built to continue to exist on the City's property and allow the respondents to revoke petitioners' rights to the use the City's property at will at the end of the term of the consent

agreement which the City assigned to petitioners when they purchased their homes. Respondents notified petitioners that the revocable consents must be renewed by June 30, 2015. In response petitioners brought this petition seeking annulment of the revocable consents and claiming that respondents are violating statutory provisions of the New York City Charter and New York City Administrative Code, impeding petitioners' ability to maintain complete beneficial use and enjoyment of their homes, and acting arbitrarily and capriciously. Petitioners allege that revocation of the consents will endanger the structural stability and fire safety of their homes. Respondents oppose the petitioner arguing, inter alia, that the consents are lawful, that petitioners had notice of the consents when they purchased their homes, and that the petition is based on hypothetical harm. Respondents state that the DOT is authorized to issue revocable consents by the New York City Charter and further that under Section 346(b) the consents are required to be revocable at any time, limited to a fixed term, and subject to an annual fee. They aver that stoops and steps are expressly included as fixtures that may be subject to revocable consents under Title 34 of the Rules of the City of New York, Section 7-04. Moreover, respondents assert that the petition should be dismissed because petitioners failed to name a necessary party, the developer who entered into the consent agreements.

In reply petitioners argue that if respondents exercise their ability to revoke the consent, petitioners would be denied ingress and egress to their homes, creating a fire hazard in violation City regulations. Respondents submit sur-reply, contending that the consents are not inconsistent with the Building Code because if revoked, petitioners would be able to modify their homes or vacate the buildings to remain in compliance with the Code. Respondents reiterate that petitioners' injury is hypothetical.

At a conference on June 28, 2016, the Court asked respondents, even if they have the power to issue the revocable consents, whether there is a mechanism by which respondents would grant petitioners unfettered access to the stairwells and allow them a more permanent right to use the City property. Respondents asserted that Section 383 of the New York City Charter requires the legislature to consent to closing the street before the City may sell a portion of the street. The Court requested additional briefing as to whether the City could sell the land located below petitioners' stoops without closing the street. Petitioners September 29, 2016 memorandum argues that respondent's assertion is contradicted by the final sentence of Section 383, which states "[n]othing herein contained shall prevent the granting of franchises, permits and licenses in respect to inalienable property." Petitioners cite sections of the New York City Charter which allegedly allow respondents to grant permanent access to petitioners' homes through zoning, alienation, or permits. In response, respondents contend that the Charter sections to which petitioners cite contemplate legislative processes that respondents themselves cannot mandate. Additionally, they argue that the resolutions petitioners propose still mandate closing the street.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). A determination is considered arbitrary when it is made "without sound basis in reason or regard to the facts." In re Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009), citing Pell, 34 N.Y.2d at 231. If the agency's determination is rationally supported, the court must sustain the determination "even if the court concludes that it would have reached a different result than the one reached by the agency. Peckham, 12 N.Y.3d at

431 (citation omitted). The court must “defer to an administrative agency’s rational interpretation of its own regulations in its area of expertise.” Id. (citation omitted). The court cannot “weigh the evidence, choose between conflicting proof, or substitute its assessment of the evidence or witness credibility for that of the administrative factfinder.” In re Porter v. New York City Hous. Auth., 42 A.D.3d 314 (1st Dep’t 2007).

Petitioners do not provide adequate support for their contention that respondents are required to do away with the revocable consents or that respondents abused their discretion by issuing them. The Court must defer to respondents’ determination, especially where, as here, respondents demonstrate that it is within their discretion to issue the consents and that they cannot address petitioners’ concerns through any mechanism that petitioners proposed.

Accordingly, it is

ORDERED that the petition is dismissed. The Clerk of the Court is directed to enter judgment accordingly.

Dated:  Jan. 13, 2017

ENTER:



JOAN B. LOBIS, J.S.C.