

E&S Realty v. Bd. of Appeals, Vill. of Sands Point

Village Not Estopped From Revoking Prior Decision on Which Erroneous Permit Premised

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Docket

- **Practice Area:** Administrative Law (<https://www.law.com/topics/administrative-law/>), Land Use and Planning (<https://www.law.com/topics/land-use-and-planning/>), Real Estate (<https://www.law.com/topics/real-estate/>)
- **Date filed:** 2019-06-26
- **Court:** Supreme Court, Nassau
- **Attorneys: for plaintiff:** For Plaintiff: Albanese, Albanese, LLP.; **for defendant:** For Defendant: Village of Sands Point.
- **Judge:** Justice John Galasso
- **Case Number:** 1187/2018

Case Digest Summary

E&S Realty sued to annul and reverse part of the Village of Sands Point Board of Appeals' decision concerning E&S's property. It applied for a certificate of completion (CoC) regarding enlargement of an accessory use on the property. Denial letters were issued, and E&S appealed. After a hearing, village granted E&S's request for an area variance but denied a use variance. E&S argued village's decision was

affected by an error of law in denying the application for a CoC, alleging it was estopped from denying issuance of same as it acted negligently in issuing a building permit and E&S acted in good faith to enlarge the accessory use on which the CoC application was premised. Village asserted it may not be equitably estopped from enforcing its zoning laws based on erroneously issued permits. The court noted as the permit was erroneously issued, and absent evidence proffered by E&S to village of accessory use being used for habitable space before the application, village's findings requiring an area variance for permitted uses was rationally based. Village was not estopped from revoking a prior decision on which the permit was premised. E&S's application was denied.

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Upon the foregoing papers, the Petition of E&S Realty LLC (hereinafter "E&S"), seeking an Order pursuant to CPLR Article 78, annulling and reversing part of the determination made by the Respondent, Board of Appeals of the Village of Sands Point (hereinafter "Village"), regarding property located at 33 Barkins Point Road, Sand Point, State of New York (hereinafter "subject property") and owned by Petitioner, is determined as set forth below. This action concerns the Petitioner's application to the Village for a certificate of completion regarding the enlargement of an accessory use/studio (hereinafter "accessory use") on the subject property which is located within the Village in a Residence B zoning district with an area of approximately 3.41 acres, and more particularly described as Section 4 Block C Lot 56 on the Land and Tax Map of Nassau County. The Village issued two denial letters regarding this application: the first letter, dated January 30, 2017, denied Petitioner's application for a certificate of occupancy on the grounds that the Village issued the building permit in error, in that the additions intruded into the side yard sky plane by approximately one (1) foot, requiring a variance of Village Code Section 176-27, and that a variance of Section 176-48 ("non-conforming uses") was required to

enlarge a non-conforming use. The second letter, dated May 24, 2017, is a revised denial letter wherein the Village states that the additions intrude into the side yard sky plane by approximately one (1) foot, requiring a variance of Village Code Section 176-27 and that a variance of Section 176-21 ("permitted uses") is required to convert a legally non-conforming accessory structure into a guest house or building designed to be used for habitable purposes.

The Petitioner appealed the denial letters and a Village hearing was held on September 17, 2018. By decision and order dated September 17, 2018 and filed September 18, 2018, the Village granted the Petitioner's request for an area variance of Village Code Section 176-27A(2) to intrude upon the required side yard sky plane for the studio by approximately one foot; denied the Petitioner's request that the first denial letter dated January 30, 2017 be deemed to govern the proceeding wherein the Village is estopped from denying a certificate of occupancy for the studio based upon the second denial letter; and, denied the request for a use variance of Village Code Section 176-21(J) to maintain the use of the studio for a residential dwelling for its household help.

In support of its application, Petitioner submits, inter alia, a copy of the Village decision and order dated September 17, 2018. Petitioner sets forth that the Village's decision is affected by error of law regarding its denial of Petitioner's application for a certificate of completion, contending that Village is estopped from denying the applicant issuance of same. Petitioner contends that the Village acted negligently in issuing the Petitioner a building permit, wherein Petitioner acted in good faith and with reasonable diligence to enlarge the accessory use upon which the certificate of completion application is premised. Petitioner also contends that the accessory use is a lawful prior non-conforming use and a permitted accessory use pursuant to Village Code Section 176-21(J), because it was used for habitable purposes prior to the Village Code amendment in 1989 prohibiting accessory uses and buildings equipped and designed to be used for habitable purposes.

Respondent Village objects asserting that the Village may not be equitably estopped from enforcing its zoning laws based on an erroneously issued building permit. Respondent also contends that at the time of the building permit application to Village the provisions of the Village Code were readily available online and usable

through Petitioner's reasonable diligence. It is also asserted that Petitioner was aware of the restrictions associated with the accessory use by virtue of its knowledge of the Restrictive Covenants upon purchase of the subject premises with regard to restrictions and covenants applicable to other accessory buildings on the subject premises which include habitable space.

Intervenor Respondents, Marilyn Brechner, Robin McDermott and Vernon McDermott oppose the instant Petition contending that Petitioner does not have the legal right to maintain and improve a single-family residence in a detached accessory structure on the subject premises wherein the building permit to enlarge the accessory was an exercise room and thereafter illegally converted to a dwelling. "Local zoning boards have broad discretion in considering applications for area variances (see *Matter of Inlet Homes Corp. v. Zoning Bd. of Appeals of Village of Sands Point*, 2 N.Y.3d 769, 780 N.Y.S.2d 298, 812 N.E.2d 1246; *Matter of Pecoraro v. Board of Appeals of Village of Sands Point*, 2 N.Y.3d 608, 781 N.Y.S.2d 234, 814 N.E.2d 404; *Matter of Ifrah v. Utschig*, 98 N.Y.2d 304, 308, 746 N.Y.S.2d 667, 774 N.E.2d 732; *Matter of Margaritis v. Zoning Bd. of Appeals of Inc. Vil. of Flower Hill*, 32 A.D.3d 855, 856, 821 N.Y.S.2d 611; *Matter of Ram v. Village of Islip*, 21 A.D.3d 493, 494, 801 N.Y.S.2d 40). A zoning board's determination shall be upheld if it is rational and not arbitrary and capricious (see *Matter of Sasso v. Osgood*, 86 N.Y.2d 374, 384-85, 633 N.Y.S.2d 259, 657 N.E.2d 254; *Matter of Bassano v. Village of Carmel Zoning Bd. of Appeals*, 56 A.D.3d 665, 868 N.Y.S.2d 677; *Matter of Kaufman v. Incorporated Vil. of Kings Point*, 52 A.D.3d 604, 608, 860 N.Y.S.2d 573; *Matter of Clark v. Village of N. Salem*, 38 A.D.3d 773, 833 N.Y.S.2d 135; *Matter of Margaritis v. Zoning Bd. of Appeals of the Inc. Vil. of Flower Hill*, 32 A.D.3d at 856, 821 N.Y.S.2d 611; *Matter of Pasceri v. Gabriele*, 29 A.D.3d 805, 815 N.Y.S.2d 218; *Matter of Halperin v. City of New Rochelle*, 24 A.D.3d 768, 772, 809 N.Y.S.2d 98). A determination is rational "if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition" (*Matter of Halperin v. City of New Rochelle*, 24 A.D.3d at 772, 809 N.Y.S.2d 98; see *Matter of Ifrah v. Utschig*, 98 N.Y.2d at 308, 746 N.Y.S.2d 667, 774 N.E.2d 732; *Matter of Grigoraki v. Board of Appeals of Village of Sands Point*, 52 A.D.3d 832, 833, 860 N.Y.S.2d 216; *Matter of Marro v. Libert*, 40 A.D.3d 1100, 1101, 836 N.Y.S.2d 691)." *Caspian Realty, Inc., v.*

Zoning Bd. of Appeals of Village of Greenburgh, 68 A.D.3d 62, 886 N.Y.S.2d 442, [2d Dept. 2009].

“[G]enerally, estoppel may not be invoked against a municipal agency to prevent it from discharging its statutory duties” (Scruggs-Leftwich v. Rivercross Tenants’ Corp., 70 N.Y.2d 849, 523 N.Y.S.2d 451, 517 N.E.2d 1337, citing Matter of Daleview Nursing Home v. Axelrod, 62 N.Y.2d 30, 33, 475 N.Y.S.2d 826, 464 N.E.2d 130; Matter of Hamptons Hosp. & Med. Center v. Moore, 52 N.Y.2d 88, 93, 436 N.Y.S.2d 239, 417 N.E.2d 533; see also, Matter of E.F.S. Ventures Corp. v. Foster, 71 N.Y.2d 359, 526 N.Y.S.2d 56, 520 N.E.2d 1345). Moreover, “[e]stoppel is not available against a local government unit for the purpose of ratifying an administrative error” (Morley v. Arricale, 66 N.Y.2d 665, 667, 495 N.Y.S.2d 966, 486 N.E.2d 824). In particular, “[a] municipality, it is settled, is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches” (City of Yonkers v. Rentways, Inc., 304 N.Y. 499, 505, 109 N.E.2d 597) and “[t]he prior issue to petitioner of a building permit could not ‘confer rights in contravention of the zoning laws’” (Matter of B & G Constr. Corp. v. Board of Appeals, 309 N.Y. 730, 732, 128 N.E.2d 423, citing City of Buffalo v. Roadway Tr. Co., 303 N.Y. 453, 463, 104 N.E.2d 96). Insofar as estoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results (Parsa v. State of New York, 64 N.Y.2d 143, 147, 485 N.Y.S.2d 27, 474 N.E.2d 235; Matter of New York City v. City Civ. Serv. Commn., 60 N.Y.2d 436, 448-449, 470 N.Y.S.2d 113, 458 N.E.2d 354). Parkview Associates v. City of New York, 71 N.Y.2d 274519 N.E.2d 1372525 N.Y.S.2d 176 (1988).

Based upon its findings of fact included in the decision and order dated September 17, 2018, the Village determined that the purpose and intent of the 1989 Village Code amendment to Section 176-21(j) was to prohibit more than one residential dwelling unit on any property in the Village and that habitable residential use is the use that Petitioner sought for their household help in its application for a building permit to enlarge the accessory use. Absent from the hearing or decision and order is any evidence presented to the Village by Petitioner or otherwise, that the accessory use was utilized as habitable space prior to the application to enlarge

upon which the building permit was issued. In as much as the building permit was issued in error, and absent any evidence presented to the Village at the hearing of the accessory use being utilized for habitable space, the findings of the Village requiring an area variance for permitted uses is rationally and reasonably based pursuant to current Village code requirements. Contrary to the contentions of the Petitioner, the decision and order sets forth the reasoning of why the accessory use is not a legally non-conforming use and the Village is not estopped from revoking its prior determination upon which the building permit was premised. Accordingly, the record includes the evidence that the Village sufficiently considered and weighed the pertinent factors in reaching a decision that is not arbitrary or an abuse of its discretion.

Petitioner's application, pursuant to CPLR Article 78, is denied, and the petition is dismissed.

This constitutes the decision and Order of this Court. Any relief not expressly granted herein is denied.

Dated: June 26, 2019