

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

PART IA23

In the Matter of the Application of
GRA V, LLC and Paris Giannopoulos,

Petitioners,

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

-against-

Meenakshi Srinivasan, James Chin, Satish Babbar,
and Joel Miele, as Commissioners of the Board of
Standards and Appeals of the City of New York,
and The Board of Standards and Appeals of the
City of New York,

Respondents.

INDEX NUMBER 1036/06
Present:

HON. Alexander W. Hunter, Jr.

FILED
OCT 6 2006
CLERK'S OFFICE

The following papers numbered 1 to 13 Read on this motion, ARTICLE 78

No _____ on Calendar of _____	<u>PAPERS NUMBERED</u>
Notice of Petition - Order to Show Cause - Exhibits and Affidavits Annexed _____	1-8
Answering Affidavit and Exhibits _____	9-12
Replying Affidavit and Exhibits _____	13
Affidavit _____	
Pleadings - Exhibit _____	
Stipulation - Referee's Report - Minutes _____	
Filed Papers _____	

Upon the foregoing papers, the petition filed by GRA V, LLC and Paris Giannopoulos, for a judgment pursuant to C.P.L.R. Article 78, nullifying and setting aside the determination of the Board of Standards and Appeals ("BSA") as illegal, arbitrary, capricious and an abuse of its discretion, declaring that BSA's application of the laws and regulations of the State and City of New York unlawful, and directing the BSA to reinstate certain revoked building permits, is denied in its entirety.

Petitioner GRA V, LLC is a company which owns two lots at 3329/3333 Giles Place in Bronx County.

Paris Giannopoulos is the managing member of GRA V LLC. Petitioners intended to develop a seven story, 63 unit residential apartment building on the aforesaid lots. When the petitioners bought the premises, it was zoned R6, which is appropriate for medium density housing, usually between three and twelve story buildings. (Respondent's Memorandum of Law, p. 3, FN 3.) The adjacent neighborhood consists of detached one and two-family houses. On May 24, 2004, the Department of Buildings ("DOB") issued permits authorizing the construction of retaining walls and fences to be installed as part of the site development of the premises. On September 7, 2004, DOB issued a permit for excavation/foundation work to be performed at the premises. On September 28, 2004, the area in which the premises is located was re-zoned from R6 to R4A which is designed to provide for single or two-family detached dwellings. DOB issued a Stop Work Order dated September 29, 2004 for all work at the premises to cease.

Petitioners assert that its contractors completed a substantial portion of the foundation between September 7, 2004 and September 28, 2004 and after DOB revoked the foundation permit due to the zoning change, petitioner's requested that the permits be reinstated. On December 27, 2004, DOB denied petitioner's request to reinstate the permits. Petitioners argue that they secured a common law vested right to continue with the construction of the building on the premises. Under the common law theory of vested rights, a developer that has commenced construction in accordance with the then existing zoning, is entitled to continue building under that zoning even after a zoning change, as long as the construction is performed pursuant to valid building permits and the developer has completed substantial construction and made substantial expenditures. (Petitioners' Amended Verified Petition, p. 6).

On January 27, 2005, petitioners filed an application seeking to continue construction at the site on the grounds that the foundation was 85% complete before the rezoning. Petitioner argues that it submitted plans, surveys, affidavits, expert statements and other documents to support its position that its common law rights were vested. Public hearings were held at the BSA on March 15, 2005, May 10, 2005, and July 12, 2005, with a decision being reached on August 9, 2005.

The BSA found that no common law vesting could have taken place since the foundation permit upon which the petitioners relied, that had been issued on September 7, 2004, was erroneously issued. Thus, BSA asserts that petitioners' common law rights did not vest. Petitioners contend that a finding of common law vested rights would enable them to proceed with the R6 zoning construction and they assert that substantial work was completed at the premises at substantial expense. Petitioners contend that the BSA failed to apply the Charter of the City of New York and applicable case law. The BSA summarily agreed with the DOB's interpretations and as such, petitioners contend the determination was arbitrary and capricious and not supported by substantial evidence.

The respondents stand by the decision rendered by the BSA and assert that no common law vesting could have taken place since the foundation permit upon which petitioners relied, that had been issued September 7, 2004, was erroneously issued. The respondents argue that when considering an application under the New York City Zoning Resolution section 23-633 for the construction of a new building on a narrow street, DOB requires a survey or accurate information on the location of an existing adjacent street wall. The purpose of the survey is to "properly identify existing adjacent buildings to establish the setback requirements for a new building." (Respondents' Memorandum of Law, p. 7). The respondents maintain that in support of their original application for a foundation permit, the petitioners' architect (Donna Difaria) submitted a stamped and signed Sanborn map (a map published by Sanborn Library LLC) in lieu of a survey. The respondents claim that the architect should have "realized" that it was not appropriate to rely on a Sanborn map for an accurate depiction of the location of adjoining properties to satisfy the requirements of ZR section 23-633. However, she stamped the map with her seal and "assured" the reviewing plan examiner that the map accurately represented conditions at the site. The plan examiner accepted the application and approved the foundation permit on

September 7, 2004. (Respondent's Memorandum of Law, p. 8).

The respondents contend that after the foundation permit had lapsed by operation of law due to the rezoning of the area where the subject premises was located, as part of a DOB audit, DOB asked for an actual survey of the premises. The survey showed that the nearest adjacent building, a garage, was 1 foot 9 inches from the street line and not a "zero set back" as was shown on the Sanborn map which petitioner's architect relied on. In order to comply with the original or R6 zoning, the building would have to be set back 1 foot 9 inches from the street. Thus, respondents assert that the issuance of the foundation permit on September 7, 2004 and the foundation work performed pursuant to that permit, were in violation of the zoning requirement. They claim that on September 7, 2004, DOB issued a partial permit for excavation/foundation work only and did not issue permits authorizing the total construction of a new building before the rezoning went into effect on September 28, 2004. Respondents assert that on September 28, 2004, petitioners, through a second architect, submitted a professionally certified application for a new building. Respondents maintain that such applications do not undergo full plan review by a DOB plans examiner. They further contend that the professionally certified plans were submitted the same day the zoning amendment was enacted, in an effort to obtain a permit before the zoning change was enacted. (Respondents' Answer to Amended Petition, pp. 7-8).

The respondents assert that on August 25, 2004, DOB objected to the plans that were filed by petitioners in the summer of 2004 and that the petitioners knew the plans were non-compliant. However, petitioners took advantage of the professional certification process and obtained a partial permit without plan review. Said permit was issued later on September 28, 2004, after the City Council had approved the zoning change. Thus, respondents assert, a proper permit authorizing the entire construction of a new building at the premises was not issued prior to the zoning amendment that was enacted on September 28, 2004. Their position is that since a valid permit did not exist, BSA was not required to determine if the second prong of the common law vesting test had been met, which is that the construction work at the site was substantial.

Petitioners argue that the Sanborn map was submitted in good faith by their architect and the DOB plan examiner deemed the map to be satisfactory and issued the foundation permit. They contend that the discrepancy with respect to the streetwall setback of 1 foot 9 inches is de minimis. Petitioners further assert that in good faith reliance on the foundation permit, they made substantial progress on the foundation and expended approximately \$475,000 taking into account "hard" and "soft" costs. Thus, their common law rights have vested. Petitioners further contend that the streetwall setback flaw has not yet been built, can easily be corrected, and was corrected per the Reconsideration. (Petitioners' Amended Verified Petition, p. 10).

The doctrine of vested rights, "... has been described as an application of the constitutionally based common-law rule protecting nonconforming uses...But the doctrine is also said to have been grounded on principles of equitable estoppel" (citations omitted). **Matter of Ellington Construction Corp. v. Zoning Board of Appeals of the Incorporated Village of New Hempstead**, 77 N.Y.2d 114, 122 (1990). The BSA cited to the cases of **Matter of Jayne Estates, Inc. v. Raynor**, 22 N.Y.2d 417 (1968) and **Albert v. Board of Standards**, 89 A.D.2d 960 (2nd Dept. 1982), in support of its position that petitioner did not acquire vested rights because it performed foundation work under an invalid foundation permit. Petitioners contend that these cases do not apply in the case at bar and state that the foundation permit was validly issued.

Respondents further cite to cases which indicate that if a permit is not valid as a matter of law, vested rights are not acquired. See, **Incorporated Village of Asharokon v. Pitassy**, 119 A.D.2d 404 (2nd Dept. 1986). Respondents focus on the fact that petitioners' submitted a Sanborn map in lieu of an actual survey in connection with its application for a foundation permit. Respondents assert that DOB may revoke a permit that is erroneously issued and it may revoke a permit that is based on an inaccurate representation made by a

building owner. See, Administrative Code §27-197; Parkview Associates v. City of New York, 71 N.Y.2d 274 (1988); Welland Estates, Inc. v. Smith, 109 A.D.2d 193 (1st Dept. 1985).

Respondents correctly argue that in an Article 78 proceeding to review the decision of a local zoning board, "judicial review is limited to determining whether the action taken by the board was illegal arbitrary or an abuse of discretion." Human Development Svcs. v. Zoning Bd. of Appeals of Village of Port Chester, 110 A.D.2d 135 (2nd Dept. 1985). Moreover, with respect to Article 78 proceedings, in Matter of Edwin A. Pell v. Board of Education of Union Free School District, 34 N.Y.2d 222, the Court of Appeals reiterated, "It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [citations omitted]." Id. at 232. Thus, this court's role is limited to the determination of whether or not there was a rational basis for the finding of the BSA. This court cannot, "...substitute its own judgment for that of the agency. Even though the court might have decided differently were it in the agency's position, the court may not upset the agency's determination in the absence of a finding, not supported by this record, that the determination had no rational basis [citations omitted]." See, Matter of Mid-State Management Corp. v. New York City Conciliation and Appeals Board, 112 A.D.2d 72 (1st Dept. 1985); Matter of Sullivan County Harness Racing Assoc., Inc. v. Robert A. Glasser, 30 N.Y.2d 269 (1972).

Taking into account the arguments made by the respondents and the cases they cited to in support of their position that petitioners did not have a valid permit and thus, have not shown that they had a common law vested right, this court finds that there was a rational basis for the BSA's decision to deny petitioner's application for a reinstatement of the revoked permits. The respondents correctly assert that the court should defer to an agency's interpretation of the statute with respect to technical questions such as reading of plans and zoning compliance. This court finds that respondents' decision was not arbitrary or capricious. See, Matter of Perotta v. City of New York, Dept. Of Buildings, 107 A.D.2d 320 (1st Dept. 1985).

Accordingly, petitioner's application pursuant to Article 78 is denied in its entirety and the petition is hereby dismissed.

This constitutes the decision and order of the court.

Dated October 3, 2006



J.S.C.A.