SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS PART 6

Justice

LANDMARK WEST! INC., et al.,

Petitioners,

- v -

NYC BD. OF STANDARDS & APPEALS, et al.,

Respondents.

INDEX NO. 650354/08

MOTION DATE 6/23/09

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 17, were read on this Article 78 petition.

	PAPERS NUMBERED
Stipulation and second amended petition (see county clerk file)	1, 1A
Answers – Exhibits	4,5 (Ans.), 6-17 (Exh.)
Replying Affidavits	Reply: 2,3

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, this Article 78 petition is decided in accordance with the accompanying decision, order, and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk, and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must E-File certificate requesting Entry of Judgment with a copy of the order and/or judgment attached.

Dated: 8/4/09

JOAN B. LOBIS, *J.S.C.*

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

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

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LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,

Petitioners,

Index No. 650354/08

Decision, Order and Judgment

-against-

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,

Respondents.

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

In this Article 78 proceeding, which was converted from a declaratory judgment action pursuant to this court's April 17, 2009 decision and order (the "April 2009 Order"), petitioners Landmark West! Inc. (Landmark West!"), 91 Central Park West Corporation ("91 CPW"), and Thomas Hansen (collectively referred to as "petitioners"), challenge the August 26, 2008 determination of the Board of Standards and Appeals of the City of New York (the "BSA" or the "Board"). The determination is set forth in Resolution 74-07-BZ (the "BSA Resolution"), which was filed on August 29, 2008. The BSA Resolution approved the application of respondent Congregation Shearith Israel a/k/a the Trustees of Congregation Shearith Israel (the "Congregation"), a not-for-profit religious institution, for a variance for the property located at 8-10 West 70th Street in Manhattan (the "Property"), which is adjacent to the Congregation's sanctuary, located at 6 West 70th Street.

The above-captioned proceeding was assigned to this Part as related to a previously-commenced Article 78 proceeding, Kettaneh v. Board of Standards and Appeals, Index No. 113227/08 ("Kettaneh"), which was also brought to challenge the BSA Resolution. Both matters were heard together at oral argument on March 31, 2009. The Kettaneh matter was fully submitted at that time, and was argued on the merits. The issue before the court in the instant matter concerned the BSA's and the Congregation's motions to dismiss on the ground that this matter should have been brought as an Article 78 proceeding. In the April 2009 Order, this court denied the motions to dismiss and ordered that the declaratory judgment action brought by petitioners herein be converted to an Article 78 proceeding. The parties were directed to serve and file additional papers.

At the March 31 oral argument, the court questioned counsel for petitioners as to the differences between the instant proceeding and the Kettaneh proceeding. Petitioners' counsel articulated two specific claims—essentially, that the BSA lacked jurisdiction and otherwise proceeded illegally—that were not raised by petitioners in Kettaneh. First, petitioners argued that the application that was presented to the BSA was not properly "passed on" by the Department of Buildings ("DOB"), in that the rejection was not issued by the commissioner or deputy commissioner, or the borough supervisor or borough commissioner, as required by the New York City Charter. Rather, petitioners assert, the document was signed by an individual in a Civil Service position, who is not authorized to sign-off on an application. Put another way, counsel argued that the "ticket" to get to the BSA was invalid. Second, petitioners argued that the plans that were presented to and rejected by the DOB were not the same as the plans that were presented to the BSA. Counsel for petitioners then stated on the record that "I think the rest of the issues are probably encompassed in [Kettaneh's] petition," to which counsel for the BSA agreed.

Therefore, except as to these two arguments, the parties agree that all of the other issues are essentially encompassed in the Kettaneh case. In a thirty-three (33) page decision, order and judgment dated July 10, 2009, this court denied the request to annul and vacate the BSA's determination and dismissed the petition in Kettaneh. The Kettaneh decision is specifically incorporated by reference herein; the factual recitations and determinations shall not be repeated, but are incorporated as if more fully set forth herein. Only those facts that are expressly required for the additional issues raised by petitioners will be set forth below.

At the outset, respondent Congregation argues that petitioners lack standing. This court finds that petitioners have standing since the claims asserted raise an "injury in fact" and the claims "fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted." New York State Assn. of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004). The Court of Appeals has held that property holders in the immediate vicinity of the premises which are the subject of a zoning determination have standing to challenge zoning determinations without their having to plead and prove special damages or injury in fact. Matter of Sun-Brite Car Wash v Board of Zoning & Appeals, 69 N.Y.2d 406, 409-10 (1987). Since Thomas Hansen, the individual property owner, and 91 CPW are in close proximity to the Property, they have standing. Accordingly, petitioners collectively have standing. This court need not reach the issue of whether Landmark West!, as an organization, has standing.

Claim that the BSA Lacked Jurisdiction

Turning to the merits of the petition, petitioners assert that the BSA lacked

jurisdiction to entertain the Congregation's application because the plans were not approved properly, in that the plans were no "passed on" by the DOB in the matter required by the City Charter. To invoke the BSA's jurisdiction, petitioners assert, the application must be an appeal from a determination of the DOB Commissioner or Manhattan Borough Superintendent. Petitioners cite to § 666(6)(a) of the City Charter, which, they assert, sets forth the jurisdiction of the BSA. Section 666(6)(a) provides that the BSA has the power

> [t]o hear and decide appeals from and review, (a) except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings or any borough superintendent of buildings acting under a written delegation of power from the commissioner of buildings filed in accordance with the provisions of subdivision (b) of section six hundred forty-five, or a not-for-profit corporation acting on behalf of the department of buildings pursuant to section 27-228.6 of the code, ...

But, as the BSA itself pointed out in a footnote to the BSA Resolution, the BSA has jurisdiction pursuant to § 668 of the Charter. The footnote sets forth that:

> an attorney representing local residents, claims that a purported failure by the . . . DOB Commissioner or the Manhattan Borough Commissioner to sign the above-referenced objections, as allegedly required by Section 666 of the . . . Charter, divests the Board of jurisdiction to hear the instant application. However, the jurisdiction of the Board to hear an application for variances from zoning regulations, such as the instant application, is conferred by Charter Section 668, which does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner

Section 668 sets forth the procedure for variances and special permits. This section is referenced in § 665 of the Charter, which provides that the BSA has the power "[t]o determine and vary the application of the zoning resolution as may be provided in such resolution and pursuant to section six hundred sixty-eight."

An agency's construction of a statute or regulation it administers, "if not unreasonable or irrational, is entitled to deference." Matter of Salvati v. Eimicke, 72 N.Y.2d 784, 791 (1988), rearg. denied, 73 N.Y.2d 995 (1989). The BSA's interpretation that it has jurisdiction under § 668 is rational and will not be disturbed. Given the interplay in the Charter between the different ways for the BSA to acquire jurisdiction over a matter, it is appropriate to defer to the agency's interpretation. "[W]here the statutory language suffers from some 'fundamental ambiguity' . . . , or 'the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices' . . . , courts routinely defer to the agency's construction of a statute it administers." New York City Council v. City of New York, 4 A.D.3d 85, 97 (1st Dep't 2004) (internal citations omitted). The BSA's interpretation that a review under §668 does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner is entitled to deference and will not be disturbed.

The Change in the Plans Renders the Application Flawed

Petitioners argue that the plans that were presented to and rejected by the DOB were not the same as the plans that were presented to the BSA, which, they contend, defeats the BSA's jurisdiction. As set forth in the Kettaneh decision, the Congregation submitted its application to the DOB, and on or about March 27, 2007, the DOB denied the application, citing eight objections. After the application was revised, the DOB issued a second determination, which eliminated one of the prior eight objections. The DOB's second determination, issued on or about August 27, 2007, was the basis for the variance application. This chronology is also set forth in the first footnote in the BSA Resolution.

Although the plan submitted to the BSA was not identical to the first plan submitted to the DOB, the footnote in the BSA Resolution reflects that the revised plan was reviewed by the DOB, and that the second review resulted in the elimination of one of the eight objections. There is no indication in the record that the Congregation bypassed the DOB in any way. Moreover, as set forth more fully in the Kettaneh decision, the plans evolved substantially over time, from a proposed fourteen-story structure to an eight-story, plus penthouse structure, which was ultimately approved by the BSA. The fact that the plans changed is something that should come of no surprise, nor is it a matter that defeats the BSA's jurisdiction. Indeed, the Kettaneh decision notes that the BSA often has pre-application meetings with applicants for variances. Revisions to proposals may be required to address the DOB's objections. Moreover, revisions occur over time throughout the BSA's review process in an effort to insure that an applicant is meeting the required criteria that the variance is the minimum variance necessary, which is the fifth required finding under Z.R. § 72-21.

Petitioners have failed to demonstrate that the BSA acted illegally and without legal authority in considering the Congregation's application. For the reasons set forth herein, and for the reasons set forth in this court's decision in Kettaneh, the request to annul and vacate the BSA's determination is denied, and the petition is dismissed. The decision of the BSA is confirmed in all respects. This constitutes the decision, order and judgment of the court.

Dated: August 4, 2009

JOAN B. LOBIS, J.S.C.