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SUPPLEMENTAL STATEMENT OF FACTS

BSA Calendar No: 2019-94-A

Premises:	36 West 66th Street, a/k/a 50 West 66th Street, Manhattan Block 1118, Lot 45 ("the Parcel")
Determination Challenged:	Issuance of Permit No. 121190200-01-NB ("the Permit")

Appellant LandMark West! ("LW!") submits this supplemental statement of facts to address the Board's refusal at the hearing held on August 6, 2019 to address the issue of the subject FAR deductions taken by the Developer for mechanical equipment space without reviewing the mechanical plans, without determining what equipment, if any, the alleged mechanical voids will house, and without analyzing the technical manufacturing requirements of the equipment and the spatial parameters necessary for its proper operation. The appellant requested that the Board divorce this matter from the City Club's appeal and ask the Developer to provide complete shop drawings of the claims mechanical spaces and direct the Department of Buildings to review them for reavaluation of its approval of the FAR deductions.

At the very core of the issue is that of the actual floor space dedicated to the mechanical equipment, which, Developer claims, inexorably leads to the FAR deductions. Frankly, this entire "height" issue is a giant red-herring, a thinly veiled misdirection argued to steer people away from the true nature of the floor deductions. Even Developer recognized this by citing to BSA Application # 2016-4327-A, the Sky House Condominium decision, wherein the Board

recognized the need to evaluate whether the, "…[a]mount of floor space used for mechanical equipment in the Proposed Building is excessive or irregular...." (Citing to Z.R. 12-10). In fact, in its decision the Board specifically reviewed Developer's affidavits describing in great detail the equipment to be used and stated:

> Whereas, the *Board credits DOB's review of the specific mechanical equipment proposed* and, in the absence of contradicting testimony or evidence from a licensed and appropriately experienced engineer, the Board has no basis upon which to question the evidence in the record suggesting that the floor space on the second, third and fourth stories of the Proposed Building is 'clearly incidental' to the principal use of the Proposed Building, in satisfaction of subdivision (b) of the 'accessory use' definition in ZR §12-10 (emphasis added).
>
> . . .
>
> WHEREAS, in response to an inquiry from the Board regarding whether a standard percentage of floor space dedicated to mechanical equipment has been interpreted as reasonable for similar developments and, thus, properly exempt from floor-area calculations, *DOB states that mechanical floor space deductions are evaluated on a case-by-case basis* and that the deduction of floor space on the second, third and fourth stories of the Proposed Building is consistent with its evaluation of mechanical floor space in comparable mixed-use developments in the City . . . (emphasis added)

So, it is beyond peradventure that the issue of mechanical deductions is not solely defined by height but by the spatial needs of the equipment and its associated elements. Sadly, in the instant case, the plans submitted totally lack any definition of the mechanical equipment, its size and its physical needs (e.g., ventilation), as per the manufacturers. The shop drawing specifications or the shop drawings themselves, produced for the developer would **contain all of these items**. Yet, the plans submitted simply assign types of units to rooms without any offering unit dimensions. The paucity of these plans violates DOB filing requirements. But that argument, much like the height argument, does not fully address the question of allowable mechanical deductions.

As an example, according to your ZD1 Zoning Diagram, the developer deducted the entire 20,478.25 sq. of the 15th floor from the FAR. calculations. Yet, Plan No. A-302.00, offers no support for this deduction, other than room assignments. i.e, Generator room, Mechanical room, etc. How then, can any responsible determination be made regarding the actual use of these spaces and their entire attribution as accessory space under the ZR?

Similar disingenuous ploys were used by developers seeking to subvert the MDL's window requirements by seeking variances for residential buildings that exceeded the underlying district floor area limits. Oftentimes, you would have plans describing single bedroom apartments surrounded by a multitude of storage spaces, which are exempted from the "living space" windows demanded by the MDL. Once the Board saw that ploy, many applications were discarded before they were even filed. It is suggested that the Board look at the shop drawings using the same heedful eye it used to review those bogus plans. No less an investigative standard should be applied to this larger, infinitely more expensive structure, which will have far more deleterious effects on the surrounding community than any of those fraudulent, small-scale multiple dwellings.

With regard to the Developer's objection to addressing the FAR deductions on the ground that Landmark West's initial statement of facts raised only addresses the height of the proposed mechanical space, that is plainly wrong. The first of the two issues presented to the BSA as the last full paragraph on the first page fairly covers all spatial objections (length, width and height) to the FAR deductions:

> The Permit should be revoked, because the underlying plans contravene the Zoning Resolution ("ZR") in that:
>
> a) the Owner's attempts to exempt the Voids from floor area should be rejected, as the Voids are neither "used for mechanical equipment," ZR §12-10, nor are they accessory uses to the residential uses in the Tower, ZR §22-12; . . .

Further, the ZRD2 Form, denied November 19, 2018, contained as item numbered 4 a challenge that the "Areas claimed for mechanical use should be proportionate to the mechanical use." This document was annexed as Exhibit F to the Statement of Facts, and is such is part of the Record presented to the Board for review.

The fact that the body of the Statement of Facts addresses the issue of height of the mechanical voids to a much greater extent than the two-deminsional calculation of the foot print of the equipment and resulting FAR deductions is merely borne out by the fact that the DOB failed to procure from the Developer the necessary specifications. Absent the necessary shop drawings, and /or manufacturer's specifications, we cannot address the FAR foot print deductions at great length. The Board is effectively overlooking an issue properly raised simply because the Statement of Facts did not offer and analyze facts that are within the sole possession of the Developer, and which counsel for the Developer has refused to share.

The Board's unwillingness to engage in a thorough review was done under a further pretext that Mr. John Low-Beer, Esq., counsel for City Club Appellant in a related appeal, requested to expedite the hearing, and the Appellant's request for the shop drawings and their subsequent review by the Department of Buildings would only further delay the proceedings. Although we are otherwise in agreement with the arguments presented by the City Club, our arguments are more extensive with regard to the FAR deductions. As a result, Landmark West has a right to be heard independent of any other appellant, and the Board's cavalier "grouping"

of the two appeals without affording each appellant a separate right to have its grievances addressed violates the basic tenets of "due process" and the First Amendment right to "petition the Government for a redress of grievances." Such rights are individual and not communal. Mr. John Low-Beer might have bound his own client to a particular pace of review before the Board, but he is no position to speak for Landmark West.

Accordingly, Landmark West requests that the Board continue its appeal to consider the issue of the propriety of the FAR deductions taken by the Developer on its April 4, 2019 Zoning Diagram.

Dated: August 21, 2019
New York, New York

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August 21, 2019

Honorable Members of the Board
New York City Board of Standards and Appeals
250 Broadway, 29th floor
New York, New York 10007

Re: Cal. No. 2019-94-A, 36 W. 66th Street, Manhattan

Dear Honorable Members of the Board:

Appellants submit this Letter-Statement to respond to questions raised by the Board at the August 6th hearing in this matter. While we appreciate the opportunity to make this additional submission, we continue to believe that the passage of time is highly injurious to Appellants' interests, and that the perfect is the enemy of the good in this situation. We are hopeful that with this and the next statement due on August 28th, the parties and the Board can put this matter to bed, and that the Board can vote on it on September 9th or 10th.

A. The Language of the Statute Is Ambiguous

1. The Bulk Packing Rule Requires That the Portion of the Building Above 150 Feet Be Limited to 40 Percent of Total Allowable Floor Area

At the August 6th hearing, Board Chair Perlmutter asked Appellants' counsel to point to something in the language of the statute that shows that Extell's interpretation does not jibe with the purpose of the statute.

The language of the Bulk Packing Rule itself makes it obvious that Extell's interpretation violates it. By requiring that 60 percent of the allowable floor area be in the lower portion of the building, the Rule limits the upper portion to 40 percent. The two portions must add up to 100 percent. This is baked into the concept of "percent." Moreover, only in this way can the Rule achieve its purpose – obvious even from its language alone – of limiting height. Extell's interpretation plainly does not meet this condition.

Although it is unnecessary to consider legislative history, that history confirms that the purpose of requiring most of the floor area to be below a certain height was to limit the amount of floor area above that height: to "control[ ] .... the amount of floor area that could be massed in the tower portion." DCP, Regulating Towers and Plazas (1989) (Exh. L), at 26 (underlining added).

"The DCP working group refers to this concept as 'Packing-the-Bulk.' In exploring this approach, staff ... concluded that a minimum percentage in the low 60's would result in an appropriate relationship between the base and the tower portions of new buildings." *Id*. at 27 (underlining added). In other words, requiring a certain amount of floor area in the base serves to control the height of the tower.[1]

It is not disputed that the total floor area of the upper portion of Extell's building is limited to the total allowable floor area in the C4-7 portion of the lot, which is 421,260 square feet. If that upper portion were similarly limited to 40 percent of that allowable floor area, as the law plainly requires, it could be no more than 168,504 square feet. But by calculating the 40 percent based on its entire lot, which has 548,543 square feet, Extell was able to put 219,417 square feet into the upper portion of its building instead of 168,504 square feet. This is 52 percent rather than 40 percent of the allowable total. Another way of saying this is that the upper portion of Extell's building has 30 percent more floor area than it would have if it were limited to 40 percent of total allowable floor area.

To the extent that Extell has placed the lower portion of the building outside the relevant envelope within which the 60 percent and the 40 percent must sum to 100, it has eliminated the 40 percent limit on the upper portion of its building. In Extell's telling, the 60 and the 40 can, and do, add up to much more – 30 percent more – than 100.

The result of Extell's interpretation is that instead of limiting tower height, each square foot added to the base in the R8 portion of the lot removes a square foot from the base in the C4-7 portion of the lot, and thereby allows the height of the tower to grow by one square foot as if there were no Bulk Packing Rule. Given enough space in R8, the entire base could be placed outside the envelope. This would allow all the floor area available in the C4-7 portion of the zoning lot to go into the upper portion of the building – the result being a tower many stories higher than it would be if it were entirely in C4-7.

Extell's response to this is that the Bulk Packing Rule is limiting height to some extent in this building, and if there were no Bulk Packing Rule the building could be even higher. However, to the extent that the Bulk Packing Rule is working in this situation, it is only because Extell does not have a large enough R8 portion to move all of the square footage of the base into the R8 district. The fact remains that the logic of Extell's interpretation is directly contrary to the Rule's purpose.

To the extent that Extell was able to apply this logic here, it nullified the Bulk Packing Rule, and its building got taller than it could have if it were entirely in the C4-7 district. This is directly contrary to legislative intent, and therefore absurd. This building is 8 or 9 stories – 128 or

[1] At the hearing, Chair Perlmutter suggested that another purpose of the Bulk Packing Rule might be to preserve street wall continuity. However, that end is achieved explicitly by a different section of the Special District regulations: ZR § 82-37. If the Bulk Packing Rule serves this purpose, it does so incidentally and indirectly. Nowhere in any of the four reports discussing the Bulk Packing Rule (the 1989 Discussion Document, the May 1993 Zoning Review of the Special District, and the two CPC Reports that accompanied enactment of the Rule in the Special District and in R9 and R10) is there any mention of preserving street wall continuity as a purpose served by the Bulk Packing Rule.

144 feet, the equivalent of 13 or 14 stories of an ordinary building – taller than it would be if it were located entirely in C4-7.

There is no earthly reason why the City Planning Commission would have intentionally written regulations to allow a building to be so significantly taller than would otherwise be allowed merely because a portion of its zoning lot is in a lower density district. Indeed, it would have been totally irrational of that body. If anything, one might think that a building that is partly in a lower density district should be lower, not higher.

Extell's interpretation violates the basic principle that zoning must be internally consistent, based on a rational underlying policy and a comprehensive plan – which, by the way, is evidenced by the legislative history of the Zoning Resolution as well as by the text itself. *Udell v. McFadyen*, 40 Misc. 2d 265, 267 (S. Ct. Nassau Co. 1963), *aff'd in relevant part sub nom. Udell v. Haas*, 21 N.Y.2d 463 (1968) (citing C. Haar, "In Accordance With a Comprehensive Plan," 68 Harv. L. Rev. 1154 (1959)); *Udell v. Haas*, 21 N.Y.2d at 471-472; *Asian-Americans for Equality v. Koch*, 72 N.Y.2d 121, 131 (1988).

2. The Mathematics of the Statute as a Whole Dictate that the Maximum Number of Floors Must Remain Constant at the "Low-30 Stories"

The legislative history states, not just in one place, as Mr. Karnovsky stated, but in multiple places, that although the drafters did not limit height per se, they intended to. and did, limit the number of stories to the low 30s (not 40, as Mr. Karnovsky erroneously claimed we stated). This limit is stated twice in the May 1993 Special District Zoning Review, at 1, 14 (Exh. B), once in the CPC Special District Report, at 18-19 (Extell Exh. 17), twice in the Borough President's Report on the Special District amendments, at 2,15 (Extell Exh. 17), and once in the CPC Report for the R9/R10 amendments, at 5.[2]

But there is no need to go beyond the words – and numbers – of the statute itself. They speak loud and clear. The parameters of 30 percent tower coverage and 60 percent floor area below 150 feet inexorably dictate an upper limit to the number of floors that is in the low 30s, and in any event nowhere near 40, as in Extell's building. In their first Statement, at pp. 12-13, Appellants presented some simplified examples to show how the number of floors remains invariant regardless of lot size. In those simplified examples, the statutory parameters permitted 13.3 floors above 150 feet. Attached hereto as Exhibit A is an Excel spreadsheet that adds more detail to take into account the penthouse rule (ZR § 82-36(a)(2)), the Inclusionary Housing bonus, and the difference between gross floor area and zoning floor area. This spreadsheet shows that under the parameters given by the statute a developer could build 14 floors below 150 feet and 18.4 floors above, for a total of 32.4 floors – i.e., precisely the low-30s promised in the various reports. Opening the spreadsheet on a computer and changing the parameters in the spreadsheet, one can see how the number of floors would be affected by variations in lot size (no effect), bulk packing percentage (the lower the percentage the more floors), tower coverage (the lower the

[2] Available at https://www1.nyc.gov/assets/planning/download/pdf/about/cpc/940013.pdf .

minimum, the more floors), and percent non-zoning floor area (the higher the percentage, the more floors).[3]

The only variable in this model that is to some extent within the developer's control is the percentage of non-zoning floor area. In the upper portion of any building, by far the largest component of non-zoning floor area is the space for accessory mechanical equipment. In 1993, it was rare for residential buildings to have even one mid-building mechanical floor, because very few such buildings had central air conditioning. But even adding a mechanical floor to the upper portion of the building would only bring the total to 33.4 floors. In order to arrive at the 40 floors, as in Extell's building, a building would have to add 7.6 floors' worth of non-zoning floor area – primarily accessory mechanical space – to the upper portion of the building.[4] DOB properly requires that mechanical floor space actually be used for mechanical equipment. Even today, no developer could legitimately claim to fill approximately 7 floors in the middle of a building with necessary accessory mechanical equipment to service the 32.4 residential floors.

This demonstrates that the parameters set by the statute embody a mathematical limit that, not coincidentally, is in the low-30 stories. Although the statute does not spell out in words the requirement that the number of stories remain in the low 30s regardless of lot size, it does do so in numbers. Its mathematics make it so. It does not make sense, and would be contrary to the constitutional principles of consistency that undergird all zoning, to assume that the City Planning Commission wished to impose this limit everywhere in the Special District except for split lots, community facility towers, and very tall height factor buildings – all rare and improbable developments here – in the R8 portion that makes up about 5 percent of that District.

B. The Most Fundamental Rule of Statutory Interpretation, Applicable to Land Use Cases as to Others, States that the Literal Language of the Statute Does Not Control Where It Leads to an Absurd Result

Even if the statute were not ambiguous on its face, it still could not be applied as Extell does.

At the August 6th hearing, Board Chair Perlmutter and Commissioner Scibetta repeatedly asserted that ZR § 82-34 was unambiguous, and that resort to legislative history was therefore not merely unnecessary, but contrary to the rule of statutory interpretation set forth in *Raritan*

[3] The formula embedded in this spreadsheet is a more elaborate version of the one described on page 12 of Appellant's initial Statement. All this is simple arithmetic: addition, subtraction, multiplication, and division. By clicking on each cell, the reader can see the underlying formula that produces the number in that cell.

[4] In modelling the maximum number of stories, we did not consider the amount of non-zoning floor area below 150 feet, because adding non-zoning floor area to the lower portion of the building would, if anything, decrease the total number of stories, not increase it. This is because the number of stories below 150 feet is fixed at 14, and adding non-zoning floor area in the lower portion of the building would only make it more difficult to fit all of the 60 percent of total allowable zoning floor area there, and consequently more difficult to use all of the 40 percent of total allowable floor area for the upper portion of the building.

Development Corp. v. Silva, 91 N.Y.2d 98 (1997). *Raritan* states that "'[a]bsent ambiguity the courts may not resort to rules of construction to broaden the scope and application of a statute,' because 'no rule of construction gives the court discretion to declare the intent of the law when the words are unequivocal.'" *Id*. at 107.

While this principle is valid in most circumstances, there is a more fundamental principle that requires courts to override even unambiguous statutory language where that language leads to a result that is plainly contrary to legislative intent or otherwise absurd. As Appellants previously noted:

> "The legislative intent is the great and controlling principle" of all statutory interpretation. . . . Therefore, even if the words of the statute could only be read as Extell does – and that is far from the case here – the Bulk Packing Rule still would not apply to a situation in which, as here, applying it is so directly contrary to the statutory intent.

Appellants' Reply Statement, at 6 (quoting *Council v. Giuliani*, 93 N.Y.2d 60, 68-69 (1999)).

Commissioner Scibetta questioned whether this most fundamental principle – that even the unambiguous language of a statute must give way in the face of results that are absurd or contrary to legislative intent – applies in land use cases. It does.

In *City v. Stringfellow's of New York*, 253 A.D.2d 110, 115-116 (1st Dep't 1999), *aff'd,* 96 N.Y.2d 51 (2001), the First Department explicitly rejected the contention that ambiguities in the Zoning Resolution are to be construed in favor of the owner when the result is contrary to the legislative intent, and the Court of Appeals affirmed without even mentioning this supposed rule.[5] *Stringfellow's* turned on the Zoning Resolution's definition of "adult establishment." Such an establishment was defined as one that, *inter alia*, was "not customarily open to the general public ... because it excludes minors by reason of age." The defendant establishment did admit minors. Accordingly, the Supreme Court held that the plain language of the statute "clearly and unambiguously" required judgment in favor of the owner. *Id.* at 114. Reversing and ruling against the owner, the Appellate Division stated: "While zoning ordinances must be narrowly interpreted and ambiguities are to be construed against the zoning authority, . . . the fundamental rule in construing any statute, or in this case an amendment to the City's Zoning Resolution, is to ascertain and give effect to the intention of the legislative body, here the New York City Council." *Id.* at 115-116.

At the hearing, we discussed *Long v. Adirondack Park Agency*, 76 N.Y.2d 416 (1990), in which the Court of Appeals read additional language into a statute to overcome "an absurd result that would frustrate the statutory purpose." *Id*. at 420. Although the literal language of the statute pointed to an outcome in favor of the property owner, who had been granted a variance by the Town Zoning Board of Appeals, the Court of Appeals decided the case against the owner. The statute there gave the Adirondack Park Agency 30 days from the granting of a zoning variance to

[5] Indeed, in the over 80 zoning cases that the Court of Appeals has decided since 1999, it has not mentioned that rule even once. This statement is based on a Lexis search for cases that contain the word "zoning" at least five times.

disapprove it. The local government did not forward the record to the Agency until shortly before the 30 days had run, and the Agency therefore was unable to complete its review within the 30 days. Finding that reading the law as written would frustrate its purpose, the Court of Appeals instead read it as providing that the 30 days did not begin to run until the Agency had all the documentation it needed to review the variance. The dissent there made the same arguments that Extell and the Commissioners made here: that the statute was unambiguous and rules of construction therefore could not be invoked; that the consequence was not "absurd" and did not completely frustrate the legislative goal; that the statute was intentionally written the way it was, as evidenced by "the existence of ... detailed rules governing" the question in another portion of the same statute; and that the Court's re-writing of the statute created additional problems. *Id*. at 423-427 (Titone, J., dissenting).

The principle that the statute's purpose governs even when the literal language is contrary has also been applied in other cases involving property rights and statutes in derogation of the common law. In *89 Christopher, Inc. v. Joy*, 44 A.D.2d 417 (1st Dep't 1974), *aff'd in relevant part*, 35 N.Y.2d 213 (1974), the Appellate Division refused to allow "a landlord to circumvent the requirement" of the City Rent and Rehabilitation Law, despite its literal language. *Id.* at 421. It stated:

> In reaching our determination, we have not overlooked those decisions which require us to read and give effect to statutes as written, to refrain from resorting to conjecture when confronted with clear and unambiguous statutory language and to give due weight to administrative construction. However, we are not obliged to follow literal language where to do so would thwart the obvious legislative intent and lead to unexpected and absurd results.

Id. at 422 (internal citations omitted) (underlining added).

Similarly, in *People ex rel. McGoldrick v. Sterling*, 283 A.D. 88, 90 (1st Dept. 1953), the First Department applied the State Residential Rent Law to the coop conversion plan of a Park Avenue building. Under the plan, only certain tenants would be given an option to buy. The court construed the statute against the landlord despite its literal language, holding that although the plan was in literal compliance with the statute and regulations, "a statute may not be read so literally that it yields in application a nonsensical result." *Id.* at 93. Observing that the provision relied on by the landlord "would have the very reverse effect of that intended if occupants were not given an option to 'purchase' their apartments before they were 'sold' over their heads," *id.* at 95, the Court held that evictions could not go forward.[6]

[6] The Board itself has also held that the rule that zoning restrictions should be construed in favor of the owner must yield to the public policy goals of the Zoning Resolution. In *2368 12th Avenue*, BSA Cal. Nos. 24-12-A & 147-12-A (Aug. 7, 2012), the appellant contended that its rooftop signs were accessory and not advertising signs, invoking the supposed rule of construction in favor of the owner. Nevertheless, the Board, noting the "public policy goal of ensuring that otherwise unlawful advertising signs or billboards cannot circumvent the requirements of the Zoning

In criminal cases, the accused enjoys constitutional protections that are at least as weighty as those of a property owner in a zoning case. The courts are justly reluctant to hold a defendant criminally liable for conduct that is not expressly prohibited by law. Yet in *People v. Santi*, 3 N.Y.3d 234 (2004), the Court of Appeals did just that, applying the principle that legislative purpose trumps plain language. The defendant, a medical doctor authorized to practice, was charged with "aiding and abetting an unauthorized individual in the unlawful practice of medicine." *Id.* at 239. The statute, by its terms, criminalized aiding and abetting only when done by "anyone not authorized to practice" medicine. Nevertheless, the Court held that the phrase "anyone not authorized to practice" must be construed to include persons, such as the defendant doctor, who were authorized to practice medicine. The Court stated that "courts normally accord statutes their plain meaning, but 'will not blindly apply the words of a statute to arrive at an unreasonable or absurd result.'" *Id*. at 242-44.

C. The Application of ZR § 82-34 to this Split Lot Situation Yields a Result that Defeats the Purpose of the Bulk Packing Rule, and Is Therefore Absurd

Extell disputes that the application of § 82-34 leads to an absurd result in this case. But "absurd" in this context means nothing more than "contrary to the purpose and intent of the underlying statutory scheme," and allowing an "end-run around" the statute. *Matter of Jamie J.*, 30 N.Y.3d 275, 284-285 (2017) (quoting *Long v. Adirondack Park Agency*, 76 N.Y.2d at 420). *See also People v. Santi*, 3 N.Y.3d at 243 (even if it "represents a fair and literal reading of the text, ... an interpretation [that] ignores the legislative intent underlying the statute's enactment" is incorrect); *New York State Bankers Ass'n v. Albright*, 38 N.Y.2d 430, 436-37 (1975) ("even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words"); *Abood v. Hospital Ambulance Service, Inc.*, 30 N.Y.2d 295, 298 (1975) (citation omitted) ("'[to] effect the intention of the legislature the words of a single provision may be enlarged or restrained in their meaning and operation, and language general in expression may be subjected to exceptions through implication'"); *Hogan v. Culkin*, 18 N.Y.2d 330 (1966) ("Literal meanings of words are not to be adhered to or suffered to 'defeat the general purpose and manifest policy intended to be promoted.'").

The logic of Extell's interpretation of the Bulk Packing Rule is directly contrary to the Rule's purpose of limiting height. For every square foot of floor area that Extell adds from the R8 district, it increases the floor area above 150 feet by a corresponding square foot over what it would be if it were entirely in the C4-7 district. Nothing in the statute's language or history even remotely suggests that City Planning Commission intended to allow a building to gain in height merely because it is on a split lot with a lower density district.

Extell, however, argues that the result here is not absurd because the building is, according to it, "only" six stories and 96 feet too high – an exceedance that it characterizes as "permissible" – and if the Bulk Packing Rule were not applied at all, its building could have been four floors higher than it is. Extell Statement, at 19-20. Appellants, in their Reply Statement, showed that in

Resolution by designating a 'sham' warehouse or storage facility as a principal use," ruled against the property owner. *Id*. at 6.

reality the excess number of floors attributable to Extell's absurd application of the Bulk Packing Rule is eight or nine, not five or six. Either way, the excess is far from trivial. Either way, too, its tower still constitutes 52 percent of the square footage allowable in the C4-7 area, rather than the maximum allowable of 40 percent, and is far taller than the intended low-30 stories. But no matter the size of the effect, Extell's interpretation is directly contrary to the legislative intent, because it increases rather than decreases the floor area above 150 feet.

D. If the Application of the Rule in This Context Leads to an Unanticipated Result That Is Contrary to Legislative Intent, a Limitation or Exception Must Be Implied

At the hearing, Mr. Karnovsky agreed that the City Planning Commission "had not, probably, studied the fact that the Special District has more than one zoning district designation," Aug. 6th Hearing Video at 2:08, and that this development "may not have been anticipated by the drafters," *id*. at 1:55. However, he argued, "this doesn't mean that you should re-write the law. If you don't like the result, you and change the law," *id.* at 2:08-2:09. The Commissioners appeared to agree.

The Court of Appeals, however, disagrees. It has observed:

> The law-makers cannot always foresee all the possible applications of the general language they use; and it frequently becomes the duty of the courts in construing statutes to limit their operation, so that they shall not produce absurd, unjust or inconvenient results not contemplated or intended. A case may be within the letter of the law, and yet not within the intent of the law-makers; and in such a case a limitation or exception must be implied.

Lake S. & M.S.R. Co. v. Roach, 80 N.Y. 339, 344 (1880) (underlining added); *see also Abood v.* 30 N.Y.2d at 298 ("language general in expression may be subjected to exceptions through implication"). This means that if a particular application of a statute leads to a result opposite to the statute's intended result, that particular application is unlawful.

This principle is fully applicable here. Pursuant to it, the Board need not decide, for example, whether the Bulk Packing Rule of ZR § 82-34 would apply to a community facility tower in R8. It needs only to decide the case before it. And in this case, the absurdity of the result is evident.

E. The Argument That the Drafters Intended to Make the Bulk Packing Rule Apply to the R8 Portion of the Special District Is Implausible

Extell's arguments as to why the drafters might have intended to make the Bulk Packing Rule, but not the Tower Coverage Rule, applicable to the R8 district are implausible. Nothing in the extensive legislative history suggests that the City Planning Commission wanted to allow a building partially in the very small R8 portion of the Special District to be taller than it would be if it were entirely in C4-7/R10, a higher-density zoning district. Nor has Extell ever given any explanation, plausible or otherwise, for why the City Planning Commission might have wanted to do so.

Extell cites the fact that community facility towers are allowed in R8 – so, according to it, the Rule has a purpose in that zoning district. At the hearing, Mr. Karnovsky stated that there were many community facilities in the Special District. It remains the case, however, that while community facilities are plentiful, community facility towers are very rare. A community facility tower must be "comprised, at every level, of only community facility uses." ZR § 24-54(a)(2). Therefore, even if the synagogue in Extell's building were located in the R8 portion, it would not make the building a community facility tower.

The only other possible application of the Bulk Packing Rule would be to a height factor building tall enough to have more than 40 percent of its floor area above 150 feet. The portion of the R8 district that occupies part of a block north of 65th Street only fronts a narrow street and any development solely in this R8 district would be on interior lots. The height of such development would be effectively limited by the narrow-street sky exposure plane and the yard requirement of interior lots so that the bulk packing rule would not be relevant.

The only other portion of the Special District zoned R8 is the through-block portion of the midblock of block 1117, between 64th and 65th Streets. This block contains 14 residential buildings, which contain hundreds of residential units, most of which are in cooperative or condominium ownership. It is far-fetched to think that this provision was designed to apply to this single partial block with no development sites, contrary to the legislative history.

As Appellants previously argued, and Mr. Karnovsky conceded, the drafters likely did not consider any development in the R8 portion of the Special District. The conclusion to be drawn from this, however, is not the one Mr. Karnovsky draws: that this failure can only be remedied by legislation. Rather, it is up to the Board to rule that this absurd application of the Bulk Packing Rule is unlawful.

Very truly yours,

/s/

John R. Low-Beer

Charles N. Weinstock

c: Michael J. Zoltan, Esq., NYC Dept. of Buildings
David Karnovsky, Esq., Fried, Frank, Harris, Shriver & Jacobson
Susan Amron, Esq., NYC Dept. of City Planning
Stuart A. Klein, Esq., Klein Slowick PLLC

Maximum height of tower in Special Lincoln Square District (zoning floor area = non-zo

Maximum zoning floor area	240,000		**Assumptio**
Area under 150	144,000	Taper	80%
Max over 150	96,000	FAR	12
Floor area per floor			
Excluding penthouse	6,000	Max Penthouse floors	4
Floors above 150'			
With no penthouse	16.0	Floors below 150	14
Floors below 150	14.0		
Total floors, no penthouse	30.0		

With penthouse	
Non-penthouse floors	13.6
Max penthouse floors	4.0
Floors above 150 feet	17.6
Floors below 150	14.0
Total floors, with penthouse	31.6

Maximum building height in Special Lincoln Square District (with NZFA deductions in p

GFA Max over 150	100,800	**Assumptio**
Gross floor area per floor		
Excluding penthouse	6,000	
Floors above 150'		
With no penthouse	16.8	

With penthouse	
Non-penthouse floors	14.4
Max penthouse floors	4.0
Floors above 150 feet	18.4
Floors below 150	14.0
Total floors	32.4

ɔning floor area)

ns

Lot area	20,000	SF
Coverage tower	30%	
Floor area under 150	60%	

ɔortion over 150)

ns

NZFA	5%	
Gross up	105%	

89 Christopher, Inc. v. Joy

Supreme Court of New York, Appellate Division, First Department

May 14, 1974

No Number in Original

Reporter
44 A.D.2d 417 *; 355 N.Y.S.2d 584 **; 1974 N.Y. App. Div. LEXIS 5022 ***

In the Matter of 89 Christopher Inc., on Behalf of Itself and All Other Property Owners Similarly Situated, Appellant-Respondent, v. Daniel W. Joy, as Commissioner of Rent and Housing Maintenance, Respondent-Appellant

Prior History: [*1]** Cross appeals from a judgment of the Supreme Court (Sidney A. Fine, J.), entered in New York County on February 27, 1974, in a proceeding pursuant to CPLR article 78. Petitioner appeals from so much of the judgment as failed to grant the petition and invalidate certain city rent regulations. Respondent appeals from so much of the judgment as permitted petitioner to collect, effective January 1, 1974, a 7 1/2% annual increase in rent for any apartment below the Maximum Base Rent established in 1972, provided petitioner complied with the 90% Operation and Maintenance certification, mandated by the statute, during the year 1974.

Disposition: Judgment, Supreme Court, New York County, entered February 27, 1974, unanimously reversed, on the law, without costs and without disbursements, the petition granted to the extent indicated in the opinion of this court and the matter remanded to respondent Rent Commissioner for further proceedings consistent herewith.

Settle order on notice.

Core Terms

rent, landlord, expenditures, certification, maximum rent, collected, effective, increases, biennially, allowance, expended, rent increase, violations, apartment, regulations, services, maximum

Counsel: *Robert S. Fougner* of counsel (*Wynne B. Stern* with him on the brief; *McLaughlin & Fougner* and *Fellner & Rovins*, attorneys), for appellant-respondent.

William E. Rosen of counsel (*Harry Michelson*, attorney), for respondent-appellant.

Judges: Murphy, J. Nunez, J. P., Kupferman, Murphy, Steuer and Tilzer, JJ., concur.

Opinion by: MURPHY

Opinion

[*418] [585]** Both petitioner and respondent appeal from a judgment entered below in an article 78 proceeding instituted by petitioner landlord (on behalf of itself and all other landlords similary situated) to review and annul the determination of respondent Rent Commissioner denying a protest to certain sections of the City Rent, Eviction and **[***5]** Rehabilitation Regulations which purport to interpret the statutory requirements for eligibility for a 1974 rent increase under the current City Rent and Rehabilitation Law.

In denying virtually all of the relief sought by petitioner, the judgment below affirmed the Maximum Base Rent ("MBR") sections of the city rent regulations requiring a landlord to ceritfy that he has expended 90% of the total amount of the cost index for operation and maintenance ("O&M") established for his type of building in order to obtain a rent increase, effective January 1, 1974, pursuant to the MBR sections of the statute (§ Y 51-1.0 *et seq*. of the Administrative Code of the City of New York, as amd. by Local Laws, 1970, No. 30 of City of New York). However, Special Term permitted petitioner **[**586]** to collect, effective January 1, 1974, a 7 1/2% increase in rent for any apartment below the MBR established in 1972, despite the landlord's seeming failure to comply with the 90% O&M certification mandated by the statute, on condition that it make up the deficiency in expenditures during 1974. Petitioner appeals from the entire judgment, except to the extent that it permits collection of a 1974 **[***6]** increase subject to the above condition; and respondent appeals from so much thereof as granted petitioner even limited relief.

The central issue on this appeal is the construction to be given the following statutory provision which prescribes the conditions **[*419]** for the MBR calculation and recalculation, particularly the portion dealing with certification of expenditures.

"No new maximum rent shall be established pursuant to paragraph (3) [providing for the maximum base rents effective January 1, 1972] or (4) [requiring the establishment of maximum base rents effective January 1, 1974 and biennially thereafter] of subdivision a of this section unless not more than one hundred fifty days nor less than ninety days prior to the effective date thereof, the landlord has certified that he is maintaining all essential services required to be furnished with respect to the housing accommodations covered by such certification, and that he will continue to maintain such services so long as such new maximum rent is in effect. Each such certification filed to obtain a new maximum rent pursuant to paragraph (4) of subdivision a of this section shall be accompanied by a certification **[***7]** by the landlord that he has actually expended or incurred ninety percentum of the total amount of the cost index for operation and maintenance established for his type of building." (Administrative Code, § Y51-5.0, subd. g, par. [6] cl. [d].)

Examination of Local Law No. 30 of 1970 reveals that the City Council made a concerted effort to cope with the widespread problem of housing disinvestment and abandonment and to preserve the existing stock of rent-controlled apartments in New York City; and to balance the interests of both landlords and tenants. After providing for rent increases on the basis of the prior rental history of the individual apartments in a building and for increased labor costs, it introduced a new long-range system for rent control by establishing an MBR for each controlled apartment. A statutory scheme was devised, essentially, to increase the financial returns of rent-controlled buildings and allocate to each apartment its fair share of the amount the landlord required to carry the building and to realize a fair return on its value, to assure the improved maintenance and upgrading of rent-controlled buildings out of the increased income obtained through **[***8]** the MBR provisions and to limit the amount of annual increases to 7 1/2% over the previously existing maximum rent.

In its initial phase, an MBR for each apartment, effective in 1972 and 1973, was to be computed. Consideration was to be given to the **[**587]** size and location of, and the number of rooms contained in, the housing accommodation and the computation was to be based on such factors as real estate taxes, water rates and sewer charges, a formula allowance for O&M, a **[*420]** limited vacancy allowance and an 8 1/2% return on capital value. (Administrative Code, § Y51-5.0, subd. a, par. [3].) Eligibility to collect the initial MBR increase (limited to 7 1/2% per annum [*id*., § Y51-5.0, subd. a, par. [5]) was conditioned upon the landlord providing timely certification in 1971 that he (a) was maintaining and would continue to maintain all essential services (*id*., § Y51-5.0, subd. g, par. [6], cl. [d]), (b) had cleared, corrected or abated all rent-impairing violations and (c) had cleared, corrected or abated at least 80% of all other violations of a stated age (or agreed to enter into a written agreement with the city rent agency to deposit all income **[***9]** derived from the property into an escrow or trust account for such purpose). (*Id*., § Y51-5.0, subd. h, par. [6].)

The statutory plan then appears to mandate the disestablishment of the 1972 MBRs and the establishment of new MBRs effective January 1, 1974 and biennially thereafter to reflect changes, if any, in the factors upon which the prior MBR was based, since it states: "The city rent agency shall establish maximum rents effective January first, nineteen hundred seventy-four and biennially thereafter by adjusting the existing maximum rent to reflect changes, if any, in the factors which determine maximum gross building rental under paragraph (3) of this subdivision." (*Id*., § Y51-5.0, subd. a, par. [4].)

In order to be eligible for a rent increase in 1974 the landlord was required, pursuant to the same provisions referred to above, to timely file new certifications as to the maintenance of essential services and the correction of rent impairing and other housing code violations. However, and in addition to the foregoing, the last sentence of clause (d) (subd. g, par [6]) of section Y51-5.0 now became operable; and the landlord was also required to provide a certification **[***10]** that "he has actually expended or incurred ninety percentum of the total amount of the cost index for operation and maintenance established for his type of building."

By Amendment No. 33 to its Rent, Eviction and Rehabilitation Regulations, respondent promulgated regulations sections 24, 25 and 26 to implement Local Law No. 30. On October 4, 1973, he interpreted the statute and regulations as requiring an expenditure for the building equal to 90% of the established O&M, even if such amount had not been collected.

The premises involved herein is a 20-unit, walk-up structure which had qualified for a January 1, 1972 MBR of $ 21,467, predicated, *inter alia*, on an O&M of $ 11,269.40. Because of **[*421]** the 7 1/2% rent increase limitation, petitioner was precluded from collecting more than $ 14,957.52 through 1973 and would need approximately six additional 7 1/2% annual increases to reach its 1972 MBR.

[588]** In applying for its January 1, 1974 rent increase petitioner certified that it had expended $ 9,108.93 for O&M. This sum was $ 1,033.53 less than the required expenditure of $ 10,142.46 (i.e., 90% of $ 11,269.40), but substantially in excess of the O&M actually **[***11]** collected.

On this appeal petitioner contends that the certification of actual expenditures requirement is inapplicable to the landlord who is merely seeking additional increases to achieve his 1972 MBR, as distinguished from the owner who applies for a biennial recalculation. Alternatively, petitioner argues that the statute should be so interpreted as to require an O&M expenditure equivalent to the MBR being collected. Thus, in the instant proceeding petitioner asserts that since it was only collecting 70% of its MBR, it should only

be required to expend $ 7,099.72 for O&M (i.e., 90% of 70% of $ 11,269.40). Both sides now agree that there was no justification for the exception granted by Special Term to petitioner.

Section Y51-5.0 (subd. a, par. [4]) of the Administrative Code requires the city rent agency to adjust the existing rents, effective January 1, 1974, and biennially thereafter to reflect economic changes in the pertinent MBR components. We find no basis for an interpretation which would permit a landlord to circumvent the requirement of submitting an O&M certification, before he obtained a 1974 increase, by merely requesting a continuation of his 7 1/2% increases **[***12]** until his 1972 MBR is obtained instead of seeking a recalculation. Such a construction of the statute would enable a landlord to avoid any expenditures for O&M, which clearly contravenes the legislative intent, as expressed in the report of the City Council's Committee on Housing:

"Maximum rents will be recomputed every two years as provided in the bill, rather than annually as proposed by the Administration. Furthermore, commencing on January 1, 1974, the City Rent Agency is required to examine every landlord's books and financial records once every three years to determine what his actual expenditures for operation and maintenance are, and if there are any significant deviations in actual expenditures and the cost allowance, to appropriately adjust the maximum rent. Furthermore, the Agency is required to establish maximum allowances for types of housing on the **[*422]** basis of such actual costs to assure that a landlord may not overimprove or overmaintain his property at the tenant's expense. This required opening of the books and adjustment of individual rents in the event of significant deviations from the cost allowance was deemed essential by the Council to prevent the **[***13]** indolent landlord from obtaining the same rent for the same type of building as the conscientious landlord who was actually expending such amount.

"In order to obtain biennial increases in rent the landlord must certify that he has expended at least 90 per cent of the cost **[**589]** allowance collected for his type of building. Furthermore, six months before an increase is due the landlord must certify that he has corrected all of the rent impairing violations against his building and 80 per cent of all other violations or he must agree to place all income from the building in trust for such purposes in accordance with a contract he enters into with the City Rent Agency." (City Council Minutes, July 26, 1970, pp. 2998-9.)

What clearly appears, therefore, is the requirement that 1972 increases under MBR are conditioned on continued maintenance of essential services and the removal of housing violations, and that biennial increases thereafter are conditioned on such factors plus a specific standard of expenditure for O&M. Accordingly, petitioner's first argument is unsound.

However, we find merit in petitioner's second contention. Although the statute appears at first blush to **[***14]** leave no room for construction, we nevertheless conclude that its literal application to this petitioner, and others similarly situated, would lead to an absurd and unintended result.

The Council Committee's own report referred to the "cost allowance collected" in reference to the 90% expenditure requirement; and we do not find such phrase limited, as respondent urges, to a particular type of building.

In reaching our determination, we have not overlooked those decisions which require us to read and give effect to statutes as written (*Lawrence Constr. Corp. v. State of New York, 293 N. Y. 634*), to refrain from resorting to conjecture when confronted with clear and unambiguous statutory language (*Meltzer v.*

Koenigsberg, 302 N. Y. 523) and to give due weight to administrative construction (*Matter of Howard v. Wyman, 28 N Y 2d 434*).

However, we are not obliged to follow literal language where to do so would thwart the obvious legislative intent and lead to unexpected and absurd results. (*Matter of Chatlos v. McGoldrick, [*423] 302 N. Y. 380*.) Our reading of the statute, in the context of the legislative intent and the over-all objective of the **[***15]** MBR program, persuades us that the required expenditure for O&M of a building may be reduced to reflect the ratio between the full MBR for the building and the amount of rent increases under MBR the landlord is permitted to collect. The indicated legislative concern with the landlord's physical plant was counterbalanced by a desire not to overburden his tenant. The limitation on the landlord's return requires a commensurate reduction in mandated maintenance expenditures to avoid an unreasonable and arbitrary consequence.

Accordingly, the judgment of Supreme Court, New York County (Fine, J.), entered February 27, 1974, should be reversed, on the law, without **[**590]** costs or disbursements, the petition granted to the extent hereinabove indicated and the matter remanded to respondent Rent Commissioner for further proceedings consistent herewith.

Settle order on notice.

Judgment, Supreme Court, New York County, entered February 27, 1974, unanimously reversed, on the law, without costs and without disbursements, the petition granted to the extent indicated in the opinion of this court and the matter remanded to respondent Rent Commissioner for further proceedings consistent herewith.

[*16]** Settle order on notice.

End of Document

Asian Americans for Equality v. Koch

Court of Appeals of New York

June 1, 1988, Argued ; July 7, 1988, Decided

No Number in Original

Reporter
72 N.Y.2d 121 *; 527 N.E.2d 265 **; 531 N.Y.S.2d 782 ***; 1988 N.Y. LEXIS 1684 ****

Asian Americans for Equality et al., Appellants. v. Edward I. Koch, as Mayor of the City of New York and Chairman of the Board of Estimate, et al., Respondents

Subsequent History: [**1]** As Amended April 11, 1989.

Prior History: Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered May 5, 1987, which, with two Justices dissenting, modified, on the law and the facts, and, as modified, affirmed an order of the Supreme Court (David B. Saxe, J.; opn *129 Misc 2d 67*), entered in New York County, *inter alia*, denying motions by defendants to dismiss the complaint as to the first, second and third causes of action which concerned the amendment to the New York City Zoning Resolution establishing the Special Manhattan Bridge District and the special permit issued pursuant to that amendment. The modification consisted of granting defendants' motions to dismiss as to the first and second causes of action.

Asian Ams. for Equality v Koch, 128 AD2d 99.

Disposition: Order affirmed, with costs.

Core Terms

zoning, housing, well-considered, exclusionary, municipality, low-cost, cause of action, low-income, City's, Township, Village, developers, rehabilitation, restrictions, facilities, ordinance, Planning, zoning ordinance, zoning law, opportunities, plaintiffs', districts, density, region

Counsel: *Frank J. Barbaro, Earle R. Tockman, Stephen Dobkin, Geoffrey D. H. Smith, Richard Sussman* and *Ann L. Detiere* for appellants. I. Plaintiffs' allegations that the Special Manhattan Bridge District zoning regulations are exclusionary states a cause of action under New York law. *(* *Robert E. Kurzius, Inc. v Incorporated Vil. of Upper Brookville [****7] , 51 NY2d 338, 450 U.S. 1042*; *Suffolk Hous. Servs. v Town of Brookhaven, 70 NY2d 122*; *Group Hous. v Board of Zoning & Appeals, 45 NY2d 266*; *Matter of Golden v Planning Bd., 30 NY2d 359*; *Berenson v Town of New Castle, 38 NY2d 102*; *Udell v Haas, 21 NY2d 463*; *Guggenheimer v Ginzburg, 43 NY2d 268*; *Russell v Trask Co., 125 AD2d 136*.) II. The court below failed to apply the correct standard for pretrial motions to dismiss. *(* *Guggenheimer v Ginzburg, 43 NY2d 268*; *Kaufman v Lilly & Co., 65 NY2d 449*; *Chinese Staff & Workers Assn. v City of New York, 68 NY2d 359*; *Goldsmith v Sternberg, 125 AD2d 365*; *Bryant Ave. Tenants' Assn. v Koch, 127 AD2d 470*; *Rovello v Orofino Realty Co., 40 NY2d 633*; *Four Seasons Hotels v Vinnik, 127 AD2d 310*; *Business Assn. v Landrieu, 660 F2d 867*; *Matter of Save the Pine Bush v City of Albany, 70 NY2d 193*; *Berenson v Town*

of New Castle, 38 NY2d 102.) III. The court below misapplied the requirements of *Berenson v* Town of New Castle to the Special Manhattan Bridge District. (Berenson v Town of New Castle, 38 NY2d 102; Euclid v Ambler Co., 272 U.S. 365; Village of Belle Terre v Boraas **[****8]** , 416 U.S. 1; Suffolk Hous. Servs. v Town of Brookhaven, 70 NY2d 122.) IV. Plaintiffs' cause of action is not barred by the Statute of Limitations. (Matter of Voelckers v Guelli, 58 NY2d 170; Matter of Save the Pine Bush v City of Albany, 70 NY2d 193; Lutheran Church v City of New York, 27 AD2d 237; Matter of Kovarsky v Housing & Dev. Admin., 31 NY2d 184; De Luca v Kirby, 83 AD2d 621; Chinese Staff & Workers Assn. v City of New York, 68 NY2d 359; Matter of Golden v Planning Bd., 37 AD2d 236, 30 NY2d 359.) V. Plaintiffs seek relief consistent with traditional principles of judicial review. (Udell v Haas, 21 NY2d 463; Berenson v Town of New Castle, 67 AD2d 506; Matter of Golden v Planning Bd., 30 NY2d 359; Robert E. Kurzius, Inc. v Incorporated Vil. of Upper Brookville, 51 NY2d 338.) VI. Plaintiffs are entitled to appeal as of right. (Chinese Staff & Workers Assn. v City of New York, 68 NY2d 359; Lighting Horizons v Kahn & Co., 120 AD2d 648; Leonhart v McCormick, 395 F Supp 1073; Federal Sav. & Loan Ins. Corp. v Director of Revenue, 650 F Supp 1217; Sherry v New York State Educ. Dept., 479 F Supp 1328; Guggenheimer **[****9]** v Ginzburg, 43 NY2d 268; Garvin v Garvin, 306 NY 118; Suffolk Hous. Servs. v Town of Brookhaven, 70 NY2d 122; Robert E. Kurzius, Inc. v Incorporated Vil. of Upper Brookville, 51 NY2d 338, 450 U.S. 1042; Berenson v Town of New Castle, 38 NY2d 102.)

Peter L. Zimroth, Corporation Counsel (Edward F. X. Hart and *Leonard Koerner* of counsel), for Edward Koch and others, respondents. Since plaintiffs' constitutional challenge is not directed to the City's Zoning Resolution but solely to an amendment affecting a small area which already contains primarily low-income housing and since plaintiffs' challenge to the amendment is premised upon an assumption that the New York State Constitution requires a municipality affirmatively to provide for low-income housing, it fails to state a cause of action cognizable under the Constitution or laws of this State. (Matter of Save the Pine Bush v City of Albany, 70 NY2d 193; Matter of Voelckers v Guelli, 58 NY2d 170; Town of Huntington v Park Shore Country Day Camp, 47 NY2d 61; Suffolk Hous. Servs. v Town of Brookhaven, 70 NY2d 122; Robert E. Kurzius, Inc. v Incorporated Vil. of Upper Brookville, 51 NY2d 338; **[****10]** Marcus Assocs. v Town of Huntington, 45 NY2d 501; Euclid v Ambler Co., 272 U.S. 365; Rogers v Village of Tarrytown, 302 NY 115; Matter of Mahoney v O'Shea Funeral Homes, 45 NY2d 719; Shepard v Village of Skaneateles, 300 NY 115.)

Ronald J. Offenkrantz and *Michael H. Smith* for Henry Partners, respondent. I. These proceedings were instituted more than four months after creation of the Special Manhattan Bridge District and more than four months after issuance of the special use permit. Affirmance of the order appealed from is required because this proceeding is untimely. (Matter of Jackson v New York Urban Dev. Corp., 67 NY2d 400; Town of Orangetown v Gorsuch, 718 F2d 29, *cert denied sub nom. Town of Orangetown v Ruckelshaus, 465 U.S. 1099*.) II. Plaintiffs do not state a claim under Berenson. (Berenson v Town of New Castle, 38 NY2d 102; Suffolk Hous. Servs. v Town of Brookhaven, 70 NY2d 122.) III. This action is not moot insofar as Henry Street Partners is concerned; while the special use permit may have been invalidated the constitutional attack on its issuance has not been withdrawn. IV. Plaintiffs may not be entitled to appeal **[****11]** as of right. (*Gillies Agency v Filor, 32 NY2d 759*.)

Leslie Salzman, Shirley Traylor, Esmeralda Simmons, Andrew Scherer, Jocelyne Martinez and *Roger*

Wareham for Ansonia Tenants Coalition, Inc., and others, *amici curiae*. I. New York City is experiencing an extreme shortage in the availability of decent, affordable housing for low- and moderate-income people. *(McCain v Koch, 117 AD2d 198, 70 NY2d 109*.) II. The housing crisis currently prevailing in New York City is creating and exacerbating serious social and medical problems. III. Given New York City's housing crisis and the impact of that crisis, the challenged zoning resolution violates the City's obligation to assure that the housing needs of low-income people are met. *(Euclid v Ambler Co., 272 U.S. 365*; *Berenson v Town of New Castle, 38 NY2d 102*; *Udell v Haas, 21 NY2d 463*; *Suffolk Hous. Servs. v Town of Brookhaven, 70 NY2d 122*; *Tucker v Toia, 43 NY2d 1*; *McCain v Koch, 117 AD2d 198, 70 NY2d 109*; *Matter of Jones v Berman, 37 NY2d 42*; *Matter of LaPorte v Berger, 57 AD2d 425*; *Matter of Rosenfeld v Blum, 82 AD2d 559*; *Matter of Lee v Smith, 43 NY2d 453*.)

Kalman Finkel, **[****12]** *Helaine Barnett, Arthur J. Fried, John E. Kirklin* and *Lynn M. Kelly* for The Legal Aid Society of New York, *amicus curiae*. The challenged zoning resolution violates New York constitutional and statutory requirements that it be part of a well-considered plan to promote the public health, safety and general welfare. *(McCain v Koch, 70 NY2d 109*; *Robert E. Kurzius, Inc. v Incorporated Vil. of Upper Brookville, 51 NY2d 338*; *Berenson v Town of New Castle, 38 NY2d 102*; *Suffolk Hous. Servs. v Town of Brookhaven, 70 NY2d 122*; *Euclid v Ambler Co., 272 U.S. 365*; *Chinese Staff & Workers Assn. v City of New York, 68 NY2d 359*; *Matter of Save the Pine Bush v City of Albany, 70 NY2d 193*.)

Judges: Simons, J. Chief Judge Wachtler and Judges Kaye, Alexander, Titone, Hancock, Jr., and Bellacosa concur.

Opinion by: SIMONS

Opinion

[*126] [*784] [**267] OPINION OF THE COURT**

Plaintiffs instituted this action to challenge an amendment to the New York City Zoning Resolution which established the Special Manhattan Bridge District in Chinatown. Plaintiffs either live or work in Chinatown or represent those who do and the gist of their complaint is that the new zoning will displace residents who require **[****13]** low-income housing because it will eliminate some of the existing housing without providing sufficient incentives for the development of affordable new housing to replace it. They seek judgment (1) declaring the Special Manhattan Bridge District amendment unconstitutional because it was not enacted pursuant to a well-considered plan and (2) imposing a mandatory injunction compelling the City to create a zoning plan for the District "which provides for and mandates a realistic opportunity for the construction of low income housing". A divided Appellate Division dismissed the complaint finding the first and second causes of action failed to state a claim and the third cause of action, seeking to enjoin development of Henry Street Towers, moot after our decision in *Chinese Staff & Workers Assn. v City of New York (68 NY2d 359*). On this appeal, plaintiffs seek reinstatement of their first and second causes of action. They contend in their complaint that the amendment results in exclusionary zoning and, referring specifically to *Southern Burlington County N.A.A.C.P v Township of Mount Laurel (92 NJ 158, 456 A2d 390 [Mount Laurel* **[****14]** *II])*, they seek affirmative relief

similar to the relief fashioned in that decision. On **[*127]** appeal to this court they have modified their argument, however, placing principal reliance on our decision in *Berenson v Town of New Castle (38 NY2d 102)*.

I

Plaintiff Asian Americans for Equality is a not-for-profit corporation engaged in supporting the rights of men and women of all races for improved housing, job opportunities and working conditions. The individual plaintiffs are now or formerly were residents of the area known as Chinatown, a center of Chinese culture and services in New York City where persons of Chinese and Asian ancestry reside. The individual plaintiffs allege either that they live in substandard housing there or that they were compelled to leave because of their inability to find suitable housing. They are persons of low income and none own property **[***785]** **[**268]** in Chinatown. [1] Defendants are the City of New York, various officers and agencies of the City and a private developer.

[**15]** The Special Manhattan Bridge District was created in 1981 by amendment to the City's Zoning Resolution. The District encompasses 14 blocks in the area of the Manhattan Bridge and includes a part, but by no means all, of Chinatown. One area south of Monroe and Madison Streets and west of St. James Place, was excluded from the District because it had been redeveloped with public or publicly assisted housing. Others were excluded because they were commercial.

The amendment was preceded by a study of the Manhattan Bridge area which confirmed that Chinatown contains a substantial proportion of high density, substandard housing occupied by low-income groups who work there in the garment, tourist and related industries. The amendment sought to correct these housing conditions by encouraging construction of new residential facilities, the rehabilitation of existing structures and the expansion of community facilities. To achieve those aims, it authorized development of mixed-income housing on land vacant or substantially vacant at the **[*128]** time the amendment was enacted. [2] The amendment provides that new construction must be authorized by special permit and regulated by a system **[****16]** of bonus points permitting increased density in new housing units for those developers who agree to do one or a combination of the following: (1) donate space for community facilities such as senior citizen or day care centers, educational facilities, or a combination of these; (2) construct low-income dwelling units; or (3) rehabilitate existing substandard housing. Defendant Henry Street Partners obtained a permit to build mixed-income housing with a greater floor area than otherwise permitted on vacant land on condition that it provide community facility space on the first floor and contribute $ 500,000 to help fund low-income housing in the District.

Recognizing that the stated goals of the City's study of the Manhattan Bridge **[****17]** area and the amendment creating the District are "very similar" to their own, plaintiffs nevertheless contend that the amendment is invalid because the means adopted to achieve them are inadequate. They charge that the bonuses awarded to permit high density housing favor moderate and high-income development and do not

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[1] Plaintiffs contend that the amendment violates their rights under the New York State Constitution. Their claims rest on due process and equal protection grounds. They have standing to raise these issues *(see, Suffolk Hous. Servs. v Town of Brookhaven, 63 AD2d 731, 109 AD2d 323, affd 70 NY2d 122; Long Is. Region N.A.A.C.P. v Town of N. Hemsptead, 102 Misc 2d 704, affd* ***75 AD2d 842****; cf., Warth v Seldin, 422 U.S. 490; see generally*, Tribe, American Constitutional Law § 3-18, at 132-134 [2d ed]).

[2] A site is substantially vacant if less than 10% of the zoning lot contains residential buildings. New construction may not be authorized for such sites, however, until the developer submits an approved relocation plan and unless it affirms that it has not harassed the tenants to relocate.

provide sufficient incentive to encourage construction of low-cost housing. They ask the court to require defendants to (1) improve existing housing in the Special Manhattan Bridge District, (2) provide more affordable low-income housing, (3) minimize the adverse affects of rehabilitation and (4) assure that the present residents who wish to stay in Chinatown are able to do so.

Defendants assert that the complaint fails to state claims for legal relief because (1) the amendment creating the Special Manhattan Bridge was in accord with a well-considered plan for the City of New York and (2) the City has no obligation to zone specific areas for low-income housing nor any constitutional obligation to affirmatively provide substantive guarantees of low-income housing in Chinatown.

II

Zoning, as first devised, was a means of dividing the whole territory of a municipality **[****18]** into districts and imposing restrictions on the uses permitted in them. Restrictions **[***786]** on size and **[*129]** density of construction **[**269]** to control fire and traffic hazards, for example, or to eliminate offensive uses from residential districts were deemed a reasonable exercise of the police power *(see, Euclid v Ambler Co., 272 U.S. 365)*. Such traditional zoning is both restrictive and passive, providing minimum encouragement for development of the municipality as a whole.

Special district zoning -- exemplified by the Manhattan Bridge District questioned here -- represents a significant departure from this traditional *Euclidian* zoning concept. It is based on the idea that zoning can be used as an incentive to further growth and development of the community rather than as a restraint. It is one of several imaginative legislative schemes intended to encourage, or even coerce, private developers into making the City a more pleasant and efficient place to live and work. Incentive zoning is based on the premise that certain uneconomic uses and amenities will not be provided by private development without economic incentive. The economic incentive frequently used, **[****19]** and the one used in the Manhattan Bridge District amendment, is the allowance of greater density within a proposed building, more floor area than permitted under general zoning rules, if developers provided certain amenities for the community. The amendment awards bonus points which entitle developers to expand their construction in return for increased construction of other, uneconomic projects such as low-cost housing, slum rehabilitation or public facilities. The bonus awarded for each amenity must be carefully structured, however, to make the cost-benefit equation favorable enough to induce the developer to provide the desired uneconomic benefit to the city but sufficiently limited to avoid a windfall to it.

New York City has used these special district incentive programs to develop uneconomic but necessary uses since 1961. By means of them they have encouraged the preservation and redevelopment of the Broadway Theatre District, protected a major investment in the Special Lincoln Square District, preserved historic shopping areas such as Fifth Avenue and provided relocation housing in the Lower Third Avenue District *(see generally*, Elliott and Marcus, *From Euclid to Ramapo:* **[****20]** *New Directions in Land Development Controls*, 1 Hofstra L Rev 56; Marcus and Groves, The New Zoning: Legal, Administrative, and Economic Concepts and Techniques, at 200 *et seq*. [1970]; 2 Rathkopf, Zoning and Planning § 17.06 [2] [4th ed]). The districts created are not traditional zoning districts, narrowly limited to particular **[*130]** uses, but broad-based plans intended to preserve and enhance troubled areas of the City which, because of their singular characteristics, are important to its wealth and vitality. The Special Manhattan

Bridge District was created to protect a badly deteriorated part of the unique area of New York City known as Chinatown.

III

A

In plaintiffs' first cause of action, they allege that the Special Manhattan Bridge District enactment is "piecemeal" legislation. Piecemeal zoning exists when only part of the land within a municipality is regulated by the zoning laws *(see*, 1 Anderson, New York Zoning Law and Practice §§ 5.03, 5.10 [3d ed]). However, the entire City of New York is zoned; indeed, New York City enacted the first comprehensive zoning law in the Nation in 1916. The litigation before us simply relates to **[****21]** one of many amendments to it. Manifestly, it is not "piecemeal" legislation.

Plaintiffs further allege in the first cause of action that the amendment is "not comprehensive in outlook" and that the study on which it is based is not part of a well-considered plan. The pleadings refer to the amendment only in this one conclusory assertion; the remaining several paragraphs of the cause of action challenge the planning study which preceded it. The plan is attacked as "not well considered", based upon insufficient information, "not related" to the District, "limited", and not addressed to the community. The validity of the amendment is not dependent solely **[***787]** upon the adequacy of the study of the **[**270]** Manhattan Bridge area, however, but on all the City's zoning policies and plans *(see, Udell v Haas, 21 NY2d 463*) and nowhere in the complaint have plaintiffs alleged that the City has failed to plan for the balanced and well-ordered development of the community or that it has neglected to zone the City to provide for the needs of its inhabitants or those in the region. Accordingly, the first cause of action does not state a legal claim for relief.

Moreover, plaintiffs have **[****22]** not only failed to plead a cause of action based upon the City's failure to follow a well-considered plan but it is clear that under established law they have none *(see, Guggenheimer v Ginzburg, 43 NY2d 268, 275*; *Foley v D'Agostino, 21 AD2d 60, 64-65)*.

[*131] The power to zone is derived from the Legislature and must be exercised in the case of towns and villages in accord with a "comprehensive plan" *(see*, *Town Law § 263*; *Village Law § 7-704*) or in the case of cities in accord with a "well considered plan" (*General City Law § 20 [25]*). The requirement of a plan is based on the premise that "zoning is a means rather than an end" (1 Anderson, New York Zoning Law and Practice § 5.03, at 158 [3d ed]). The function of land regulation is to implement a plan for the future development of the community *(Berenson v Town of New Castle, 38 NY2d 102, 109*, *supra)*. Its exercise is constitutional only if the restrictions are necessary to protect the public health, safety or welfare. The requirement of a comprehensive or well-considered plan not only insures that local authorities act for the benefit of the community as a **[****23]** whole but protects individuals from arbitrary restrictions on the use of their land *(see, Udell v Haas*, 21 NY2d, *supra, at 469*; *see*, Note, *Comprehensive Plan Requirement in Zoning*, 12 Syracuse L Rev 342).

A well-considered plan need not be contained in a single document; indeed, it need not be written at all. The court may satisfy itself that the municipality has a well-considered plan and that authorities are acting in the public interest to further it by examining all available and relevant evidence of the municipality's land use policies *(Udell v Haas, supra, at 470-472*). Zoning legislation is tested not by whether it defines

a well-considered plan but by whether it accords with a well-considered plan for the development of the community. When a zoning ordinance is amended, the court decides whether it accords with a well-considered plan in much the same way, by determining whether the original plan required amendment because of the community's change and growth and whether the amendment is calculated to benefit the community as a whole as opposed to benefiting individuals or a group of individuals *(see, Randolph v Town of Brookhaven, 37 NY2d 544, 547*; **[****24]** *Matter of Town of Bedford v Village of Mount Kisco, 33 NY2d 178, 187-188*, *rearg denied 34 NY2d 668*).

Because zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of constitutionality and the burden rests on the party attacking them to overcome that presumption beyond a reasonable doubt *(Matter of Town of Bedford v Village of Mount Kisco, supra, at 186*; *Shepard v Village of Skaneateles, 300 NY 115, 118)*. In claims such as this, the analysis follows traditional due process rules: if the **[*132]** zoning ordinance is adopted for a legitimate governmental purpose and there is a "'reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end'", it will be upheld *(see, McMinn v Town of Oyster Bay, 66 NY2d 544, 549*, quoting *French Investing Co. v City of New York, 39 NY2d 587, 596*, *rearg denied 40 NY2d 846*, *appeal dismissed 429 U.S. 990*). **[***788]** An amendment which has been **[**271]** carefully studied, prepared and considered meets the general requirement for **[****25]** a well-considered plan and satisfies the statutory requirement *(Randolph v Town of Brookhaven, supra, at 547*; *Matter of Town of Bedford v Village of Mount Kisco, supra, at 188-189*; *see*, 1 Anderson, New York Zoning Law and Practice § 5.03, at 161-162 [3d ed]). The court will not pass on its wisdom *(see, Matter of Voelckers v Guelli, 58 NY2d 170, 177)*.

Manifestly, this legislation was reasonably related to its goals: the development of needed housing and the rehabilitation of existing housing in one area of Chinatown. There is no allegation that it was not consistent with the City's general planning or that the City had failed to make provision for low-cost housing. That being so, and inasmuch as the amendment was enacted after study and consideration *(see, Lai Chun Chan Jin v Board of Estimate, 62 NY2d 900* [reciting the preenactment procedures of the present legislation]), it met the requirements for a well-considered plan set forth in *Randolph v Town of Brookhaven (supra)* and *Matter of Town of Bedford v Village of Mount Kisco (supra)*.

B

Plaintiffs' second **[****26]** cause of action seeks a mandatory injunction compelling the City to amend the Special Manhattan District Zoning to create greater opportunity for the construction of low-income housing. Plaintiffs do not attack the purpose of the amendment but rather the adequacy of the legislative scheme. They claim that the incentives offered will not provide sufficient low-cost housing because the rewards for doing so are too low compared to the rewards the amendment authorizes for other amenities. As pleaded, the cause of action seeks relief from exclusionary zoning similar to that granted in *Southern Burlington County N.A.A.C.P v Township of Mount Laurel (67 NJ 151, 336 A2d 713*, *appeal dismissed 423 U.S. 808 [Mount Laurel I]*; *92 NJ 158, 456 A2d 390 [Mount Laurel II], supra)*: a mandatory injunction compelling the City to correct the problem. On appeal plaintiffs rely primarily on **[*133]** the rule in *Berenson v Town of New Castle (38 NY2d 102*, *supra)*, a decision of this court which held that a zoning ordinance would be annulled if it did not include districts for multiple housing **[****27]** when community and regional needs required such housing. *Berenson* did not mandate affirmative relief, nor have we had occasion to do so since that decision *(see*, Anderson & Mayo, *Land Use Control*, 35 Syracuse L Rev 485, 488-489; *see also, Blitz v Town of New Castle, 94 AD2d 92, 98-99*; *see generally*,

Nolon, *A Comparative Analysis of New Jersey's Mount Laurel Cases with the Berenson Cases in New York*, 4 Pace Env L Rev 3).

Exclusionary zoning may occur either because the municipality has limited the permissible uses within a community to exclude certain groups *(see, e.g., Dowsey v Village of Kensington, 257 NY 221)*, or has imposed restrictions so stringent that their practical effect is to prevent all but the wealthy from living there *(see, Levitt v Incorporated Vil. of Sands Point, 6 NY2d 269*; *and see generally*, Annotation, *Exclusionary Zoning*, *48 ALR3d 1210*). It is a form of racial or socioeconomic discrimination which we have repeatedly condemned *(see, e.g., Suffolk Hous. Servs. v Town of Brookhaven, 70 NY2d 122*; *Robert E. Kurzius, Inc. v Incorporated Vil. of Upper Brookville, 51 NY2d 338, 345*; **[****28]** *Berenson v Town of New Castle, supra; Matter of Golden v Planning Bd., 30 NY2d 359*, *appeal dismissed 409 U.S. 1003*). If the party attacking the ordinance establishes that it was enacted for an exclusionary purpose or has an exclusionary effect, then the ordinance will be annulled *(see Robert E. Kurzius, [***789] [**272] Inc. v Incorporated Vil. of Upper Brookville, supra)*.

In *Berenson* we reviewed an ordinance which made no provision for low- or moderate-income housing in undeveloped areas of the municipality. We held that there must be a legitimate basis for such exclusions; limitations on development will be permitted only if the ordinance satisfies the needs of the community and also reflects a consideration of regional needs and requirements. We stated, however, that our concern was not "whether the zones, in themselves, are balanced communities, but whether the town itself, as provided by its zoning ordinances, will be a balanced and integrated community" *(Berenson v Town of New Castle, supra, at 109)*. Constitutional principles are not necessarily offended if one or several uses are not included **[****29]** in a particular area or district of the community as long as adequate provision is made to accommodate the needs of the community and the **[*134]** region generally *(see, Town of Pompey v Parker, 53 AD2d 125, 127*, *affd 44 NY2d 805)*.

Applying these decisions plaintiffs' second cause of action does not state a claim of exclusionary zoning. New York City does not now nor has it ever excluded low-cost housing in Chinatown or in the City generally. Low-income families now live in the District and will continue to live there, hopefully in rehabilitated or newly constructed low-cost housing, if the purposes of the amendment are fulfilled.

Plaintiffs nevertheless contend that the amendment must be annulled because its effect will be exclusionary. They assert that not only will presently available sites be limited to luxury housing but they predict that new development will force them from their homes and, because the change in zoning favors construction of mixed-income apartments, present structures will be replaced by living accommodations they cannot afford. They note that the constitutional validity of zoning rests on the exercise of the police **[****30]** power for the general welfare and that the general welfare is no more abused by zoning which excludes the poor from a community than by zoning which forces them out of the community. Thus, their complaint seeks an order of the court compelling the City to provide low-cost housing, relief similar to that afforded in the *Mount Laurel* cases. Having failed to sustain that argument in the Appellate Division, they have adopted in this court the position of the Appellate Division dissenters that the *Berenson* rule prohibiting exclusionary zoning must be modified to define the "community" for zoning purposes as the 14-block area of the Special Manhattan Bridge District.

Berenson cannot reasonably be extended to the facts presented here. The City is the governing authority, not the District and this action challenges its laws. When enacting them, City officials must address the needs of the broader community and must act not only for benefit of the District and its residents, but for

the benefit of the City as a whole. Requiring City planners to include particular uses in every district may be truly obnoxious to the City's over-all development, however, and applying the *Berenson* **[****31]** rule to a district as small as this 14-block area could defeat the intended purpose of special district zoning. The interpretation plaintiffs seek also runs counter to the rationale underlying the *Berenson* decision. That holding was deemed necessary to avoid the parochialism of elected local officials in communities which **[*135]** excluded minorities and socioeconomic groups from undeveloped areas of their municipalities to cater to a favored constituency. But here the question of exclusion relates to a Special District in the most highly developed municipality in the Nation, one which already has made extensive allowance for a variety of housing opportunities within its boundaries.

Nor have plaintiffs stated a claim for affirmative relief. The *Mount Laurel* decisions *(supra)*, which they rely upon, addressed a substantially different problem, the zoning of a suburban township approximately 20 miles from centers of employment in Camden and Philadelphia. The New Jersey Supreme Court held that the township's zoning systematically excluded poor and middle-income persons from the community by means of artificially strict, **[***790]** **[**273]** cost-generating zoning restrictions *(e.g.*, **[****32]** minimum lot sizes, prohibition against mobile homes and multiple housing) and that it therefore violated the Equal Protection Clause of the *State Constitution (67 NJ 151, 336 A2d 713*, *supra)*. The township responded to this decision by rezoning for low-cost housing three small, widely scattered areas (less than .25% of its land) suffering from swampy soil conditions, high noise levels and proximity to industrial uses. On a subsequent appeal the court ordered Mount Laurel to amend its ordinance to "create realistic opportunities" for low-cost housing in the township by means of government subsidies and inclusionary zoning. The court acknowledged that it was acting legislatively in determining the use appropriate to the area, and imposing a remedy (92 NJ, *supra*, at 243), but considered the action necessary because of the failure of the local government to address the problem. In doing so, it noted that the Legislature had directed establishment of a Statewide blueprint for the use and development of the land in New Jersey and that State planners had prepared a master plan in response to the statute, the State Development Guide Plan, designating **[****33]** Mount Laurel Township as a "growth" area. The affirmative relief granted by the court was consistent with the planners' classification of the Mount Laurel Township *(see*, *92 NJ 158, 220-248, 456 A2d 390, 421-435*, *supra)*.

Both *Mount Laurel* and *Berenson* examined the limits expanding suburban communities could impose on the type of growth within their boundaries. This action, however, concerns a densely developed area in New York City with substantial low-cost housing, deteriorating to be sure, but bordering on an area of Chinatown containing modern public housing and in a City containing much more. Plaintiffs seek not to **[*136]** overcome exclusionary practices or to correct some past inequity by implementing an existing lawful State-wide legislative policy, as in *Mount Laurel*, but to overturn the considered decision of the executive and legislative branches of New York City's government because they believe the City's chosen remedy for this established area will prove inadequate.

We recognize plaintiffs' concerns over displacement and gentrification in the Chinatown area. Indeed, in a prior appeal involving the Special Manhattan Bridge **[****34]** District, we granted summary judgment annulling the special permit to Henry Street Partners and directed that construction could not commence until the City addressed the potential displacement of inhabitants and businesses before authorizing the work to progress *(see, Chinese Staff & Workers Assn. v City of New York, 68 NY2d 359*, *supra)*. But plaintiffs' attack on the zoning laws, seeks much broader relief, a rewriting of the ordinance itself.

In our prior decisions we have not compelled the City to facilitate the development of housing specifically affordable to lower-income households; a zoning plan is valid if the municipality provides an array of opportunities for housing facilities *(see, Suffolk Hous. Servs. v Town of Brookhaven, 70 NY2d 122, supra)*. We conclude that we should not extend that rule in this case. Those charged with the duty of addressing the problems of Chinatown chose to rezone the Manhattan Bridge area and provide housing incentives they deemed most suitable. They have attempted to use incentive zoning to provide realistic housing opportunities which include new apartments for the poor. Nothing in the legislative **[****35]** plan suggests that it will fail its purpose and plaintiffs do not allege that the solution is arbitrary or capricious or undertaken for an improper purpose, only that they would have zoned the area differently, or better, to avoid a potential future problem. Their allegations fail to state a cause of action entitling them to judicial relief.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

End of Document

24-12-A & 147-12-A
APPLICANT – Richard G. Leland, Esq./Fried Frank, for 12th Avenue Realty Holding Corp., owner; Mizey Realty Co., Inc., lessee.
SUBJECT – Application February 2, 2012 and May 8, 2012 – Appeal challenging the Department of Buildings' determination that outdoor accessory signs and structures are not a legal non-conforming use pursuant to §52-00. M1-2 zoning district.
PREMISES AFFECTED – 2368 12th Avenue, bounded by Henry Hudson Parkway, West 134th Street, 12th Avenue and 135th Street, Block 2005, Lot 32, Borough of Manhattan.
COMMUNITY BOARD #9M
APPEARANCES –
For Applicant: Richard G. Leland.
ACTION OF THE BOARD – Appeal denied.
THE VOTE TO GRANT –
Affirmative: 0
Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez 5
THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board in response to Notice of Sign Registration Rejection letters from the Borough Commissioner of the Department of Buildings ("DOB"), dated January 3, 2012, denying Application Nos. 1005504 and 1005605 from registration for signs at the subject site (the "Final Determinations"), which read, in pertinent part:

> The Department of Buildings is in receipt of additional documentation submitted in response to the Deficiency Letter from the Signs Enforcement Unit and in connection with the application for registration of the above-referenced sign. Unfortunately, we find this documentation inadequate to support the registration of the sign and as such, the sign is rejected from registration. This sign will be subject to enforcement action 30 days from the issuance of this letter; and

WHEREAS a public hearing was held on this application on June 12, 2012, after due notice by publication in *The City Record*, and then to decision on August 7, 2012; and

WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan, Vice-Chair Collins, Commissioner Hinkson, and Commissioner Ottley-Brown; and

WHEREAS, the subject site is located on the block bounded by the Henry Hudson Parkway to the west, West 134th Street to the south, 12th Avenue to the east, and West 135th Street to the north, in an M1-2 zoning district within the Special Manhattanville Mixed Use District; and

WHEREAS, the site has a lot area of approximately 15,670 sq. ft. and is occupied by a one-story building with a floor area of 3,000 sq. ft. and an illuminated double-faced ground sign with each face measuring 20 feet by 60 feet (1,200 sq. ft.) beginning at a height of approximately 85 feet above grade and rising to a height of approximately 105 feet above grade (the "Signs"); one sign faces to the north and one sign faces to the south; and

WHEREAS, the Signs are located within 200 feet of the Henry Hudson Parkway, a designated arterial highway pursuant to Zoning Resolution Appendix H, and within 200 feet of Riverbank State Park, a "public park" pursuant to ZR § 12-10; and

WHEREAS, this appeal is brought on behalf of the owner of the sign structure (the "Appellant"); and

WHEREAS, the Appellant seeks a reversal of DOB's rejection of the Appellant's registration of the signs based on DOB's determination that the Signs are not permitted to be used as non-conforming accessory business signs; and

WHEREAS, DOB appeared and made submissions in opposition to this appeal; and

PROCEDURAL HISTORY

WHEREAS, the Appellant asserts that the Signs were constructed in 1999 pursuant to three permits that were approved by DOB on February 19, 1999 (collectively, the "Permits"): (1) Permit 102051823-01-AL, which approved the sign structure; (2) Permit 102051805-01-SG, which approved an "illuminated accessory business sign"; and (3) Permit 102051814-01-AL, which also approved an "illuminated accessory business sign"; and

WHEREAS, the Appellant represents that beginning on April 1, 1999, the Signs were put into use to display copy in connection with the use of the building on the site for storage and staging of display fixtures used by Tommy Hilfiger U.S.A., Inc. ("Tommy Hilfiger") in its product showrooms and in department stores carrying Tommy Hilfiger licensed clothing and products; and

WHEREAS, the Appellant asserts that the Signs were used exclusively and continuously to display copy in connection with Tommy Hilfiger's use of the site through the end of May 2008, and the Tommy Hilfiger copy was removed from the Signs between May 31 and June 5, 2008; and

WHEREAS, the Appellant represents that Wodka, LLC ("Wodka") has leased the subject site beginning May 1, 2010 through the present, using the subject building for the storage of promotional materials and staging of Wodka promotional activities, and using the Signs for display of copy connected with its use of the site; and

WHEREAS, on or about September 1, 2009, pursuant to the 2008 Building Code and Chapter 49 of Title 1 of the Rules of the City of New York ("RCNY"), the Appellant filed to register the Signs as non-conforming accessory signs; and

WHEREAS, by letter dated June 2, 2011, DOB informed the Appellant that its filing failed to establish that the accessory sign was: (1) legally created before February 27, 2001 (the effective date of the applicable amendment to the Zoning Resolution); and (2) not used to display advertising; and

24-12-A & 147-12-A

WHEREAS, by letter dated August 11, 2011, the Appellant submitted additional photographs and contracts regarding the Signs; and

WHEREAS, DOB determined that the additional materials failed to establish the existence of a non-conforming accessory sign eligible for registration, and issued the Final Determinations on January 3, 2012; and

RELEVANT STATUTORY PROVISIONS

ZR § 12-10 *Definitions*

Accessory use, or accessory (2/2/11)

An "accessory use":

(a) is a #use# conducted on the same #zoning lot# as the principal #use# to which it is related (whether located within the same or an #accessory building or other structure#, or as an #accessory use# of land), except that, where specifically provided in the applicable district regulations or elsewhere in this Resolution, #accessory# docks, off-street parking or off-street loading need not be located on the same #zoning lot#; and

(b) is a #use# which is clearly incidental to, and customarily found in connection with, such principal #use#; and

(c) is either in the same ownership as such principal #use#, or is operated and maintained on the same #zoning lot# substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal #use#.

When "accessory" is used in the text, it shall have the same meaning as #accessory use#.

* * *

Sign, advertising (4/8/98)

An "advertising sign" is a #sign# that directs attention to a business, profession, commodity, service or entertainment conducted, sold, or offered elsewhere than upon the same #zoning lot# and is not #accessory# to a #use# located on the #zoning lot#.

* * *

ZR § 42-55 *Additional Regulations for Signs Near Certain Parks and Designated Arterial Highways (2/27/01)*

…(a) Within 200 feet of an arterial highway or a #public park# with an area of one-half acre or more, #signs# that are within view of such arterial highway or #public park# shall be subject to the following provisions:

(1) no permitted #sign# shall exceed 500 square feet of #surface area#; and

(2) no #advertising sign# shall be allowed nor shall an existing #advertising sign# be structurally altered, relocated or reconstructed;

* * *

ZR § 52-11 – *Continuation of Non-Conforming Uses/General Provisions (12/15/61)*

A #non-conforming use# may be continued, except as otherwise provided in this Chapter.

* * *

ZR § 52-61 – *Discontinuance/General Provisions (10/7/76)*

If, for a continuous period of two years, either the #nonconforming use# of #land with minor improvements# is discontinued, or the active operation of substantially all the #non-conforming uses# in any #building or other structure# is discontinued, such land or #building or other structure# shall thereafter be used only for a conforming #use#. Intent to resume active operations shall not affect the foregoing . . .

* * *

Building Code § 28-502.4 – Reporting Requirement

An outdoor advertising company shall provide the department with a list with the location of signs, sign structures and sign locations under the control of such outdoor advertising company in accordance with the following provisions:

(1) The list shall include all signs, sign structures and sign locations located (i) within a distance of 900 linear feet (274 m) from and within view of an arterial highway; or (ii) within a distance of 200 linear feet (60 960 mm) from and within view of a public park with an area of ½ acre (5000 m) or more…

* * *

RCNY § 49-15 – Sign Inventory to be Submitted with Registration Application

…(d)(5) Each sign shall be identified as either "advertising" or "non-advertising." To the extent a sign is a non-conforming sign, it must further be identified as "non-conforming advertising" or "non-conforming non-advertising." A sign identified as "non-conforming advertising" or "non-conforming non-advertising" shall be submitted to the Department for confirmation of its non-conforming status, pursuant to section 49-16 of this chapter.

* * *

RCNY § 49-16 – Non-conforming Signs

(a) With respect to each sign identified in the sign inventory as non-conforming, the registered architect or professional engineer shall request confirmation of its non-conforming status from the Department based on evidence submitted in the registration application. The Department shall review the evidence submitted and accept or deny the request within a reasonable period of time. A sign that has been identified as non-

conforming on the initial registration application may remain erected unless and until the Department has issued a determination that it is not non-conforming…

* * *

RCNY § 49-43 – Advertising Signs

Absent evidence that revenue from the sign is clearly incidental to the revenue generated from the use on the zoning lot to which it directs attention, the following signs are deemed to be advertising signs for the purposes of compliance with the Zoning Resolution:

(a) Signs that direct attention to a business on the zoning lot that is primarily operating a storage or warehouse use for business activities conducted off the zoning lot, and that storage or warehouse use occupies less than the full building on the zoning lot; or

(b) All signs, other than non-commercial, larger than 200 square feet, unless it is apparent from the copy and/or depictions on the sign that it is used to direct the attention of vehicular and pedestrian traffic to the business on the zoning lot.

* * *

THE APPELLANT'S POSITION

a. Lawful Establishment and Continuous Use

WHEREAS, the Appellant contends that the Final Determination should be reversed because (1) the Signs were lawfully established in 1999 as an accessory sign as defined by ZR § 12-10 and may therefore be maintained as a legal non-conforming accessory sign pursuant to ZR § 52-11, and (2) the Signs have operated as accessory signs with no discontinuance of two years or more since their lawful establishment; and

WHEREAS, in support of the lawful establishment of the Signs in 1999, the Appellant relies on (1) the 1999 Permits, (2) a 1999 media contract between the Appellant and Tommy Hilfiger for the use of the Signs, dated December 24, 1998, which commenced on April 1, 1999 and expired on March 31, 2002 (the "1999 Media Contract"), (3) a license agreement between the Appellant and Tommy Hilfiger for the use of the site for storage and/or warehousing of Tommy Hilfiger's products, which commenced on January 4, 1999 and expired at the end of the 1999 Media Contract; and (4) an affidavit from Peter Connolly, the President of Marketing for Tommy Hilfiger from 1998 until September 2006, stating that from January 4, 1999 through his departure from the company in September 2006, the subject building was used by Tommy Hilfiger for "the storage, staging and repair of…display fixtures as well as administrative functions related to such use…" (the "Tommy Hilfiger Affidavit"); and

WHEREAS, in support of the continuous use of the Signs since 1999, the Appellant submitted a timeline with supporting evidence consisting of media contracts, license agreements, lease agreements, affidavits, and photographs, for each year from 1999 through 2012; and

WHEREAS, the Appellant asserts that at the time the Signs were erected in 1999, the Zoning Resolution permitted accessory signs in the subject M1-2 zoning district with no restriction as to size, however, on February 27, 2001 new zoning regulations were enacted under ZR § 42-55 imposing a 500 sq. ft. area limitation on signs within 200 feet and within view of arterial highways and public parks; and

WHEREAS, the Appellant contends that following the enactment of ZR § 42-55 on February 27, 2001, the Signs – measuring 1,200 sq. ft. each – became existing non-conforming uses as defined by the Zoning Resolution; and

WHEREAS, the Appellant asserts that it has provided to DOB a preponderance of evidence including DOB permits, advertising contracts, licenses for use of the at-grade portions of the site, and photographs demonstrating that the Signs were lawfully established and continually used from 1999 to the present, without any discontinuance of use of the Signs for two years or more; and

b. The Accessory Sign v. Advertising Sign Analysis

WHEREAS, the Appellant asserts that it has established by a preponderance of the evidence that, when established, the Signs were accessory signs as defined by the Zoning Resolution; and

WHEREAS, the Appellant relies on the definitions for "advertising sign" and "accessory use" set forth at ZR § 12-10; and

WHEREAS, as noted above, ZR § 12-10 defines an accessory use as a use: (1) conducted on the same zoning lot as the principal use to which it is related; (2) which is clearly incidental to, and customarily found in connection with, such principal use; and (3) which is either in the same ownership as such principal use, or is operated and maintained on the same zoning lot substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal use; and

WHEREAS, the Appellant asserts that the Signs meet each of the criteria of the ZR § 12-10 definition of accessory use; and

WHEREAS, specifically, the Appellant contends that the Signs meet the ZR § 12-10(a) definition of "accessory use" in that the Signs were established in 1999 by Tommy Hilfiger on the same zoning lot (comprised of tax lot 32) as the principal use of the building on the site for storage, staging, and repair of display fixtures by Tommy Hilfiger, and the Signs remain on the same zoning lot as the use of the entirety of the building on the zoning lot by Wodka; and

WHEREAS, the Appellant contends that the Signs meet the ZR § 12-10(b) definition of "accessory use" in that the display of Tommy Hilfiger copy and Wodka copy on the Signs has clearly been incidental to the use by Tommy Hilfiger and Wodka of the building on the site, and a company using a property "customarily" posts signs displaying the company name "in connection with" its use of such property; and

24-12-A & 147-12-A

WHEREAS, finally, the Appellant contends that the Signs meet the ZR § 12-10(c) definition of "accessory use" in that the Signs were operated and maintained on the same zoning lot for display of Tommy Hilfiger copy and Wodka copy, which display of copy has been substantially for the benefit of the occupants of the principal use of the at-grade portions of the site; and

WHEREAS, the Appellant notes that ZR § 12-10 states that an "advertising sign" is a sign which is "not #accessory# to a #use# located on the #zoning lot#," and therefore the Signs are specifically excluded from the definition of "advertising sign" since they were established as accessory to Tommy Hilfiger's use of the same zoning lot; and

WHEREAS, accordingly, the Appellant contends that it satisfies the plain meaning of the Zoning Resolution definition of accessory use, and cites to Gruson v. Dep't of City Planning, 2008 N.Y. Slip Op 32791U (Sup. Ct., N.Y. Cnty October 3, 2008) and Raritan Dev. Corp. v. Silva, 91 N.Y.2d 98 (1997) for the principle that, in interpreting statutes such as the Zoning Resolution, the plain meaning of words should be applied when the statutory language is clear and unambiguous; and

WHEREAS, the Appellant further contends that in rejecting the registration of the Signs, DOB has impermissibly construed ambiguity in the meaning of the term "accessory use" against the Appellant, and any ambiguity in the Zoning Resolution must be determined in favor of the property owner; and

WHEREAS, specifically, the Appellant asserts that even if the meaning of "principal use" in the definition of "accessory use" is ambiguous, the New York State Court of Appeals in Toys "R" Us v. Silva, 89 N.Y.2d 411, 421 (1996) found that "zoning restrictions, being in derogation of common-law property rights, should be strictly construed and any ambiguity resolved in favor of the property owner"; and

WHEREAS, the Appellant also discusses three Board cases cited by DOB as evidence of the Board's experience in reviewing DOB determinations regarding accessory uses (BSA Cal. Nos. 14-11-A, 45-96-A, and 194-94-A); and

WHEREAS, specifically, the Appellant argues that BSA Cal. No. 14-11-A does not offer any precedential value as to whether the Signs may be considered an accessory use because that case concerned permitted floor space in the cellar of a residential building; and

WHEREAS, the Appellant argues that BSA Cal. No. 45-96-A, which concerned a large cigarette sign in connection with a small convenience store, can be distinguished from the instant case because cigarettes were among the many types of products sold from the principal use which was the convenience store itself, while at the subject site the Signs have been leased and operated by and for the benefit of the sole occupant and use of the building on the site; and

WHEREAS, the Appellant contends that the subject case is more analogous to BSA Cal. No. 194-94-A, where the Board found (and the Court of Appeals affirmed in New York Botanical Garden v. Board of Standards and Appeals of the City of New York, 91 N.Y.2d 413 (1998)) that a 480-ft. (approximately 45-story) radio tower for a 50,000 watt radio station constituted an accessory use notwithstanding its large size and the fact that broadcasting from the station would go well beyond the boundaries of the university to which the radio station and its proposed tower were accessory; and

WHEREAS, the Appellant argues that, similar to BSA Cal. No. 194-94-A, the Board should not consider the size of the Signs in relation to the size of the principal use as determinative of whether they may be considered accessory to the use of the building; and

DOB'S POSITION

WHEREAS, DOB makes the following primary points to support its position that the Signs do not qualify as non-conforming accessory signs: (1) the Signs were never lawfully established as accessory signs because the warehouse at the site was not a legitimate principal use; and (2) the Signs are currently used as unlawful advertising signs for the display of Wodka copy; and

WHEREAS, DOB asserts that there was never a legitimate principal use at the subject lot that would have permitted the use of the Signs by Tommy Hilfiger as an accessory use; and

WHEREAS, DOB notes that, according to Certificate of Occupancy No. 102657947, dated January 31, 2003, the principal use of the zoning lot is "warehouse with accessory commercial office;" and

WHEREAS, DOB relies on the language in RCNY § 49-43 which establishes a rebuttable presumption that "signs that direct attention to a business on the zoning lot that is primarily operating a storage or warehouse use for business activities conducted off the zoning lot" and that signs "larger than 200 square feet, unless it is apparent from the copy and/or depictions on the sign that it is used to direct the attention of vehicular and pedestrian traffic to the business on the zoning lot" are advertising signs for purposes of compliance with the Zoning Resolution; and

WHEREAS, DOB also relies on Department Operations Policy and Procedure Notice 10/99 ("OPPN 10/99), issued prior to the promulgation of Rule 49 but remaining in effect, which sets forth the requirements for obtaining an accessory sign permit; and

WHEREAS, DOB notes that OPPN 10/99 parallels the rebuttable presumption set forth in RCNY § 49-43, that signs connected to a principal use whose activity on the zoning lot consists primarily of storage or a warehouse, and signs larger than 300 square feet which do not direct attention to the zoning lot are deemed to be advertising signs; and

WHEREAS, DOB further notes that OPPN 10/99 also sets forth what evidence is required in a permit application to demonstrate that the principal use can

support the sign as an accessory use, which includes: (1) the name of the business owner, (2) a description of the business operation signed by the owner, (3) evidence that the use is permitted on the zoning lot, (4) a lease or deed demonstrating the amount of space on the zoning lot that will be used by the principal use and how the space will be used, (5) a description of the proposed sign and copy, (6) evidence that the sign will be owned and paid for by the owner of the principal use, and (7) a statement of the size and type of sign to be installed; and

WHEREAS, OPPN 10/99 further provides that if the plan examiner cannot determine based on the evidence provided that the proposed sign is a legitimate accessory sign, the application may be referred to the borough commissioner for further review, in which case the borough commissioner may request additional evidence to determine:

(1) that the use identified as the principal use is in fact a bona fide business (e.g., a business plan, purchase orders and receipts for merchandise or service equipment, copies of advertisement and/or phone listings identifying the business at the zoning lot, sales or other accounting/financial records (if the business is an existing business), request for a site inspection to show planned or existing business operations, etc.) and/or

(2) that the proposed sign is accessory to the identified principal use (e.g., evidence that the actual or anticipated revenue generated by the business or the expense of operating the business on the zoning lot at least equals or exceeds the cost of purchasing or leasing and maintaining the sign); and

WHEREAS, DOB states that OPPN 10/99 was published to prevent sham warehouses with "accessory signs" which in fact were nothing more than an empty building with an advertising sign, and OPPN 10/99 represents the interpretation and implementation of two well-established Zoning Resolution requirements: (1) that an accessory use be "clearly incidental to" and "customarily found in connection with" the principal use; and (2) that advertising signs be placed a certain distance from the City's arterial highways; and

WHEREAS, DOB asserts that a sign (use) whose revenue far exceeds that which is generated by the principal use of the zoning lot cannot be considered a "clearly incidental" use, and while it is customary for a business to have accessory signage, it is not customary for the sign revenue to dwarf the business revenue such that the business would scarcely exist without the sign; and

WHEREAS, DOB further asserts that where, as here, the surface area of the sign copy is four-fifths the square footage of the warehouse (the Signs measure 1,200 sq. ft. each, for a total of 2,400 sq. ft., while the subject warehouse building is approximately 3,000 sq. ft.), the sign cannot reasonably be considered "clearly incidental to" the warehouse; and

WHEREAS, DOB argues that the Appellant's reliance on DOB permits as evidence of the establishment of non-conforming accessory signs is misplaced, noting that the 1999 Permits were not signed off until January 22, 2003 and were filed under professional certification and pursuant to Department Directive 14/1975, which means that the job applicant certified to DOB at the time of filing and at the time of sign-off that the permit applications complied with all applicable laws, rules, and regulations; and

WHEREAS, DOB contends that, despite the sign-off, a review of the job folders reflects that the items required by OPPN 10/99 to establish a legitimate principal use are not included; and

WHEREAS, DOB asserts that the only evidence provided regarding the warehouse operations from 1999 through 2008 is the Tommy Hilfiger Affidavit, which states that the warehouse was "used by Tommy Hilfiger for the storage, staging, and repair of…display fixtures as well as for administrative functions related to such use…"; however, there is nothing in the record that corroborates this statement; and

WHEREAS, specifically, DOB argues that there is no objective, independently verifiable evidence of warehouse operations, such as a business plan, purchase orders or receipts for merchandise or service equipment, copies of advertisements or phone listings, or financial records of any kind; and

WHEREAS, further, DOB notes that the Signs did not direct the attention of vehicular and pedestrian traffic to the Tommy Hilfiger business on the zoning lot; and

WHEREAS, DOB asserts that one uncorroborated statement cannot be considered sufficient evidence of almost ten years of warehouse operations; accordingly, the legitimacy of the principal use has not been demonstrated; and

WHEREAS, DOB further asserts that absent a demonstrated, legitimate principal use at the subject lot, the Tommy Hilfiger signs could not have been accessory signs; rather, they were by definition advertising signs; and

WHEREAS, DOB states that, therefore, the Signs could not have become non-conforming accessory signs when the Zoning Resolution was amended, effective February 27, 2001, to restrict the height and surface area of accessory signs near arterial highways, and since the Signs were advertising signs near an arterial highway and a public park, the Signs were maintained in violation of ZR § 42-55; and

WHEREAS, DOB asserts that when Wodka took over the use of the site, the use of the Signs as unlawful advertising signs continued; and

WHEREAS, DOB argues that the Appellant has similarly failed to submit evidence to DOB that would rebut the presumption set forth in RCNY § 49-43 and OPPN 10/99 that the Wodka signs – which are located on a zoning lot whose principal use consists primarily of a warehouse and which is greater than 200 sq. ft. and

24-12-A & 147-12-A

clearly not used to direct the attention of vehicular and pedestrian traffic to the business of the zoning lot – are advertising signs rather than accessory signs; and

WHEREAS, DOB states that it inspected the warehouse on or about February 3, 2012, and observed minimal warehouse activities and a Wodka sign that did not indicate any connection to the Wodka warehouse; and

WHEREAS, accordingly, DOB concludes that the use of the Signs by Wodka is also deemed to be as advertising signs in violation of ZR § 42-55, and that the registration of the Signs as non-conforming accessory signs was properly rejected; and

WHEREAS, in response to the Appellant's argument that the plain meaning of the Zoning Resolution supports its continued use of the Signs as accessory to the warehouse on the subject lot, DOB asserts that the plain meaning of the text actually supports DOB's determination that the Appellant has failed to demonstrate the existence of a principal use for which an accessory sign may be erected and maintained; and

WHEREAS, specifically, DOB argues that the ZR § 12-10 definition of "accessory use" divides uses into two categories – principal uses and accessory uses – with accessory uses being subordinate and dependent upon principal uses; therefore, before determining whether a particular use may be considered "accessory' per ZR § 12-10, the principal use of the lot must be identified; and

WHEREAS, DOB contends that rather than establishing that the principal use of the subject lot is a warehouse, the evidence submitted by the Appellant, including the Tommy Hilfiger leases and media contracts, favors the conclusion that the principal use of the lot is the advertising sign, and the warehouse exists for the sole purpose of claiming that the advertising sign is accessory to it; and

WHEREAS, DOB further contends that, even assuming the warehouse is considered a principal use, the Signs do not satisfy the remainder of the criteria for an "accessory use," as they are not "clearly incidental to and customarily found in connection with the principal use of the lot;" and

WHEREAS, specifically, DOB states that the combined surface area of the Signs at 2,400 sq. ft. is almost as large as the floor area of the one-story warehouse (3,000 sq. ft.), and the evidence of the operations at the site (media contracts, license agreements, and photographs) relate predominantly to the Signs rather than the warehouse; and

WHEREAS, DOB also cites to New York Botanical Garden v. Board of Standards and Appeals of the City of New York, 91 N.Y.2d 413, 420 (1998), where the Court of Appeals observed that whether a proposed use is accessory "depends on an analysis of the nature and character of the principal use of the land in question in relation to the accessory use, taking into consideration the over-all character of the particular area in question;" and

WHEREAS, DOB argues that the analysis espoused by the Court of Appeals favors DOB's determination, as the subject lot's value derives substantially from its proximity to the Henry Hudson Parkway and 12th Avenue, and while the site could reasonably be used for a warehouse use, the evidence suggests that the use of the Signs is too significant to be accessory to the warehouse operation; and

WHEREAS, as to the Appellant's argument that if there is ambiguity regarding the meaning of "principal use" such ambiguity must be resolved in favor of the property owner, DOB asserts that the Appellant is not requesting the Board to resolve an ambiguity in the meaning of the term; rather, the Appellant is requesting the Board to consider a tiny warehouse with absolutely no proof of active operations to be a "principal use," which amounts to giving the term no effect whatsoever, contrary to the fundamental principles of statutory interpretation; and

WHEREAS, DOB notes that the Board has reviewed DOB determinations regarding accessory uses in the past (citing BSA Cal. Nos. 14-11-A, 45-96-A, and 194-94-A), and asserts that the subject case does not come close to satisfying the criteria for accessory use; and

CONCLUSION

WHEREAS, the Board agrees with DOB that the Signs are unlawful advertising signs which were never established as accessory signs pursuant to the ZR § 12-10 definition of accessory use; and

WHEREAS, the Board finds that the Signs do not meet the criteria of "accessory use" because the warehouse at the site does not qualify as a legitimate principal use and the Signs are not "clearly incidental to" the purported principal use of the site as a warehouse; and

WHEREAS, the Board agrees with DOB that in order to determine whether a use satisfies the ZR § 12-10 definition of "accessory use," the principal use, upon which the accessory use depends, must first be identified; and

WHEREAS, the Board finds that DOB appropriately relied upon RCNY § 49-43 and OPPN 10/99 for guidance in determining whether the purported principal use at the site was legitimate; and

WHEREAS, the Board notes that RCNY § 49-43 and OPPN 10/99 reflect the public policy goal of ensuring that otherwise unlawful advertising signs or billboards cannot circumvent the requirements of the Zoning Resolution by designating a "sham" warehouse or storage facility as a principal use solely in an attempt to justify the actual principal use of the site as an advertising sign; and

WHEREAS, the Board agrees with DOB that RCNY § 49-43 and OPPN 10/99 establish a rebuttable presumption that the Signs are advertising signs because they (1) are connected to a principal use whose activity on the zoning lot consists primarily of storage or a warehouse, and (2) are larger than 300 sq. ft. and do not direct attention to the zoning lot; and

WHEREAS, the Board finds that the Appellant has failed to submit evidence reflecting that the "revenue from the sign is clearly incidental to the revenue generated from the use on the zoning lot to which it directs attention," and therefore has not met the criteria in RCNY § 49-43 for overcoming the presumption that the Signs are advertising signs; and

WHEREAS, similarly, the Board finds that the Appellant has failed to submit sufficient evidence pursuant to OPPN 10/99 to establish that the claimed principal use is a "bona fide business" or that "the actual or anticipated revenue generated by the business or the expense of operating the business on the zoning lot at least equals or exceeds the cost of purchasing or leasing and maintaining the sign;" and

WHEREAS, specifically, the Board agrees with DOB that the leases and media contracts submitted by the Appellant reflect that the revenue generated from the Signs far exceeds the revenue generated by the warehouse or storage facility use on the site, and that all of the evidence provided indicates that the use of the building on the site is subservient to the Signs; and

WHEREAS, the Board further agrees with DOB that the only evidence submitted by the Appellant regarding the warehouse operations from 1999 through 2008 is the Tommy Hilfiger Affidavit, which provides a generic description of the use of the site for "storage, staging, and repair of…display fixtures as well as for administrative functions related to such use," and which, absent the submission of objective, independently verifiable evidence of warehouse operations to corroborate the affidavit, as required by OPPN 10/99, the Board finds insufficient to establish a legitimate principal use on the site; and

WHEREAS, as to the current use of the site, the Board finds that, based on its site visits and the photographs submitted by the Appellant and DOB, Wodka's use of the warehouse building is not indicative of a legitimate principal use, and there is nothing on the Signs that directs attention to the building on the site; and

WHEREAS, specifically, the Board notes that the building currently consists largely of empty space, with the occupied portions used for the storage of a small amount of "promotional material," which the Board finds cannot support the Appellant's contention that this is a principal use to which the two 1,200 sq. ft. signs are accessory; and

WHEREAS, the Board further notes that a large, deteriorating Tommy Hilfiger sign remains on the exterior of the subject building despite the fact that Wodka has operated the site exclusively since 2010, which further indicates that the only purpose for the subject building is to justify the Appellant's claim that the Signs qualify as accessory rather than advertising signs; and

WHEREAS, the Board agrees with DOB that, since the Signs were never established as accessory signs, they could not have become non-conforming accessory signs when ZR § 42-55 was modified on February 27, 2001 to restrict the height and surface area of accessory signs near arterial highways; accordingly, the Appellant's reliance on ZR § 42-55 and the provisions for the continuance of non-conforming uses is misplaced; and

WHEREAS, the Board disagrees with the Appellant's contention that the Signs satisfy the plain meaning of the ZR § 12-10 definition of "accessory use," as the text requires that such use be accessory to a principal use, and the Appellant has not established that the purported principal use on the site is legitimate; and

WHEREAS, the Board finds that, even if the principal use identified on the site were legitimate, the Appellant still would not satisfy the plain meaning of "accessory use," as the relationship between the Signs and the warehouse is such that the Signs cannot be considered "clearly incidental to" the warehouse; and

WHEREAS, the Board further finds that the Signs, during their operation by both Tommy Hilfiger and Wodka, meet the ZR § 12-10 definition of "advertising signs" in that they "direct[] attention to a business…conducted, sold, or offered elsewhere than upon the same zoning lot…" and

WHEREAS, specifically, the Board finds that the Signs do not provide any information which would direct attention to the purported principal use on the subject zoning lot; rather, the Signs serve to advertise the business conducted elsewhere; and

WHEREAS, the Board finds the Appellant's argument that the Signs are explicitly excluded from the definition of "advertising sign" because the definition states that an advertsing sign is a sign which is "not #accessory# to a #use# located on the #zoning lot#" to be misguided, as the essence of the subject appeal concerns whether or not the Signs qualify as "accessory," and since the Board has determined that they are not "accessory" signs, they are clearly not excluded from the definition of an "advertising sign;" and

WHEREAS, the Board disagrees with the Appellant's assertion that DOB has injected ambiguity into the term "principal use," and finds that DOB has applied a rational interpretation to the term, pursuant to the guidance provided by RCNY § 49-43 and OPPN 10/99, while the Appellant would have the Board interpret the term in such a way that merely claiming a use as a "principal use" would be sufficient to establish it as such, despite the lack of any evidence whatsoever regarding the actual activity on the site or the relationship between the purported "principal use" and "accessory use;" and

WHEREAS, as to the Appellant's analysis of the prior Board cases cited by DOB, the Board finds that DOB's purpose for citing the cases was merely as evidence that the Board has previously engaged in the analysis regarding what constitutes an accessory use, and DOB did not claim that the facts in any of the cited cases were analogous to the facts in the subject case or that they offered any precedential value; and

24-12-A & 147-12-A

WHEREAS, accordingly, the Appellant's ability to distinguish the facts of the cases under BSA Cal. Nos. 14-11-A and 45-96-A is not relevant to the Board's analysis of the current case; and

WHEREAS, the Board is not persuaded by the Appellant's assertion that the subject case is analogous to BSA Cal. No 194-94-A, where the Board determined that a 50,000 watt radio tower with a height of 480 feet on the Fordham University campus qualified as an "accessory use;" and

WHEREAS, specifically, the Board notes that unlike the subject site, there was no question in the Fordham University case that the university was a legitimate principal use, and in its decision the Board noted that the university submitted evidence demonstrating that the radio station and the radio tower were subordinate to the functions of the university as a whole, that it is commonplace for universities to own and operate radio stations as part of their educational mission, and that many universities had university-affiliated public radio stations with signal strengths of 50,000 watts or more; and

WHEREAS, as to the Appellant's argument that, similar to the radio tower in the Fordham University case, the Board should not consider the size of the Signs in relation to the principal use to be determinative of whether they can be considered an "accessory use," the Board finds the Appellant's argument misguided in that the Board's decision did not directly address that issue; and

WHEREAS further, the Board does not consider the fact that the combined surface area of the Signs (2,400 sq. ft.) is nearly as large as the floor area of the building (3,000 sq. ft.) to be dispositive of whether or not the Signs are an accessory use; however, the Board does find that the size of the Signs in relation to the size of the warehouse reinforces the additional evidence in the record which reflects that the Signs are not "clearly incidental to" the warehouse building; and

WHEREAS, as to the question of continuity, the Board finds that since the threshold matter of the classification of the Signs is not met, it is not necessary to address whether there has been any two-year discontinuance of the Signs; and

WHEREAS, the Board finds that the Appellant has failed to provide evidence that the Signs were established as accessory signs prior to the modification of ZR § 42-55 on February 27, 2001 and, thus, are not eligible for legal non-conforming status as accessory signs; and

WHEREAS, the Board further finds that the current use of the Signs remains as unlawful advertising signs; and

WHEREAS, therefore, the Board finds that DOB properly rejected the Appellant's registration of the Signs as accessory signs.

Therefore it is resolved that the subject appeal, seeking a reversal of the Final Determinations of the Department of Buildings, dated January 3, 2012, is hereby denied.

Adopted by the Board of Standards and Appeals, August 7, 2012.

A true copy of resolution adopted by the Board of Standards and Appeals, August 7, 2012.
Printed in Bulletin Nos. 32-33, Vol. 97.

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City of New York v. Stringfellow's of N.Y.

Supreme Court of New York, Appellate Division, First Department

February 4, 1999, Decided ; February 4, 1999, Entered

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Reporter
253 A.D.2d 110 *; 684 N.Y.S.2d 544 **; 1999 N.Y. App. Div. LEXIS 935 ***

City of New York et al., Appellants, v. Stringfellow's of New York, Ltd., et al., Respondents, et al., Defendants.

Prior History: [*1]** Appeal from an order of the Supreme Court (Stephen Crane, J.), entered November 6, 1998 in New York County, which, *inter alia,* denied plaintiffs' motion for preliminary injunction and granted defendants-respondents' renewed motion for summary judgment dismissing the complaint.

Core Terms

establishment, adult, Zoning, minors, drinking, eating, customarily, entertainment, summary judgment, regularly, features, dances, preliminary injunction, cross motion, admit, general public, inter alia, activities, statutes, topless, words, zoning district, restrictions, anatomical, excludes, premises, patrons, female, infant, provisions

Counsel: *Margaret G. King* of counsel (*Barry P. Schwartz* and *Karen M. Griffin* on the brief; *Michael D. Hess, Corporation Counsel* of New York City, attorney), for appellants.

Mark J. Alonso of counsel (*Michael Braunstein* and *Jaymee Kahn* on the brief, attorneys), for respondents.

Judges: Sullivan, J. P., Nardelli and Williams, JJ., concur.

Opinion by: ANDRIAS

Opinion

[*111] [545]** Andrias, J.

If Hollywood were writing the script or Variety the headline, the issue presented might possibly be characterized as "Ten's World Class Cabaret meets Disney World". Put another way, in a more legally oriented context, "Can an otherwise 'adult eating and drinking establishment' remove itself from restrictive zoning regulations by the simple expedient of admitting previously banned minors when accompanied by a parent or guardian?" The answer must be no.

As described by its president, **[***2]** defendant Stringfellow's of New York, Ltd. has, since 1991, operated an adult cabaret at 35 East 21st Street under the name Ten's World Class Cabaret, featuring among other things, topless entertainment by female entertainers.

In 1995, the New York City Zoning Resolution was amended to add various provisions, including section 12-10 (adult establishment), restricting the locations at which so-called "adult" establishments could be maintained or sited in the future. The constitutionality of such provisions has been upheld (*Stringfellow's of N. Y. v City of New York, 171 Misc 2d 376*, **[**546]** *affd 241 AD2d 360*, *affd 91 NY2d 382*; *see also, Hickerson v City of New York, 997 F Supp 418*, *affd 146 F3d 99*, *cert denied sub nom. Amsterdam Video v City of New York, __ US __, 142 L Ed 2d 658*) and is not in issue, the Court of Appeals having held that the "enactment of the Amended Zoning Resolution was not an impermissible attempt to regulate the content of expression but rather was aimed at the negative secondary effects caused by adult uses, a legitimate governmental purpose" (*Stringfellow's of N. Y. v City of New York, supra,* 91 **[*112]** NY2d at 399 **[***3]** [citation omitted]). However, the applicability of section 12-10 of the Zoning Resolution is.

That section provides, in pertinent part:

"An 'adult establishment' is a commercial establishment where a 'substantial portion' of the establishment includes an adult book store, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof, as defined below …

"(b) An adult eating and drinking establishment is an eating or drinking establishment which regularly features any one or more of the following:

"(1) live performances which are characterized by an emphasis on 'specified anatomical areas' or 'specified sexual activities'; or

"(2) films, motion pictures, video cassettes, slides or other visual reproductions which are characterized by an emphasis upon the depiction or description of 'specified sexual activities' or 'specified anatomical areas'; or

"(3) employees who, as part of their employment, regularly expose to patrons 'specified anatomical areas'; and

"which is not customarily open to the general public during such features because it excludes minors by reason of age."

Sections 32-01 and 42-01 of the **[***4]** Zoning Resolution, in addition to the applicable regulations regarding permitted uses, further limit the location of adult establishments in certain zoning districts. Section 52-77 governs the termination of nonconforming adult establishments in all zoning districts.

During the pendency of the various constitutional challenges to the amendments to the Zoning Resolution, enforcement of such provisions was stayed until July 28, 1998, when the United States Supreme Court denied a further stay (*Amsterdam Video v City of New York, __ US __, 119 S Ct 4*).

By summons and complaint dated July 22, 1998, Stringfellow's sought a declaratory judgment declaring that it is not an "adult eating or drinking establishment" within the meaning of Amended Zoning Resolution § 12-10 (adult establishment) (b) because it does not "regularly feature … employees who, as part of their employment, regularly expose to patrons 'specified anatomical areas' " and because it does

not exclude minors by reason of their age. Thereafter, because of the lack of a stay of enforcement and fear that the City would seek an ex parte order closing its business, Stringfellow's sought **[***5]** to enjoin the City from moving for such relief and the City cross-moved to **[*113]** dismiss the complaint on the ground that Stringfellow's lacked standing and that the issue was not ripe for adjudication, which cross motions were argued before the IAS Court on September 25, 1998, at which time the court stated that it would notify Stringfellow's of any ex parte applications by the City. The cross motions were then marked submitted with a decision promised in mid-October.

While such cross motions were still *sub judice,* the City, by summons and verified complaint dated October 13, 1998, commenced the present action seeking, *inter alia,* to permanently enjoin Stringfellow's, pursuant to sections 7-706 and 7-714 of the Administrative Code of the City of New York, from further conducting or maintaining a public nuisance at the premises; and, permanently enjoining Stringfellow's from operating or allowing the operation of the subject premises as an adult establishment in violation of section 42-01 (b) of the Zoning Resolution.

[547]** By order to show cause, dated October 14, 1998, the City moved for a preliminary injunction closing Ten's because it was being operated **[***6]** in violation of section 12-10 of the Zoning Resolution, whereupon defendant served its verified answer and cross-moved to, *inter alia,* preliminarily enjoin plaintiffs from taking any action to close Ten's; toll the time in which it may cure any defect in its business; and, consolidate this action with the prior action commenced by Stringfellow's.

Thereafter, in a decision dated October 22, 1998, the court granted the City's cross motion to dismiss Stringfellow's declaratory judgment action on the ground that it was superfluous and that the City's present lawsuit is an adequate vehicle by which to determine all of the rights and liabilities of the parties. On October 27, 1998, defendant moved for summary judgment, *inter alia,* dismissing the complaint, and the City cross-moved for summary judgment in its favor on the grounds that there is no triable issue of fact that Ten's is an adult drinking and eating establishment as defined by section 12-10 of the Zoning Resolution and is operating within a prohibited zoning district.

In a decision dated November 4, 1998, the IAS Court denied the parties' cross motions for summary judgment, finding that questions of fact existed as **[***7]** to whether Ten's did in fact exclude minors on account of age because, on the one hand, Ten's had demonstrated that it had instituted a comprehensive policy to admit minors with certain restrictions, while on the other, four City inspectors averred that Ten's had at least one sign in its **[*114]** premises stating that minors will not be admitted. In so ruling, the court found that "defendants do not dispute that Ten's is covered by the definition of 'an adult eating and drinking establishment' ", but argue that the Zoning Resolution does not apply to Ten's because it does not exclude minors on account of their age. As found by the court, "Ten's has a policy to admit minors subject to certain restrictions mandated by the Penal Law and other state laws", which policy was instituted in mid-1997 merely to avoid application of the Zoning Resolution.

In interpreting section 12-10, the IAS Court found that it clearly and unambiguously applies only to businesses otherwise qualifying as adult establishments where such businesses are not customarily open to the general public because they exclude minors by reason of age at times during which certain sexually oriented activities are featured. **[***8]** Therefore, the court held, under the plain language of section 12-10, Ten's cannot be defined as an adult eating and drinking establishment if it does not exclude minors on account of age. The court also found unpersuasive the City's argument that Ten's admission policy amounts to a de facto exclusion policy inasmuch as the several steps required before a minor will be

admitted seem designed to ensure that admission of the minor does not violate any relevant sections of the Penal Law or any statutes governing alcohol and tobacco products. It further found that the City had not set forth any evidence that Ten's admission policy violates any such statutes. As to the City's argument that the exclusion of minors provision was not intended to apply to businesses such as Ten's as opposed to "legitimate theatrical performances and films including nudity or having a sexual theme", the court held that, given that section 12-10 is unambiguous on its face, it would be inappropriate and inadvisable for the court to look behind it to apply the Zoning Resolution to Ten's.

Finally, the court opined that the City cannot argue that the courts should ignore this part of the Zoning Resolution **[***9]** because it removes certain businesses from its reach, stating: "If the ZR as drafted does not attain all of its supposed goals, then it should be revised within constitutional parameters. Such a revision is not within the power of this court in light of the clear language of the ZR."

The next day, November 5, 1998, the IAS Court heard oral argument on the City's motion for a preliminary injunction. During the course of the proceedings, Stringfellow's withdrew its cross motion seeking, *inter alia,* to preliminarily enjoin the **[*115]** City from taking any action to close Ten's; to toll its time to cure any defects in its business; and, to consolidate this action with its prior declaratory **[**548]** judgment action. Counsel for Stringfellow's then stipulated that, if found to be an adult establishment, Ten's is in a location that is prohibited for adult establishments under the Amended Zoning Resolution. Counsel for the parties further stipulated that since October 14, 1998, the date of the order to show cause obtained by the City, there is no evidence of a sign on Ten's premises restricting admission to persons 21 years of age or older.

Thereupon, the court rendered **[***10]** its decision on the record denying the City's motion for a preliminary injunction. The court found that, based on the stipulations entered into by the parties, the City had failed to meet its burden of proving by clear and convincing evidence its right to a preliminary injunction closing Ten's. The court further found that Ten's does not close itself to the general public by excluding minors by reason of age, in light of its written admission policy that admits minors under certain conditions intended to avoid offending the Penal Law, pursuant to which, as the court noted, endangering the welfare of a child is still a crime. The court also granted defendant's renewed motion for summary judgment and dismissed the City's complaint, with defendant withdrawing its motion for sanctions and the first three of its four counterclaims without prejudice, leaving its fourth counterclaim for abuse of process. The court concluded that Ten's is not an adult eating or drinking establishment as defined by section 12-10 (adult establishment) (b) of the Amended Zoning Resolution, finding that it is not, as described in that section, "an establishment which is not customarily open to the general **[***11]** public during such features because it excludes minors by reason of age."

We disagree and accordingly reverse and grant the City's cross motions to the extent of granting it a preliminary injunction and partial summary judgment on the issue of whether Ten's is an adult eating or drinking establishment as defined by section 12-10 (adult establishment) (b) of the Amended Zoning Resolution.

While zoning ordinances must be narrowly interpreted and ambiguities are to be construed against the zoning authority (*Toys "R" Us v Silva, 229 AD2d 308, revd on other grounds 89 NY2d 411*), the fundamental rule in construing any statute, or in this case an amendment to the City's Zoning Resolution, is to ascertain and give effect to the intention of the legislative **[*116]** body, here the New York City Council. The intent of the City Council is controlling and, subject to constitutional or other legal

limitations, must be given force and effect. Such intent is ascertained from the words and language used in the statute and if the language thereof is unambiguous and the words plain and clear, there is no occasion to resort to other means of interpretation. **[***12]** Only when words of the statute are ambiguous or obscure may courts go outside the statute in an endeavor to ascertain their true meaning. The legislative intent is to be ascertained from the words and language used and the statutory language is generally interpreted according to its natural and obvious sense, without resorting to an artificial or forced construction (*see generally,* McKinney's Cons Laws of NY, Book 1, Statutes §§ 92, 94, 96). "[A] court in construing a law will sometimes be guided more by its purpose than its phraseology". (*Id.,* § 96, at 208-909.)

Here, there is no question that the intent of the City Council was to prohibit adult eating or drinking establishments such as Ten's from operating in certain locations or zoning districts in New York City. Stringfellow's having stipulated that it is in such a location, i.e., in an M1-5M Zoning District within 500 feet of a church and an R9A Zoning District, the only remaining issue is whether it falls within the definition of adult eating or drinking establishment contained in section 12-10 (adult establishment) (b).

The operative words for purposes of any analysis of section 12-10 (adult establishment) **[***13]** (b) are "regularly" (as in "regularly features" live performances characterized by an emphasis on " 'specified anatomical areas' " or "regularly features" employees who, as part of their employment, regularly expose to patrons " 'specified anatomical areas' ", later defined as, *inter alia,* "female breast below a point immediately above the top of the areola") and "customarily" (as in "an adult eating and drinking establishment" regularly featuring such activities " **[**549]** which is not customarily open to the general public during such features because it excludes minors by reason of age").

Regularly is generally defined as customarily, usually or normally, but other definitions include: occurring at fixed intervals, i.e., periodic; or, constant, i.e., not varying. (American Heritage Dictionary, Second College Edition [1982].) The fact that Ten's "regularly" features topless and so-called table or lap dancing is established in the record by the affidavits of City inspectors who visited Ten's on at least 10 occasions from August 3, 1998 to October 7, 1998 and observed such performances. **[*117]** In addition to those virtually uncontested observations, Stringfellow's, **[***14]** in affidavits and affirmations by its president and counsel, admits that Ten's features female entertainers who perform topless dances for its patrons, and, for a fee paid by the customer, perform so-called "table dances" in a disrobed fashion, but denies that the entertainers perform "lap dances" and protests that the dancers wear so-called "T-backs" as opposed to the "G-string" described by one inspector. Other inspectors described various dancers as wearing a "thong bikini bottom", "string bikini bottoms" or "hot pants", but all were unanimous in stating that the women were topless and, in addition to the dances performed on stage, various inspectors described lap dances which were offered and performed in a second level seating area or separate cubicles for an additional $ 20 and such dances entailed the dancers gyrating their hips in close proximity to the male patrons' genital areas and shaking their breasts in close proximity to their faces. The women also were observed touching their breasts and buttocks as they performed on stage and gave lap dances while placing themselves between the male patrons' legs. Thus, there can be no question that the described activities are **[***15]** regularly featured at Ten's.

We next turn to the term customarily, as in "not customarily open to the general public". As the City aptly points out, the term "customarily" is often encountered in the language of zoning statutes, most frequently in sections referring to home occupations or accessory uses that are incidental to a principal use (*see, e.g., Matter of New York Botanical Garden v Board of Stds. & Appeals, 91 NY2d 413, 419-420)*. As held in

Matter of Teachers Ins. & Annuity Assn. v City of New York (82 NY2d 35), a case involving the landmarking of the Four Seasons restaurant, the meaning of customary public openness is a legal question for the courts rather than one of administrative expertise and "*customary* openness, accessibility, invitation to the public [are] words that are readily understood to require usual, ordinary or habitual (rather than rare or occasional) availability to the general public". (*Supra, at 43* [emphasis in original].)

The City and respondent differ on whether "customarily" as used in section 12-10 means the practice of Ten's as opposed to the practice of the entire topless bar "industry". The City **[***16]** urges that the section 12-10 definition of "adult eating or drinking establishment" refers to the type of establishment and the term "customarily" logically and necessarily refers to general, **[*118]** not individual, practice, while respondent contends that the fact that such definition uses the singular form throughout is proof positive that the term "customarily" means only the establishment in question and, that if the City Council meant what the City suggests, it would have included the phrase "and which is not *of the type* customarily open to the general public" (respondent's emphasis).

Respondent's argument that its individual practice of admitting minors somehow takes it out of the scope of the Amended Zoning Resolution is belied by the specific rules of construction of language which apply to the text of the Zoning Resolution and are set forth in article 1 (ch 2) of the Zoning Resolution. Section 12-01 (d) specifically provides that "words used in the singular number shall include the plural, and the plural the singular, unless the context clearly indicates the contrary." Such rule comports with *General Construction Law § 35* (*see also,* **[***17]** McKinney's Cons Laws of NY, Book 1, Statutes § 252). As a result, it is unnecessary to add additional language to make it **[**550]** clear that the language of section 12-10 reflects that the City Council intended the term "customarily" to apply to "adult eating or drinking establishment[s]" in general as opposed to any particular establishment. Thus, any argument that the isolated practice of an individual adult establishment somehow changes the broader industry custom and practice of excluding minors is legally flawed and defies logic and common sense.

In addition, a statute generally speaks, not from the time when it was actually enacted or when the courts are called upon to interpret it, but as of the time it took effect. In other words, it is to be interpreted as the courts would have if it had come into question soon after its passage (McKinney's Cons Laws of NY, Book 1, Statutes § 93; *Matter of Spencer v Board of Educ., 39 AD2d 399, 402*, *affd on opn at App Div 31 NY2d 810*). The amendments in issue took effect on October 25, 1995, although enforcement of such provisions was judicially stayed until July 28, 1998, and it is not contended, **[***18]** nor could it be, that, prior to October 25, 1995 or shortly thereafter, adult eating and drinking establishments, as defined by the City Council, admitted minors to their premises with or without an admission charge, with or without parental consent or the consent of the minor, or accompanied or unaccompanied by parents or guardians.

Indeed, Stringfellow's does not question the IAS Court's finding that its "policy to admit minors was instituted in mid-1997 subject to certain restrictions mandated by the Penal Law and **[*119]** other state laws" merely to avoid application of the Amended Zoning Resolution and there is nothing in the record or otherwise that indicates that the adult entertainment industry's customary practice of excluding minors has changed in any respect. Moreover, without characterizing or passing on the moral content of the entertainment presented by Ten's, which is unnecessary to do in this case, we note that any attempt to avoid the impact of the Penal Law, to the extent it criminalizes endangering the welfare of a child under 17 years old (*Penal Law § 260.10*) or disseminating indecent material to minors by admitting them to such **[***19]** performances with an admission charge (*see, Penal Law § 235.21 [2]*) would be ineffective as being against public policy, as expressed by the Legislature in those statutes.

Ten's attempt to avoid both the restrictions of the Zoning Resolution as well as any potential criminal liability is embodied in its "Door Policies for Minors". Such policy provides that customers under the age of 18 may enter the club only if accompanied by a parent/guardian and that both the parent/guardian and the minor must sign sworn statements, after a guided tour of the premises, unaccompanied by the minor, in which the parent/guardian accepts full responsibility for allowing the minor to enter Ten's and warrants that the topless entertainment and/or nudity as presented by Ten's is not harmful to or will not have any negative effect on the minor. The minor, who in the only documented case on the record was a 13-year-old boy from Caracas, Venezuela who visited Ten's with his father on October 11, 1998, is required to swear that he or she will not drink or order alcohol or use tobacco products while in Ten's. He or she is also required to swear that he or she understands **[***20]** that Ten's provides topless dancing by females and that this type of entertainment is not harmful or offensive to him or her in any way and that he or she has or has not, as the case may be, personally observed bare female breasts in various described circumstances including, *inter alia,* movies, cable television, National Geographic, Broadway theater, other magazines, personal experience, etc. Finally, the minor must swear that he or she has not and/or will not be harmed by seeing exposed female breasts. The policy also provides that minors are not to be required to pay the club's cover charge and "should not get dances".

With due respect to counsel who has attempted to bring his client into compliance with the Zoning Resolution by promulgating this policy, the required "consents" are meaningless and **[*120]** without legal effect. An infant is defined by statute in New York as a person under the age of 18 years (*Domestic Relations Law § 2*). Infancy, since common-law times and most likely long before, is a legal disability and an infant, in the absence **[**551]** of evidence to the contrary, is universally considered to be lacking in judgment, **[***21]** since his or her normal condition is that of incompetency. In addition, an infant is deemed to lack the adult's knowledge of the probable consequences of his or her acts or omissions and the capacity to make effective use of such knowledge as he or she has. It is the policy of the law to look after the interests of infants, who are considered incapable of looking after their own affairs, to protect them from their own folly and improvidence, and to prevent adults from taking advantage of them (66 NY Jur 2d, Infants and Other Persons Under Legal Disability, § 2).

That is why there are child labor laws and prohibitions against smoking, drinking and driving before a certain age. That is also why it is generally required for children under the age of 18 to obtain parental consent to participate in beneficial extracurricular activities such as sports, school trips, etc. As for requiring the minor to sign a consent or waiver before being admitted to Ten's, such release or waiver is of no effect since it is conclusively presumed that infants do not have the mental capacity and discretion to protect themselves from the artful designs of adults. (*Id.,* § 15.)

Stringfellow's argues **[***22]** that, if a minor and his or her parent signs a statement that the entertainment (which the parent has reviewed in advance) is not harmful to the minor, it is difficult for the government to contend that such entertainment is harmful, much less hold Ten's responsible for the parent's misapprehension of the minor's maturity level. If a parent feels it is appropriate for his or her child to visit Ten's, it is urged, it is hardly the province of the City to step in and insist that such behavior endangers the child's "moral welfare". It is unnecessary for us to decide whether the entertainment or other activities presented by Ten's constitutes endangering the welfare of a minor because the parental and minor consents could not insulate Ten's or, for that matter the parent, from any potential criminal liability.

Thus, regardless of whether in one isolated instance Ten's has admitted a 13-year-old boy with the approval of his father, the evidence of which is questionable, it cannot be said that Ten's "customarily"

admits minors as that term is ordinarily understood. Ten's status as an adult establishment is defined **[*121]** by the nature of its entertainment which admittedly is intended **[***23]** for an adult clientele. That the same entertainment may also be attractive to minors with or without parental approval, does not change the essential nature of the establishment or remove it from the ambit of the Amended Zoning Resolution.

As to Stringfellow's argument, that, in any event, summary judgment in favor of the City is unwarranted because of its affirmative defense that the Alcoholic Beverage Control Law preempts the Amended Zoning Resolution with respect to liquor-licensed establishments, as well as "the plethora of material issues" which must be addressed before the City can obtain judgment, we note that Stringfellow's failed to raise the preemption issue when it had the opportunity to do so in its constitutional challenge to the Amended Zoning Resolution (it was raised by one of the *amici curiae* [*see, Stringfellow's of N. Y. v City of New York, supra,* 91 NY2d, at 389] to no avail) and it does not indicate in any way how the Amended Zoning Resolution directly or incidentally affects the sale or the consumption of alcohol as was the case in *Matter of Lansdown Entertainment Corp. v New York City Dept. of Consumer Affairs (74 NY2d 761)*. **[***24]** Moreover, although the Alcoholic Beverage Control Law is preemptive of local law in the regulation of the manufacture, sale and distribution of alcoholic beverages, the Court of Appeals has noted that "establishments selling alcoholic beverages are not exempt from local laws of general application", in this case the Amended Zoning Resolution (*supra, at 763*; *see also, People v De Jesus, 54 NY2d 465*).

Nevertheless, despite the fact that Stringfellow's has already stipulated that, if found to be an adult establishment, Ten's is in a prohibited location and it does not specify further what the plethora of factual issues presented are, there are unresolved issues regarding notice and abatement of a public **[**552]** nuisance in the context of *section 7-707 of the Administrative Code*, which governs the procedure to be followed where a preliminary injunction has been granted (*see, City of New York v Basil Co., 182 AD2d 307*).

Accordingly, the order of the Supreme Court, New York County (Stephen Crane, J.), entered November 6, 1998, which, *inter alia,* denied plaintiffs-appellants' motion for a preliminary injunction and granted defendants-respondents' **[***25]** renewed motion for summary judgment dismissing the complaint, should be reversed, on the law, without costs, plaintiffs' motion for a preliminary injunction granted, defendants' renewed motion for summary judgment denied and the City's cross motion **[*122]** for summary judgment granted to the extent of awarding the City partial summary judgment on the issue of whether defendant-respondent Stringfellow's falls within the definition of adult eating or drinking establishment contained in section 12-10 (adult establishment) (b) of the City's Zoning Resolution and remanding the matter for further proceedings, in accordance with the provisions of *section 7-707 of the Administrative Code*, to determine when defendant was or will be on actual or constructive notice of the subject public nuisance and whether it has acted or will act to abate same within a reasonable time, and for further proceedings consistent with said determination.

Sullivan, J. P., Nardelli and Williams, JJ., concur.

Order, Supreme Court, New York County, entered November 6, 1998, reversed, on the law, without costs, plaintiffs' motion for a preliminary injunction granted, defendants' renewed motion for summary judgment **[***26]** denied and the City's cross motion for summary granted to the extent of awarding the City partial summary judgment on the issue of whether defendant-respondent Stringfellow's falls within

the definition of adult eating or drinking establishment contained in section 12-10 (adult establishment) (b) of the City's Zoning Resolution and the matter remanded for further proceedings.

End of Document

Hogan v. Culkin

Court of Appeals of New York

September 29, 1966, Argued ; October 27, 1966, Decided

No Number in Original

Reporter
18 N.Y.2d 330 *; 221 N.E.2d 546 **; 274 N.Y.S.2d 881 ***; 1966 N.Y. LEXIS 1020 ****

In the Matter of Frank S. Hogan, as District Attorney of New York County, Appellant, v. Gerald P. Culkin, as a Justice of the Supreme Court of the State of New York; Warden of Green Haven Prison, Appellant, and David Betillo, Respondent

Prior History: [**1]** *Matter of Hogan v. Culkin, 25 A D 2d 395*.

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered May 17, 1966, which unanimously (1) denied an application by petitioner for an order under CPLR article 78 prohibiting (a) respondent Justice of the Supreme Court from holding a hearing pursuant to a writ of habeas corpus issued on March 24, 1966 and (b) respondent Warden of Green Haven Prison from complying with an order of said Justice directing the appearance of relator David Betillo in New York County pursuant to said writ, and (2) dismissed the proceeding.

Disposition: Order of Appellate Division reversed and matter remitted to that court with instructions to grant the order of prohibition as prayed for in the petition.

Core Terms

returnable, detention, state institution, issuing, writ of habeas corpus, state prison, detained, cases, inmates, writs

Counsel: *Louis J. Lefkowitz, Attorney-General* (*Michael H. Rauch* and *Samuel A. Hirshowitz* of counsel), and *Frank S. Hogan, District Attorney* (*Alan F. Leibowitz* of counsel), for appellants. I. A writ of habeas corpus to inquire into the detention of an inmate in a State prison can be returnable only in the county of detention. Accordingly, respondent Justice was without power to make the writ of habeas corpus in the instant proceeding returnable in New York County and would be assuming excessive jurisdiction if he were to hear and determine the merits of the writ. (*People ex rel. Van Buren v. Superintendent, 118 Misc. 145*; *Matter of Holbrook v. Holbrook, 31 Misc 2d 288*; *People ex rel. Ursoy v. Superintendent, 120 Misc. 353*; *People ex rel. Potterton v. Potterton, 169 Misc. 404*; *People v. Huntley, 15 N Y 2d 72*; *Ahrens v. Clark, 335 U.S. 188*; *New York Foundling Hosp. v. Gatti, 203 U.S. 429*; *United States v. Tribote **[****4]** , 297 F. 2d 598*.) II. A writ of prohibition is the proper remedy to test the Appellate Division's interpretation of the statute. (*Matter of Public Serv. Comm. v. Norton, 304 N. Y. 522*; *Quimbo Appo v. People, 20 N. Y. 531*; *Matter of Morhous v. New York Supreme Ct., 293 N. Y. 131*; *Matter of Murphy v. Supreme Ct., 294 N. Y. 440*; *Matter of Culver Contr. Corp. v. Humphrey, 268 N. Y. 26*; *People ex rel. Safford v. Surrogate's Ct., 229 N. Y. 495*; *Matter of Murtagh v. Leibowitz, 303 N. Y. 311*; *People ex rel. Jerome v. Court of Gen.*

18 N.Y.2d 330, *330; 221 N.E.2d 546, **546; 274 N.Y.S.2d 881, ***881; 1966 N.Y. LEXIS 1020, ****4

Sessions, 185 N. Y. 504; *Matter of Elcock v. Boccia, 12 Misc 2d 955*; *Matter of Fitzgerald v. Wells, 14 Misc 2d 435, 9 A D 2d 812, 7 N Y 2d 711*; *Matter of Hogan v. Court of Gen. Sessions, 296 N. Y. 1*; *Matter of Thompson v. Murray, 271 App. Div. 306*.)

Joseph Aronstein for respondent. I. A writ of habeas corpus to inquire whether a sentence imposed upon a prisoner was a legal or illegal sentence may be issued by a Supreme Court Justice of New York County, the county in which the trial was had, and make such writ of habeas corpus returnable in New York County in the **[****5]** exercise of his discretion. (*People ex rel. Miller v. Martin, 1 N Y 2d 406*; *People v. Sullivan, 3 N Y 2d 196*.) II. A Justice of the Supreme Court derives his power from the common law and the *Constitution of the State of New York. (People v. Folmsbee, 60 Barb. 480*; *People ex rel. Barry* v. *Mercein*, 8 Paige Ch. 46; *People ex rel. Trainer* v. *Cooper*, 8 How. Prac. 289; *People ex rel. Rosenthal v. Cowles, 59 How. Prac. 287*; *People v. Hanna, 3 How. Prac. 39*.)

Judges: Fuld, J. Chief Judge Desmond and Judges Van Voorhis, Burke, Scileppi, Bergan and Keating concur.

Opinion by: FULD

Opinion

[*332] **[**547]** **[***882]** The primary question here presented is whether, under *CPLR 7004 (c)*, a writ of habeas corpus directed to the warden of a State prison may be made returnable and heard before a Justice of the Supreme Court in a county other than that in which the relator is detained.

The relator is presently serving a sentence of 25 to 40 years (as a parole violator) at Green Haven State Prison in Dutchess County, consequent upon his conviction on certain felony charges in the Supreme Court, New York County, in 1936. Some months ago he sued **[****6]** out a writ of habeas corpus from the Supreme Court, New York County, alleging, *inter alia*, that, when he appeared for sentence in 1936 he was not asked, as required by section 480 of the Code of Criminal Procedure, why judgment **[***883]** should not be pronounced against him. [1] The writ was made returnable in New York County before the issuing justice who denied a motion by the district attorney to amend the writ by making it returnable in Dutchess County, the situs of the relator's detention. The district attorney thereupon instituted this proceeding under article 78 of the CPLR for a judgment in the nature of prohibition to restrain the issuing justice **[*333]** from holding a hearing on the writ in New York County, and to prohibit the warden from producing his prisoner there. The Appellate Division denied the application, and the appeal is in this court by our permission.

[**7]** Prior to 1922, the pertinent statutes left it within the sound discretion of the issuing judge to determine whether a writ of habeas corpus should be made returnable outside the county in which the relator was detained (See Code Civ. Pro., § 2023 [L. 1880, ch. 178]; Civ. Prac. Act, § 1239, subd. 2 [L.

[1] The petition further alleged that the relator was not represented by his attorney at the time, but that claim would not be redressible by habeas corpus. The exclusive remedy for a deprivation of the right to counsel is *coram nobis*. (See, e.g., *People ex rel. Sedlak v. Foster, 299 N. Y. 291*; *People ex rel. Cunningham v. McNeill, 306 N. Y. 645*.)

1920, ch. 925]; see *People ex rel. [**548] Van Buren v. Superintendent, 118 Misc. 145*.) However, in order to obviate the administrative, security and financial burdens entailed in requiring prison authorities to produce inmates pursuant to such writs in a county other than that in which they were detained, the statute was amended in 1922, on recommendation of the Attorney-General and the Superintendent of Prisons, so as to make special provision for writs directed to those in charge of State prisons or other State institutions. The new legislation (Civ. Prac. Act, § 1239, subd. 3, as added by L. 1922, ch. 187) mandated that "All writs of habeas corpus directed to the * * * warden of a state prison, or the superintendent * * * of a state institution, must be made returnable before a * * * [judge] in the county in which the person is detained", unless there was no **[****8]** such judge "in the county capable of acting", in which event the writ was to be made returnable before the nearest accessible judge "in an adjoining county". This language was thereafter uniformly interpreted as requiring that, under normal circumstances, a writ sued out by an inmate of a State institution was to be made returnable solely in the county where the institution was located. (See, e.g., *Matter of Holbrook v. Holbrook, 31 Misc 2d 288*; *People ex rel. Ursoy v. Superintendent, 120 Misc. 353*.)

Subdivision (c) of *CPLR 7004*, which has superseded the Civil Practice Act section on the subject, continues the differentiation between writs directed to State institutions and writs issued in other cases. The problem here presented arises only because of certain verbal changes made in **[***884]** the course of the consolidation and rephrasing of the applicable provisions. Thus, in place of the former language that "*All* writs of habeas corpus" directed to a State institution were to be made returnable in the county **[*334]** of the relator's detention, the CPLR section recites that "A writ to *secure the discharge* of a person from a state institution" must **[****9]** be made so returnable and that "In all other cases" the writ is to be returnable in the county where it was issued unless the issuing court or judge decides to make it returnable in the county of detention. (Emphasis supplied.) [2]

Interpreting these terms in a strictly **[****10]** literal sense, a majority of the Appellate Division held that, since the relator was not seeking to be "discharged", but only to be "resentenced", the provision limiting the place of return of the writ to the county of detention was inapplicable and the place of return of the writ was, instead, left to the sound discretion of the issuing judge.

We cannot accept that interpretation. As the explanatory notes of the draftsmen of the CPLR make clear, the paraphrasing of the language in the Civil Practice Act was not intended to alter the rule that habeas corpus hearings must be held in the county of detention when the relator is an inmate of a State institution. The notes expressly state that "The only change in substance" was to provide, in cases where no judge was available in the county of detention, for the writ "to be returned to the 'nearest accessible' judge, rather than [as formerly] to the 'nearest accessible * * * judge in an adjoining county.'" (See N. Y. Legis. Doc., 1959, No. 17, p. 66; see, also, 7 Weinstein-Korn-Miller, *N. Y. Civ. Prac., [**549] par. 7004.07*, p. 70-38.) Obviously, then, the phrase, "A writ to secure the discharge of a person from a state institution", **[****11]** was adopted merely as a generic description of habeas corpus in terms of its function.

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[2] The full text of subdivision (c) of *CPLR 7004* is as follows: "A writ to secure the discharge of a person from a state institution shall be made returnable before a justice of the supreme court or a county judge being or residing within the county in which the person is detained; if there is no such judge it shall be made returnable before the nearest accessible supreme court justice or county judge. In all other cases, the writ shall be made returnable in the county where it was issued, except that where the petition was made to the supreme court or to a supreme court justice outside the county in which the person is detained, such court or justice may make the writ returnable before any judge authorized to issue it in the county of detention."

The Legislature has sought to relieve wardens of State prisons from having to comply with writs of habeas corpus by producing inmates out of the county of detention, under guard, and often **[*335]** at great distances and great expense. (See *Ahrens v. Clark, 335 U.S. 188, 191*.) The burden is equally heavy whether the relief sought by the writ be that of a permanent "discharge" or simply **[***885]** a remand for resentencing. Manifestly, to differentiate between the two situations would not only be completely illogical and unrealistic but would, indeed, serve to thwart the very policy considerations underlying the statute. Absent clear language to that effect, and considering the contrary indications to be found in the Revisors' Notes, we will not ascribe such ambivalent intentions to the Legislature." In construing statutory provisions, the spirit and purpose of the statute and the objectives sought to be accomplished by the legislature must be borne in mind. '* * * Literal meanings of words are not to be adhered to or suffered to "defeat the general purpose and manifest policy intended **[****12]** to be promoted".'" (See *Matter of New York Post Corp. v. Leibowitz, 2 N Y 2d 677, 685*; *Matter of Capone v. Weaver, 6 N Y 2d 307, 309*; *People v. Ryan, 274 N. Y. 149, 152*.)

Accordingly, we hold that *CPLR 7004(c)*, like its predecessor in the Civil Practice Act, distinguishes between writs of habeas corpus concerning the inmates of State institutions, in the first instance, and writs "In all other cases", in the second. Where the writ is directed to the warden of a State prison, whether it seeks a complete release from cusody or a remand for resentencing, it must be made returnable in the county of detention, subject to the exception applicable when there is no available judge in that county. In all other cases, the writ is to be made returnable in the county of issuance, unless the issuing judge should decide in his discretion to make it returnable in the county of detention.

One question remains for our consideration -- whether prohibition lies under the circumstances here presented. The majority of the Appellate Division, having concluded that the place for return of the writ was committed to the discretion of the issuing judge, held that prohibition was **[****13]** not available. However, under our interpretation of the statute, the respondent was completely without jurisdiction to hold any hearing on the writ in New York County, and it necessarily follows that the district attorney was fully warranted in seeking to prohibit such **[*336]** a hearing. We have uniformly held that prohibition is the proper remedy whenever a court threatens to act without or in excess of its power, not only with respect to a lack of jurisdiction over the subject matter (see, e.g., *Matter of Kraemer v. County Ct., 6 N Y 2d 363*; *Matter of Hogan v. Court of Gen. Sessions, 296 N. Y. 1, 8-9*; *Matter of Morhous v. New York Supreme Ct., 293 N. Y. 131, 140*; *Matter of Culver Contr. Corp. v. Humphrey, 268 N. Y. 26, 39-40)* but also where the Legislature has confined the exercise of jurisdiction to a court in some other county. (See *Matter of Murtagh v. Leibowitz, 303 N. Y. 311, 319*; **[***886]** *Matter of Murphy v. Supreme Ct., 294 N. Y. 440, 445*; see, also, *Matter of Schneider v. Aulisi, 307 N. Y. 376, 381*.)

Here, in point of fact, prohibition was the only adequate remedy available to prevent the threatened exercise **[****14]** of unauthorized **[**550]** power. No appeal was possible from the issuing judge's direction for return of the writ in New York County or his refusal to make it returnable in Dutchess County, the place of detention; and an appeal from any order made at the completion of the habeas corpus hearing would be *brutum fulmen* -- a complete futility -- since, once the prisoner were produced in New York County and a hearing held, the act in excess of jurisdiction would be consummated, thereby defeating the jurisdictional imperatives of the statute. In such circumstances where the lack of jurisdiction is clearly established, the petitioner is entitled to relief in the nature of prohibition as a matter of law. (See, e.g., *Matter of Baltimore Mail S. S. Co. v. Fawcett, 269 N. Y. 379, 383-385*.)

18 N.Y.2d 330, *336; 221 N.E.2d 546, **550; 274 N.Y.S.2d 881, ***886; 1966 N.Y. LEXIS 1020, ****14

The order of the Appellate Division should be reversed and the application for a judgment in the nature of prohibition granted, as prayed for in the petition.

Order of Appellate Division reversed and matter remitted to that court with instructions to grant the order of prohibition as prayed for in the petition.

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Neutral
As of: August 21, 2019 2:04 PM Z

Lake S. & M. S. R. Co. v. Roach

Court of Appeals of New York

February 24, 1880, Submitted ; March 9, 1880, Decided

No Number in Original

Reporter
80 N.Y. 339 *; 1880 N.Y. LEXIS 104 **

The Lake Shore and Michigan Southern Railway Company, Respondent, v. Patrick Roach et al., Appellants.

Prior History: **[**1]** Appeal from order of the General Term of the Supreme Court, in the fourth judicial department, affirming an order of Special Term, denying defendants' motion to set aside proceedings on the part of plaintiff for the claim and delivery of an engine and cars, to recover the possession of which this action was brought.

The facts are sufficiently stated in the opinion.

Disposition: Order affirmed.

Core Terms

taxes, seize

Syllabus

The provision of the charter of the city of Buffalo of 1870 (§ 22, chap. 519, Laws of 1870), declaring that goods and chattels upon lands for which taxes are assessed shall be deemed to belong to the person to whom the lands are assessed, does not apply to property belonging to another person in no way liable for the tax which is transiently upon lands assessed, but in the possession of the owner for his own purposes; and the collector cannot lawfully, by virtue of his warrant, take such property, for the purpose of satisfying the tax.

Where such property is so taken, an action by the owner to recover the possession thereof, may be maintained against the collector.

The property in such case cannot properly be said to be taken for a tax within the meaning of the provision of the Code **[**2]** of Procedure (§ 207), requiring an affidavit for the claim and delivery of property to show that the property has not been taken for a tax, or of the provision of the Revised Statutes (2 R. S., 522, § 4), which provides that "no replevin shall lie for any property taken by virtue of any warrant for the collection of any tax," etc.

It seems, that where property belonging to A., upon lands assessed to B., has been properly levied upon by the collector, under said provision of the charter, it cannot be shown against him that B. did not own or

occupy the lands; there being nothing upon the face of the papers to notify the collector of the alleged illegality, it is his duty to execute his warrant, and he will be protected in doing so.

Counsel: P. A. Matteson, for appellants. When property has been taken in violation of the provisions of law, it is proper practice to make a motion to set aside the proceedings. O'Reilly v. Good, 42 Barb., 521; Niagara Elevating Co. v. McNamara, 1 Sheldon, 361.) The warrant is a protection to the collector, and this action cannot be sustained. (Niagara Elevating Co. v. McNamara, 50 N.Y., 653; The People v. Albany C. P., 7 Wend., 485; Slocum v. Mayberry, **[**3]** 2 Wheat., 1; Taylor v. Caryl, 20 How. [U.S.], 583; Deming v. Janes, 72 Ill., 78; Freeman v. Howe, 24 How. [U.S.], 450; Cooley on Taxation, 302; The Troy and L. R. R. Co. v. Kane, 72 N.Y., 614; Chegaray v. Jenkins, 5 id., 376; Abbott v. Yost, 2 Denio, 86.) Although a warrant may have issued erroneously or irregularly, if on its face it gives authority to the officer to collect the fine etc., replevin cannot be sustained. (O'Reilly v. Good, 42 Barb., 521; People ex rel. Enos v. Albany, 7 Wend., 485; Hudler v. Golden, 36 N.Y., 446; Clearwater v. Bull, 63 id., 627.) The roll and warrant is the process. (Bradley v. Ward, 58 N.Y., 401; See Burroughs on Tax, 256, 261, 262; Nolan v. Busby, 28 Ind., 154.) An inferior public officer, acting within the scope of his warrant when apparently regular, is protected, unless the authority issuing it is without jurisdiction. (Cunningham v. Mitchel, 67 Penn., 78; Moore v. Alleghany City, 18 id., 55; St. Louis Building Assn. v. Lighter, 47 Mo., 393; Pacific R. R. Co. v. Dulle, 48 id., 282; Sheldon v. Van Buskirk, 2 N.Y., 473; Cooley on Taxation, 302; The State v. Allen, 2 McCord, 55, 60; Stockwell v. Vietch, 38 Barb.) The appropriate and only remedy, **[**4]** so far as defendants are concerned, is by an action to restrain them from selling or interfering with this property. (Demings v. Janes, 72 Ill., 78.)

A. P. Laning, for respondent. Replevin, or proceedings of claim and delivery, is the proper and only remedy which the plaintiff has in this action. (Stockwell v. Vietch, 15 Abb., 412; Thompson v. Button, 14 J. R., 84; Judd v. Fox, 9 Cow., 259.) The collector acquired no jurisdiction, his warrant being irregular in that it showed the tax was assessed to neither the owners nor occupants. (1 R. S., 389, §§ 1, 2; Whitney v. Thomas, 23 N.Y., 281; Mygatt v. Washburn, 15 id., 316; Johnson v. Learn, 30 Barb., 616; Pratt v. Stewart, 8 id., 493; Van Rensselaer v. Cotterell, 7 id., 127; Dubois v. Webster, 7 Hun., 371.) Plaintiff had acquired a property in the premises occupied by the railway track, that could not be taken for a tax assessed against the person over whose land the railway passes, or assessed against the lands adjoining, or over which such a right of way has been acquired. (Troy R. R. Co. v. Potter, 42 Vt., 265; Rogers v. Bradshaw, 20 J. R., 735; The State v. Maine, 27 Conn., 641; Mt. Washington Road, 35 N. H., 134.)

Judges: Earl, **[**5]** J. All concur, except Rapallo and Andrews, JJ., not sitting.

Opinion by: EARL

Opinion

[*341] Earl, J. The plaintiff commenced an action to recover of the defendants the possession of a railroad engine and several railroad cars, and upon an affidavit and notice directed to him, the sheriff of Erie county took the property from **[*342]** the possession of the defendants, and while it was in his possession they made a motion at a Special Term of the Supreme Court to set aside the proceedings pertaining to taking the property, which motion was denied. They then appealed to the General Term of the Supreme Court, and from the order of affirmance there to this court.

The defendant Roach was a tax collector of the city of Buffalo, and by virtue of a tax warrant issued to him, he was commanded to collect a certain tax imposed upon certain land in the city of Buffalo, which was assessed to Palmer & Co., and not being able to find any property of Palmer & Co. out of which to make the tax, or to procure payment of the tax otherwise, and finding this personal property upon the land taxed, he, with the aid of the other defendant, seized this property, by virtue of his warrant, for the purpose of satisfying **[**6]** the tax. The property, which consisted of an engine and freight cars, was at the time in the possession of the plaintiff, having been temporarily run upon the land, on a track used by plaintiff communicating with the Union Iron Works, for the purpose of procuring freight. Under such circumstances the collector claims that the plaintiff had no right in this action to direct the sheriff to take the property from him.

The plaintiff claims that Palmer & Co. did not own or occupy the land, and that the assessment and tax were, therefore, illegal and void. But it did not appear upon the assessment-roll, or in the warrant, that they did not own or occupy the land. The assessment, upon the warrant and papers delivered to the collector, was valid. There was nothing upon the face of the papers to notify the collector of the alleged illegality, and hence it was his duty to execute the warrant, and it is well settled that he would be protected in doing so: (*The Niagara Elevating Company v. McNamara, 50 N.Y. 653*; *The Troy and Lansingburgh R. R. Co. v. Kane, 72 N.Y. 614*; *Chegaray v. Jenkins, 5 N.Y. 376*.) And the property which he could take by virtue of such a warrant **[**7]** could not be taken from him in such an action as **[*343]** this. Section 207 of the Code of Procedure, which is still in force, provides that plaintiff's affidavit must show that the property has not been taken for "a tax, assessment or a fine," and the Revised Statutes (2 R. S., 522, § 4) provide that "no replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment or fine," and such is still the law: (*Hudler v. Golden, 36 N.Y. 446*.

But the plaintiff claims that the collector had no right to seize its property for the payment of this tax; and that really presents the only question for consideration here. If the collector had no right to seize this property under his warrant, the plaintiff can maintain this action. If a tax collector illegally seizes the property of A. to satisfy the tax of B., A. can maintain an action of replevin for its recovery: (*Stockwell v. Vietch, 15 Abb. Pr. 412*; *Thompson* v. *Button*, 14 J.R. 84; *Judd v. Fox, 9 Cow. 259*.) As the warrant in such case does not authorize or justify the seizure of the property, it cannot properly be said to be taken by virtue thereof.

This **[**8]** tax was imposed and warrant issued under the revised charter of the city of Buffalo, the act chapter 519 of the Laws of 1870. Section thirteen of title five of that act provides that the comptroller shall issue the warrant commanding the collector to collect from the several persons, etc., the taxes set opposite their respective names; and section nineteen provides that the collector shall demand the taxes, and that he shall make the amount thereof out of the goods and chattels of the persons, etc., opposite to whose names such taxes are set down; and then section twenty-two provides as follows: "Goods and chattels in the possession of the person opposite to whose name the taxes are set down, or upon the lands for which such taxes are assessed, shall be deemed to belong to such person; and no claim of property made thereto by any other person shall be available to prevent a sale." The object of this provision of law is to facilitate the collection of taxes, and to prevent fraud and collusion, by which their collection can be delayed or defeated **[*344]** and the government thus embarrassed. Its main purpose is, not to authorize the property of one to be taken to pay the tax of another, **[**9]** but to prevent disputes as to the ownership of property which the collector might seize. This is to be accomplished by the rule of evidence enacted that property found in the possession of the tax debtor or upon his land when the tax is thereon,

must be deemed to belong to him. It is manifest that this language cannot be taken literally. If one should drive upon the land taxed with a horse and wagon, simply to make a call as a visitor, or as a physician, or as an officer in the discharge of his official duty, could the property be taken out of his possession to satisfy the tax? If a thief had stolen the property, and taken it temporarily upon the land, could it be taken from his possession and sold for the tax? If one is passing over the land of another on his own business, can he be stripped of all the property in his possession for a tax upon the land? It cannot be doubted that the law-makers did not intend that this law should be applied in such cases; and yet they are within the letter of the law. The law-makers cannot always foresee all the possible applications of the general language they use; and it frequently becomes the duty of the courts in construing statutes to limit their **[**10]** operation, so that they shall not produce absurd, unjust or inconvenient results not contemplated or intended. A case may be within the letter of the law, and yet not within the intent of the law-makers; and in such a case a limitation or exception must be implied.

Without attempting to define the precise reach of this law, I am of opinion it was not intended to apply to the case of property transiently upon the land taxed and in the possession of the owner for his own purposes; and that the collector, in such case, cannot by virtue of his warrant lawfully take the property from the owner's possession for the purpose of satisfying a tax for which he is in no way liable.

The order should be affirmed, with costs.

All concur, except Rapallo and Andrews, JJ., not sitting.

Order affirmed.

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Questioned
As of: August 21, 2019 1:57 PM Z

People ex rel. McGoldrick v. Sterling

Supreme Court of New York, Appellate Division First Department

December 8, 1953

No Number in Original

Reporter
283 A.D. 88 *; 126 N.Y.S.2d 803 **; 1953 N.Y. App. Div. LEXIS 2986 ***

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOSEPH D. McGOLDRICK, as State Rent Administrator, Appellant, and MONROE JACOBS et al., Interveners, Appellants, v. EDWARD C. STERLING et al., Respondents.

Prior History: **[***1]** APPEAL from a judgment of the Supreme Court in favor of defendants, entered October 20, 1953, in New York County, upon a decision of the court on a trial at Special Term (BRISACH, J.).

Core Terms

tenants, apartments, regulation, Rent, co-operative, occupancy, eviction, leases, allocated, certificates, purchasers, housing accommodation, proprietary, premises, dwelling, landlord, purchase stock, two-year, shares, subdivision, stock, shares of stock, stock purchaser, injunctive, reserved

Counsel: *Robert H. Schaffer* **[***6]** of counsel (*Norman S. Fenton* with him on the brief, attorney), for appellant.

Leonard M. Wallstein, Jr., of counsel (*Senjamin Menschel* with him on the brief; *Wallstein, Menschel & Wallstein,* attorneys), for interveners, appellants.

George Brussel, Jr., of counsel (*Rosston, Hort & Brussel,* attorneys), for respondents.

Opinion by: BREITEL

Opinion

[*90] **[**805]** BREITEL, J. The question is whether an owner of real property - a multiple dwelling - may cut off the possessory rights of statutory tenants under the State Residential Rent Law (L. 1946, ch. 274, as amd.) by transferring the property to a corporation under a so-called "co-operative plan" and selling to strangers, without offering to the tenants, the shares allocated to their apartments.

We believe that the statute and regulations by implication do not so permit; that the regulations, as distinguished from the statute, were certainly not intended to so permit; and that, in any event, if the

regulations so permit they are invalid and of no effect to that extent, because not in effectuation of the purposes of the statute, and indeed, in contravention thereof.

This is what happened.

Edward C. Sterling **[***7]** had become the sole owner of 1133 Park Avenue, a multiple dwelling with thirty-two apartments. From 1934 to 1953, Mr. Sterling and his family had owned bonds secured by the building - some $306,500 worth out of a total bonded indebtedness of $504,000. In 1953, when the building was in reorganization, Mr. Sterling bid at public auction for the property, and took title on May 21, 1953.

In June, 1953, Mr. Sterling caused 1135 Park Avenue Corporation to be organized under the Stock Corporation Law (not the Cooperative Corporations Law). On June 29, 1953, the "co-operative plan" was promulgated over the subscription of the managing agents for the building.

The plan provided that of the thirty-two apartments in the building nineteen were allocated to occupant tenants. They would have the privilege of purchasing shares in the corporation allocated to their respective apartments and thereby obtain so-called "proprietary leases". As to the remaining thirteen apartments it was provided in the agreement for the sale of **[*91]** the building to the newly organized corporation that: "As part of the consideration for this sale and the conveyance of title by the Seller [Mr. Edward C. **[***8]** Sterling] to the Purchaser, **[**806]** the Organizer of the Cooperative Plan of Organization referred to in the annexed Plan of Cooperative Organization, shall have the right to purchase and acquire 3,335 shares of the stock of the Corporation allocated to apartments: 1-E, 2-E, 3-E, 5-E, 16-E, 1-SE, 1-W, 2-W, 3-W, 6-W, 9-W, 16-W, and PH-W and to execute Subscription Agreements and Proprietary Leases covering said shares and apartments."

The excepted apartments have been transferred to Mr. Robert D. Sterling, father of the seller. Some of the excluded tenants desire to purchase co-operative interests in their apartments, and at least one of them made a tender to purchase an interest in his at the price scheduled in the plan.

The effect of this "co-operative plan" is that occupant tenants of the apartments reserved for the "organizer" were not permitted to purchase "co-operative" interests in their apartments. The further effect would be that after a two-year lapse as provided in subdivision 3 of section 55 of the Rent and Eviction Regulations of the Temporary State Housing Rent Commission, the stranger purchasers of the shares allocated to the thirteen reserved apartments would **[***9]** be able to obtain certificates of eviction and remove the occupants. So the defendants contend. Indeed, they concede that the purpose of this Sterling plan is to allow the owner's father, Mr. Robert D. Sterling, to whom the reserved apartments were "sold", to speculate with the reserved apartments, sell them, and make a capital profit.

Upon the trial plaintiffs sought to show, but the evidence was excluded, that the seven residential tenants who were precluded from purchase of co-operative interests in the building were especially selected because of their efforts in the past in resisting rent increases before the Rent Administrator and in making complaints with respect to the maintenance of services.

The Rent Administrator brings this action for judgment enjoining defendants - members of the Sterling family who participated in the Sterling plan, the newly organized corporation, and the managing agents - from proceeding with the plan. He claims that it was designed illegally to circumvent the statutes and the regulations thereunder. A number of the tenants, excluded from the privilege of purchasing stock under

the Sterling plan, intervened as plaintiffs. They seek a **[*92]** **[***10]** declaratory judgment, in addition to injunction, that the Sterling plan is invalid, void and of no effect.

Pending determination of the action a temporary injunction was obtained and the plan has consequently not progressed. Upon the trial the court dismissed the complaints at the close of the entire case. In effect, the trial court held that the Sterling plan involved nothing more **[**807]** than a series of legal acts and that Mr. Sterling had a right to do with his property as the plan contemplated.

We cannot wholly agree with the contentions of either side to this controversy.

The State Residential Rent Law (L. 1946, ch. 274, as last amd. by L. 1953, ch. 321) sets up a system of regulation of rented residential dwellings on an emergency basis. Power is given to the Rent Commission to establish maximum rents. Tenants of controlled premises are entitled to possession so long as they pay the rent due, subject to certain exceptions. They may be removed, save in the case of the exceptions, only if certificates of eviction are first obtained from the Rent Commission. The State's police power is exercised through control of evictions. It is thus in that area that one must **[***11]** find warrant or prohibition for the operation of the Sterling plan. It is not in the province of the court to pass upon the character of ownership or the method of transfer of title that Mr. Sterling may propose for property owned by him. The statute does not purport to regulate title or transfer of title. It does, as already stated, impose controls on maximum rents and evictions.

Co-operatively owned apartments are not mentioned in the statute, except for a single reference not applicable to this case (§ 4, subd. 4, par. [a], cl. [3]). Hence, the right to obtain orders for certificates of eviction with respect to co-operatively owned apartments must be found in sections of the statute that deal generally with certificates of eviction.

Paragraph (a) of subdivision 2 of section 5 is pertinent. It reads in part:

"The commission shall issue such an order whenever it finds that:

"(a) the landlord seeks in good faith to recover possession of housing accommodations because of immediate and compelling necessity for his own personal use and occupancy or for the use and occupancy of his immediate family; provided, however, that where the housing accommodations are located **[***12]** in a one- or two-family house and the landlord seeks in good **[*93]** faith to recover possession for his own personal use and occupancy, an immediate and compelling necessity need not be established".

Under the Sterling plan the owner of the fee would be 1135 Park Avenue Corporation. The purchasers of stock in the corporation are entitled to "proprietary" leases to apartments for which specific shares of stock have been allocated. The lessee in the lease is in much the same position as any other tenant under the usual leasing arrangement. The reason is undoubtedly the wish to retain for the corporation the facile **[**808]** and summary remedies that are available to the ordinary landlord, in the event the lessee defaults in his obligations.

The statute defines a landlord as one entitled to the rent for use or occupancy of any housing accommodation (§ 2, subd. 6). Thus, a tenant of an apartment may be a "landlord" to his subtenant. The proprietary leases in this case provide that the lessee is entitled to the rents of his apartment if there is an existing statutory tenancy.

Of course, a statute may not be read so literally that it yields in application a nonsensical **[***13]** result. In the context of a plan, such as the Sterling plan, the 1135 Park Avenue Corporation is the landlord, not the stranger to whom its shares are sold. The co-operative lessee becomes entitled to the rents by assignment and not by virtue of the statutory tenant being his sublessee. (See *Matter of Danforth v. McGoldrick, 201 Misc. 480, 482-483* [Special Term, N.Y. Co., 1951, CORCORAN, J.].) (We note again that it is the shares in the corporation that are sold, and despite a vernacular usage to the contrary, the apartment is not sold, but leased under a so-called "proprietary" lease.)

Consequently, no warrant is found in the statute for granting certificates of eviction to purchasers of shares in the so-called "co-operatively-owned" corporation in this case. If warrant exists for granting the certificates, it must be found in the regulations promulgated by the Rent Commission under the very broad rule-making powers conferred on it (§ 4, subd. 4, par. [a]; § 4, subd. 5, par. [a]; § 4, subd. 5, par. [b]; § 5, subd. 3; § 6, subds. 1, 2; § 12, subd. 1).

Subdivision 3 of regulation 55 reads as follows:

"In the case of housing accommodations in a structure **[***14]** or premises owned by a cooperative corporation or association, a certificate shall be issued by the Administrator to a purchaser of stock or other evidence of interest to possession of such housing accommodations by virtue of a proprietary lease **[*94]** or otherwise where (a) the tenant originally obtained possession of the housing accommodations by virtue of a rental agreement with the purchaser; or (b) the purchased stock was acquired by the landlord more than two years prior to the date of the filing of the application; or (c) the purchased stock was acquired less than two years prior to the date of filing of the application and on that date stock in the cooperative has been purchased by persons who are tenants in occupancy of at least 80 percent of the dwelling units, in the structure or premises and are entitled by reason of stock ownership to proprietary leases of dwelling units in the structure or premises; or (d) the cooperative **[**809]** was organized and acquired its title or leasehold interest in the structure or premises before February 17, 1945 and on that date stock in the cooperative allocated to 50 percent or more of the dwelling units in the structure or premises **[***15]** was held by individual owners, who are or whose assignees or subtenants are tenants in occupancy of such dwelling units in the structure or premises at the date of the filing of the application.

"For the purposes of this paragraph the term 'tenants in occupancy' includes only (1) a person who purchased the stock allocated to a vacant apartment; or (2) a person who while he was a tenant in occupancy in the building, purchased the stock allocated to his or some other housing accommodation in the building for personal occupancy; or (3) a person who purchased the stock allocated to a housing accommodation which is occupied by a tenant who obtained his possession from said purchaser of the stock; or (4) a person who purchased the stock allocated to an apartment from an owner of such stock who was in occupancy of such apartment.

"For the purposes of this paragraph the term 'housing accommodation' shall not include servants' rooms which are non-housekeeping and located in the service portion of the building, and the term 'tenant' shall not include the persons occupying such servants' rooms. Any application under this paragraph must also comply with the requirements of paragraphs 1 and **[***16]** 4 of this section; provided, however, that where the applicant seeks to recover possession for his own personal use, he need not establish an immediate and compelling necessity."

It should be noted that the regulation refers to a purchaser of stock under a co-operative plan as a landlord. Earlier it was said that the statutory reference to a landlord did not include the holder of a proprietary lease. There is only a **[*95]** superficial inconsistency produced by the draftsman of the regulation. There can be no question that the regulation refers to a holder of a proprietary lease. We do not question the effect of that reference, so long as the rent commission had the power to make the regulation in question. It had that power if it is construed to conform with the purpose of the statute in protecting statutory tenants.

The Rent Administrator contends that from a reading of the whole regulation it is evident that primarily tenants in occupancy as statutory tenants are to be protected; hence, the punctilious provisions with respect to the 80% requirement and the definition of tenants in occupancy. He contends that the same punctilious and intended protection must be read **[***17]** into that branch of the regulation which provides for granting certificates of eviction, after a two-year lapse, even if 80% of the occupant tenants have not subscribed to the co-operative plan. Consequently, **[**810]** he argues, the two-year option provision would have the very reverse effect of that intended if occupants were not given an option to "purchase" their apartments before they were "sold" over their heads.

A serious question may be raised, although it was not, as to the applicability of the regulation to the corporation in the particular Sterling plan. It is questionable indeed whether a corporation is embarked on a co-operative plan, within the meaning of the regulation, at least, when thirteen out of thirty two apartments are to be reserved for private manipulative speculation before they will come to rest as co-operative units. We submit that it is not. It is then but a part co-operative. A sensible reading of the regulation suggests that it was contemplated that a co-operative might be set up for the tenants in occupancy. If 80% went along, the participants in the plan are eligible for the benefits of the regulation. If more than 20% of the tenants hold **[***18]** out, even then, the plan may go forward and after the lapse of two years the participants may rely on the alternative requirement prescribed in the regulation. A plan which will be co-operative for strangers to the premises hardly matches the stress placed upon the provisions as to who are "tenants in occupancy".

The Federal statutes and regulations which preceded the State statutes did not have the two-year optional provision (U.S. Code, tit. 50, Appendix, § 1899; Code of Fed. Reg., tit. 24, § 852.26, subd. [c], par. [1], cl. [ii]). Neither did the State regulations prior to 1951. The Temporary State Housing Rent Commission in proposing the change (1951 Rent Control Plan, **[*96]** p. 32) said: "In proposing this change in the Regulations, the Commission does not intend to abandon its position that the right of the recent purchaser of stock allocated to a cooperative apartment to evict the tenant in possession must be limited to avoid improper pressures upon such tenants to purchase stock in dormant or new cooperatives."

Implicit in the regulation and explicit in the proposal for the amended regulation is the concept that it is the occupant tenant to whom rights to **[***19]** the possession of the apartment will be offered. Any other view would permit owners, by the device of the Sterling plan, to remove first large portions, and later the whole of multiple dwellings from the rent control laws, without the intended protection to statutory tenants.

The regulations contain an interesting provision which exemplifies the plan of protection for statutory tenants. Section 57 authorizes subdivision of larger apartments, but conditioned upon providing options to, or in the alternative, relocation of, tenants displaced by the alterations.

[811]** This court has heretofore recognized that co-operative apartment plans are subject to supervision if their effect may be to frustrate the policy of the State in controlling maximum rents and evictions (*Judson v. Frankel, 279 App. Div. 372*). In that case it was noted by Mr. Justice VAN VOORHIS, now Associate Judge of the Court of Appeals, that: "It is not clear, nevertheless, that the intent of the Rent Commission or of the Legislature was to allow statutory tenants to be confronted with the alternatives of purchasing their apartments or of being evicted, at least unless they originally become tenants under **[***20]** leases from owners of separate, individual co-operative apartments, and except at the instance of such individual apartment owners, their successors or assigns." (P. 373.)

It was said further: "Plaintiffs should have the right to test out the question as to whether the co-operative scheme proposed by the defendants is a device to evade and circumvent the emergency rent control laws intended for the protection of the tenants." (P. 374.)

Surely, if an unfairly capitalized co-operative scheme may circumvent the laws by depriving the tenant in occupancy of a reasonable alternative to eviction, the absence of any alternative, reasonable or unreasonable, comes within the strictures of the ruling in *Judson* v. *Frankel.*

But let us assume that the regulation is to be read very literally, as defendants contend, and that the two-year provision **[*97]** serves to cut off the possessory rights of statutory tenants after the lapse of two years. Then, we say, the regulation is to that extent null and void. This would be so because it would no longer be in effectuation of the purposes of the statute but in conflict therewith (*Matter of Hoenig v. McGoldrick, 281 App. Div. 663*). **[***21]** The effect would be, indirectly, to decontrol premises, without warrant in the statute, at the option of owners who could successfully traffic in proprietary leases to the exclusion of tenants in possession. The statute does not give the Rent Administrator power to decontrol premises or categories of dwellings except as particularized in the statute. Consequently, he has no power to make a regulation that would have that effect indirectly. The absence of such delegation of power contrasts with the delegation of power to decontrol and recontrol areas, and under certain circumstances, categories of housing accommodations in the State, when findings are made and particularized standards are met (§ 12).

We would hesitate to declare invalid the two-year provision of subdivision 3 of section 55 of the regulations. Its purpose and effect can be validly retained if it is implied that it, like the balance of the regulation, **[**812]** requires a reasonable protection for statutory tenants for whose protection and benefit the emergency statutes exist in the first instance.

There is still another matter to be mentioned. The tenants, whose apartments were to be "sold" over their heads **[***22]** without option, claimed they were the subject of retaliation, because they had resisted rent increases and had made complaints with respect to the maintenance of services. The bulk of the proffered evidence was excluded by the court. Such retaliation is illegal (§ 10, subd. 2). Evidence to that effect was therefore admissible, and not limited to the period following the taking of title by Mr. Sterling in his individual capacity. That such retaliation be disguised would not avail, nor is it material that the reasons for retaliation arose under different formal ownerships. However, in view of the holding herein, a new trial is not required.

On the trial, and again upon argument in this court, counsel for defendants offered to stipulate to protect the possessory rights of the statutory tenants. The Rent Administrator rejects and objects to the stipulation proffered. The stipulation would not solve the problem. For one, it would affect only the particular

intervening tenants. It would not affect noninterveners. It might not affect successors. Moreover, the Rent Administrator, who initiated this action, is entitled to a declaration **[*98]** as to his responsibilities in **[***23]** connection with plans such as this. Plans such as the Sterling plan may have a coercive effect on tenants. Such possible effect is not completely negated by stipulation extended as a matter of grace. It is the responsibility of the Rent Administrator under the statute to prevent such practices (§ 11, subd. 1).

Declaratory judgment and injunctive relief are needed promptly. If the Rent Administrator must wait until the two-year period has passed and then act only with reference to applications for certificates of eviction, it may be too late. Rights and interests may have vested in bona fide purchasers of stock in the "co-operatively owned" corporation, and the Rent Administrator may be barred from refusing certificates of eviction (See *Matter of Hoenig v. McGoldrick, 281 App. Div. 663*, *supra.*)

Accordingly, the Rent Administrator is entitled to a declaratory judgment that purchasers of shares of stock in the 1135 Park Avenue Corporation, allocated to apartments occupied by statutory tenants who have been precluded from purchasing such shares of stock under the plan, will not be entitled to certificates of eviction against such statutory tenants under subdivision **[***24]** 3 of section 55 of the regulations, as such regulation now reads. Moreover, the Rent Administrator is further entitled to injunctive relief requiring defendants to stamp such shares of stock in an appropriate manner to put the purchasers thereof on notice that the **[**813]** plan under which they are issued does not meet the requirements of the regulation, as it now reads, for the purpose of obtaining certificates of eviction. The relief requested declaring the plan an illegal one and enjoining defendants from putting said plan into effect should be denied, except as above provided.

Judgment dismissing the complaints should be reversed and judgment should be granted in favor of plaintiffs to the extent indicated, without costs.

Settle order. Upon the settlement additional provisions may be submitted for inclusion relating to the declaratory judgment and injunctive relief to be granted and consistent with the holding of the court.

COHN, J.P., BASTOW, BOTEIN and BERGAN, JJ., concur.

Judgment unanimously reversed and judgment is directed to be entered in favor of the plaintiffs to the extent indicated in the opinion herein, without costs. Settle order on notice.

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People v. Santi

Court of Appeals of New York

October 21, 2004, Decided

No. 122, No. 123

Reporter
3 N.Y.3d 234 *; 818 N.E.2d 1146 **; 785 N.Y.S.2d 405 ***; 2004 N.Y. LEXIS 2442 ****

The People of the State of New York, Respondent, v. Ana Marie Santi, Appellant. The People of the State of New York, Respondent v. Peter Corines, Appellant.

Subsequent History: Related proceeding at *Corines v. Sentry Life Ins. Co., 33 A.D.3d 443, 821 N.Y.S.2d 885, 2006 N.Y. App. Div. LEXIS 12376 (N.Y. App. Div. 1st Dep't, 2006)*

Habeas corpus proceeding at *Corines v. Warden, Otisville Fed. Corr. Inst., 2007 U.S. Dist. LEXIS 40081 (E.D.N.Y., June 1, 2007)*

Related proceeding at *Corines v. Am. Physicians Ins. Trust, 2011 U.S. Dist. LEXIS 21084 (S.D.N.Y., Feb. 25, 2011)*

Prior History: Appeal, in the first above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered September 8, 2003. The Appellate Division affirmed a judgment of the Supreme Court, Queens County (Laura D. Blackburne, J.), which had convicted defendant, upon a jury verdict, of unauthorized practice of medicine (four counts).

Appeal, in the second above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered September 8, 2003. The Appellate Division affirmed a judgment of the Supreme Court, Queens County (Laura D. Blackburne, J.), which had convicted defendant, upon a jury verdict, of unauthorized practice of medicine (four counts).

People v Santi, 308 A.D.2d 464, 764 N.Y.S.2d 193, affirmed.

People v Corines, 308 A.D.2d 457, 764 N.Y.S.2d 117, affirmed. **[****1]**

People v. Corines, 308 A.D.2d 457, 764 N.Y.S.2d 117, 2003 N.Y. App. Div. LEXIS 9268 (N.Y. App. Div. 2d Dep't, 2003)
People v. Santi, 308 A.D.2d 464, 764 N.Y.S.2d 193, 2003 N.Y. App. Div. LEXIS 9276 (N.Y. App. Div. 2d Dep't, 2003)

Disposition: Order of the appellate division affirmed in each case.

Core Terms

Patient, licensed, profession, anesthesia, juror, unauthorized practice, individuals, aiding and abetting, statute's, exempt, medical practice, administered, Surgical, expert testimony, experiences, unlicensed, medicine, legislative intent, juror misconduct, see people, fraudulently, sensation, provides, convict, needle, abets, pain

Counsel: *Appellate Advocates,* New York City (*Lynn W.L. Fahey* of counsel), for appellant in the first above-entitled action. I. The proof was insufficient to establish beyond a reasonable doubt that appellant practiced medicine, when the People relied exclusively on the testimony of three lay witnesses as to what they experienced and observed after appellant started intravenous lines in their hands to prove that she administered anesthetic medication to them. (*Jackson v Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560*; *People v Kenny, 30 N.Y.2d 154, 282 N.E.2d 295, 331 N.Y.S.2d 392*; *People v Abelson, 309 N.Y. 643, 132 N.E.2d 884*; *Mosberg v Elahi, 80 N.Y.2d 941, 605 N.E.2d 353, 590 N.Y.S.2d 866*; *Fiore v Galang, 64 N.Y.2d 999, 478 N.E.2d 188, 489 N.Y.S.2d 47*; *McDermott v Manhattan Eye, Ear & Throat Hosp., 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65*; *Koehler v Schwartz, 48 N.Y.2d 807, 399 N.E.2d 1140, 424 N.Y.S.2d 119*; *Sawyer v Dreis & Krump Mfg. Co., 67 N.Y.2d 328, 493 N.E.2d 920, 502 N.Y.S.2d 696*; *Cole v Fall Brook Coal Co., 159 N.Y. 59, 53 N.E. 670*; *Star v Berridge, 77 N.Y.2d 899, 571 N.E.2d 74, 568 N.Y.S.2d 904*.) II. Appellant, charged with administering anesthetic medication on four occasions, was denied her rights to due process and effective assistance of counsel when the court refused to respond meaningfully to a jury question about whether "introducing an IV" would, in and of itself, constitute the practice of medicine, thereby allowing the jury to convict appellant based on a theory that was at odds with the indictment, unsupported by the evidence, and consistent with innocence. (*People v Almodovar, 62 N.Y.2d 126, 464 N.E.2d 463, 476 N.Y.S.2d 95*; *People v Malloy, 55 N.Y.2d 296, 434 N.E.2d 237, 449 N.Y.S.2d 168*; *People v Weinberg, 83 N.Y.2d 262, 631 N.E.2d 97, 609 N.Y.S.2d 155*; *People v Miller, 6 N.Y.2d 152, 160 N.E.2d 74, 188 N.Y.S.2d 534*; *People v Lupo, 305 N.Y. 448, 113 N.E.2d 793*; *People v Gonzalez, 293 N.Y. 259, 56 N.E.2d 574*; *People v Bleau, 276 A.D.2d 131, 718 N.Y.S.2d 453*; *People v Henning, 271 A.D.2d 813, 706 N.Y.S.2d 748*; *People v Panetta, 250 A.D.2d 710, 673 N.Y.S.2d 434*; *People v Pyne, 223 A.D.2d 910, 636 N.Y.S.2d 491*.) III. Appellant was denied her rights to due process and confrontation when a juror employed at Beth Israel Hospital influenced the other jurors, based on knowledge purportedly gained from her unique work experience, to conclude that appellant was guilty of practicing medicine without a license for merely inserting an intravenous needle into a patient's hand. (*Sheppard v Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600*; *People v Maragh, 94 N.Y.2d 569, 729 N.E.2d 701, 708 N.Y.S.2d 44*; *People v Arnold, 96 N.Y.2d 358, 753 N.E.2d 846, 729 N.Y.S.2d 51*; *United States v Torres, 128 F.3d 38*, *523 U.S. 1065, 118 S. Ct. 1399, 140 L. Ed. 2d 657*; *People v Brown, 48 N.Y.2d 388, 399 N.E.2d 51, 423 N.Y.S.2d 461*; *People v Flores, 282 A.D.2d 688, 725 N.Y.S.2d 655*.) IV. The hearing court improperly precluded the defense from asking the jurors appropriate questions directly relevant to the *People v Maragh (94 N.Y.2d 569, 729 N.E.2d 701, 708 N.Y.S.2d 44 [2000])* issue. (*People v Smith, 59 N.Y.2d 988, 453 N.E.2d 1079, 466 N.Y.S.2d 662*.)

Eliot Spitzer, Attorney General, New York City (*Laurie M. Israel, Michael S. Belohlavek* and *Robin A. Forshaw* of counsel), for respondent in the first above-entitled action. I. The trial evidence, viewed in the light most favorable to the prosecution, was legally sufficient to establish defendant's guilt of the unauthorized practice of medicine. (*People v Bleakley, 69 N.Y.2d 490, 508 N.E.2d 672, 515 N.Y.S.2d 761*; *Jackson v Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560*; *People v Cabey, 85 N.Y.2d 417, 649 N.E.2d 1164, 626 N.Y.S.2d 20*; *People v Contes, 60 N.Y.2d 620, 454 N.E.2d 932, 467 N.Y.S.2d 349*; *People v Ford, 66 N.Y.2d 428, 488 N.E.2d 458, 497 N.Y.S.2d 637*; *People v Williams, 84 N.Y.2d 925, 644*

N.E.2d 1367, 620 N.Y.S.2d 811; *People v Rossey, 89 N.Y.2d 970, 678 N.E.2d 473, 655 N.Y.S.2d 861*; *People v Norman, 85 N.Y.2d 609, 650 N.E.2d 1303, 627 N.Y.S.2d 302*; *People v Hines, 97 N.Y.2d 56, 762 N.E.2d 329, 736 N.Y.S.2d 643*; *People v Cronin, 60 N.Y.2d 430, 458 N.E.2d 351, 470 N.Y.S.2d 110*.) II. The trial court appropriately responded to the jury's note. (*People v Malloy, 55 N.Y.2d 296, 434 N.E.2d 237, 449 N.Y.S.2d 168*; *People v Esquilin, 236 A.D.2d 245, 653 N.Y.S.2d 567*, *91 N.Y.2d 902, 691 N.E.2d 1024, 668 N.Y.S.2d 1000*; *People v Solis, 215 A.D.2d 789, 627 N.Y.S.2d 408*; *People v Almodovar, 62 N.Y.2d 126, 464 N.E.2d 463, 476 N.Y.S.2d 95*; *People v Spann, 56 N.Y.2d 469, 438 N.E.2d 402, 452 N.Y.S.2d 869*; *People v Davis, 223 AD2d 376, 636 N.Y.S.2d 294*; *People v Gonzalez, 293 N.Y. 259, 56 N.E.2d 574*; *People v Sanducci, 195 N.Y. 361, 88 N.E. 385, 23 N.Y. Cr. 389*.) III. The jurors did not act improperly in reaching their verdict of guilt. (*People v Williams, 63 N.Y.2d 882, 472 N.E.2d 1026, 483 N.Y.S.2d 198*; *People v Brown, 48 N.Y.2d 388, 399 N.E.2d 51, 423 N.Y.S.2d 461*; *People v Maragh, 94 N.Y.2d 569, 729 N.E.2d 701, 708 N.Y.S.2d 44*; *People v Testa, 61 N.Y.2d 1008, 463 N.E.2d 1223, 475 N.Y.S.2d 371*; *People v Arnold, 96 N.Y.2d 358, 753 N.E.2d 846, 729 N.Y.S.2d 51*; *People v James, 112 A.D.2d 380, 491 N.Y.S.2d 836*; *People v Thomas, 170 A.D.2d 549, 566 N.Y.S.2d 323*; *People v Leonti, 18 N.Y.2d 384, 222 N.E.2d 591, 275 N.Y.S.2d 825*; *People v Damiano, 87 N.Y.2d 477, 663 N.E.2d 607, 640 N.Y.S.2d 451*; *People v Arnold, 96 N.Y.2d 358, 753 N.E.2d 846, 729 N.Y.S.2d 51*.) IV. The trial court appropriately exercised its discretion in limiting the scope of questions posed during the juror misconduct hearing. (*Pennsylvania v Ritchie, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40*; *People v Alomar, 93 N.Y.2d 239, 711 N.E.2d 958, 689 N.Y.S.2d 680*; *People v Hameed, 88 N.Y.2d 232, 666 N.E.2d 1339, 644 N.Y.S.2d 466*; *People v Testa, 61 N.Y.2d 1008, 463 N.E.2d 1223, 475 N.Y.S.2d 371*; *People v Loliscio, 187 A.D.2d 172, 593 N.Y.S.2d 991*; *United States v Ianniello, 866 F.2d 540*; *People v Leonard, 252 A.D.2d 740, 677 N.Y.S.2d 639*; *People v Corines, 295 A.D.2d 445, 743 N.Y.S.2d 314*; *People v Friedgood, 58 N.Y.2d 467, 448 N.E.2d 1317, 462 N.Y.S.2d 406*.)

Mark M. Baker, New York City, for appellant in the second above-entitled action. I. As a matter of statutory construction, as well as clear legislative intent, a duly licensed physician cannot be prosecuted under *Education Law § 6512 (1)* as an aider and abettor of a nonlicensed person. (*People v Varas, 110 A.D.2d 646, 487 N.Y.S.2d 577*; *Remba v Federation Empl. & Guidance Serv., 149 A.D.2d 131, 545 N.Y.S.2d 140*, *76 N.Y.2d 801, 559 N.E.2d 655, 559 N.Y.S.2d 961*; *People v Mauro, 147 Misc. 2d 381, 555 N.Y.S.2d 533*; *People v Allen, 92 N.Y.2d 378, 703 N.E.2d 1229, 681 N.Y.S.2d 216*; *Matter of Scotto v Dinkins, 85 N.Y.2d 209, 647 N.E.2d 1317, 623 N.Y.S.2d 809*; *Matter of Sutka v Conners, 73 N.Y.2d 395, 538 N.E.2d 1012, 541 N.Y.S.2d 191*; *People v Lupinos, 176 Misc. 2d 852, 674 N.Y.S.2d 582*; *People v Jelke, 1 N.Y.2d 321, 135 N.E.2d 213, 152 N.Y.S.2d 479*; *People v Ching Fong, 186 Misc. 2d 477, 718 N.Y.S.2d 805*; *People v Chavis, 91 N.Y.2d 500, 695 N.E.2d 1110, 673 N.Y.S.2d 29*.) II. Because the People's articulated theory of the case was based solely on codefendant Ana Marie Santi's alleged administering of anesthesia, the trial court's refusal to provide a meaningful response to the jury's note, by acknowledging that Santi's conceded insertion of intravenous lines was not unlawful, constructively amended the indictment and deprived defendants of due process of law. (*People v Iannone, 45 N.Y.2d 589, 384 N.E.2d 656, 412 N.Y.S.2d 110*; *People v Perez, 83 N.Y.2d 269, 631 N.E.2d 570, 609 N.Y.S.2d 564*; *People v Grega, 72 N.Y.2d 489, 531 N.E.2d 279, 534 N.Y.S.2d 647*; *People v Livoti, 166 Misc. 2d 925, 632 N.Y.S.2d 425*; *People v Plaisted, 1 A.D.3d 805, 768 N.Y.S.2d 236*; *People v Kaminski, 58 N.Y.2d 886, 447 N.E.2d 43, 460 N.Y.S.2d 495*; *People v Fata, 184 A.D.2d 206, 586 N.Y.S.2d 780, 80 N.Y.2d 974, 605 N.E.2d 879, 591 N.Y.S.2d 143*; *People v Powell, 153 A.D.2d 54, 549 N.Y.S.2d 276*; *People v Spann, 56 N.Y.2d 469, 438 N.E.2d 402, 452 N.Y.S.2d 869*; *People v Gachelin, 237 A.D.2d 300, 654 N.Y.S.2d 393*.) III. Because the jury clearly convicted defendant based on Ana Marie Santi's conceded insertion of

the intravenous needles into the three patients, and because no expert testimony was introduced by the People, the evidence was legally insufficient, as a matter of law, to establish that anesthesia had been administered. (*People v Contes, 60 N.Y.2d 620, 454 N.E.2d 932, 467 N.Y.S.2d 349*; *Matter of Morrissey v Sobol, 176 A.D.2d 1147, 575 N.Y.S.2d 960*, *79 N.Y.2d 754, 589 N.E.2d 1263, 581 N.Y.S.2d 281*; *People v Amber, 76 Misc. 2d 267, 349 N.Y.S.2d 604*; *People v Cole, 219 N.Y. 98, 113 N.E. 790, 34 N.Y. Cr. 539*; *People v Allcutt, 117 A.D. 546, 102 N.Y.S. 678, 20 N.Y. Cr. 560*, *189 N.Y. 517, 81 N.E. 1171*; *People v Rubin, 103 Misc. 2d 227, 424 N.Y.S.2d 592*; *People v Lehrman, 251 A.D. 451, 296 N.Y.S. 580*; *Engel v Gerstenfeld, 184 A.D. 953, 171 N.Y.S. 1084*; *Jackson v Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560*; *Maldonado v Scully, 86 F.3d 32*.) IV. Because a certain juror, who was perceived by the other members of the panel as a medical professional, gratuitously shared her assumed expertise with her colleagues with respect to a material issue in the case which was not within the ken of the average juror, and which was treated by the other jurors as if it were evidence, the resulting misconduct severely prejudiced defendant, thereby warranting a new trial. (*People v Maragh, 94 NY2d 569, 729 N.E.2d 701, 708 N.Y.S.2d 44*.)

Eliot Spitzer, Attorney General, New York City (*Laurie M. Israel, Caitlin J. Halligan, Michael Belohlavek* and *Robin A. Forshaw* of counsel), for respondent in the second above-entitled action. I. Neither the legislative history of *Education Law § 6512 (1)* nor rules of statutory construction support defendant's contention that, as a duly licensed physician, he could not be found guilty of the unauthorized practice of medicine. (*Matter of Delmar Box Co. [Aetna Ins. Co.], 309 N.Y. 60, 127 N.E.2d 808*; *Matter of Knight-Ridder Broadcasting v Greenberg, 70 N.Y.2d 151, 511 N.E.2d 1116, 518 N.Y.S.2d 595*; *People v Coleman, 104 A.D.2d 778, 480 N.Y.S.2d 888*; *People v Calkins, 9 N.Y.2d 77, 172 N.E.2d 549, 211 N.Y.S.2d 166*; *People v Irving, 107 A.D.2d 944, 484 N.Y.S.2d 354*; *People v Evans, 58 A.D.2d 919, 396 N.Y.S.2d 727*; *People v Merfert, 87 Misc. 2d 803, 386 N.Y.S.2d 559*; *People v Prainito, 97 Misc. 2d 66, 410 N.Y.S.2d 772*; *People v Reilly, 85 Misc. 2d 702, 381 N.Y.S.2d 732*; *People v Brody, 298 N.Y. 352, 83 N.E.2d 676*.) II. The trial court appropriately responded to the jury's note. (*People v Malloy, 55 N.Y.2d 296, 434 N.E.2d 237, 449 N.Y.S.2d 168*; *People v Esquilin, 236 A.D.2d 245, 653 N.Y.S.2d 567*, *91 N.Y.2d 902, 691 N.E.2d 1024, 668 N.Y.S.2d 1000*; *People v Solis, 215 A.D.2d 789, 627 N.Y.S.2d 408*; *People v Almodovar, 62 N.Y.2d 126, 464 N.E.2d 463, 476 N.Y.S.2d 95*; *People v Davis, 223 A.D.2d 376, 636 N.Y.S.2d 294*; *People v Spann, 56 N.Y.2d 469, 438 N.E.2d 402, 452 N.Y.S.2d 869*; *People v Grega, 72 N.Y.2d 489, 531 N.E.2d 279, 534 N.Y.S.2d 647*; *People v Fata, 184 A.D.2d 206, 586 N.Y.S.2d 780*; *People v Powell, 153 A.D.2d 54, 549 N.Y.S.2d 276*; *People v Gachelin, 237 A.D.2d 300, 654 N.Y.S.2d 393*.) III. The People presented legally sufficient evidence of defendant's guilt. (*People v Bleakley, 69 N.Y.2d 490, 508 N.E.2d 672, 515 N.Y.S.2d 761*; *Jackson v Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560*; *People v Cabey, 85 N.Y.2d 417, 649 N.E.2d 1164, 626 N.Y.S.2d 20*; *People v Contes, 60 N.Y.2d 620, 454 N.E.2d 932, 467 N.Y.S.2d 349*; *People v Ford, 66 N.Y.2d 428, 488 N.E.2d 458, 497 N.Y.S.2d 637*; *People v Williams, 84 N.Y.2d 925, 644 N.E.2d 1367, 620 N.Y.S.2d 811*; *People v Rossey, 89 N.Y.2d 970, 678 N.E.2d 473, 655 N.Y.S.2d 861*; *People v Norman, 85 N.Y.2d 609, 650 N.E.2d 1303, 627 N.Y.S.2d 302*; *People v Hines, 97 N.Y.2d 56, 762 N.E.2d 329, 736 N.Y.S.2d 643*; *People v Rivera, 84 N.Y.2d 766, 646 N.E.2d 1098, 622 N.Y.S.2d 671*.) IV. The jurors did not act improperly in reaching their verdict of guilt. (*People v Williams, 63 N.Y.2d 882, 472 N.E.2d 1026, 483 N.Y.S.2d 198*; *People v Brown, 48 N.Y.2d 388, 399 N.E.2d 51, 423 N.Y.S.2d 461*; *People v Maragh, 94 N.Y.2d 569, 729 N.E.2d 701, 708 N.Y.S.2d 44*; *People v Testa, 61 N.Y.2d 1008, 463 N.E.2d 1223, 475 N.Y.S.2d 371*; *People v Arnold, 96 N.Y.2d 358, 753 N.E.2d 846, 729 N.Y.S.2d 51*; *People v James, 112 A.D.2d 380, 491 N.Y.S.2d 836*; *People v Thomas, 170 A.D.2d 549, 566 N.Y.S.2d 323*; *People v Leonti, 18 N.Y.2d 384, 222 N.E.2d 591, 275 N.Y.S.2d 825*; *People*

v Damiano, 87 N.Y.2d 477, 663 N.E.2d 607, 640 N.Y.S.2d 451; *People v Arnold, 96 N.Y.2d 358, 753 N.E.2d 846, 729 N.Y.S.2d 51*.)

Judges: Opinion by Judge Ciparick. Chief Judge Kaye and Judges Smith, Rosenblatt, Graffeo, Read and Smith concur.

Opinion by: CIPARICK

Opinion

[1148] [***407] [*239]** Ciparick, J.

We are asked to determine whether a licensed physician is subject to prosecution under *Education Law § 6512 (1)* for aiding and abetting an unauthorized individual in **[***408] [**1149]** the unlawful practice of medicine. We conclude that the only reasonable interpretation of the statute does not exempt licensed individuals from criminal prosecution. Additionally, questions regarding sufficiency of the evidence, a response to a jury inquiry and potential juror misconduct are all likewise resolved in the People's favor.

Both appeals here arise out of the same set of facts. Defendant Peter Corines, a licensed medical doctor, owned and operated two medical offices--Surgical Consultants, P.C. and Ambulatory Anesthesia, P.C.--in Queens County, New York. From 1997 **[****2]** to 1998 defendant Ana Marie Santi worked intermittently for Corines at Surgical Consultants. Defendant Santi was licensed to practice medicine in August 1972. Originally, Corines hired Santi as an anesthesiologist, but on March 16, 1998, the Department of Health suspended Santi's license to practice medicine. Despite her suspension, Santi continued to work, in some capacity, at Surgical Consultants. Corines described her as a "medical assistant."

The Attorney General charged each defendant with four counts of unauthorized practice of medicine under *Education Law § 6512 (1)*. The charges stemmed specifically from the treatment of three patients of defendant Corines.

On June 22, 1998, Patient A visited Surgical Consultants to have laser surgery. Defendant Santi entered the operating room **[*240]** where Patient A was waiting and started an intravenous, or "I.V." line, placing the needle in the patient's right hand. The patient testified she immediately felt relaxed. Corines subsequently entered the room. Patient A then became unconscious and Corines began the surgery.

During the procedure, Patient A awoke twice, nauseous and in pain. The second time she awoke, Corines **[****3]** was not present in the room. To calm her, Santi gave her an injection and laid her down. Ultimately, following the procedure, she was led to a recovery room and fell asleep.

On July 28, 1998, Corines treated Patient B at Surgical Consultants. As Patient B testified, shortly after his arrival there, Santi entered the examination room and directed him to lie on his back. Santi then prepped and cleaned Patient B's right hand, unwrapped an I.V. needle and inserted it into the back of his hand. The needle was connected to tubing which led to an I.V. bag. Patient B said he felt a warm sensation and observed Santi adjust the flow of the liquid. Defendant Corines thereafter entered the room and performed the procedure. After it was complete, Santi returned and removed the needle from Patient

B's hand, at which point he said he felt "woozy" and "a bit weak." He received no subsequent medical treatment from Corines.

Patient C testified that on December 4, 1998 she visited Surgical Consultants to have cosmetic eye surgery. Both Corines and Santi were present in the operating room. Corines, situated on Patient C's right side, engaged her in conversation. Santi, standing to the patient's left, **[****4]** inserted an I.V. into her left hand. Immediately after Santi placed the needle in her hand, according to Patient C, she felt the "medication" and fell into unconsciousness. When she awoke both Santi and Corines were in the room. Patient C remained a bit drowsy after she regained consciousness. Santi helped her dress and Patient C ultimately left the office. Following the surgery Patient C's eyelids became infected and she returned to Surgical Consultants on December 30, 1998 for treatment. Again, she testified, both Santi and Corines were present in the operating room. Corines informed her that he was going to give her an injection to help ease the pain. **[***409]** **[**1150]** Santi then placed an I.V. line in Patient C's hand. Santi remained on the patient's left side, where the I.V. line was located. Corines remained on Patient C's right side, away from the I.V. line. Patient C felt the medication take effect. Corines then directed Santi to increase the flow of medication, and Patient C fell into unconsciousness.

[*241] At trial, the People proceeded on the theory that, in each of the aforementioned instances, Santi engaged in the unauthorized practice of medicine by administering anesthesia, and that Corines **[****5]** aided and abetted her. Defendants, by contrast, claim that the I.V. lines contained either a simple water and glucose, or glucose saline, solution and that the I.V. lines that Santi initiated contained no anesthesia, and that she merely prepared the patients and Corines administered the anesthesia.

Following the People's proof, Corines moved for a trial order of dismissal claiming that the evidence was insufficient to support the charges. Specifically, defendant claimed that no "qualified" individual testified to the use of anesthesia. Santi joined the motion and further noted that even "held in the light most favorable to the People . . . [t]here is no specific proof as to actual drugs or anesthesia having been administered." The court reserved decision, ultimately denying defendants' motion. Following their case, defendants again moved to dismiss. [1] The court again reserved decision. The jury convicted both Santi and Corines on each of the four counts of unauthorized practice in violation of *Education Law § 6512 (1)*. After conducting an investigation that revealed what defendants believed to be misconduct by a juror that improperly influenced other members **[****6]** of the jury, defendants moved to set aside the verdict. The court denied the motion without a hearing and defendants appealed.

The Appellate Division remanded the case for a hearing on the juror misconduct issue (*see People v Corines, 295 A.D.2d 445, 743 N.Y.S.2d 314 [2d Dept 2002]*; *People v Santi, 295 A.D.2d 457, 743 N.Y.S.2d 308 [2d Dept 2002]*). Following the hearing, the court again denied defendants' motions. Defendants again appealed.

The Appellate Division, this time addressing the merits, affirmed. The Court conducted both a sufficiency and factual review and ultimately concluded that "[t]he evidence adduced at trial demonstrated that the defendant practiced medicine without a license . . . by administering anesthesia to three patients" (*People v Santi, 308 A.D.2d 464, 465, 764 N.Y.S.2d 193 [2d Dept 2003]*; *see also* **[****7]** *People v Corines, 308 A.D.2d 457, 457-458, 764 N.Y.S.2d 117 [2d Dept 2003]*). The Court further held, with regard to defendant

[1] This second motion to dismiss was actually made the day after summations, just before the judge's charge to the jury.

Corines, that he "aided and abetted Santi in her unlicensed practice of medicine" (*Corines, 308 A.D.2d at 458*). A Judge of **[*242]** this Court granted leave to appeal, and we now affirm each of the appeals.

I. *Education Law § 6512*

[1] We begin our discussion with an analysis of defendant Corines' primary claim assailing the lower courts' interpretation of *Education Law § 6512 (1)*. Specifically, defendant Corines contends that the plain language of *section 6512 (1)* exempts licensed individuals from criminal prosecution under the statute. We disagree.

Title VIII of the New York State Education Law regulates professional conduct and requires certain enumerated professionals, **[***410]** **[**1151]** including physicians, to obtain a license in order to practice such professions lawfully (*see generally Education Law § 6500 et. seq.*; *Education Law §§ 6520, 6521*). *Education Law § 6512 (1)* criminalizes the conduct of any individual who practices any of the enumerated professions in title VIII without **[****8]** authorization. Similarly, it criminalizes the conduct of anyone who aids and abets an unauthorized individual in the unlawful practice of any such profession (*see Education Law § 6512 [1]*; *see also Penal Law § 20.00*).

Specifically, *Education Law § 6512 (1)* provides that:

> "Anyone not authorized to practice under this title who practices or offers to practice or holds himself out as being able to practice in any profession in which a license is a prerequisite to the practice of the acts, or who practices any profession as an exempt person during the time when his professional license is suspended, revoked or annulled, or who aids or abets an unlicensed person to practice a profession, or who fraudulently sells, files, furnishes, obtains, or who attempts fraudulently to sell, file, furnish or obtain any diploma, license, record or permit purporting to authorize the practice of a profession, shall be guilty of a class E felony."

In interpreting the statute we are guided by a well-settled principle of statutory construction: courts normally accord statutes their plain meaning, but "will not **[****9]** blindly apply the words of a statute to arrive at an unreasonable or absurd result" (*Williams v Williams, 23 N.Y.2d 592, 599, 246 N.E.2d 333, 298 N.Y.S.2d 473 [1969]*; *see also Matter of Rouss 221 N.Y. 81, 91, 116 N.E. 782 [1917]*; *Holy Trinity Church v United States, 143 U.S. 457, 460, 36 L. Ed. 226, 12 S. Ct. 511 [1892]*).

[*243] It is equally well settled that, "[i]n implementing a statute, the courts must of necessity examine the purpose of the statute and determine the intention of the Legislature" (*Williams, 23 N.Y.2d at 598*). Indeed, "[t]he primary consideration of the courts in the construction of statutes is to ascertain and give effect to the intention of the Legislature" (McKinney's Cons Laws of NY, Book 1, Statutes § 92 [a], at 177). Legislative intent drives judicial interpretations in matters of statutory construction (*see People v Allen, 92 N.Y.2d 378, 383, 703 N.E.2d 1229, 681 N.Y.S.2d 216 [1998]*).

Corines claims that a plain reading of *Education Law § 6512 (1)* makes clear that only individuals "not authorized to practice under [the *Education Law*]" may be prosecuted under the statute. Defendant also contends that a comparison of the distinct language used in *section 6512 (1)* and *Education Law § 6512 (2)* **[****10]** further supports his reading of the statute and thereby renders subdivision (1) superfluous. [2] Both the trial court and the Appellate Division disagreed with defendant's interpretation, as do we.

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[2] *Education Law § 6512 (2)* provides that

While we acknowledge that defendant's interpretation of the statute represents a fair and literal reading of the text, such an interpretation ignores the legislative intent underlying the statute's enactment. If the phrase "not authorized to practice under this title" **[****11]** modified the pronoun "[a]nyone," **[***411]** **[**1152]** as defendant urges, the statute would necessarily be applied in an unreasonable manner. For example, defendant's interpretation of the statute would exempt any licensed or authorized individual from criminal prosecution if such person aided or abetted fewer than three people in the unlicensed and unauthorized practice of a profession. Following this reasoning, such a reading would allow for authorized or licensed individuals to fraudulently reproduce and distribute diplomas and licenses, an act similarly proscribed in the statute for lay individuals.

In effect, the statute, read as defendant asks, would enable licensed individuals of all professions under the purview of title VIII to engage in conduct that would otherwise be criminal. We **[*244]** cannot accept that the Legislature intended to enable such conduct, nor do we believe that it intended to create such a disparity in the statute's application. Insofar as we must interpret a statute so as to avoid an "unreasonable or absurd" application of the law, we reject defendant's interpretation (*Williams, 23 N.Y.2d at 599*). Instead, we look to the legislative intent underlying the statute's enactment **[****12]** for guidance. A review of the legislative history makes apparent that only one reasonable interpretation of the statute exists.

Title VIII has a clear regulatory purpose. Specifically, the statute's legislative introduction indicates that it "provides for the regulation of the admission to and the practice of certain professions" (*Education Law § 6500*). Indeed, it cannot be reasonably contested that the legislation attempts to provide for the safe interaction of the regulated professions and those individuals that would engage their services, namely, the public. Broadly stated, it is a statute clearly designed to promote the public's safety. Allowing licensed physicians to aid and abet unauthorized individuals in the unlawful practice of medicine does not in any way promote the general welfare or otherwise ensure public safety.

A deeper look at the legislative history underlying the enactment of *Education Law § 6512* further supports our interpretation. In juxtaposing *section 6512*, as originally enacted in 1971, with the enactment of *section 6512 (2)* five years later, it is apparent that the Legislature did not intend to exempt licensed **[****13]** individuals from prosecution under the law for aiding and abetting fewer than three individuals in the unauthorized practice of a profession.

In 1971, as part of a greater revision of the Education Law, the Legislature enacted *section 6512*. At that time, it consisted of only a single section with wording substantially similar to that of *section 6512 (1)* as it exists today (L 1971, ch 987, § 2). [3] The unauthorized practice of a profession, originally, was a class A misdemeanor.

"[a]nyone who knowingly aids or abets three or more unlicensed persons to practice a profession or employs or holds such unlicensed persons out as being able to practice in any profession in which a license is a prerequisite to the practice of the acts, or who knowingly aids or abets three or more persons to practice any profession as exempt persons during the time when the professional licenses of such persons are suspended, revoked or annulled, shall be guilty of a class E felony."

[3] The original 1971 enactment read as follows:

"*§ 6512*. Unauthorized practice a crime

[**14]** **[*245]** In 1976, the Legislature increased the existent sanction by enacting *section 6512 (2)* (L 1976, ch 689). This section, as evidenced by the extensive legislative discussion that preceded its passage, was enacted primarily to combat the growing problem of massage parlor prostitution in urban areas (*see* Mem of Assembly Member **[***412]** **[**1153]** Lipschutz, Bill Jacket, L 1976, ch 689). The Legislature passed the law with the hope that "increasing the penalty in cases where three or more persons are involved in the unauthorized practice of a profession would facilitate law enforcement efforts to eradicate certain evils such as the illicit practice of massage" (*id.*). In 1979 the Legislature, without explanation, raised the penalty for a violation of *section 6512 (1)* to a class E felony.

The statute's evolution makes obvious that *section 6512 (2)* was enacted to combat a specific perceived evil, distinct from that covered in *section 6512 (1)*. Again, there was no legislative discussion concerning an alteration in the scope of *section 6512 (1)*. Neither is there any indication that the Legislature intended to exempt a certain class of individuals, licensed professionals, from criminal prosecution for aiding and abetting **[****15]** fewer than three people in the unauthorized practice of a profession. Absent such an express indication, we cannot and will not assume that the Legislature desired such an exemption.

We conclude that *Education Law § 6512 (1)* does not exempt licensed physicians from prosecution under the statute. To the contrary, *section 6512 (1)* allows for the prosecution of any individual, licensed or not, that aids and abets an unauthorized individual in the practice of medicine. Defendant Corines fits neatly within the statute's scope. Furthermore, under the accessorial liability statute, he is likewise liable as he knew defendant Santi was not authorized to practice medicine, and he "intentionally aided" her in the practice of medicine on his patients through the administration of anesthesia (*see Penal Law § 20.00*). [4] Corines's argument here is thus without merit. We next turn to the sufficiency claim raised by both defendants.

[**16]** **[*246]** II. Defendants' Sufficiency and Expert Witness Claims

Evidence is legally sufficient to support a conviction where, "if accepted as true, [it] would establish every element of an offense charged and the defendant's commission thereof" (*CPL 70.10 [1]*). This Court's role on sufficiency review is limited to determining whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (*Jackson v Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 [1979]*; *see also People v Contes, 60 N.Y.2d 620, 621, 454 N.E.2d 932, 467 N.Y.S.2d 349 [1983]*). Ultimately, so long as the evidence at trial establishes "any valid line of reasoning and permissible inferences [that] could lead a rational person" to convict, then the conviction survives sufficiency review (*People v Williams, 84 N.Y.2d 925, 926, 644 N.E.2d 1367, 620 N.Y.S.2d 811 [1994]*).

"Anyone not authorized to practice under this title who practices or offers to practice or holds himself out as being able to practice in any profession in which a license is a prerequisite to the practice of the acts, or who aids or abets an unlicensed person to practice a profession, or who fraudulently sells, files, furnishes, obtains, or who attempts fraudulently to sell, file, furnish or obtain any diploma, license, record or permit purporting to au-thorize the practice of a profession, shall be guilty of a class A misdemeanor" (L 1971, ch 987, § 2).

[4] *Penal Law § 20.00* provides that "[w]hen one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct."

3 N.Y.3d 234, *246; 818 N.E.2d 1146, **1153; 785 N.Y.S.2d 405, ***412; 2004 N.Y. LEXIS 2442, ****16

Both defendants Corines and Santi contend that the evidence at trial was insufficient to support Santi's conviction for the unauthorized practice of medicine and Corines' conviction for aiding **[****17]** and abetting such unauthorized practice. They focus their claim on the People's failure to call an expert witness to testify to the effects of anesthesia. They assert on appeal that, in the absence of expert testimony establishing a causal connection between the sensations each of the complaining patients experienced and the typical effects attendant to the administration of anesthesia, the **[***413]** **[**1154]** evidence at trial was insufficient to support their convictions.

Expert testimony is properly admitted "when it would help to clarify an issue calling for professional or technical knowledge . . . beyond the ken of the typical juror" (*De Long v County of Erie, 60 N.Y.2d 296, 307, 457 N.E.2d 717, 469 N.Y.S.2d 611 [1983]*). Admission of expert testimony is a matter largely left to the discretion of the trial court (*see People v Brown, 97 N.Y.2d 500, 505, 769 N.E.2d 1266, 743 N.Y.S.2d 374 [2002]*).

[2] While expert testimony may be properly admitted in certain cases, it is not always required to prove a particular crime (*see e.g. People v Cratsley, 86 N.Y.2d 81, 87-88, 653 N.E.2d 1162, 629 N.Y.S.2d 992 [1995]*). Additionally, an expert is not necessarily required to testify to the effects of a particular drug; lay testimony on this issue suffices in **[****18]** some instances (*see People v Kenny, 30 N.Y.2d 154, 156-157, 282 N.E.2d 295, 331 N.Y.S.2d 392 [1972]*). Simply, expert testimony is used to "aid a lay jury in reaching a verdict" (*People v Taylor, 75 N.Y.2d 277, 288, 552 N.E.2d 131, 552 N.Y.S.2d 883 [1990]*). Expert testimony was not required in this case.

We recognized long ago that "modern juries are not bereft of education and intelligent persons who can be expected to apply **[*247]** their ordinary judgment and practical experience" (*Havas v Victory Paper Stock, 49 N.Y.2d 381, 386, 402 N.E.2d 1136, 426 N.Y.S.2d 233 [1980]*). The administration of anesthesia, a commonly employed means of relieving pain during surgical procedures, is not a matter so foreign or esoteric as to require an expert explanation. Jurors, equipped with their everyday knowledge and experience, could reasonably have concluded that the sensations and experiences described by each of the patient-witnesses were caused by the administration of anesthesia. Under the circumstances of this case, on this record, it is clear that the jury did not need expert assistance in determining whether Santi administered anesthesia to each of the complaining patients.

The three patient-witnesses described in detail their experiences **[****19]** with defendants. Each testified regarding a warm sensation following Santi's introduction of the I.V. line. Both Patient A and Patient C fell into unconsciousness shortly after Santi started the respective I.V. line. After Corines directed Santi to increase the flow of the I.V., Patient C immediately lost consciousness. When one patient regained consciousness, she needed assistance dressing, and she remained weak and semi-conscious for a significant period following the procedure.

While Patient B did not lose consciousness, his medical records stated that he received sedatives to ease his pain. He recalled a warm, burning sensation that followed Santi's insertion of the I.V. prior to Corines ever entering the room. Following the procedure Patient B was weak and "woozy." He was unable to rise up off the operating table without holding on to something for support. This evidence, both direct and circumstantial, supported the People's theory.

Furthermore, defendant Corines' own testimony, and his own medical records, proved helpful to the People (*see generally People v Hines, 97 N.Y.2d 56, 61, 762 N.E.2d 329, 736 N.Y.S.2d 643 [2001]*).

3 N.Y.3d 234, *247; 818 N.E.2d 1146, **1154; 785 N.Y.S.2d 405, ***413; 2004 N.Y. LEXIS 2442, ****19

Corines described anesthesia as a type of pain reliever, and **[****20]** he described the manner in which anesthesia is typically administered, either through an I.V. line or via direct injection. Additionally, Corines confirmed that each of the patient-witnesses received anesthesia, and he admitted that **[***414]** **[**1155]** defendant Santi, his "medical assistant," attended each of the four procedures.

Reviewing the evidence in the light most favorable to the People, the jury could have used a clear and valid line of reasoning to convict Santi and, consequently, Corines as acting in concert on each of the four counts of the indictment.

[*248] III. Jury Inquiry and the Trial Court's Response

CPL 310.30 provides, in pertinent part, that during deliberations, upon a jury's request for clarification, "the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper." The court does not have discretion in deciding whether to respond (*see People v Almodovar, 62 N.Y.2d 126, 131, 464 N.E.2d 463, 476 N.Y.S.2d 95 [1984]*; *People v Malloy, 55 N.Y.2d 296, 301, 434 N.E.2d 237, 449 N.Y.S.2d 168 [1982]*; **[****21]** *People v Gonzalez, 293 N.Y. 259, 262, 56 N.E.2d 574 [1944]*). Moreover, the court, in response, "must give meaningful supplemental instructions" (*Malloy, 55 N.Y.2d at 301*). Therefore, while a trial court is without discretion in deciding whether to respond, the court does have discretion as to the substance of the response.

[3] Simple reiteration of an original instruction may, under appropriate circumstances, constitute a meaningful response sufficient to satisfy the statutory mandate (*see id. at 298*). Specifically, when the original instruction is accurate and "[w]here the jury expresses no confusion [regarding the original charge]," a simple reiteration of the original instruction suffices as a meaningful response (*id. at 302*). This case gives rise to the unique circumstances under which a rereading of the original charge suffices.

The trial court originally instructed the jury, in pertinent part, that:

> "in order for you to find the defendant Ana Marie Santi guilty of the crime of practicing medicine without a license as charged in the four counts of this indictment, the People are required to prove from all of the evidence in the case beyond a reasonable doubt each **[****22]** of the following three elements."

In describing the third element, the trial judge instructed the jury that the People must prove defendant Santi "knowingly practiced medicine upon [each patient] through the administration of anesthesia."

During deliberations the jury inquired whether "[u]nder the conditions of Dr. Santi's suspension as performing the duties of a medical assistant, was Dr. Santi permitted to introduce an I.V. to a patient?" The trial judge, after hearing both parties, responded to the note by rereading the original instruction, **[*249]** including the language specifically requiring proof that Santi administered anesthesia. While it might have been better to address the note more directly, here rereading the original, proper instruction was sufficient to convey the appropriate message to reasonable jurors. The jury's note had not expressed confusion about the meaning of that instruction. We therefore conclude that the trial judge provided a meaningful response to the jury's inquiry.

IV. Juror Misconduct

3 N.Y.3d 234, *249; 818 N.E.2d 1146, **1155; 785 N.Y.S.2d 405, ***414; 2004 N.Y. LEXIS 2442, ****22

Finally, defendants claim that during deliberations a juror improperly influenced the others. The juror worked at a hospital as a patient care associate. **[****23]** Defendants claim that she asserted her medical expertise, became an "unsworn witness" **[***415]** **[**1156]** in the jury room and improperly swayed the jury to convict.

[4] Firstly, we are presented with findings of fact made by Supreme Court on remittitur and affirmed by the Appellate Division. Therefore, our review here is limited to whether there is any "possible view of the evidence that would support the determination" below (*People v Damiano, 87 N.Y.2d 477, 486, 663 N.E.2d 607, 640 N.Y.S.2d 451 [1996]*). Clearly, there is record support for the trial court's factual findings and refusal to set aside the verdict based on juror misconduct.

Juror misconduct constitutes reversible error where "(1) jurors conduct[] personal specialized assessments not within the common ken of juror experience and knowledge (2) concerning a material issue in the case, and (3) communicat[e] that expert opinion to the rest of the jury panel with the force of private, untested truth as though it were evidence" (*People v Maragh, 94 N.Y.2d 569, 574, 729 N.E.2d 701, 708 N.Y.S.2d 44 [2000]*). It would be improper for a juror to "engage in experimentation, investigation and calculation that necessarily rely on facts outside the record and beyond the **[****24]** understanding of the average juror" (*People v Arnold, 96 N.Y.2d 358, 367, 753 N.E.2d 846, 729 N.Y.S.2d 51 [2001]*). Jurors are not, however, required to "check their life experiences at the courtroom door" (*id. at 366*).

The record indicates that the juror, while perhaps assertive, was not an "expert." Her experiences in the medical field were limited. Moreover, she did not conduct any experiment or investigation that was later used to influence the jury. Instead, the record makes clear that she merely gave her lay opinions regarding the introduction of an I.V. line, drawing on both her **[*250]** life experiences and the trial evidence. This was proper. These record facts support the conclusion below that the juror's participation in the deliberations did not rise to the level of juror misconduct.

Defendants' remaining claims are without merit.

Accordingly, in each case, the order of the Appellate Division should be affirmed.

Chief Judge Kaye and Judges G.B. Smith, Rosenblatt, Graffeo, Read and R.S. Smith concur.

In each case: Order affirmed.

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Raritan Dev. Corp. v. Silva

Court of Appeals of New York

September 10, 1997, Argued ; October 28, 1997, Decided

No. 169

Reporter
91 N.Y.2d 98 *; 689 N.E.2d 1373 **; 667 N.Y.S.2d 327 ***; 1997 N.Y. LEXIS 3231 ****

In the Matter of Raritan Development Corp. et al., Appellants, v. Gaston Silva et al., Respondents.

Prior History: **[****1]** Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered September 30, 1996, which affirmed a judgment of the Supreme Court (Louis Sangiorgio, J.), entered in Richmond County in a proceeding pursuant to CPLR article 78, dismissing a petition seeking to annul a determination of respondent Board of Standards and Appeals of the City of New York that affirmed a determination of the Borough Superintendent of the Department of Buildings of the City of New York revoking a building permit issued to petitioners.

Matter of Raritan Dev. Corp. v Silva, 231 AD2d 725, reversed.

Disposition: Order reversed, with costs, petition granted and determination of respondent Board of Standards and Appeals revoking petitioners' building permit annulled.

Core Terms

Zoning, space, cellar, floor area, calculations, dwelling purposes, specifically excluded, basement, residential, Dwelling, floor space, supplied, words, subdivision, buildings, Planning, density, regulation, plane, curb, ratio, bulk, legislative history, plain-meaning, Controls, purposes, plain meaning, petitioners', restrictions, measured

Counsel: *Tenzer Greenblatt, L. L. P.,* New York City *(James G. Greilsheimer* and *Lawrence S. Feld* of counsel), for appellants. The Board of Standards and Appeals contravened the plain meaning of the Zoning Resolution when it ruled that the exemption of "cellar space" from the definition of "floor area" is limited to "cellar space" that is not used for dwelling **[****2]** purposes. (*Matter of Trump-Equitable Fifth Ave. Co. v Gliedman, 57 NY2d 588, 98 AD2d 487, 62 NY2d 539*; *Finger Lakes Racing Assn. v New York State Racing & Wagering Bd., 45 NY2d 471*; *Matter of Harbolic v Berger, 43 NY2d 102*; *Matter of Jones v Berman, 37 NY2d 42*; *Matter of Allen v Adami, 39 NY2d 275*; *Thomson Indus. v Incorporated Vil. of Port Wash. N., 27 NY2d 537*; *Matter of 440 E. 102nd St. Corp. v Murdock, 285 NY 298*; *Matter of Exxon Corp. v Board of Stds. & Appeals, 128 AD2d 289, 70 NY2d 614, 151 AD2d 438, 75 NY2d 703*; *Matter of Toys "R" Us v Silva, 89 NY2d 411*; *Appelbaum v Deutsch, 66 NY2d 975*.)

Paul A. Crotty, Corporation Counsel of New York City *(Virginia Waters, Leonard Koerner* and *Ellen B. Fishman* of counsel), for respondents. I. Petitioners have failed to preserve any argument regarding the

correct standard of agency and judicial review. In any event, the courts below properly reviewed the Board of Standards and Appeals' determination in accordance with controlling precedent. (*Matter of Wiegan v Board of Stds. & Appeals, 229 App Div 320, 254 NY 599*; *Matter of Friedman-Kien v City of New York, 92 AD2d 827, **[****3]** 61 NY2d 923*; *Matter of Toys "R" Us v Silva, 89 NY2d 411*; *People ex rel. Fordham Manor Refm. Church v Walsh, 244 NY 280*; *Matter of Cowan v Kern, 41 NY2d 591*; *Matter of Fiore v Zoning Bd. of Appeals, 21 NY2d 393*; *Matter of Doyle v Amster, 79 NY2d 592*; *Conley v Town of Brookhaven Zoning Bd. of Appeals, 40 NY2d 309*; *Matter of Fuhst v Foley, 45 NY2d 441*; *Matter of Khan v Zoning Bd. of Appeals, 87 NY2d 344*.) II. The courts below correctly sustained the Board of Standards and Appeals' determination that a dwelling unit at the zoning cellar level should be included in the calculation of floor area under Zoning Resolution § 12-10. (*Doctors Council v New York City Employees' Retirement Sys., 71 NY2d 669*; *Matter of Chatlos v McGoldrick, 302 NY 380*; *Matter of Carr v New York State Bd. of Elections, 40 NY2d 556*; *New York State Bankers Assn. v Albright, 38 NY2d 430*; *Bragg v Genesee County Agric. Socy., 84 NY2d 544*; *Matter of New York City Asbestos Litig. [Brooklyn Nav. Shipyard Cases], 82 NY2d 342*; *Matter of DeTroia v Schweitzer, 87 NY2d 338*; *Matter of Frishman v Schmidt, 61 NY2d 823*; *Matter of Town of New Castle v Kaufmann, **[****4]** 72 NY2d 684*; *Matter of Parkview Assocs. v City of New York, 71 NY2d 274, 488 US 801*.)

Sean M. Walsh, Douglaston, for Federation of Civic Councils of the Borough of Queens, Inc., *amicus curiae*. The courts below properly sustained the Board of Standards and Appeals' determination that a dwelling unit at the cellar level should be included in the calculation of the Floor Area Ratio under Zoning Resolution § 12-10. (*Appelbaum v Deutsch, 66 NY2d 975*; *Matter of Perotta v City of New York, 107 AD2d 320, 66 NY2d 859*; *Doctors Council v New York City Employees' Retirement Sys., 71 NY2d 669*; *New York State Bankers Assn. v Albright, 38 NY2d 430*.)

Judges: Chief Judge Kaye and Judges Titone, Bellacosa and Ciparick concur with Judge Smith; Judge Levine dissents and votes to affirm in a separate opinion in which Judge Wesley concurs.

Opinion by: SMITH

Opinion

[*100] **[***327]** **[**1373]** Smith, J.

Respondents, the Commissioners of the Board of Standards and Appeals of the City of New York (BSA), argue that this Court should defer to the agency's interpretation of section 12-10 of New York City's Zoning Resolution. However, when an interpretation is contrary to the **[****5]** plain meaning of the statutory language, we have typically declined to enforce an agency's conflicting application thereof. We see no compelling reason to depart from that long-established rule in this case.

In calculating the Floor Area Ratio (FAR) for zoning purposes, floor area includes the total amount of "floor space used for dwelling purposes, no matter where located within a building, when not specifically excluded; … However, the floor area of a building shall not include … cellar space." **[*101]** Contrary to respondents' argument, we find that this language clearly provides that **[***328]** "cellar space" is excluded from "floor area" without further qualification. We further conclude that such an interpretation is not "absurd." The Appellate Division's order should be reversed.

91 N.Y.2d 98, *101; 689 N.E.2d 1373, **1373; 667 N.Y.S.2d 327, ***328; 1997 N.Y. LEXIS 3231, ****5

[1374]** BACKGROUND

A development of two-family residences on Staten Island was planned in a R3-2 zoning district. That zoning district permits a "floor area ratio" of 0.50 for each building. That ratio means that the total floor area of each building may not exceed 50% of the area of the lot on which the residence is situated. One particular residence was designed to be a trilevel **[****6]** residential building with one dwelling unit comprised of the top two floors and another single dwelling unit on the ground floor. The architect calculated the FAR without including the floor space of the ground floor.

The relevant zoning provision, Zoning Resolution § 12-10, provides in relevant part:

" 'Floor area' is the sum of the gross areas of the several floors of a building or buildings, measured from the exterior faces of exterior walls or from the center lines of walls separating two buildings. In particular, floor area includes: …

"(g) any other floor space used for dwelling purposes, no matter where located within a building, when not specifically excluded; …

"However, the floor area of a building shall not include:

"(a) cellar space".

The Zoning Resolution defines "cellar" in R3 zoning districts as: "a space wholly or partly below the base plane with more than one-half its height (measured from floor to ceiling) below the base plane." It is conceded by both parties that the ground floor of the subject residence fits within this definition of a "cellar."

On October 14, 1993, the New York City's Department of Buildings (DOB) objected to the architect's **[****7]** FAR calculations because the ground level was a "dwelling unit" and should have been included in the FAR calculations notwithstanding the fact that the ground floor was a "cellar" as that term is defined in the Zoning Resolution. The DOB found that the cellar **[*102]** space exclusion only applied to "true cellar space, space used for nonhabitable purposes, such as for furnace rooms, utility rooms, auxiliary recreation rooms, etc." The DOB further claimed that this interpretation was consistent with the "Zoning Resolution's treatment of basement space and the Multiple Dwelling Law's treatment of cellar space."

The DOB also claimed that the "past practice and policy in interpreting the 1916 Zoning Resolution and the current Zoning Resolution has consistently been to require a habitable room at the zoning cellar level to be included as floor area." Previous approvals that did not conform to this interpretation were allegedly "given in error."

The DOB revoked petitioners' building permit and denied the architect's request for reconsideration. The development corporation of the residential community appealed to the BSA. The BSA noted that the Department of City Planning, "the **[****8]** drafters of the Zoning Resolution, strongly supports the determination of the Department of Buildings based upon the language of the Zoning Resolution, the legislative history of the definition of 'floor area' and the interpretation of the Zoning Resolution in conjunction with the Multiple Dwelling Law." The BSA denied the appeal and found that DOB's ruling had been "reasonable and rational."

Petitioners filed this CPLR article 78 proceeding to annul the BSA's decision. Supreme Court examined the legislative history of the provision and determined that cellar space to be used as dwelling space should be included in the FAR calculation. The court also found that DOB had consistently adhered to that interpretation which reflected standard industry practice. The Appellate Division affirmed and found BSA's interpretation rational and supported by legislative history. This Court granted leave to appeal.

ANALYSIS

Contrary to the parties' assertions, this Court has consistently applied the same standard of review for agency determinations. Where "the question is one of pure **[***329]** legal interpretation of statutory terms, deference to the BSA is not required" (*Matter of* **[****9]** *Toys "R"* Us v Silva, 89 NY2d 411, 419). On the other hand, when applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference (*see,* Matter of Jennings v New York State Off. of Mental Health, 90 NY2d 227, 239; Kurcsics **[*103]** v Merchants Mut. Ins. Co., 49 NY2d 451, 459). Even in those situations, however, a determination by the agency that "runs counter to the clear wording of a statutory provision" is given little weight (Kurcsics v Merchants Mut. Ins. Co., 49 NY2d, at 459; *see also, Matter of Toys "R"* Us v Silva, 89 NY2d, at 418-419).

The statutory language could not be clearer. As noted above, a cellar is defined within the Zoning Resolution in terms of its physical location in a building. "Floor area" includes dwelling spaces when not specifically excluded and "cellar space," without further qualification, is expressly excluded from FAR calculations. [1] Thus, FAR calculations should not include cellars regardless of the intended use of the space. BSA's interpretation conflicts with the plain statutory language and may not be sustained.

[**10]** BSA urges this Court to ignore the obvious interpretation of the Zoning Resolution and, instead, to look beyond the pages of statutory text. BSA attempts to justify its reading by first referring this Court to the language of a former version of the regulation. In 1916, the Zoning Resolution defined "floor area" as "the sum of the gross horizontal areas of the several floors … but excluding … basement and cellar floor areas not devoted to residence use." BSA is correct that the 1916 Zoning Resolution supports its contention that cellar space is only excluded from FAR calculations when not used for residential purposes.

However, the provision was changed in 1961 to its present text. In the amended text, cellar spaces were excluded from floor area without qualification. There is no evidence that the changed meaning was accidental or superfluous (*see,* Mabie v Fuller, 255 NY 194, 201 ["We must assume that the Legislature in enacting the section intended that it should effect some change in the existing law and accomplish some useful purpose"]). Still, BSA insists that the amendment did not change the law.

For example, BSA argues that it has always interpreted the **[****11]** resolution a particular way so, presumably, it should be allowed to continue to do so. Such evidence might be more compelling **[*104]** if the present text of the Zoning Resolution offered any support. It should also be noted that BSA concedes that it has not consistently interpreted the statute in the same manner as it did here.

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[1] The dissent interprets the exclusionary language to apply to dwelling space "which is specifically excluded *as such*" (dissenting opn, at 110 [emphasis in original]). The provision, of course, is not so limited. Where, as here, the language is unambiguous, and the result not absurd, we see no reason to depart from the legislative text.

91 N.Y.2d 98, *104; 689 N.E.2d 1373, **1374; 667 N.Y.S.2d 327, ***329; 1997 N.Y. LEXIS 3231, ****11

Perhaps most telling is BSA's contention to Supreme Court that its interpretation of the Zoning Resolution is consistent with the Multiple Dwelling Law which applies to residential buildings for three or more families. As BSA notes in its answer, which was verified by its Commissioner:

"Section 26 of Title I in *Article 3 of the Multiple Dwelling Law* reads (under paragraph 2 Definitions):

"b. 'Floor area': the sum of the gross horizontal areas of all of the several floors of a dwelling or dwellings and accessory structures on a lot measured from the exterior faces of exterior walls or from the center line of party walls, except:

"1. cellar not used for residential purposes."

Unfortunately, BSA relies upon a version of the law which was amended over a decade ago. In 1985, the definition of the exclusion was modified from "cellar not used for **[****12]** residential purposes" to the unqualified "cellar space" (*see,* L 1985, ch 857, § 1). According to the legislative memorandum which accompanied **[***330]** the text of the new law, the "amendment resolves [a] conflict by correlating the bulk of yard regulation requirements of the Multiple Dwelling Law with those of the Local Zoning Resolution, thus providing one clear set of guidelines for professionals and administrators" (1985 McKinney's Session Laws of NY, at 3171). The memorandum concludes that "the Mayor urges upon the Legislature the earliest possible favorable consideration of this proposal" (*id.*). Thus, it **[**1376]** was thought in 1985 that the unqualified exclusion of cellar space from floor area calculations would be in conformity with the Zoning Resolution. BSA's reliance on outdated laws to justify its reading of the Zoning Resolution would be yet another reason to annul its determination.

Essentially, BSA has (sometimes) grafted onto the language of the current Zoning Resolution an addendum of its own whereby only certain cellars are excluded from floor area calculations. Typically, we have declined to uphold such an interpretation (*see, Matter of* **[****13]** *Chemical Specialties Mfrs. Assn. v Jorling, 85 NY2d 382, 394* [" '(N)ew language cannot be **[*105]** imported into a statute to give it a meaning not otherwise found therein' "], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 94, at 190). Moreover, the conclusion reached herein is not "absurd" as the BSA contends.

FAR is related to the density of land use and such regulations have been upheld as reasonable (*see, Pondfield Rd. Co. v Village of Bronxville, 1 AD2d 897, affd without opn 1 NY2d 841*; 1 Anderson, New York Zoning Law and Practice § 9.46 [3d ed]). BSA contends that its interpretation of the Zoning Resolution would prevent "the additional burden" of increased neighborhood population upon schools and parking. However, FAR calculations were not designed to control population.

As noted above, FAR is comprised of total floor area within the building divided by the total area of the lot containing the building. Since residential areas have lower FAR, more lot is required to build larger buildings. Such concerns restrict *physical* development within a neighborhood (*see,* 7 Rohan, *Zoning and Land Use Controls § 42.06 [2] [c]* [1997] ["Through **[****14]** this device, zoning ordinances restrict the amount of development on a lot by specifying the ratio that the floor area of a building may bear to the lot area"]; *see also* 3 Rathkopf, Zoning and Planning § 34C.02 [1] [4th ed] [the " 'floor area ratio' or F.A.R. technique is widely used today to establish the gross maximum size of a building in terms of the amount of floor area permitted therein"]).

It has also been stated that "[o]ne way to control the size of a building is to limit its overall volume" through FAR limits (7 Rohan, Zoning and Land Use Controls, at App 42-10; *see also,* 3 Rathkopf, Zoning

and Planning § 34C.02 [1] [4th ed] ["A more flexible method of regulating bulk is establishing a ratio between the size of the lot and the gross floor area of the principal building to be erected thereon"]). Indeed, the area regulations of New York City were originally enacted to regulate bulk in building development (*see,* Bassett, Zoning: The Laws, Administration, and Court Decisions During the First Twenty Years, at 62 ["Many ordinances have followed that of New York City in limiting building area to a fraction of the lot area. … The regulation must **[****15]** not be so drastic that it compels an absurdly small house on a normal lot or an unreasonably large lot for a normal house"]).

It seems clear that such zoning restrictions were never designed to combat the erection of primarily underground housing levels which do not contribute to bulky, high-rise **[*106]** development. [2] It is eminently logical that **[***331]** cellars, housing levels that are more than halfway below the ground, would be excluded from FAR calculations notwithstanding the actual or intended use of the space. Consistent with the purpose of FAR restrictions to control building density, it should be noted that basement space, also defined in the Zoning Resolution in terms of its physical location within a building as being more than halfway above ground, is included in FAR calculations to the same extent as similarly situated space. **[**1377]** Contrary to the views expressed in the dissenting opinion, we find nothing in zoning treatises, California case citations or the legislative history of the 1990 amendment to the Zoning Resolution that would indicate a contrary legislative intent regarding the 1961 amendments to the Zoning Resolution which excluded cellars, **[****16]** in unqualified language as to the intended use, from FAR calculations.

In sum, BSA urges this Court **[****17]** to disregard the plain meaning of the Zoning Resolution because (1) the former version of the Zoning Resolution should be binding upon any interpretation of the amended language thereof; (2) BSA's interpretation is consistent with an outdated version of the Multiple Dwelling Law; (3) the Zoning Resolution was amended to require cellars to be measured from the surrounding ground level rather than curb level to prevent overexcavation of lots; (4) BSA has inconsistently interpreted the Zoning Resolution in a particular manner; and (5) BSA seeks to prevent overcrowding through provisions designed to control physical bulk of buildings. We find such arguments to be unpersuasive.

This Court has long applied the well-respected plain meaning doctrine in fulfillment of its judicial role in deciding statutory construction appeals. We agree that "[i]t is fundamental that a court, in interpreting a statute, should attempt to effectuate **[*107]** the intent of the Legislature," but we have correspondingly and consistently emphasized that "where the statutory language is clear and unambiguous, *the court should construe it so as to give effect to the plain meaning of the words used* **[****18]** " (*Patrolmen's Benevolent Assn. v City of New York, 41 NY2d 205, 208* [emphasis added] [citations omitted]; *see, Doctors Council v New York City Employees' Retirement Sys., 71 NY2d 669, 674-675)*.

We have provided further clear teaching and guidance that "[a]bsent ambiguity the courts may not resort to rules of construction to broaden the scope and application of a statute," because "no rule of construction

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[2] In a 1990 Planning Report prepared by the Department of City Planning, it is stated that under current regulations, a "cellar does not count as floor area" and "cellars are exempt from floor area calculations" (*see,* New York Dept of City Planning, Lower Density Zoning, Proposed Follow-up Text Amendment: A Planning Report, at 35, 37 [June 1990]). Previously, the resolution defined a cellar as more than halfway below "curb" level which caused developers to "level" lots so that a ground floor could still qualify as a "cellar." The Zoning Resolution was amended to provide that "the base plane [ground], and not curb level, be the benchmark for determining whether floor space is a basement or cellar." Thus, a basement, "with more than half its height" above the ground would count as floor area but cellars on sloping sites, even if situated above "curb level" would be excluded in such calculations.

gives the court discretion to declare the intent of the law *when the words are unequivocal*" (*Bender v Jamaica Hosp., 40 NY2d 560, 562* [emphasis added] [citations omitted]). Lastly, "[t]he courts are not free to legislate and if any unsought consequences result, *the Legislature is best suited to evaluate and resolve them*" (*id.* [emphasis added]). Based on this Court's adherence to these respectable principles and precedents as primary sources of authority for the legitimacy of the plain-meaning doctrine, we reject the dissent's characterization of the statutory construction tool generally and as applied in this case.

BSA's interpretation is not only against the plain meaning of the resolution's text and contrary to the Multiple Dwelling Law, **[****19]** but also contrary to the purpose behind FAR restrictions in general. There is no statutory or practical support for BSA's strained construction of the Zoning Resolution for FAR calculations. The solution here is for the City to legislate a different definition if that is its intent, to be manifested by the ordinance itself.

The Appellate Division order should be reversed, with costs, the petition granted and the determination of respondent Board of Standards and Appeals revoking petitioners' building permit annulled.

Dissent by: LEVINE

Dissent

Levine, J. (Dissenting). We respectfully dissent. This case presents an unfortunate yet graphic example of the plain-meaning doctrine in operation, eschewing as it does other sources and evidence of legislative intent, such as context, **[***332]** legislative history and the purpose of the enactment. The majority appears to elevate the plain-meaning rule to a point of interpretive primacy not supported by our precedents. Although, to be sure, our Court has employed plain-meaning arguments in the past (*see, e.g., Patrolmen's Benevolent Assn. v [*108] City of New York, 41 NY2d 205, 208*; *Bender v Jamaica Hosp., 40 NY2d 560, 561-562),* **[****20]** our prevailing view has been, wisely, that the overarching duty of the courts in statutory interpretation is always to ascertain the legislative intent through examination of all available legitimate sources. "The legislative intent is the great and controlling principle. **[**1378]** Literal meanings of words are not to be adhered to or suffered to 'defeat the general purpose and manifest policy intended to be promoted' " (*People v Ryan, 274 NY 149, 152*; *see, Matter of Sutka v Conners, 73 NY2d 395, 403*; *Matter of Albano v Kirby, 36 NY2d 526, 529-531*; *Matter of Petterson v Daystrom Corp., 17 NY2d 32, 38)*.

Chief Judge Breitel articulated well the predominant view of this Court in *New York State Bankers Assn. v Albright (38 NY2d 430*): "Absence of facial ambiguity is … rarely, if ever, conclusive. The words men use are never absolutely certain in meaning; the limitations of finite man and the even greater limitations of his language see to that. Inquiry into the meaning of statutes is never foreclosed at the threshold" (*id., at 436*). The Court went on to quote, with approval, the Supreme Court's opinion in *United States v American Trucking Assns. [****21] (310 US 534, 544)*:

" 'Frequently, however, even when the plain meaning did not produce absurd results but merely an *unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words.* When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear

the words may appear on "superficial examination" ' " (*New York State Bankers Assn. v Albright, 38 NY2d, at 437*, *supra* [emphasis supplied]).

Criticism of the plain-meaning doctrine has long been expressed by legal scholars as frustrating legislative objectives and placing unrealistic demands upon the legislative process (*see,* Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation In The "Modern" Federal Courts,* 75 Colum L Rev 1299 [1975]). More recently, in the current debate over the "new textualism" (*see, e.g.,* Eskridge, *The New Textualism, 37 UCLA L Rev 621* [1990]; Shapiro, *Continuity and Change in Statutory Interpretation, 67 NYU L Rev 921* **[*109]** [1992]), legal and linguistic **[****22]** scholars have criticized the plain-meaning doctrine for oversimplifying the task of interpretation and for, itself, creating new interpretative problems (*see,* Cunningham, Levi, Green and Kaplan, *Plain Meaning and Hard Cases, 103 Yale LJ 1561* [1994], reviewing Solan, The Language of Judges [1993]).

Simply put, even if a court might encounter that rare case where the words of a statute are so utterly and indisputably clear (notwithstanding the litigants' dispute over their meaning) that the court could correctly interpret the statute's meaning merely by reading its words, this is *not* that case.

The issue here is whether space to be used as actual living quarters, located partly below ground at the lowest level of a house in a residential zoning district, is to be excluded from the calculation of the floor area ratio (FAR) under New York City Zoning Resolution § 12-10. The applicable FAR, as the majority points out (majority opn, at 101), would limit the total floor area of petitioners' residential building to 50% of the square footage of the lot on which it is situated.

Petitioners claim that the space, irrespective of its use as a dwelling unit, falls literally **[****23]** within the definition of "cellar" space introduced in a 1990 amendment to Zoning Resolution § 12-10, as "space wholly or partly **[***333]** below the base plane, with more than one half its height (measured from floor to ceiling) below the *base plane*" (NY City Zoning Resolution § 12-10, "cellar" [emphasis in original]). Section 12-10 excludes cellar space as such from the floor area numerator of the FAR (*see, id.,* § 12-10, "Floor area"--exclusions [a]).

Respondents, constituting the Board of Standards and Appeals of the City of New York (BSA) and the New York City Department of Buildings, however, determined that the cellar space exclusion was inapplicable here because the space in question is not used as a cellar but, rather, as a subsurface apartment. Supreme Court and the Appellate Division agreed (*231 AD2d 725*). The BSA relied upon, among other things, subdivision (g) of the floor area **[**1379]** component of section 12-10, which directly applies to the space at issue, mandating that floor area includes:

"any *other floor space used for dwelling purposes, no matter where located* within a building, when not specifically excluded" (NY City Zoning Resolution **[****24]** § 12-10 ["Floor area" (g); emphasis supplied]).

The majority holds that subdivision (g) does not require **[*110]** petitioners' partly below ground living quarters to be included in floor area because cellar floor space is "specifically excluded." Therefore, the majority reasons, a cellar always falls within the exception to subdivision (g), which otherwise includes all space used for dwelling purposes irrespective of its location in the building (*id.*).

To be sure, the "specifically excluded" exception to the inclusion of all space devoted to dwelling purposes under subdivision (g) can be read, as interpreted by the majority, to refer to any space excluded

elsewhere in the Zoning Resolution. Nevertheless, the provision can be read with at least equal plausibility not to apply to cellar *living* quarters. Thus, the "specifically excluded" exception can easily be interpreted as applying only to "floor space *used for dwelling purposes*" (*id.*) which is specifically excluded *as such* elsewhere in the statute. Reading the exception in this fashion, since cellar space *used for dwelling purposes* is not "specifically excluded" from floor area anywhere in the **[****25]** Zoning Resolution, the BSA correctly determined that the floor space of petitioners' subsurface apartment had to be counted in the FAR calculation.

The foregoing contrasting interpretations of the treatment of dwelling space/floor area in Zoning Resolution § 12-10 present a paradigm of what linguists refer to as "*structural ambiguity* [in which] interpretive difficulties arise not from indeterminacy as to the meaning of individual words but from *ambiguity as to the relationship of the words in a sentence structure*" (Cunningham, Levi, Green and Kaplan, *Plain Meaning and Hard Cases,* 103 Yale LJ, at 1570 [emphasis supplied]). Here, the text of subdivision (g) alone does not resolve the issue as to whether the "specifically excluded" phrase in that provision refers to *any* space otherwise expressly excluded from floor area, or solely to any "other floor space *used for dwelling purposes*" specifically excluded as such (*see,* NY City Zoning Resolution § 12-10 "Floor area" [g] [emphasis supplied]). For us, the irrefutable existence of that ambiguity is sufficient to resolve this appeal in the Board's favor. We would defer to the BSA's interpretation, the **[****26]** agency we have recognized as having responsibility for implementing the statutory purposes of New York City Zoning Resolution § 12-10, which not even petitioners dispute is consistent with the general policy of this FAR legislation. Moreover, as the BSA points out, the statute explicitly directs that in the event of an internal conflict between provisions in the regulations over the bulk of buildings, the "more restrictive" provision controls (NY City Zoning Resolution § 11-22).

[*111] Even without according deference to the BSA's interpretation, inclusion in floor area of cellar space used for dwelling purposes, because space used that way is not otherwise "specifically excluded," represents a sounder reading of the "dwelling purpose" inclusory language of subdivision (g), and is more consistent both with section 12-10 as a whole, and with the legislative history and transcendent purpose of the Zoning Resolution.

First, consistent with the BSA's interpretation, Zoning Resolution § 12-10 actually **[***334]** contains a defined floor space *used for dwelling purposes* which is "specifically excluded" as such from floor area. Under subdivision (i) of the exclusionary **[****27]** portion of section 12-10, the lowest stories of qualifying houses in specific residential zoning districts are excluded from floor area if used as a "furnace room, *utility room, auxiliary recreation room*" (NY City Zoning Resolution § 12-10, "Floor area"--exclusions [i] [3] [emphasis supplied]). Thus, it is readily apparent that what was contemplated in the "specifically excluded" exception to the catchall provision (otherwise including in floor area all space used for dwelling purposes) was those particular spaces devoted to some dwelling uses, which the legislative body determined were not to be counted as floor area in the FAR calculation. This conclusion is reinforced by the fact that both subdivision (g) of the floor area definitional portion of section 12-10, in **[**1380]** its present form, and the specific exclusion of certain lower story space utilized for dwelling purposes such as a utility or recreation room, were added simultaneously to the Zoning Resolution in 1961. Thus, the most plausible explanation for the insertion of the "specifically excluded" exception was to avoid conflict between the foregoing provisions.

The majority's interpretation relies heavily **[****28]** upon the fact that, whereas the 1916 Zoning Resolution expressly excluded from floor area basements and cellars only when " 'not devoted to

residence use,' " the 1961 recodification flatly excluded cellars without the nonresidential use qualification (*see,* majority opn, at 103, 106). However, the 1961 resolution substituted the floor area catchall provision contained in subdivision (g) for the 1916 specific exclusion of nonresidential cellar and basement space (*see,* NY City Zoning Resolution § 12-10, "Floor area" [g] [including in floor area *any* space used for dwelling purposes "*no matter where located*"] [emphasis supplied]). It was, therefore, unnecessary to retain the 1916 nonresidential use qualification in the 1961 Zoning Resolution cellar space exclusion. Thus, the absence of that nonresidential use qualification **[*112]** in the cellar exclusion is of no significance whatsoever in interpreting the all-inclusory dwelling space language in subdivision (g) of the 1961 resolution (still in effect), which is the dispositive issue in this case.

It is also highly unlikely that in the 1961 FAR recodification, the legislative body had the intent ascribed **[****29]** to it by the majority, i.e., to permit exclusion from floor area of cellar space used for residential purposes. In the general purpose clause of the 1961 Zoning Resolution, subdivision (d) recites that a specific purpose of the resolution was "[t]o protect residential areas against congestion, as far as possible, by *regulating the density of population*" (NY City Zoning Resolution § 21-00 [d], Statement of Legislative Intent [emphasis supplied]). Permitting cellar area devoted to residential use to be excluded from the numerator of the FAR formula hardly comports with that purpose.

Moreover, the legislative history of the present "base plane" definition of excluded cellar space in Zoning Resolution § 12-10, upon which petitioners concededly must rely in order to exclude, from the FAR, the lowest level living quarters of its building, makes it absolutely clear that the "base plane" definition was never intended to change the settled construction of the prior law which limited the exclusion to "true" cellar space (as commonly understood) and not space, as urged by petitioners, used as a cellar apartment. The present "base plane" definition was added in a 1990 amendment **[****30]** to Zoning Resolution § 12-10. Prior to 1990, and at least as early as 1961, section 12-10 differentiated between basement space and cellar space, and the difference in treatment was maintained in the current statutory scheme. Basement space, *even when not used for dwelling purposes,* was previously and still is included in floor area for determining the FAR. The definitions of basement space and cellar space were (and are) complementary and employed essentially to differentiate one from the other.

As explained in the legislative memorandum in support of the 1990 amendment, the differences between basement and true cellar spaces were originally defined in terms of their location in relation to the curb level of the building lot (*see,* New York Dept of City **[***335]** Planning, Lower Density Zoning, Proposed Follow-up Text Amendment: A Planning Report, at 35 [1990]). Under the 1961 Zoning Resolution, basement space was defined as space partly below curb level, with at least one half of its height *above* curb level (*id.*). Cellar space, although similar, was space whose height was more than one half *below* curb level (*id.*).

[*113] The 1990 amendments **[****31]** only changed the benchmark differentiation between basement and cellar space from curb level to base plane (*id., at 35-36*). Significantly, this change was enacted to address the unintended result of the prior definition, which encouraged needless excavation of upwardly sloping lots in order to avoid having true cellar space counted as basement space, and thereby included in floor area (*see, id., at 35*). Thus, there is not even the hint of any indication that the decisive amendment of the definition of cellar space, upon which petitioners must rely, was intended to expand the cellar **[**1381]** exclusion to space used for subsurface living quarters. Indeed, the manifestation of intent regarding the amendment was completely to the contrary. The 1990 amendment also contained a proviso for reverting the benchmark of the basement and cellar space differentiation back to curb level under

certain circumstances "to *reduce the potential abuse* of this [base plane] provision by excavation of yards, *turning cellars into floor space suitable for additional bedrooms and accessory units*" (*id., at 36* [emphasis supplied]).

Furthermore, as already pointed out, the function **[****32]** of the definition of cellar has nothing whatsoever to do with determining whether any cellar space actually used for dwelling purposes is to be excluded from floor area. Rather, in context, the definition is designed solely to differentiate cellar space from basement space, the latter space always being included in floor area irrespective of its nonuse for dwelling purposes.

Finally, the majority's application of the plain-meaning doctrine here, to permit the exclusion from floor area of cellar space converted to an actual dwelling unit, directly conflicts with the underlying purpose of the FAR concept embodied in New York City Zoning Resolution § 12-10. Contrary to the suggestion in the majority writing that the purpose of the FAR is an apparently aesthetic one, merely to restrict the bulk of buildings within the zoning district and therefore was "never designed to control population" (majority opn, at 105), and was "never designed to combat the erection of primarily underground housing levels which do not contribute to bulky, high-rise development" (majority opn, at 105-106), the well-recognized purpose of FAR residential zoning regulation is to control population density with **[****33]** its resultant adverse impact on quality of life and overtaxing of governmental services within the zoning district.

It should be self-evident and beyond dispute that the primary effect of restricting the amount of buildable floor space **[*114]** for each building lot in a *residential* district, through a FAR, will be to limit the aggregate habitable space occupied by people within the zoning district, i.e., its *population density.*

As explained by Rohan, among the various height, bulk and density controls and "measurement restrictions imposed through the use of zoning power [are] … *devices for limiting population density,* i.e., minimum lot areas, frontage requirements and *floor area ratio*" (7 Rohan, *Zoning and Land Use Controls § 42.01 [5]*, at 42-10--42-11 [1997] [emphasis supplied]; *see generally, id.,* ch 42, at 42-1 ["Measurement Controls: Height, Bulk and Density"]). The Rathkopf treatise discusses zoning controls on building area, bulk and floor size, "including *floor-area-ratio* restrictions that are tied to overall lot size" (3 Rathkopf, Zoning and Planning § 34C.01, at 34C-1 [Ziegler 4th ed] [emphasis supplied]). The author characterizes **[****34]** the function of these controls as including "protection of public health and safety, [and] *prevention of overcrowding* and traffic congestion" (*id.,* § 34C.02 [2], at 34C-6 [emphasis supplied]). Additionally, in *Broadway, Laguna, Vallejo Assn. v Board of Permit Appeals,* a leading early case on the validity of zoning regulation through FARs, the court stated that: "*the consensus among zoning authorities is that, in terms of controlling* **[***336]** *population density* and structural congestion, the technique of restricting the *ratio of a building's* rentable *floor space* to the size of the lot on which it is constructed possesses numerous advantages" (*66 Cal 2d 767, 771, 427 P2d 810, 813* [emphasis supplied]). Indeed, ironically, the legislative report in support of the very amendment to Zoning Resolution § 12-10 relied upon by petitioners here is entitled "*Lower Density* Zoning, Proposed Follow-up Text Amendment" (New York Dept of City Planning [1990] [emphasis supplied]). Moreover, as previously noted, the general purpose clause of the 1961 Zoning Resolution militates strongly against the majority's interpretation of that law's modification **[****35]** of the cellar exclusion as permitting cellar residences to be omitted from the FAR equation.

Thus, petitioners' interpretation of section 12-10 (adopted by the majority here), permitting a developer to set up a cellar dwelling unit not subject to FAR restrictions, is diametrically opposed to the basic purposes

of the Zoning Resolution. This alone should be enough to reject petitioners' interpretation, **[**1382]** even if the "plain meaning" of the words supported that interpretation (*see, New York State Bankers Assn. v Albright, supra,* quoting *United States v American Trucking Assns., supra; see also, Cabell v Markham, 148 F2d 737, 739* [Hand, J.] ["The **[*115]** defendants have no answer except to say that we are not free to depart from the literal meaning of the words, however transparent may be the resulting stultification of the scheme or plan as a whole. Courts have not stood helpless in such situations; the decisions are legion in which they have refused to be bound by the letter, when it frustrates the patent purpose of the whole statute"], *affd 326 US 404*).

Because the pertinent provisions of New York City Zoning Resolution § 12-10 are at the least **[****36]** ambiguous, and because the BSA's interpretation of subdivision (g) is consistent with section 12-10 as a whole, its legislative history and patent statutory purpose, we would uphold the Board's determination and affirm the dismissal of the petition by the courts below.

Chief Judge Kaye and Judges Titone, Bellacosa and Ciparick concur with Judge Smith; Judge Levine dissents and votes to affirm in a separate opinion in which Judge Wesley concurs.

Order reversed, etc.

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Udell v. Haas

Court of Appeals of New York

January 8, 1968, Argued ; February 28, 1968, Decided

No Number in Original

Reporter
21 N.Y.2d 463 *; 235 N.E.2d 897 **; 288 N.Y.S.2d 888 ***; 1968 N.Y. LEXIS 1567 ****

Daniel A. Udell, Appellant, v. Richard Haas, as Mayor of the Village of Lake Success, et al., Respondents

Prior History: [**1]** *Udell v. Haas, 27 A D 2d 750.*

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered February 20, 1967, which affirmed, by a divided court, insofar as appealed from, a judgment of the Supreme Court, entered in Nassau County upon a decision of the court on a trial at a trial and Special Term (Bernard S. Meyer, J.; opinion *sub nom.* *Udell v. McFadyen, 40 Misc 2d 265*; see, also, *46 Misc 2d 804*). Plaintiff appealed to the Appellate Division only from such portion of the judgment as read: "Ordered, Adjudged and Decreed that Ordinance No. 60 adopted by the Village of Lake Success on July 27, 1960, insofar and to the extent that it changed the permitted use of properties belonging to this plaintiff within the said Village located on the easterly side of Lakeville Road and on the westerly side of Summer Avenue from a Business 'A' and Business 'B' District to a Residence 'C' District, be and the same hereby is declared constitutional and in all respects valid".

Disposition: Order reversed, with costs in all courts, and case remitted to Supreme Court, Nassau County, for further proceedings in accordance with the opinion herein.

Core Terms

zoning, parcel, village, comprehensive plan, ordinance, rezoning, Northern, courts, business use, recommended, feet, community's, residential use, zoning map, discriminatory, neck, planning, conform, retail, land use control, zoning ordinance, commercial use, land use, nonresidential, residential, invalidity, properties, landowner, traffic

Counsel: *Gerald Dickler* for appellant. I. Ordinance No. 60 is discriminatory as applied to plaintiff's property. (*Hyde v. Incorporated Vil. of Baxter Estates, 2 A D 2d 889, 3 N Y 2d 873*; *Connell v. Town of Granby, 12 A D 2d 177*; *Watson v. Maryland, 218 U.S. 173*; *Mallary, Inc. v. City of New Rochelle, 184 Misc. 66, 268 App. Div. 878, 295 N. Y. 712*; *De Sena v. Gulde, 24 A D 2d 165*.) II. The change in zoning of appellant's property was *ultra vires*, as not in conformity with a comprehensive plan. (**[****6]** *Levitt v. Incorporated Vil. of Sands Point, 3 Misc 2d 92, 2 A D 2d 688, 781*; *Arverne Bay Constr. Co. v. Thatcher, 278 N. Y. 222*; *Harris v. Village of Dobbs Ferry, 208 App. Div. 853*.) III. The ordinance challenged herein was confiscatory as applied to plaintiff's property. (*Dowsey v. Village of Kensington, 257 N. Y. 221*; *Vernon Park Realty v. City of Mount Vernon, 307 N. Y. 493*; *Chusud Realty Corp. v. Village of Kensington, 22 A D 2d 895*; *Mary Chess, Inc. v. City of Glen Cove, 18 N Y 2d 205*.)

John M. Lewis for respondents. I. Plaintiff has failed to sustain his burden of establishing that the zoning as it affects the subject parcel is discriminatory. II. The judgment must be affirmed since plaintiff failed to sustain his burden of proving that the zoning ordinance was not enacted in accord with a comprehensive plan. (*Rodgers v. Village of Tarrytown, 302 N. Y. 115*.) III. Plaintiff failed to sustain his burden of proving beyond a reasonable doubt that the ordinance restricts the use of his property in such a manner that it cannot be used for any reasonable purpose. (*Arverne Bay Constr. Co. v. Thatcher, 278 [****7] N. Y. 222*; *Fusco v. Town of Oyster Bay, 23 Misc 2d 72*; *Gullo v. Village of Lindenhurst, 16 Misc 2d 761*; *Scarsdale Supply Co. v. Village of Scarsdale, 15 Misc 2d 289*; *Gardner v. Le Boeuf, 14 Misc 2d 98*; *Ulmer Park Realty Co. v. City of New York, 270 App. Div. 1044*; *Franklin v. Incorporated Vil. of Floral Park, 269 App. Div. 695, 294 N. Y. 862*; *Matter of Setauket Development Corp. v. Romeo, 18 A D 2d 825*; *Levitt v. Incorporated Vil. of Sands Point, 6 N Y 2d 269*.)

Judges: Keating, J. Chief Judge Fuld and Judges Burke, Scileppi, Bergan, Breitel and Jasen concur.

Opinion by: KEATING

Opinion

[*466] **[**898]** **[***891]** The issue on this appeal is whether a 1960 amendment to the Building Zone Ordinance (altering the Zoning Map) of the Village of Lake Success, which reclassified appellant's property from Business "A" and "B" to Residence "C", is valid. Appellant claims that the rezoning was discriminatory, confiscatory and *ultra vires*.

The background of the dispute is this: The Village of Lake Success is a small, suburban community in the extreme westerly portion of Nassau County. It has a rather irregular shape, but generally **[****8]** is **[**899]** bounded on the south by the Northern State Parkway and on the north and east by the Town of North Hempstead. To the west lies its giant neighbor, the City of New York.

The village is approximately two square miles in size. Running through it in a generally north-south direction is the main artery of the village, Lakeville Road. That street intersects with Northern Boulevard, a major east-west thoroughfare in this section of Long Island.

The village's northern boundary appears to be completely arbitrary. For the most part, it is to the south of Northern Boulevard. However, along Lakeville Road, the village reaches out in a northerly direction to touch Northern Boulevard. The area is not large and is neck-like in shape, consisting of several hundred feet on either side of Lakeville Road extending from Northern Boulevard some 750 feet to University Road on the west side of Lakeville Road and some 600 feet to Cumberland Avenue on the east. Cumberland Avenue and University Road form what may be described as the base of the neck.

Prior to the 1960 rezoning in question, almost the entire neck was zoned for business. For a distance of some 400 feet south of Northern **[****9]** Boulevard, the area was zoned Business "A" which permitted retailing and similar uses as well as laboratories and office and public buildings. The rest of the neck was zoned Business "B" where essentially the only nonresidential use allowed was neighborhood retailing.

[*467] Two parcels of land were initially the subject of this litigation. They are located in this neck and constitute a substantial portion of it. However, as a result of this litigation, only one parcel is now in

question. It consists of approximately two and one-half acres, covering all of the area formerly zoned Business "A" on the *east* side of Lakeville Road, except for a 100 by 100-foot plot in the northwest corner of the parcel at the intersection of Northern Boulevard and Lakeville Road which is occupied by a gasoline station. Twenty-four feet of the southern end of the parcel extend into the former Business "B" zone. Appellant also owns land, adjacent to and east of this property in the Town of North Hempstead.

[*892]** When appellant assembled this east parcel in 1951, the only use being made of this property was in the northerly portion facing Northern Boulevard. It was then being operated **[****10]** as a restaurant.

Also in 1951, plaintiff acquired two and one-half acres of vacant lots on the *west* side of Lakeville Road. This property covered almost the entire block from Lakeville Road to University Place, one block to the west of Lakeville Road, and from Northern Boulevard for a distance of approximately 500 feet to the south towards University Road, except for a few lots facing University Place to the west. Like the northwest corner of the east parcel, the northeast corner of this property is also occupied by a gas station, not owned by appellant.

The zoning amendment, ordinance No. 60, placed the entire neck, except for a 100-foot-wide strip adjacent to Northern Boulevard, in a Residence "C" category. Thus, the northeast and the northwest corners of the east and west parcels, respectively, that is the land fronting on Northern Boulevard, are not directly involved in this proceeding since the rezoning did not affect those portions of appellant's property. Permitted uses in the new classification include public and religious buildings and residences with minimum plot size set at 13,000 square feet and minimum frontage of 100 feet on Lakeville Road.

The trial court **[****11]** held the rezoning with respect to the so-called *west* parcel unconstitutional as being confiscatory, but sustained the ordinance insofar as it affected the *east* parcel (*Udell v. McFadyen, 40 Misc 2d 265*). The decision with respect to the west parcel rested on three grounds. First, there was the **[*468]** size and shape of the plot; second, the topography of the land, which sloped down some **[**900]** 15 feet from Lakeville Road to University Place; and third, the existing neighboring uses. After a careful evaluation of the evidence, the trial court concluded that "residential zoning precludes use for any purpose to which it is reasonably adaptable" (*40 Misc 2d 265, 271)*. It also held the rezoning to be discriminatory, of which more will be said later.

With respect to the east parcel, however, a contrary conclusion was reached as to the validity of the ordinance. In essence, the court held that since the appellant also owned contiguous lots fronting on Summer Avenue in the Town of North Hempstead, residential use was practical for the east parcel since the residences could face Summer Avenue. In addition, it found residential zoning would not be inconsistent with **[****12]** the character of the neighborhood and that a nursery school located on the south side of the east parcel was not incompatible with residential use. The problem raised by the commerce of Northern Boulevard could be remedied by appropriate fencing.

Both sides appealed this decision. During the pendency of the appeal, the village passed a second amendatory ordinance rezoning the *west* **[***893]** parcel into a new Business "C" category, which permitted "such scientific and/or research laboratory use, offices for executive, administrative, banking or professional purposes, libraries, schools, telephone exchanges and municipal building uses, as may be approved by the Village * * * upon recommendation of the Planning Board". Following this second change, the village withdrew its appeal.

On the landowner's appeal, the Appellate Division affirmed. Justice Hopkins, dissenting, stated in a brief opinion that he could see no justification for treating the two properties differently and that the "same considerations that prompted the declaration of invalidity of the ordinance exist on the one side of Lakeville Road as on the other" (*27 A D 2d 750, 751*).

We hold that ordinance No. 60 **[****13]** is invalid with respect to the *east* parcel as well as the *west* parcel. We have concluded that the rezoning was discriminatory and that it was not done "in accordance with [the] comprehensive plan" of the Village of Lake Success (Village Law, § 177). In our view, sound zoning principles were not followed in this case, and the root cause of **[*469]** this failure was a misunderstanding of the nature of zoning, and, even more importantly, of its relationship to the statutory requirement that it be "in accordance with a comprehensive plan."

Zoning is not just an expansion of the common law of nuisance. It seeks to achieve much more than the removal of obnoxious gases and unsightly uses. Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems.

This fundamental conception of zoning has been present from its inception. The almost universal statutory requirement that zoning conform to a "well-considered **[****14]** plan" or "comprehensive plan" is a reflection of that view. (See Standard State Zoning Enabling Act, U. S. Dept. of Commerce [1926].) The thought behind the requirement is that consideration must be given to the needs of the community as a whole. In exercising their zoning powers, the local authorities must act for the benefit of the community as a whole following a calm and deliberate consideration of the alternatives, and not because of the whims of either an articulate minority or even majority of the community. (*De Sena v. Gulde, 24 A D 2d 165* [2d Dept., 1965].) Thus, the mandate of the Village Law (§ 177) is not a mere technicality which serves only as an obstacle course for public officials to overcome in carrying out their duties. Rather, the comprehensive **[**901]** plan is the essence of zoning. Without it, there can be no rational allocation of land use. It **[***894]** is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll.

Moreover, the "comprehensive plan" protects the landowner from arbitrary restrictions on the use of his property which can result from the pressures which outraged **[****15]** voters can bring to bear on public officials. "With the heavy presumption of constitutional validity that attaches to legislation purportedly under the police power, and the difficulty in judicially applying a 'reasonableness' standard, there is danger that zoning, considered as a self-contained activity rather than as a means to a broader end, may tyrannize individual property owners. Exercise of the legislative **[*470]** power to zone should be governed by rules and standards as clearly defined as possible, so that it cannot operate in an arbitrary and discriminatory fashion, and will actually be directed to the health, safety, welfare and morals of the community. The more clarity and specificity required in the articulation of the premises upon which a particular zoning regulation is based, the more effectively will courts be able to review the regulation, declaring it ultra vires if it is not in reality 'in accordance with a comprehensive plan.'" (Haar, "In Accordance With a Comprehensive Plan", 68 Harv. L. Rev. 1154, 1157-1158.)

As Professor Haar points out, zoning may easily degenerate into a talismanic word, like the "police power", to excuse all sorts of arbitrary infringements **[****16]** on the property rights of the landowner. To assure that this does not happen, our courts must require local zoning authorities to pay more than

mock obeisance to the statutory mandate that zoning be "in accordance with a comprehensive plan". There must be some showing that the change does not conflict with the community's basic scheme for land use.

One of the key factors used by our courts in determining whether the statutory requirement has been met is whether forethought has been given to the community's land use problems. (See 68 Harv. L. Rev. 1154, 1171; Note, Comprehensive Plan Requirement in Zoning, 12 Syracuse L. Rev. 342, 344-345.)

Where a community, after a careful and deliberate review of "the present and reasonably forseeable needs of the community", adopts a general developmental policy for the community as a whole and amends its zoning law in accordance with that plan, courts can have some confidence that the public interest is being served (*Rodgers v. Village of Tarrytown, 302 N. Y. 115, 121-122*; *Thomas v. Town of Bedford, 11 N Y 2d 428, 434)*. Where, however, local officials adopt a zoning amendment to deal with various problems that have arisen, **[****17]** but give no consideration to alternatives which might minimize the **[***895]** adverse effects of a change on particular landowners, and then call in the experts to justify the steps already taken in contemplation of anticipated litigation, closer judicial scrutiny is required to determine whether the amendment conforms to the comprehensive plan.

[*471] The role of these experts must be more than that of giving rationalizations for actions previously decided upon or already carried out. In recent years, many experts on land use problems have expressed the pessimistic view that the task of bringing about a rational allocation of land use in an ever more urbanized America will prove impossible. But of one thing, we may all be certain. The difficulties involved in developing rational schemes of land use controls become insuperable when zoning or changes in zoning are followed rather than preceded by study and consideration.

By this statement, we do not mean to imply that the courts should examine the motives of local officials. What we do mean is that the courts must satisfy themselves **[**902]** that the rezoning meets the statutory requirement that zoning be "in accordance **[****18]** with [the] comprehensive plan" of the community.

Exactly what constitutes a "comprehensive plan" has never been made clear. Professor Haar in his article discusses most of the meanings which courts have given the term. In the conclusion of his article he notes (68 Harv. L. Rev. 1173): "As we have seen, the courts have taken a number of rather different approaches in testing zoning measures for consonance with the enabling act mandate of 'accordance with a comprehensive plan.' None of the meanings suggested -- broad geographical coverage, 'policy' of the planning or zoning commission, the zoning ordinance itself, the rational basis underlying the ordinance -- do extreme violence to the statutory wording. But all of them share a common defect: they emphasize the question whether the zoning ordinance is a comprehensive plan, not whether it is in accordance with a comprehensive plan. Thus construed, the enabling act demands little more than that zoning be 'reasonable,' and impartial in treatment, to satisfy the constitutional conditions for exercise of the state's police power."

No New York case has defined the term "comprehensive plan". Nor have our courts equated the term with **[****19]** any particular document. We have found the "comprehensive plan" by examining all relevant evidence (*Rodgers v. Village of Tarrytown, 302 N. Y. 115, 122*, *supra; Thomas v. Town of Bedford, 11 N Y 2d 428, 434-435*, *supra*). As the trial court noted, generally New York cases "have analyzed the ordinance * * * in **[*472]** terms of consistency and rationality" (*40 Misc 2d 265, 267-268)*. While these elements are important, the "comprehensive plan" requires **[***896]** that the rezoning

should not conflict with the fundamental land use policies and development plans of the community (see *Santmyers v. Town of Oyster Bay, 10 Misc 2d 614, 616*; *Linn v. Town of Hempstead, 10 Misc 2d 774*; *Place v. Hack, 34 Misc 2d 777*; *Walus v. Millington, 49 Misc 2d 104*). These policies may be garnered from any available source, most especially the master plan of the community, if any has been adopted, the zoning law itself and the zoning map.

In the case at bar, the search for the village's "comprehensive plan" is relatively easy. It may be found both in the village's zoning ordinance and in its zoning map.

In 1925 the Village of Lake Success adopted its **[****20]** first zoning ordinance. At least since 1938, appellant's parcel has been placed in a business use district. Over the years, various amendments were passed, none of them, however, affecting appellant's property. If anything, the changes tended to reinforce the conclusion that the community had decided that the neck of land was most appropriately fitted for business use because of its proximity to Northern Boulevard. Thus, in the early 1950s the west side of University Place near Northern Boulevard was rezoned for business use.

When appellants acquired the parcel, it had been zoned for business use for some 12 or 13 years and so it remained for the next 8 or 9 years.

In 1958 the village undertook to set forth expressly the essential development goals of the community. It did so in the form of an amendment to the zoning ordinance and entitled the statement a "developmental policy". According to the statement, Lake Success was and was to remain a suburban community of low density, one-family residential development. Other uses were to be permitted only to the extent that they were related to residential use, e.g., schools, churches and community institutions, or as they might **[****21]** contribute to the strengthening of the tax base of the community.

[903]** If one examines the zoning map of the village as it stood prior to June, 1960, this policy is carried out almost perfectly. Only a small portion of the community's land was zoned for business **[*473]** use. It is important to note that almost, if not, every piece of property in the nonresidential category was located on the periphery of the community, usually adjacent to lands in neighboring communities with similar nonresidential use. Consistent with this "developmental policy", a portion of the northeast section of the community had previously been rezoned for commercial use.

Thus, as matters stood on the morning of June 21, 1960, the village had a zoning plan with stated community goals and a zoning map which consistently carried out these policies.

[*897]** On June 21, 1960 Fred Rudinger, an associate of the appellant, appeared at the village's offices with a preliminary sketch for the development of the vacant west parcel with a bowling alley and a supermarket or discount house. That same evening, the village planning board recommended a change in zoning from business to residential use.

[**22]** The minutes of that meeting indicate that, following a discussion of the severe traffic problem which had developed on Lakeville Road, a proposed amendment to the zoning map was recommended to the village trustees. A month or so later, this proposal became, in slightly modified form, ordinance No. 60.

Next, the following comment appears in the minutes: "Mr. Klein informed the Board that *by coincidence*, this morning, an informal preliminary sketch was submitted to him by Mr. Fred Rudinger for the

development of the area with a bowling alley and a supermarket or discount house. The Board gave no opinion on this informal sketch and no further action was considered necessary." (Emphasis supplied.)

The reference to Mr. Rudinger's visit as being "by coincidence" appears somewhat odd since no zoning amendments had been considered previously. It is significant that no consideration was given to other possible alternatives for alleviating the traffic problem.

Only after adopting this recommendation did the planning board vote to ask the board of trustees to retain a planning expert to review the village's master plan. On July 5, 1960 the trustees retained Mr. Hugh Pomeroy to make **[****23]** just such an investigation. Later that same day, the planning board and the trustees met in joint session, and it was agreed that a required public hearing **[*474]** should be held promptly. On July 27, 1960 ordinance No. 60 became law following the holding of a public hearing two days earlier.

This history of ordinance No. 60 must immediately raise doubts whether this race to the statute books was in accord with sound zoning principles or was a subversion of them for the process by which a zoning revision is carried out is important in determining the validity of the particular action taken. The village argues that there was no longer any need for shopping facilities in the area. Assuming that to be so, this does not explain why consideration was only given to zoning the area as "Residence C". A fair respect for the community's need for taxables, as set forth in its "developmental policy", required that some thought be given to other possible land use controls.

A more substantial justification for the rezoning was the serious traffic conditions on Lakeville Road. However, at the trial, the village's own expert, Mr. Frederick P. Clark, who was retained by the village after **[****24]** Mr. Pomeroy's death, admitted that business use of the east parcel would create less of a traffic problem than business use of the west parcel **[***898]** would. The reason for this was that access to the east parcel could be restricted to Northern Boulevard, while access to the west parcel would probably have to be from Lakeville Road.

[904]** The point here is not only that the expert's argument does not support the village's position, but that his testimony also conflicted sharply with the community's "developmental policy" and his own earlier recommendations for modifications of that policy, which he had made in 1962 when he drafted a proposed "Comprehensive Zoning Plan" for the community.

In that report, Mr. Clark had recommended the rezoning of various perimeter areas in the community for commercial and light manufacturing use to take account of property developments outside the community and to strengthen the tax base. For example, he suggested that the entire area of the community south of the Northern State Parkway be rezoned for commercial or light manufacturing. On cross-examination, Mr. Clark admitted that the east parcel was in a perimeter area. The fair implication, **[****25]** therefore, is that commercial use of this property would conform with his recommendations for land use control.

[*475] More pertinent is Mr. Clark's testimony at the trial: "In my opinion the property on the east side, the Andre property, could be used either for residential purposes as presently zoned or for business. I do not find in my study of it a marked superiority of one over the other. I believe it could be used for either as an appropriate use."

He later modified this statement to include the proviso that there should be no access from Lakeville Road. This concession by Mr. Clark was no mistake. In light of the recommendations of his

"Comprehensive Zoning Plan of 1962", he had to agree that commercial use was at least equally desirable. Otherwise, he would have discredited his own planning work for the community. Mr. Clark's testimony establishes that the zoning amendment was neither in 1960 nor afterwards in harmony with the community's over-all land use plan.

Aside from this testimony, examining the zoning map, one would find it difficult to locate a more fitting area to use for commercial purposes than this isolated neck near Northern Boulevard of which the **[****26]** subject parcel is part.

Viewing the village's plans on a temporal basis, there is a consistency predating ordinance No. 60 and post-dating the change. In 1958 a large area in the northeast section of the village had been zoned for nonresidential use. After 1960 other changes of a similar nature were recommended in conformity with a policy of expanding areas of noncommercial use on the periphery of the community. The only significant deviation was the ordinance No. 60.

It is not disputed that the village officials faced a traffic problem in the Northern Boulevard-Lakeville Road area. Nevertheless, we can **[***899]** come to no other conclusion that the rezoning was not "accomplished in a proper, careful and reasonable manner" (*Rodgers v. Village of Tarrytown, 302 N. Y. 115, 122*, *supra*). Ordinance No. 60 not only did not conform to the village's general "developmental policy", but it was also inconsistent with what had been the fundamental rationale of the village's zoning law and map. The amendment was not the result of a deliberate change in community policy and was enacted without sufficient forethought or planning. The particular conditions existing in the area **[****27]** did not support the radical change, which ordinance No. 60 embodied.

[*476] More than 60% of the value, of appellant's property, or $ 260,000, * was wiped out because, to use the words of the village's first expert, "in his discussions he had **[**905]** found *it is the feeling of the Village* that it does not want extensive business in that area". (Emphasis supplied.)

These vague desires of a segment of the public were not a proper reason to interfere with the appellant's right to use his property in a manner which for some 20 odd years was considered perfectly proper. If there is to be any justification for this interference with **[****28]** appellant's use of his property, it must be found in the needs and goals of the community as articulated in a rational statement of land use control policies known as the "comprehensive plan". We find that appellant has demonstrated that ordinance No. 60 did not conform to the established "comprehensive plan" of the village. Hence, ordinance No. 60 must be held to be *ultra vires* as not meeting the requirement of section 177 of the Village Law that zoning be "in accordance with a comprehensive plan".

Turning then to the other claims of the appellant, we have also concluded that his claim of discrimination is equally valid.

Discrimination in zoning is usually thought of in terms of the injustice done to the landowner. In reality, it is also a wrong done to the community's land use control scheme. It is the opposite side of the coin, one side of which is "spot zoning".

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* Mr. Erskine, the village's expert, gave as the value of that portion of *east* parcel still in a Business "A" classification as $ 3.50 per square foot and the value of the property rezoned for Residence "C" as $ 1 per square foot. This is a 71.4% reduction in value, and the expert conceded that no consideration had been given to preparing the lots for construction.

Nevertheless, a claim of discrimination is not just another way of saying that the change does not accord with the comprehensive plan. When the claim is one of discrimination, the focus of inquiry is narrower. The issue is the propriety of the treatment of the subject parcel as compared to neighboring properties.

[**29]** Trial Term found the rezoning here to be discriminatory because the rezoning did not affect the retail service area to the south on Lakeville **[***900]** Road. The court pointed out that, while those properties would of course be entitled to an exemption for existing nonconforming uses, there was nothing to differentiate that parcel from the appellant's west parcel, and the failure to include **[*477]** the existing retail area evidenced a discriminatory pattern of treatment. It also found that the "ordinance as enacted discriminated against the east parcel" for the same reason that it discriminated against the west parcel, but also because, unlike the west parcel, most of the east parcel was already being used as a restaurant, that is for a nonconforming commercial use. Nevertheless, there was a "sufficient difference" between the two parcels to warrant their being treated differently (*40 Misc 2d 265, 272*).

The difference was the fact that the east parcel could be used for residential purposes, where the west parcel could not be. A property owner need not prove confiscation to establish discrimination. In almost every respect, the properties are alike. Also, on the north, **[****30]** west and southwest of the east parcel, the adjacent properties are now zoned for business use.

While not decisive, there is also the added factor that there is at present a nonconforming commercial use on part of the property, which is likely to persist. The treatment accorded the east parcel must take account of economic realities.

There is an inconsistency in the argument of the Trial Justice that there was nothing in the "surrounding residential uses * * * nor any other circumstances" to distinguish the retail service area from both the west and east parcels, and, on the other hand, that the east and west parcels were somehow different (*40 Misc 2d 265, 272*).

In any event, reversal is clearly warranted by the subsequent history of this case. The village might have met the Trial Justice's objection, had it rezoned the Lakeville Road retail area to Residence "C". Instead, contingent upon the Appellate Division's sustaining the finding of invalidity, the village rezoned the west parcel into a new category Business "C" which permits **[**906]** allegedly non-traffic-creating business use, i.e., laboratories and office and public buildings. Subsequently, the village withdrew its **[****31]** appeal. As Justice Hopkins correctly pointed out, the village thus accepted the finding of invalidity. That being so, it removes all doubt that the treatment of the east parcel is discriminatory.

Having recognized that the west parcel could not fairly be zoned for residential use, the village was bound to show that dissimilar treatment of the east parcel was still warranted. The **[*478]** village offers no acceptable reason to justify the distinction and, as noted above, the position of the village's expert was, if anything, that the east parcel could properly be **[***901]** zoned for non-residential use, but the west parcel should be restricted to residential use. That crucial concession removed any basis for an argument that the needs of the village required a different treatment of the east parcel from that of the west parcel.

Appellant has amply demonstrated that ordinance No. 60 constitutes unjustifiable discrimination. If we also consider the fact that, aside from the lack of any showing of purpose in distinguishing the two parcels, the substantial loss which appellant will sustain if the zoning change is upheld, the invalidity of

the ordinance becomes unquestionably **[****32]** clear (*Stevens v. Town of Huntington, 20 N Y 2d 352*; see, also, *Mary Chess, Inc. v. City of Glen Cove, 18 N Y 2d 205, 209-211)*.

The order of the Appellate Division should be reversed and the judgment of the Supreme Court should be modified by striking out the first decretal paragraph and by substituting in place thereof a decretal paragraph declaring ordinance No. 60 to be *ultra vires*, unconstitutional and void as to the property of plaintiff located on the easterly side of Lakeville Road and the westerly side of Summer Avenue, with costs.

Order reversed, with costs in all courts, and case remitted to Supreme Court, Nassau County, for further proceedings in accordance with the opinion herein.

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Udell v. McFadyen

Supreme Court of New York, Trial and Special Term, Nassau County

September 16, 1963

No Number in Original

Reporter
40 Misc. 2d 265 *; 243 N.Y.S.2d 156 **; 1963 N.Y. Misc. LEXIS 1632 ***

Daniel A. Udell, Plaintiff, v. Edward McFadyen et al., Constituting the Board of Trustees of the Village of Lake Success, Defendants

Core Terms

parcel, Village, zoning, ordinance, residential, Northern, feet, retail, properties, frontage, traffic, reduction, fronting, rezoned, subject parcel, nonconforming, detrimental, distance, Street, values

Counsel: *Hall, Casey, Dickler, Howley & Brady* (*James Austin* of counsel), for **[***3]** plaintiff.

John M. Lewis and *Edward Wallace* for defendants.

Judges: Bernard S. Meyer, J.

Opinion by: MEYER

Opinion

[*266] **[**157]** This action involves two properties in the Village of Lake Success. As stipulated by the parties, the court has viewed the properties and the environs. The north-south artery of the village is Lakeville Road. Generally, the northern boundary of the village is a substantial distance south of Northern Boulevard, but for several hundred feet on either side of Lakeville Road it juts northward and reaches Northern Boulevard. Initially the neck of land thus described was zoned Business "A" for a distance of 400 feet south of Northern Boulevard and Business "B" for the remainder of the distance to Cumberland Avenue on the east side of Lakeville Road and to University Road on the west side of Lakeville Road.

The first of the subject parcels, hereafter referred to as the east parcel, covers all of the area formerly zoned Business "A" on the east side of Lakeville Road, except the 100 by 100-foot parcel at the southeast corner of Northern Boulevard and Lakeville Road which is occupied by a gasoline station. The east parcel also takes in a few feet of **[***4]** the former Business "B" area and includes lots outside the village boundary but contiguous with the eastern boundary of the parcel which give access from the parcel to Summer Avenue. The east parcel has 228-foot frontage on Northern Boulevard, 324-foot frontage on Lakeville Road, and is approximately two acres in size. It was used as a hotel and when acquired by

plaintiff was in use as a restaurant. The lease permits the landlord to withdraw from its terms the land fronting on Lakeville **[**158]** Road to a depth of 100 feet at any time upon 30 days' notice. The remainder of the property formerly zoned Business "B" on the east side of Lakeville Road is used as a nursery school. There is a drop in grade of some 15 feet from Summer Avenue to Lakeville Road.

The second subject parcel, hereafter referred to as the west parcel, is about two and one-half acres in size and includes 20 lots which front on the west side of Lakeville Road beginning at a point 105 feet south of Northern Boulevard and run south for 400 feet, and Lots 39, 40, 41 and 45 through 59 inclusive fronting on University Place. University Place is the next street west of Lakeville Road and, though plaintiff does **[***5]** not own Lots 42, 43 and 44, most of the University Place lots are contiguous to most of the Lakeville Road lots. The plaintiff also owns a parcel, not involved in this proceeding, at the southeast corner of University Place and Northern Boulevard, fronting 135 feet on Northern Boulevard which is joined to the west parcel by a neck of land 10.5 feet wide. All of the west parcel is now vacant land. On the southwest corner of Lakeville Road and Northern Boulevard is a gasoline station. The land **[*267]** fronting on Lakeville Road south of the west parcel a distance of 260 feet to University Road is occupied by two former residences now used for business purposes and a taxpayer containing five small stores. The land fronting on University Place a distance of 200 feet to University Road is occupied by residences. There is a drop in grade of some 15 feet from Lakeville Road to University Place.

Plaintiff assembled the properties thus described in 1951. On June 30, 1960, he applied for permits to erect a bowling alley and a junior department store on the west parcel. The application was denied July 25 for reasons not here material. On June 21, 1960, the Village Planning Commission **[***6]** recommended rezoning the area so that the business areas would be limited to a depth of 150 feet along Northern Boulevard and along each side of Lakeville Road, and that the remainder be rezoned Residence "C". On July 5, 1960, a joint meeting of the Planning Commission and the Board of Trustees was held at which Hugh Pomeroy, consultant to the village, was present. He recommended that the entire area except the Northern Boulevard frontage and the existing business uses south of the west parcel be rezoned residential. On July 27, 1960, the ordinance was amended in conformance with that recommendation. Except for the northernmost 100 feet of the east parcel, the two parcels are now in Residence "C" district, in which permitted uses are one-family dwellings, including accessory professional office use, churches, public schools or libraries or municipal buildings, truck gardening and nurseries. Plaintiff attacks the 1960 rezoning as (1) not in accordance with a comprehensive plan, (2) confiscatory, and (3) discriminatory.

The phrase "in accordance with a comprehensive plan" may be understood to mean (1) conforming to a master plan, (2) broad in scope **[**159]** of coverage, (3) **[***7]** all inclusive in control of use, height and area, or (4) internally consistent zoning based on a rational underlying policy (Haar, "In Accordance With a Comprehensive Plan", 68 Harv. L. Rev. 1154). The second and third meanings are not here involved. As to the first, the only zoning case found in which conformance to a master plan has been considered is *Matter of Fornaby v. Feriola (18 A D 2d 215)* in which the ordinance specifically provided that "use shall not conflict with the direction of building development in accordance with any Master Plan". Most New York cases concerned with the meaning of the phrase have dealt with spot zoning and, while adopting no clear definition, have analyzed the ordinance and the fact situation presented in terms of consistency and rationality (*Rodgers v. Village of Tarrytown, 302 N. Y. 115, 124*; **[*268]** *Connell v. Town of Granby, 12 A D 2d 177*; *Twenty-One White Plains Corp. v. Village of Hastings-on-Hudson, 14 Misc 2d 800*, affd. *9 A D 2d 934*; *Linn v. Town of Hempstead, 10 Misc 2d 774*; *Santmyers v. Town of*

Oyster Bay, 10 Misc 2d 614; *Soule v. Town of Perinton, 152 N. Y. S. 2d 734*, app. dsmd. **[***8]** *2 A D 2d 834*).

The village relies on the statement of "developmental policy" incorporated in its ordinance in 1958, which reads as follows:

"Taking into account considerations of

"(a) the conservation of existing and potential property values in the Village:

"(b) the character of existing development in the Village:

"(c) the physical characteristics of the terrain of the Village and the suitability of the land of the Village for various uses:

"(d) the physical situation of the Village and the functional relationships of the uses of the land therein to the existing and prospective development of the inter-community area consisting of the Great Neck-Manhasset areas and adjoining areas in Nassau County, New York

"it is determined

"(a) that the most appropriate predominant use of land throughout the Village consists of low-density one-family residential development, carefully regulated as to quality;

"(b) that all other uses in the Village shall be either

"1. related to such residential use in a community sense, such as schools, churches, and other community institutions; or

"2. economically related to such residential use by reason of contributing to a tax base for **[***9]** the Village that will make possible the adequate provision of the public **[**160]** facilities and services that are necessary for sound residential development;

"(c) that all such non-residential uses shall be limited in location, size and character to the extent that they will satisfactorily perform their respective functions, as aforesaid, in a manner that will not detract from the predominatly [*sic*] low-density one-family residential character of the Village or hinder further development of like nature and quality."

It argues that retail service uses are not encompassed within that statement. The argument is somewhat disingenuous, however, for (1) had the village fathers so construed the statement they would have amended the ordinance in 1958 to exclude such uses from the permissible ones, and (2) continuance of the **[*269]** existing retail service uses south of the west parcel would, *because inconsistent with the statement*, discriminate against the property that was rezoned.

While the statement does not entirely exclude retail service uses, it does establish the underlying policy of the zoning ordinance. The evidence shows that Lakeville Road in the area **[***10]** of the subject parcels is now a source of traffic difficulty and that the difficulty would be increased by business uses on the subject parcels. Plaintiff's argument that there must be "some very important reason" for a change in zoning has long ago been discredited (Village Law, § 179; *Rodgers v. Village of Tarrytown, 302 N. Y. 115, 121*, *supra*; *Levitt v. Incorporated Vil. of Sands Point, 6 N Y 2d 269, 273)*, but if such a reason were required the traffic problem is quite real and is a valid basis for action by a board charged with adopting

regulations "designed to lessen congestion in the streets" and "to facilitate the adequate provision of transportation" (Village Law, § 177). Moreover, residential zoning is consistent not only with the policy established by the statement but with the actual use of land along Lakeville Road within the village. Nor in view of the shopping available in nearby areas outside the village, and of the fact that the last commercial building erected in the area of the subject parcels was built in 1956, can the court say that the Village Board was arbitrary in its conclusion that more shopping facilities in that area are not required. **[***11]** The court concludes that the 1960 ordinance amendment does not violate the statutory mandate that it "be made in accordance with a comprehensive plan."

The claim that the amendment is as to plaintiff's properties confiscatory is predicated on the reduction in value of the properties as a result of the zoning and the claim that Residence "C" zoning precludes use of the properties for any use for which reasonably adaptable. The village having upzoned the subject properties the court concludes, on the reasoning set forth on this point in *Chusud Realty Corp. v. Village of Kensington (40 Misc 2d 259)* decided herewith, that evidence of values before and after the rezoning is relevant and that the village's motion to strike that testimony must be denied. It finds the value of the east parcel zoned for business to be, in round figures, $ 425,000 and under present zoning to be $ 165,000, a reduction of $ 260,000. It finds the value of the west parcel zoned for business to be, in round figures, $ 250,000, and under present zoning to be $ 46,000, a reduction of $ 204,000. [In arriving at present values the court in light of *Scarsdale Supply Co. v. Village of Scarsdale (8 [***12] N Y 2d 325)* has given no consideration **[*270]** to the value of the nonconforming use of the east parcel. For reasons hereafter indicated, it has accepted plaintiff's values as to the west parcel but defendant's values as to the east parcel.] It further finds that plaintiff's investment in the east parcel is $ 160,000, and in the west parcel, including brokerage, legal fees and taxes $ 65,000. While the reductions in value are substantial and while there is a partial loss of investment as to the west parcel, *Hadacheck v. Sebastian (239 U.S. 394)* which sustained an ordinance notwithstanding a reduction in value from $ 800,000 to $ 60,000, and *Levitt v. Incorporated Vil. of Sands Point (6 N Y 2d 269*, *supra*) make clear that neither factor by itself constitutes confiscation. Against the loss of the property owner is to be balanced the public welfare; other factors to be considered are: the character of the neighborhood, the zoning and use of properties nearby, the suitability of the subject property for the uses to which restricted, the extent to which removal of the restriction will detrimentally affect nearby property, the length of time since structures of **[***13]** the type permitted by the restriction have been built in the area (see *Chusud Realty Co. v. Village [**161] of Kensington, 40 Misc 2d 259*, *supra*).

With respect to the east parcel, the court finds the ordinance not confiscatory. Except for the Northern Boulevard frontage which is still zoned business and the retail service uses south of the west parcel, the character of the neighborhood is still residential. The nursery school use to the south is not detrimental to a residential use; the grade of the property would not prevent the building of salable residences; there is access from Sumner Street and the size and shape of the residential portion of the parcel is such that a plot plan with access from Sumner Street and which would require no one to back out onto Lakeville Road seems feasible, or at least has not been demonstrated to be infeasible. The proximity of the Northern Boulevard business uses is not so detrimental an influence in view of the Sumner Street access and the possibility of screening as to preclude residences. The area may fairly be compared with the Alfieri property on the southwest corner of Lakeville Road and University Road, which sold **[***14]** on November 16, 1961 for $ 1 a square foot and on which a residence has been erected. The detriment to public welfare if traffic stemming from business use of the **[**162]** east parcel is added to the existing traffic problem is substantial. Though a reduction of $ 250,000 in value is also substantial there is, short

of actual and substantial expenditures, no vested right in a zoning classification (*New York Trap Rock Corp. v. Town of Clarkstown, 1 A D 2d 890*, affd. *3 N Y 2d 844*; *Town of [*271] Hempstead v. Lynne, 32 Misc 2d 312*) and it has not been shown that residential zoning precludes use to which the property is reasonably adaptable.

With respect to the west parcel, the situation is, however, quite different. The gasoline station on the north, the retail service uses on the south and the Lakeville Road traffic make the Lakeville Road frontage undesirable for residences. Recognizing the latter factor, the village suggests that residences on the Lakeville Road lots could be given access through University Place by driveways or driveway easements. The suggestion overlooks the modest character of the residences now on the west side of University Place, **[***15]** the undesirability of "piggyback" homes to most buyers, the problem, particularly in snowy weather, created by the grade of the driveway that would be required. The dilemma of such access or the frustration of becoming embroiled in Lakeville Road traffic, particularly in that created by cars backing out of the retail service area on the south, differentiates the west parcel from the Alfieri property (access to which is from University Road) and warrants acceptance of plaintiff's valuation of these plots. As for the University Place frontage, Lots 39, 40 and 41 would be unusable except as adjuncts of Lakeville Road plots, a use which would add little to the selling price. Moreover, the character of the existing residences on the west side of University Place would add to the difficulty of selling residences on the University Place frontage at prices consistent with building costs and the cost of the land involved. Removal of the residential restriction can have relatively little detrimental effect on nearby properties in view of the presence of the retail services uses and the fact that until 1960 the west parcel was entirely zoned for business. While the Alfieri residence has **[***16]** recently been built nearby, it is not comparable for the reasons indicated above. The court concludes that the shape of the west parcel, its terrain and its surroundings differentiate the west parcel from the east parcel, that as to the west parcel plaintiff has sustained its burden of showing that residential zoning precludes use for any purpose to which it is reasonably adaptable, and that, because of that fact, and notwithstanding the public benefit involved in such zoning, it cannot be sustained.

There exists a further reason for invalidating the ordinance: in failing to reclassify the property south of the west parcel now devoted to retail service uses, it denies plaintiff equal protection of the law. Discrimination is not per se invalid, but discrimination without reasonable basis in classification is. That the property is now devoted to business **[**163]** use furnishes a basis for **[*272]** according it nonconforming status; indeed, an ordinance failing to protect existing nonconforming uses may be a denial of due process (*Town of Somers v. Camarco, 308 N. Y. 537*; cf. *Matter of Harbison v. City of Buffalo, 4 N Y 2d 553* and *Town of Somers v. Camarco [***17] Contrs., 24 Misc 2d 673*, affd. *12 A D 2d 977* and *13 A D 2d 531*; but, see, *Matter of Engelsher v. Jacobs, 5 N Y 2d 370, 375)*. "The rationalization of exempting previously existing non-conforming uses from the requirements of the ordinance is that vested rights have been obtained by the owner which cannot summarily be liquidated, that the zoning statutes and the ordinance as enacted contemplate their eventual elimination either through obsolescence or through the provisions against rebuilding in case of destruction, or the prohibition of alterations, repairs, enlargement of use and similar restrictions, all of which have been held valid." (Rathkopf, Law of Zoning and Planning [3d ed.], pp. 7-19.) Due process requires the protection of existing uses, but not their exemption from the zoning plan (*Molnar v. Henne & Co., 377 Pa. 571*; see *Stone v. Cray, 89 N. H. 483*; *Sampere v. City of New Orleans, 166 La. 776*, affd. *279 U.S. 812*). In according the retail service use properties business classification, the village granted to their owners not the limited right to continue existing use but the very much more valuable right to change the use of their

properties **[***18]** to any purpose permissible in a business zone. Neither the surrounding residential uses, nor the nature of the traffic problem, nor any other circumstances with respect to the retail service use properties, other than their present nonconforming uses, differentiates them from the west parcel. No distinction can be drawn on the basis of the former Business "A" and Business "B" zoning, for part of plaintiff's west parcel was in the same zone (Business "B") as was the retail service use area. The court is as to the west parcel "able to say that there is 'no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched'" (*Watson v. Maryland, 218 U.S. 173, 179)*. The ordinance is, therefore, discriminatory as to the west parcel.

The ordinance as enacted also discriminated against the east parcel for the reasons above stated and for the further reason that the greater part of the restaurant use is in the area zoned residential. However, there is, as above indicated, a sufficient difference between the east parcel and the west parcel to warrant their being differently zoned. In view of that fact and of the court's holding that **[***19]** the west parcel and the retail service use area must be treated similarly, the apparent discrimination in the ordinance as enacted becomes unreal. The difference **[*273]** between the **[**164]** east and west parcels furnishes reasonable basis for treating the east parcel differently than the retail service use area.

Judgment will, therefore, be entered declaring Ordinance No. 60 unconstitutional as to the west parcel but constitutional as to the east parcel.

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