2020 WL 8877655 (N.Y.Sup.), 2020 N.Y. Slip Op. 34453(U) (Trial Order)
Supreme Court of New York.
New York County

**1 THE COMMITTEE FOR ENVIRONMENTALLY SOUND DEVELOPMENT, The Municipal Art Society of New York, Petitioners-Plaintiffs, v. AMSTERDAM AVENUE REDEVELOPMENT ASSOCIATES LLC, New York City Board of Standards and Appeals, New York City Department of Buildings, Respondents-Defendants.

No. 157273/2019.
February 13, 2020.

*1 PART IAS MOTION 23EFM
MOTION DATE 10/18/2019
MOTION SEQ. NO. 001

Decision * Order on Motion

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Present: Hon. W. Franc Perry, Justice.

[This opinion is uncorrected and not selected for official publication.]

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 30, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 95, 97, 99, 102 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

In motion sequence number 001 of this Article 78 proceeding, the Committee for Environmentally Sound Development (CESD) and the Municipal Art Society of New York (MASNY and, with CESD, petitioners), move to vacate the June 25, 2019 revised resolution (Revised Resolution [NYSCEF Doc No. 48]) of respondent New York City Board of Standards and Appeals (BSA) which, on remand from a prior Article 78 proceeding (2018 Proceeding),[1] denied petitioners' appeal and upheld a challenged building permit.

**2 BACKGROUND

The Resolution and the Decision

In the Decision, this court ruled in favor of petitioners and vacated a resolution, issued by BSA on September 7, 2018 (Resolution) in connection with petitioners' first administrative appeal (First Appeal). The Resolution upheld a building permit (Permit) issued to respondent Amsterdam Avenue Redevelopment Associates LLC (Owner) for construction of a

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55-story "pencil" tower (New Building) at 200 Amsterdam Avenue, in the County, City and State of New York (Development Site). The court found the Resolution unreasonable as it was inconsistent with the plain language of Zoning Resolution section 12-10 (d), noting that BSA upheld the Permit by adhering to an "historical interpretation" of the term "zoning lot" that its sister agency, respondent New York City Department of Buildings (DOB), declared to be wrong during the pendency of the First Appeal.

This erroneous historical interpretation (that is, that zoning lots could consist of partial tax lots), appeared in a 1978 Departmental Memorandum of Acting DOB Commissioner Irving Minkin, known as the "Minkin Memo" (annexed as exhibit 9 to the affirmation of Paul D. Selver, Esq. in opposition to petition, executed September 6, 2019 [NYSCEF Doc No. 56]).

According to BSA, the Minkin Memo summarizes certain 1977 zoning amendments, including the newly added subparagraph (d) to New York City Zoning Resolution (Zoning Resolution or ZR) Section 12-10's definition of "zoning lot," and states that a "'single zoning lot' [] may consist of one or more tax lots *or parts of tax lots*" (Resolution at 12 [NYSCEF Doc No. 4] [emphasis added]).

***2** DOB now disagrees with Commissioner Minkin's construction. It has expressly declared in a Buildings Bulletin (Bulletin) which it publicly released during the First Appeal that this ****3** provision to the Minkin Memo incorrectly interpreted the definition of "zoning lot" under ZR Section 12-10 (d) (*see* Decision, 2019 Slip Op 30621[U], *17-18).

Michael Zoltan, Esq., Assistant General Counsel of DOB, explained that DOB wrote the Bulletin to clarify the requirements for forming zoning lots and

> to clarify the proper procedures and forms required to create and verify the proper formation of a zoning lot. In the context of the subject appeal, the Minkin Memo's incorrect interpretation that the ZR permitted zoning lots to consist of portions of tax lots came to light.
>
> As explained by Appellants, there is strong evidence that the ZR did not intend to allow zoning lots to consist of partial tax lots.

(*id.*, 2019 Slip Op 30621[U], *11, quoting letter of Mr. Zoltan to BSA, dated March 9, 2018 in response to First Appeal [NYSCEF Doc No. 5]).

The Bulletin first appeared in February 2018 and proposed, among other things, amending ZR Section 12-10 (d)'s definition of "zoning lot" to read as follows:

> *A 12-10 (d) zoning lot is a tract of land that consists of one tax lot or two or more tax lots (not parts of tax lots)* that are contiguous for a minimum of ten linear feet, and located within a block and declared by all 'parties in interest' (other than those that previously recorded a waiver of their rights) to be a 'zoning lot' in a recorded Zoning Lot Declaration of Restrictions.

(*see id.*, 2019 Slip Op 30621[U], at *11 n 5 [emphasis in original]).

The court, persuaded by DOB's analysis, accepted the Bulletin's corrected definition of "zoning lot" under ZR Section 12-10 (d) (described in the Decision, 2019 Slip Op 30621[U], at *17 *et seq.*), but disagreed with DOB'S decision to delay abrogating the Minkin Memo until after BSA resolved the First Appeal. The court concluded that the delay served no purpose because DOB's intended amendment of the definition of "zoning lot" merited not only prospective but retroactive application as well, as it did not state a new principle but instead corrected "a long-standing, albeit untested, misinterpretation of statutory language, … which will invalidate the ****4** Permit" *ab initio* (*id.,* 2019 Slip Op 30621[U], at *19, citing *Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 197-98 [1st Dept 2011]).

The court also ruled that the Minkin Memo's interpretation of "zoning lot" violated rules' of construction because it rendered superfluous the term "unsubdivided" in the statutory definition of "zoning lot" by accepting that the subject lot was unsubdivided "simply because [Owner] has declared it to be so." (*id.*, 2019 Slip Op 30621[U], at *18).

The court granted the petition, vacated the Resolution, and remanded the matter to BSA to review DOB's grant of the Permit

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approval in accordance with the Zoning Resolution's plain language and the Decision.

The Revised Resolution

In the Revised Resolution, BSA asserts that issuance of the Permit must be upheld, largely based on what it views as Uncertainty regarding DOB's corrected interpretation of "zoning lot" under ZR Section 12-10 (d). BSA characterizes the DOB's rejection of the Minkin Memo as being its "allegedly corrected 'current interpretation"' and claims that, "throughout this appeal, DOB has expressed a significant amount of uncertainty as to whether it will proceed with releasing this allegedly corrected 'current interpretation' through a draft Buildings Bulletin." (Revised Resolution at 8 [NYSCEF Doc No. 48]).

***3** BSA acknowledges DOB's declaration that the Minkin Memo's "'historical interpretation' of the 'zoning lot' definition … is purportedly 'incorrect,"' but it also asserts that DOB has conceded that the Minkin Memo "reflects a 'longstanding, plausible and consistent' interpretation of the 'zoning lot' definition" (*id.*).

BSA further asserts that, "throughout this appeal, DOB has expressed a significant amount of uncertainty as to whether it will proceed with releasing this allegedly corrected ****5** 'current interpretation' through a draft Buildings Bulletin" (*id.*). BSA complains that "DOB declined – on numerous occasions – to give a clear response, instead describing the draft Buildings Bulletin as 'out there and as a draft' and a 'potential interpretation' DOB 'is considering"' (*id.*).

The court does not agree that DOB expressed uncertainty about the Bulletin's future, as BSA suggests. DOB stated unequivocally that the Minkin Memo is incorrect but, because of its long-standing memo and

> the fact that [DOB] is still in the process of preparing [the] *Bulletin that will supersede the Minkin Memo* and as a result has not yet rescinded the Minkin Memo, [DOB] is required to issue a permit for a zoning lot containing a partial tax lot to avoid acting arbitrarily and capriciously.

(March 9, 2018 Letter of Michael Zoltan, Esq., DOB's Assistant General Counsel to BSA Board Members, at 8 [NYSCEF Doc No. 5] [emphasis added]).

At the hearing of the Appeal, Mr. Zoltan further explained why he believed the Minkin Memo interpretation should be grandfathered in this case:

> This brings us back to [the] department's interpretation going forward and how it relates to this permit. As noted by the board yesterday, the city is not [estopped] in correcting its errors. In fact, the department relies on this principle when it revokes a permit due to a mistake. *We request that the board affirm the department's current interpretation of [the] Minkin memo, although not unreasonable, is incorrect*.
>
> *However, the department also asks the board to affirm the subject permit because it relied on a 40-year longstanding determination from the highest ranking official in the department in over 30 years of department determinations relying on this interpretation for the subject zoning lots*.

(*see* Excerpts of BSA March 27, 2018 public hearing transcript at 52:8 to 24 [NYSCEF Doc No. 66] [emphasis added]).

****6 Motion Sequence No. 001**

In this application, petitioners argue that the Permit is invalid because the Owner's gerrymandered Development Site does not qualify as "two or more lots of record" under ZR Section 12-10 (d). Petitioners pray that the court enter judgment in their favor and against respondents pursuant to CPLR Article 78, nullifying and vacating the Revised Resolution, and ordering DOB to revoke the Permit and compel respondent Owner to remove all floors of the New Building that exceed bulk permitted under the Zoning Resolution. Petitioners also pray that the court award them costs, fees and disbursements incurred in connection with these proceedings, and such other and further relief as is just and proper.

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Respondents BSA and DOB have appeared and oppose the petition claiming that the BSA's conclusion that the land assembled to develop the New Building is consistent with the paragraph (d) definition of a "zoning lot", and therefore should not be disturbed by the court. Owner similarly opposes the petition. Owner argues, among other things, that the Revised Resolution's reaffirmance of the Permit is entitled to substantial deference and so should not be invalidated. Owner also asserts the Revised Resolution should be sustained because it is reasonable and well supported by evidence presented to BSA, and that retroactive application of DOB's corrected interpretation would be unduly prejudicial.

DISCUSSION

***4** BSA acted unreasonably by sustaining the Permit in the Revised Resolution, relying on what DOB had already identified as an incorrect interpretation of the Zoning Resolution. BSA also erred by adhering to this incorrect interpretation because it had not yet been superseded.

At a public hearing preceding BSA's issuance of the Resolution, CESD's counsel conceded that DOB has authority under the City Charter to declare what the Zoning Resolution ****7** means and that BSA has the authority to determine if DOB's interpretation of the Zoning Resolution is correct (BSA Public Hearing Transcript of March 27, 2018 at 57: 3-5 [NYSCEF Doc No. 21]; *see also* City Charter § 645 [1] [DOB commissioner has the "powers and duties exclusively, subject to review only by the board of standards and appeals as provided by law, [] to examine and approve or disapprove plans for the construction or alteration of any building or structure…"] and § 666 [6] [BSA empowered "[t]o hear and decide appeals from and review … any order, requirement, decision or determination" of DOB]).

DOB properly exercised its authority by identifying an erroneous interpretation of the Zoning Resolution and by publishing a proposed amendment to correct the error. BSA, however, balked in its duty. It did not consider whether DOB or the Minkin Memo were correct. Instead, it ignored DOB's corrected interpretation and improperly affirmed the Permit, premised on the fact that the Minkin Memo had not yet been superseded.

In the Decision, the court noted that it need not defer to BSA's expertise "'where the question is one of pure legal interpretation of statutory terms"' (Decision, 2019 KY Slip Op 30621[U], *17, quoting *Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 419 [1998]). The question before the court in the 2018 proceeding was a matter of pure legal interpretation: that is, whether under ZR Section 12-10 (d) "'a single zoning lot' [] may consist of one or more tax lots *or parts of tax lots*" (Resolution at 12 [NYSCEF Doc No. 4] [emphasis added]), as stated in the Minkin Memo.

The court chose not to interpose itself in the interpretation of the Zoning Resolution in the Decision as it recognized that the issue presented was "one of pure legal interpretation of statutory terms" and because DOB had already resolved the question by presenting a cogent analysis of ZR Section 12-10 (d) and correcting the Minkin Memo's error by issuing the Bulletin ****8** (Decision, *11-12, 17-19). BSA and DOB, however, were admonished that the correction of the Minkin Memo's misinterpretation of the term "zoning lot" must be given retroactive application (*id.*, 2019 NY Slip Op 30621[U], *19, citing *Gersten*, 88 AD3d at 197-198), which would invalidate the Permit. Thus, BSA's affirmation of the Permit, on the ground that the Minkin Memo had not yet been rescinded or superseded, plainly violates the Decision and the language of the Zoning Resolution.

Respondents' arguments in opposition are unavailing. Respondents argue that the Revised Resolution, reaffirming the Permit, is entitled to substantial deference. This contention, however, ignores the qualification that deference is warranted only where BSA's "'interpretation is neither irrational, unreasonable nor inconsistent with governing statute"' (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 418-19 [1996], quoting *Matter of Trump-Equitable Fifth Ave. Co. v Gliedman,* 62 NY2d 539, 545 [1984]).

***5** Considering the circumstances, resolution of this dispute could not be achieved without determination and application of the correct definition of the term "zoning lot". BSA sidestepped this issue twice, in the Resolution and the Revised Resolution. As such, this issue remains unresolved, and as it presents a question of pure legal interpretation, this court is

empowered to make this determination. (*Matter of New York Botanical Garden*, 91 NY2d at 419, quoting *Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419 [1996]; see also, *Matter of Peyton v New York City Bd. of Stds. & Appeals,* 166 AD3d 120, 136 [1st Dept 2018] [Where the question presented is one of pure statutory interpretation dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretative regulations are therefore to be accorded much less weight. In the latter case, courts are free to ascertain the proper interpretation ****9** from the statutory language and legislative intent. When a statute's language is clear, resort to extrinsic evidence to glean the legislature's intent is not necessary]).

The Decision held that the Resolution is unreasonable because it was premised on an erroneous interpretation of the underlying Zoning Resolution. Based on that determination, the court nullified and vacated the Resolution and directed BSA to review its prior approval of the Permit in accordance with the Decision and the plain language of the Zoning Resolution.

BSA wholly ignored this directive and instead wrongly claimed that it had been directed to consider "ways in which the Resolution could be amended to more specifically describe [BSA's] determination" (Revised Resolution, at 1). Accordingly, the Revised Resolution is not entitled to substantial deference. (*Matter of Peyton*, 166 AD3d at 136 [deference to BSA is not required because the question is one of pure legal interpretation of statutory terms]).

Owner argues that the Revised Resolution should be affirmed because it is rational and well supported. This assertion is unfounded. The Revised Resolution repeats many of the same errors from the Resolution, which DOB showed to be unreasonable. For example, it was unreasonable for BSA to assert that the Zoning Lot at issue here, comprised of whole and partial tax lots, could be deemed "unsubdivided" within the meaning of the Zoning Resolution, merely by having Owner declare it to be so.

This court previously rejected this assertion (Decision at 18). Indeed, a plain text reading of the definition of "zoning lot" as set forth in ZR § 12-10 (d) does not permit the formation of a zoning lot consisting of *partial* tax lots, as that interpretation would render superfluous the word "unsubdivided", because if a tract of land is "unsubdivided," it cannot include parts of tax lots. Based on elementary rules of statutory construction, the presence of the word "unsubdivided" in the definition of zoning lot excludes the interpretation urged by respondents here and improperly ****10** applied by BSA in the Revised Resolution, *to wit*, that a zoning lot could consist of *partial* tax lots. Such construction of plain language, not only violates the rules of statutory interpretation, but also violates the public policy of transparency imbued in the zoning rules and regulations which are intended to provide proper notice and protection to the public to avoid unwarranted confusion and promote clarity in the application of these regulations to further the City's interest in ensuring zoning compliance.

Owner also argues that retroactive application of DOB's corrected interpretation should not be permitted because it would be improper and unduly prejudicial. This argument is premised on the proposition that an invalid building permit, issued based on an erroneous interpretation of the Zoning Resolution, could be validated by Owner's reasonable reliance. This is not so. First,

> a municipality, it is settled, is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches and the prior issue to petitioner of a building permit could not confer rights in contravention of zoning laws. Insofar as estoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even Where there are harsh results.... The policy reasons Which foreclose estoppel against a governmental entity in all but the rarest cases thus have irrefutable cogency in this case.

***6** (*Matter of Parkview Assocs. v City of New York*, 71 NY2d 274, 282 [1988] [citations, internal quotation marks and alterations omitted]).

Even if, for the sake of argument, estoppel could be considered, Owner's conduct would not merit relief, as it has been aware of challenges to its Permit from the start. Indeed, petitioners' First Appeal, attacking the validity of the Permit, was commenced before Owner's work on the site had proceeded past installation of building footings (Decision, n 6 at *20).

Thereafter, Owner entered stipulations, so ordered by the court, to avoid the possibility that injunctive proceedings would cause construction delays. In these stipulations, Owner ****11** acknowledged that a challenge to the validity of its Permit had been made and agreed that it could not rely on its progress in construction and development, or its expenditures at the

Development Site, during the "Time Period," to support the argument that it would be entitled to continue or complete construction, including any argument premised on retroactivity, vesting rights, estoppel, mootness, laches or other equitable defenses. The Time Period was defined as ending upon the entry of an order or judgment in the 2018 proceeding (*see* stipulation so ordered on October 10, 2018 in the 2018 Proceeding [Index No. 153819/2018] [NYSCEF Doc No. 79]). Thus, the Time Period lapsed upon entry of the Decision, e-filed on March 14, 2019, vacating the Resolution.

It appears that Owner completed much of the construction work by the time the Decision was entered. According to petitioners, Owner "topped out" on its construction at the 52nd floor in or about July 2019 (petitioners' reply memo at 5 [NYSCEF Doc No. 99]). Considering the record before this court, Owner must bear the responsibility for any harsh results arising from invalidation of the Permit. "When a permit is wrongfully issued in the first instance, the vested rights doctrine does not prevent the municipality from revoking the permit to correct its error" (see *Matter of Perlbinder Holdings, LLC v Srinivasan*, 27 NY3d 1, 8, 29 N.Y.S.3d 230, 49 N.E.3d 699 [2016]).

CONCLUSION

For the reasons set forth above, it is hereby

ORDERED and ADJUDGED that the Petition is granted, insofar as nullifying and vacating BSA's Revised Resolution dated June 25, 2019, which affirmed the decision of DOB to issue Building Permit No, 122887224-01-NB; and it is further

****12** ORDERED and ADJUDGED that DOB revoke the Permit and compel Owner to remove all floors that exceed bulk permitted under the Zoning Resolution; and it is further

ORDERED and ADJUDGED that petitioners are awarded reasonable costs, fees and disbursements, as taxed by the Clerk upon submission by petitioners of an appropriate bill of costs and a proposed judgment to the Clerk.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

2/13/2020

DATE

<<signature>>

W. FRANC PERRY, J.S.C.

CHECK ONE:	☑ **CASE DISPOSED**		☐ **NON-FINAL DISPOSITION**	
	☑ **GRANTED**	☐ **DENIED**	☐ **GRANTED IN PART**	*7 ☐ **OTHER**
APPLICATION:	☐ **SETTLE ORDER**		☐ **SUBMIT ORDER**	
CHECK IF APPROPRIATE:	☐ **INCLUDES TRANSFER/REASSIGN**		☐ **FIDUCIARY APPOINTMENT**	☐ **REFERENCE**

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Footnotes

1 Facts relevant to this motion are set forth at length in this court's March 14, 2019 decision and order (Decision) in the 2018 Proceeding captioned *The Committee for Environmentally Sound Dev. v Amsterdam Ave. Redevelopment Assoc. LLC* (2019 NY Slip Op 30621[U] [Sup Ct, NY County 2019]) and will not be repeated here. The 2018 proceeding's index number is 153819/2018. The Decision, e-filed on March 14, 2019, is available as a slip opinion at https://www.nycourts.gov/reporter/slip-service.shtml.

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