

**Mosley v New York City Landmarks Preserv.
Commission**

2005 NY Slip Op 30504(U)

December 7, 2005

Supreme Court, New York County

Docket Number: 105015/2005

Judge: Paul G. Feinman

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

HON. PAUL G. FEINMAN

PART 52

Index Number : 105015/2005

MOSLEY, KEVIN L.

vs

LANDMARKS PRESERVATION COMM

Sequence Number : 001

ARTICLE 78

INDEX NO.

105015/05

MOTION DATE

9/21/05

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion to/for Article 78

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits

2,3

Replying Affidavits

4-8

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this ~~motion~~ petition is granted in part & denied in part per annexed memorandum of judgment.

This judgment is subject to review by the County Clerk and notice of entry cannot be deemed based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 12/7/05

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X
KEVIN L. MOSLEY and DIANA CECCACCI,
Petitioners,

against

Index Number 105015/2005
Oral Arg. Date Sept. 21, 2005
Mot. Seq. No. 001

NEW YORK CITY LANDMARKS PRESERVATION
COMMISSION, and its Commissioners, and City of
New York,

Respondents,
-----X

**DECISION, ORDER AND
JUDGMENT**

For the Petitioner:
Kevin L. Mosley, Esq.
Shafran & Mosley, PC
350 Fifth Avenue, Suite 2310
New York NY 10118
(212) 631-7000

For the Respondent:
Michael A. Carlini, Esq.
Corporation Counsel of the City of New York
By: Amy J. Weinblatt, Esq.
100 Church St.
New York NY 10007
(212) 788-0764

Papers considered in review of this petition to remove landmark status:

Papers	Numbered
Notice of Petition and Affidavits Annexed.....	<u>1</u>
Verified Answer and Memo of Law.....	<u>2,3</u>
Verified Reply and Reply Memo of Law.....	<u>4,5</u>
Petitioners' Suppl. Reply Memo of Law.....	<u>6</u>
Aff. of Mark A. Silberman.....	<u>7</u>
Public Hearing Transcript.....	<u>8</u>

PAUL GEORGE FEINMAN, J.:

This petition pits the rights of homeowners to do with their property as they wish against the public interest in historic preservation of the architectural history of our city, state and country. Petitioners contend that they have unwillingly and erroneously had their home classified as a pre-1924 construction that should be preserved as part of the Douglaston Hill Historic District. They also challenge the 2004 creation of the Douglaston Hill Historic District. As is set forth below, the designation of the Douglaston Hill Historic District was neither arbitrary nor capricious. However, while the determinations of the Landmarks Preservation Commission are ordinarily entitled to great

This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 2111).

deference, when, as here, there is a factual error regarding the age and other significant data regarding the landmarked building, it is appropriate to remand the determination for a *de novo* consideration as to whether the building is properly designated as included in the historical district. Whether that determination, upon the correct facts, will lead to the same result is, of course, for the agency to determine in the first instance in the exercise of its professional expertise. Accordingly, for the reasons set forth below, the petition is granted in part and denied in part.

Factual Background and Contentions

Petitioners are a married couple who, in October 2004, bought the premises known as 41-45 240th Street, Douglaston, Queens, New York (Ver. Pet. ¶¶ 1, 8). They allege that they were unaware at the time they purchased the property that it was included as part of a newly designated landmarked historic district. In December 2004, the premises and approximately 30 other residences out of 100 homes in the area were officially designated the Douglaston Hill Historic District (Ver. Pet. ¶¶ 9, 20). Two of the homes on properties abutting petitioners' property were not included in the historic district (Ver. Pet. ¶ 15).

Petitioners seek an order compelling respondent New York City Landmarks Preservation Commission ("LPC") to remove their home, 41-45 240th Street, from the Douglaston Hill Historic District. They also seek a declaratory judgment removing landmark status or historic designation from the premises and from the entire district. First petitioners argue that because LPC denied an earlier application to create the Douglaston Hill Historic District in 2003, the granting of this status a year later without sufficient explanation is arbitrary and capricious. Second they argue that the LPC relied on incorrect and incomplete information to find that the house at 41-45 240th Street is much older than it actually is and has particular historic significance which it does not actually have.

They also argue that they did not receive notice of the LPC's intent to include the house or of the public hearing concerning the proposed historic area and that only the homes of owners who wished to be included in the historic district were included.

Petitioners argue that the LPC included their home in the historic district based on incorrect and incomplete information. They point to the LPC's December 14, 2004 "Douglaston Hill Historic District Designation Report," which includes a historic summary of the area, describes the architectural significance of many of the wood frame homes built between about 1890 and 1930, includes photographs and descriptions of each of the 31 houses designated as of historic significance, and specifically cites petitioners' premises in its historical summary under the sub-heading "Early Development" (Ver. Pet. Ex. A, hereinafter "Report"). In discussing the extension of the Flushing and Northside Railroad to the Little Neck area in 1866-67, it states that

[t]he house at 41-45 240th Street (originally Prospect Avenue) appears to date to period of the railroad's arrival.

(Report p. 9). The Report further notes that the house appears on the 1873 *Beers Atlas*, and that it

still occupies its original 200 by 200 foot lot that was purchased by August Michan of New York in 1953. The way the house is positioned at the back of the lot reflects early suburban ideals. By 1873, the house was occupied by Alexander Taylor, who remained there and may have owned it until 1900.

(Id.). A footnote states further that "[t]he house appears to have been enlarged and given neo-Colonial-style embellishments in the early twentieth century, and remains largely intact to that period." (Id., n.22). The Report describes the premises in similar but greater detail in the section entitled "Building Profiles" (Id. pp. 48-49).

Petitioners argue that the building that appears in the 1873 *Beers Atlas* is not the same shape and size or in the same location as the building currently in existence. They contend that at the time

the LPC made its determination concerning the property, it did not discover or have available certain of the historic documents now proffered in the instant petition and made available more recently. They point to a survey done in 1919 showing a house in existence which differs from both the 1873 structure and the current structure (Ver. Pet. ¶¶ 31-35, and Ex. B, C). They also point to a 1924 map which shows the presence of the basic structure now in existence (Ver. Pet. Ex. D). They argue that the surveys show that the earlier structure appears to have been demolished sometime prior to 1919, and the present house built sometime after 1919 and before 1924 (Ver. Pet. ¶¶ 26-27).

In further support of their petition and its argument that the building was not built in the third quarter of the 19th century, petitioners provide an affidavit by a licensed architect, John McLean, who reviewed the relevant documents, analyzed the plans, and examined the house, and determined that it was built in the first quarter of the 20th century (Ver. Reply Ex. B).¹ They also include a copy of the recorded deed of conveyance for the premises dated July 28, 1919 to Fred and Carolyn Hollweg (Ver. Reply Ex. C), and an undated construction plans labeled “Residence for Mrs. Fred Hollweg” (Ver. Reply Ex. D). In addition, they state that in early April 2005, an LPC “staff member” examined the house and stated afterwards that it was her belief that the house was built in the 20th century (Pet. Ver. Reply Ex. A, Mosley Aff. ¶¶ 10-11).

Petitioners contend that the house’s foundation and structure also establish that it was built in the 20th century and that Mosley and his building inspector viewed but do not possess the actual contract for construction of the house which was dated in the 20th century (Ver. Pet. ¶¶ 39-41 and Ex. E [Giordano Aff. ¶ 4]). Moreover, in the intervening years changes have been made to the

¹Although McLean indicated that his curriculum vitae was attached to his affidavit, it was not included in the court’s copy of the petitioners’ reply papers.

existing structure such as an enclosure of the front porch, an iron railing added to the porch stairs, a concrete driveway, and replacement of the windows with single-pane vinyl-clad windows, all of which take away from the premises' historic veracity (Ver. Pet. ¶ 43).

Petitioners argue that because this information has all been made available to the LPC, it is arbitrary and capricious for it not to reevaluate its findings as concerns their home and to change its designation and remove it from landmarked status. They contend that the LPC's decision was not supported by the facts and that its refusal to re-address the designation as concerns their property is arbitrary and capricious, citing *Matter of Paloma Homes v Petrone*, 10 AD3d 612 (2d Dept. 2004) (arbitrary and capricious where there was failure to set forth findings of fact concerning a property's significance). They also contend that the LPC acted in an excess of jurisdiction and abused its discretion.

Respondents oppose the petition on two bases. First is that the determinations of the LPC were based on extensive studies and reports, as well as public discussion and a hearing on notice. Thus, they contend there was nothing arbitrary or capricious, nor was there an abuse of discretion, in the determination to create a historic district which includes petitioners' home. They note that by statute, the LPC is necessarily composed of experts, including at least three architects, one historian qualified in the field, one city planner or landscape architect, and one a realtor (Ver. Ans. ¶ 55, citing City Charter § 3020[1]). In addition, the LPC employs other technical experts and employees as needed to perform its duties under the statute (Id., citing City Charter § 3020[5]). In considering the application for historical designation of the Douglaston Hill area, the LPC experts researched and analyzed documents and visited and assessed the area, and their conclusions concerning which homes were to receive landmark status are, respondents contend, supported by the record. They

suggest that even if petitioners' home was in fact not built prior to 1924, this would still make it of architectural and historic importance to the Historic District and it would not be error to include it in the historic district on that basis alone (Ver. Ans. ¶ 75).² Second, respondents argue that the petition is premature as petitioners have failed to exhaust their administrative remedies prior to commencing this proceeding (CPLR 7801[1]).

Analysis

1. Exhaustion of Administrative Remedies

Respondents argue that the petition is premature pursuant to CPLR 7801(1) as petitioners should have "applied to the Commission to modify or rescind the designation" (Resp. Memo of Law p. 13). The court is not persuaded that petitioners could have made a formal appeal of the LPC decision rather than commence this special proceeding. Petitioners make clear that they made several attempts to present to the LPC what they believe is compelling evidence concerning the age of their house. For example, they provided copies of the 1919 and 1924 maps to the LPC in March 2005 (Pet. Ver. Reply Ex. F). They allowed a member of the LPC, at the Commission's request, to examine the house in April 2005, and showed that member the original plans for the construction of the house (Pet. Ver. Reply, ¶ 22[d-e]; Ex. G). They contacted LPC Executive Director Ronda Wist and Director of Research May Beth Betts in mid-April 2005, however both women refused to meet with them and *stated that there would not be a reconsideration of the status of the premises* (Ver. Reply ¶¶ 22[f-g]; Ex. A, Mosley Aff. ¶¶12-16 [emphasis added]). The LPC instead continued to describe the house as having been built in the mid-19th century (see, e.g., Ver. Reply, Ex. H, LPC

²According to the December 14, 2004 Douglaston Hill Historic District Designation Report, the houses in the district were "constructed largely between 1890 and 1930." (Ver. Pet. Ex. B, Report, p. 4).

Notice of Public Hearing on May 24, 2005, p. 7, and June 21, 2005, p. 6).

It is apparent that if there is a mechanism for an appeal, petitioners were never informed of what it is. Therefore, it cannot be found that the petition is premature (*Barrett v Morgenthau*, 74 NY2d 907, 909 [1989] [holding that where respondent failed to advise petitioner of the availability of an administrative appeal in the office and failed to demonstrate that there were procedures for appealing, it could not complain that the petitioner failed to exhaust his administrative remedies]).

2. Arbitrary and Capricious Determination

It is a well-settled rule that judicial review of administrative determinations is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]).

The LPC has the statutory authority to designate historic districts and to regulate proposed changes to any of the structures within those districts (Landmarks L. §§ 25-303, 305, 306, 310). The courts have repeatedly noted the particular expertise of the members of the LPC and have accordingly given deference to its decisions (*Shubert Org., Inc. v Landmarks Preservation Commn., of the City of New York*, 166 AD2d 115, 120 [1st Dept.], *app. dismissed* 78 NY2d 1006 [1991], *cert. denied* 504 US 946 [1992]; *see also*, *Matter of Society for Ethical Culture v Spatt*, 68 AD2d 112 [1st Dept 1979], *affd* 51 NY2d 449 [1980]; *Matter of Committee to Save Beacon Theatre v City of New York*, 146 AD2d 397, 405 [1st Dept 1989]).

When reviewing a petition brought pursuant to Article 78 of the CPLR, the court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept. 1983]). Reviewing courts are "not empowered to substitute their own judgment or discretion for that of an administrative agency

merely because they are of the opinion that a better solution could thereby be obtained.” (*Peconic Bay Broadcasting Corp. v Board of App.*, 99 AD2d 773, 774 [2d Dept. 1984]). The scope of review does not include “any discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed by the Authority” (*Featherstone v Franco*, 95 NY2d 550, 554 [2000], citing *Matter of Pell v Board of Educ.*, 34 NY2d 222, 232-234 [1974]). Once the court has found that a rational basis exists for the determination, its review is ended (*Matter of Sullivan County Harness Racing Assoc., Inc. v Glasser*, 30 NY2d 269, 277-278 [1972]).

The test of whether a decision is arbitrary or capricious is “‘determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.’” (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]), quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609). An arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Matter of Pell*, at 232). Furthermore, the test of whether the determination is an abuse of discretion is whether it “shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law” (*Featherstone v Franco*, 95 NY2d at 554; *Matter of Pell v Board of Educ.*, at 233).

a. *Designation of Douglaston Hill Historic District*

The court finds unpersuasive petitioners’ argument that because the LPC denied landmark status to the Douglaston Hill Historic District in 2003, its action in granting landmark status in 2004 was arbitrary and capricious. Unlike *Matter of Lafayette Storage & Moving Corp. [Lincoln Storage of Buffalo]*, cited by petitioner, where the Court found that the “sufficient factual similarities” between the two types of employees at issue required the reviewing agency to explain its decision that treated them differently (77 NY2d 823, 826 [1991]), here, the applications concern noticeably

different amounts of land and properties. The LPC decision in 2003, based on an application submitted in about November 2000, held that the totality of the proposed area “lacked the architectural or planning coherence that makes an area constitute a distinct section of the city and contributes to a special sense of place.” (Ver. Ans. Ex. A, Letter, Dec. 10, 2003 from LPC to W. Sievers, Douglaston Little Neck Historical Society). In contrast, the area under scrutiny and approved in 2004 is about half the size of the earlier proposal (*cf.* Ver. Reply Ex. I, and Ver. Ans. Ex. C, unnumbered p. 7; *see also* Ver. Ans. ¶¶ 65-67, 73 and *cf.* Ex. B, C, D). The court therefore defers to the agency’s expertise and decision designating a Douglaston Hills Historic District, even one that consists of some but not all of the homes in the area, and finds that such a determination is neither arbitrary nor capricious, nor an abuse of discretion.

b. *Designation of 41-45 240th Street as Historic Landmark*

Unlike *Paloma Homes*, 10 AD3d 612, where the Town Board did not proffer findings of fact showing the grounds for determining that a particular building was a historic landmark, here the LPC has published a detailed explanation concerning 41-45 204th Street which appears to be *factually incorrect*. It is certainly in the interest of the LPC that its assessment of a historical building be accurate. There is no rational basis for its decision not to evaluate petitioners’ documentary evidence described above in detail and the conclusions reached by experts, including apparently its own staff member, who have examined the premises’ structure. It may well be that after a *de novo* consideration of *all* evidence, the LPC will reach the same result, and this Court’s decision is not intended to compel a particular result. However, any classification must be based on a factually correct understanding of the history of the building and consider all the evidence. Accordingly, the petition is granted to the extent that the proceeding is remanded in order

for the LPC to conduct an additional examination of all the documentation and investigative reports concerning the premises known as 41-45 240th Street, and to issue a new determination concerning the premises' importance, if any, to the Douglaston Hill Historic District.

c. Notice

Petitioners' argument that they should have been notified of the public hearing is unavailing, given that they only acquired their home in October 2004. The affected homeowners and elected officials were notified by the LPC of the scheduled hearing in April 2004 and the public hearing was held in early August 2004 (Resp. Memo of Law at 11, § C). Presumably the *previous owner* of the property was notified. In any event, it is beyond cavil that the LPC cannot be held responsible for notifying *potential future* homeowners. Similarly, petitioners' argument based on information gleaned from their neighbors that the LPC generally did not designate as landmarks those houses whose owners did not want their properties included in the historic district (Ver. Reply Ex. A, Mosley Aff. ¶ 19) is unpersuasive to find the entire process arbitrary and capricious.³ Moreover, it would again have been the previous owner who gave consent to having the house considered for inclusion in the Historic District.⁴

For the above stated reasons, it is

ORDERED that the petition is denied to the extent that it seeks relief as to the 2004

³ Respondents' counsel states that in July 2004, at the time it was determined to consider the application of the Historic District, the records of the Department of Buildings pertaining to each of the premises in question was flagged with the letter "C," indicating that they were being considered for landmark historic status (Ver. Ans. ¶ 69).

⁴The court does not address the issue of the Certificate of Appropriateness (see Pet. Supp. Reply Memo of Law), the contents of which have been refuted by the LPC's General Counsel (Silberman Aff. ¶ 6), except to note that there appears to be confusion in the LPC as to the description of the subject premises.

designation of the Douglaston Hill Historic District and it is hereby DECLARED and ADJUDGED that the 2004 designation of the Douglaston Hill Historic District was not arbitrary and capricious; and it is further

ORDERED that the petition is granted to the extent that it pertains to the particular premises known as 41-45 240th Street, Douglaston, Queens, New York, and it is hereby DECLARED and ADJUDGED that the determination to include the premises known as 41-45 240th Street, Douglaston, Queens, New York, in the Douglaston Hill Historic is vacated and that the matter is remanded to the Landmarks Preservation Commission in order for it to conduct a *de novo* examination of all the documentation and investigative reports concerning the premises known as 41-45 240th Street, including the documentation gathered by petitioners, and to issue a new determination concerning the actual age of petitioners' house and its historical importance, if any, to the Douglaston Hill Historic District.

This is the decision, order and judgment of this court. The court will mail courtesy copies to counsel.

Dated: December 7, 2005
New York, New York

ENTER:
Paul Hargrave

and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 741B).