SUPREME COURT OF THE STATE OF NEW YORK **Index No. 80189/2011**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 1**

DAVID P. CELESTINA

Petitioner

DECISION & ORDER

against

HON. JOSEPH J. MALTESE

NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK

Respondent

The following items were considered in the review of the following petition under Article 78 of the Civil Practice Law and Rules

Papers	Numbered
Notice of Petition and Affidavits Annexed	1
Answering Affidavits	2
Memoranda of Law	3 & 4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Petition under Article 78 is as follows:

This petition appeals the decisions made on July 29, 2010 and on March 24, 2011 by the New York City Environmental Control Board ("ECB") that are related to the violation #34825136R, dated May 26, 2010. The petition is transferred to the Appellate Division, Second Department for determination of whether substantial evidence supports the decision of the ECB.

Facts

This is an action based upon the use of a property located at what is commonly known as 343 Crown Avenue, Staten Island, NY 10312. The usage is nonconforming to current zoning within its neighborhood. The petitioner was previously cited for illegal use of his property in violation of Zoning Resolution ("ZR") § 22-00. At a previous hearing held on June 12, 2006, there was testimony by the petitioner's grand-mother, Gabrielle Teunkins, that the premises have

remained in the petitioner's family since the decade of the 1920's. At that hearing, Mrs. Teunkins testified she resided in a residence at the address of those premises. There was further testimony by the petitioner that since at least 1935, the property has been used as part of a family construction business. On June 12, 2006, Administrative Law Judge Phyllis J. Roberts found that testimony offered at the hearing was credible; that the use of the land as a construction business was "grandfathered" under ZR § 52-11 *et seq.*; and that the premises might be utilized for non-conforming use as a construction business, specifically to allow storage of a truck in the driveway and construction material at the side of the house.

On May 26, 2010, the petitioner was issued another violation citing ZR § 25-41. The violation was for the parking of unplated or unregistered vehicles, specifically a gray dump truck and a tan Ford Triton V10 Van. The vehicles were parked at the rear of a driveway in an R3-X zoned district where limitations on parking are imposed by the zoning resolution. Administrative Law Judge Daniella Caputo held a hearing on July 21, 2010. During the hearing, in addition to the facts previously related, the petitioner stated that the van was plated and registered with commercial plates from New Jersey. The respondent includes a picture of the dump truck in question, on the left-hand door of which can be seen a business logo with the petitioner's name, and an address and phone number. On August 2, 2010, a decision found the petitioner's testimony to be credible, but found the petitioner to be in violation of ZR § 25-41 for "dead storage" of unplated/unregistered vehicles. No immediate corrective action was ordered but a penalty of $800.00 was levied. Upon appeal, the decision and order was affirmed on March 24, 2011, by Ms. Suzanne Beddoe, Chair of the ECB. Mr. Celestina now petitions this court under Article 78 of the CPLR to invalidate the administrative findings, because the findings were arbitrary and capricious and beyond the weight of evidence.

Discussion

The Supreme Court is the proper forum in which to initiate this petition.

"The only questions that may be raised in a proceeding under this article are ... whether a

determination was affected by an error of law or was arbitrary and capricious ... [and] whether a determination made as a result of a hearing held, and at which evidence was taken pursuant to direction by law is, on the entire record, supported by substantial evidence"[1]. "A proceeding under this article shall be brought in the supreme court in the county specified in subdivision (b) of section 506...".[2] "Where [the substantial evidence issue] is raised, the court shall first dispose of such other objections as could terminate the proceeding ... without reaching the substantial evidence issue. If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division held with the judicial department embracing the county in which the proceeding was commenced..[3] The preliminary issues to be determined by this Supreme Court are whether there was an error of law, and whether the determination was arbitrary and capricious. Following determination of those issues, the Appellate Division will determine whether the evidence presented was adequately substantial to support the holding of the ECB.

The ECB made an error of law.

"As a general rule, a nonconforming use of real property that exists at the time a restrictive zoning ordinance is enacted is constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance".[4] The region in which the subject

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[1]CPLR § 7803 (3) and (4).

[2]CPLR § 7804 (b).

[3]CPLR § 7804 (g).

[4]*Jones v. Town of Carroll,* 15 NY 3d 139, 143 [2010]; *Glacial Aggregates LLC v. Town of Yorkshire*, 14 NY 3d 127, 135 [2010].

property lies is zoned R3x ,[5] pursuant to ZR § 21-13 adopted on December 5, 1990.[6] The zoning resolutions invoked against the petitioner are ZR §§ 25-41 and 25-412. ZR § 25-41 was adopted on December 15, 1961 and ZR § 25-412 was adopted on September 29, 2010.[7] Clearly because the property has been used as a construction business since 1935, its use preceded the adoption of either of these zoning resolutions. With few exceptions, the subject property may be utilized for a purpose that is antecedent to and nonconforming to the subsequent zoning resolutions, whatsoever may be those subsequent resolutions. There is no extent reason to believe that a property owner's constitutionally protected rights have been superseded by ZR §§ 25-41 and 25-412.

ZR § 25-41, "Purpose of Spaces and Rental to Non-Residents', states that "[i]n all districts, as indicated, all permitted or required offstreet parking spaces, open or enclosed, which are 'accessory' to 'residences' shall comply with the provisions of this Section."[8] Referring to R3 districts, "such spaces shall be operated primarily for the long-term storage of the private passenger motor vehicles used by the occupants of such 'residences'".[9] Therefore, Zoning Resolution ZR § 25-412 designates particular exceptions to primary use, but does not say those designated exceptions were the exclusive exceptions to the primary use, and ZR § 25-412 does not designate any prohibited exceptions to the intended primary use of accessory parking spaces. Therefore, the

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[5]*NYC Planning, ZoLa, Zoning and Land Use,* http://gis.nyc.gov/doitt/nycitymap/template?applicationName=ZOLA [311 Online, accessed January 4, 2012]; .

[6]*Zoning Resolution Web Version, The City of New York,,Dept.of City Planning, Zoning and Land Use Application Guide, Zoning Text*, http://www.nyc.gov/html/dcp/pdf/zone/art02c01.pdf [311 Online, accessed January 4, 2012].

[7]*Zoning Resolution Web Version, The City of New York,,Dept.of City Planning, Zoning and Land Use Application Guide, Zoning Text*, http://www.nyc.gov/html/dcp/pdf/zone/art02c05.pdf [311 Online, accessed January 4, 2012]; *accessed via*.http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml [NYC.gov accessed January 4, 2012].

[8]ZR § 25-41.

[9]ZR § 25-412.

storage of construction vehicles is not a prohibited exception to ZR § 25-412.

Additionally, the specific violation issued against the petitioner cited "dead storage" of vehicles. "Dead storage" is not represented as being a term of art, nor identified as a colloquialism. "Dead storage" is a term utilized in three zoning resolutions pertaining to parking[10], but remains undefined despite a search of the Zoning Resolutions.[11] "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."[12] Therefore, failing to define "dead storage" fails to provide fair warning and invalidates a violation contingent upon that term. Because the alleged violation is based upon vehicles in "dead storage", the issuance of that violation by the respondent may be improper for want of fair warning to the petitioner of the reputed "dead storage" of his vehicles.

Under the Rules of the City of New York, for enforcement procedures before the Environmental Control Board ("ECB"), the ECB "shall have the burden of proof in establishing by a preponderance of the credible evidence that the [responding party] has committed the violation charged in the notice of violation, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto". [13] The ECB asserts that two vehicles were parked in a location that was residential and that the vehicles were in "dead storage". The petitioner testified that the property in question was properly in nonconforming use as a construction yard long before the current zoning regulations were put into place. It is commonly known that dump trucks are vehicles used in the business of construction for the transport of construction materials. Therefore, parking inactive capital equipment used in a construction business, may be a typical use

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[10] *Twice in* ZR 12-10, Definitions of Public Parking Garage and Public Parking Lot; and once in ZR 32-25, Use Group 16 , C. Vehicle Storage Establishments (however, "dead storage" is not itself defined in the zoning resolutions).

[11] *Zoning Resolution, Web Version, The City of New York,,* http://www.nyc.gov/html/dcp/pdf/zone/allarticles.pdf *[311 Online, accessed January 4, 2012*].

[12] *Grayned v. City of Rockford*, 408 US 104, 108 [1972].

[13] RCNY § 3-54 (a).

of a construction yard. The ECB has offered no evidence that parking a dump truck is not a typical use of a construction yard.

Earlier, an Administrative Law Judge held that storage of construction equipment, in this case an unplated/unregistered dump truck and a plated and registered commercial van, is not a normal use for a construction yard. A dump truck should be commonly recognized as a tool of the trade used in the construction industry. Here, no evidence was given by the respondents to support a view that a dump truck is not a device properly stored on a construction yard, whether it is plated and registered at any given time or not.

ZR § 25-412 does not specifically prohibit "dead storage" of construction vehicles, and ZR § 25-412 does permit uses other than the primary one. There was no fair warning of the meaning of "dead storage." The subject property falls within a nonconforming use exception to zoning resolutions and the pre-existent nonconforming use is constitutionally protected. Therefore, the error of law was to apply the requirements of ZR §§ 25-41 and 25-412 to a violation held against the petitioner, who has a constitutionally protected right to use the subject property as a construction yard.

The procedures that the ECB used in its determination were not arbitrary and capricious.

The ECB represented the petitioner's use of his driveway to park his vehicle as a breach of ZR §§ 25-41 and 25-412. The ECB first issued a violation, next followed an established process that provided a hearing and then considered an appeal to that hearing. Therefore, the determination made by the ECB was not arbitrary and capricious in so far as its process or procedures.

A determination of substantial evidence must be made.

Promoting aesthetic values is a valid goal for zoning resolutions.[14] Even then, limitations on

[14]*Cromwell v. Ferrier*, 19 NY 2d 263, 266 [1967].

the use of land based on aesthetics are not always within the police power of the state.[15] There are additional exceptions to the general principle that permits ongoing nonconforming use. Substantial discontinuance of a nonconforming use over the span of two years prohibits a return to nonconforming use.[16] Expansion of a nonconforming use of land is not permitted.[17]

"[T]he right to use a nonconforming lot should not be lost except for reasons based on a clear showing of direct or probable harm to the community."[18] The Zoning Resolutions specify matters of health and public safety such as "fire, explosions, toxic and noxious matter, radiation and other hazards, and against offensive noise, vibration, smoke and other particulate matter, odorous matter, heat, humidity, glare, and other objectionable influences ... heavy traffic and ... through traffic of all kinds ... [and] to provide for access of light and air to windows and for privacy."[19] By itself, a goal of decreasing traffic congestion may be an adequate public safety issue to overcome the general principle of permitting nonconforming use.[20]

Here, the respondent asserts the general purpose of zoning resolutions as being the promotion and protection of public health, safety, and general welfare. However, the respondent does not articulate a specific threat to public health, safety or general welfare or safety that the petitioner's parked dump truck and van may represent. Therefore, there is no reason given, based on direct or indirect harm to the community upon which to base a violation of the law.

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[15]*Cromwell v. Ferrier*, 19 NY 2d at 272.

[16]NYC Zoning Resolution § 52-61; *Toys "R" Us v. Silva*, 89 NY 2d 411, 414-415 [1996].

[17]*Robert's Running Creek Mobile Home Park, Inc. v. Landolfi*, 44 NY 2d 771 [1978].

[18]*Young v. Bd. of Zoning Appeals*, 35 AD 2d 430, 432 [2d Dept 1970]; *affm'd* 29 NY 2d 685 [1971].

[19]ZR § 21-00.

[20]*Overhill Bldg. Co. v. Delaney*, 28 NY 2d 449, 456-457 [1971].

Here, it must be determined that there was substantial evidence to support the findings of the ECB whether judged under the correct application of law represented here, or even under a misapplication of law. Substantial evidence is "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact ".[21] "Substantial evidence is 'less than a preponderance of the evidence' and, 'as a burden of proof, it demands only that a given inference is reasonable and plausible, not necessarily the most probable."[22] Here, the ECB failed to articulate a specific threat to health, public safety and general welfare, but determining if there is substantial evidence to validate the decision of the ECB is a function for a term of the Second Department, Appellate Division.[23]

Accordingly, it is hereby

ORDERED, that this matter is transferred to a term of the Second Department, Appellate Division for disposition of all issues.

ENTER,

DATED: January 30, 2012

Joseph J. Maltese
Justice of the Supreme Court

[21] *WEOK Broadcasting Corp. v. Planning Bd of Lloyd*, 79 NY 2d 373, 383 [1992]; *quoting Grammatan Ave. Associates v. State Div. Of Human Rights*, 45 NY 2d 176, 180 [1978].

[22] *Matter of Autotech Collision, Inc. v. Incorporated Village of Lynbrook*, 76 AD 3d 559, 560 [2d Dept 2010]; *quoting 300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 NY 2d at 180; *and also quoting Matter of Miller v. DeBuono,* 90 NY 2d 783, 793 [1997].

[23] CPLR § 7804 (g).