City Club of N.Y. v New York City Bd. of Stds. & Appeals
2020 NY Slip Op 33139(U)
September 25, 2020
Supreme Court, New York County
Docket Number: 161071/2019
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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THE CITY CLUB OF NEW YORK,

Petitioner,

- v -

NEW YORK CITY BOARD OF STANDARDS AND APPEALS, NEW YORK CITY DEPARTMENT OF BUILDINGS, EXTELL DEVELOPMENT COMPANY, WEST 66TH SPONSOR LLC,

Respondents.

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INDEX NO. 161071/2019

MOTION DATE 9/22/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 68, 69, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106

were read on this motion for INJUNCTIVE RELIEF.

Upon the foregoing documents, the petition is granted; the subject decisions and orders of respondents New York City Board of Standards and Appeals and New York City Department of Buildings are vacated; and respondents Extell Development Company and West 66th Sponsor LLC, and anyone acting for, by, or through them, are permanently enjoined from constructing the subject building as proposed.

The Case

In this CPLR Article 78 Special Proceeding petitioner, the City Club of New York ("petitioner"), asks this Court to vacate a September 17, 2019 "Resolution," filed October 15, 2019 (NYSCEF Doc 17), of respondent New York City ("the City") Board of Standards and Appeals ("the BSA") that affirmed respondent the New York City Department of Buildings ("the DOB") in issuing a permit ("the Permit") to respondents Extell Development Company and its affiliate, West 66th Street Sponsor LLC (collectively, "the Developer"), that approved a proposal ("the Proposal") to construct a 775-foot-tall, 39-story residential building ("the Building") at 36 West 66th Street, in a lot fronting on the south side of West 66th Street and backing on the north side of West 65th Street, New York, NY ("the Lot"), three buildings (100 feet) in from Central Park, which is in the Special Lincoln Square District ("the SLSD") that the City created in 1969.

Discussion

The Tower on a Base Rules

This case calls to mind the old adage about not missing the forest for the trees. The parties have submitted reams (or the digital equivalent thereof) of well-argued papers supporting and opposing, respectively, the petition, and the reader who wants to know everything there is to

know about the zoning rules at issue here, how and why they came about, and the tortuous history of the instant dispute, is welcome to peruse them. But in this Court's view the case is simple and straightforward.

Every government, including, of course, New York City, has the right to limit the height of buildings. The rules here at issue are designed to do just that, to limit the height of buildings, that is their *raison d'etre*. Of course, the other side of that coin is that developers have the right to build as high as they want, unless there is something limiting them. Super-tall buildings have obvious advantages (economic, social, esthetic, environmental) and disadvantages (neighboring views, light, air, a different esthetic), and this Court is not called upon, and is not, weighing or passing judgment on them, a task for the legislative and executive branches of government.

In 1993, to limit the height of buildings in the SLSD, the City imposed two simple rules, envisioning the then-relatively new "Tower on a Base" model. One, Zoning Resolution ("ZR") § 82-34, known as the "Bulk Distribution Rule," (sometimes referred to as the "Bulk Packing Rule"), provides, in relevant part, as follows: "Within the Special District, at least 60 percent of the total ***floor area*** permitted on a ***zoning lot*** shall be within ***stories*** located partially or entirely below a height of 150 feet from ***curb level***" (stylization in original). The other rule, ZR § 82-36, known as the "Tower Coverage Rule," provides that the "tower" above the "base" have a footprint of at least 30% of the lot area ("not less than 30 percent of the ***lot area*** of a ***zoning lot***") (a "zoning lot" being an assemblage of tax lots that collectively constitutes the basis for analyzing compliance with the ZR).

The history and context of these rules, well-described in the submissions, indicate that they work in tandem to limit the height of buildings. Indeed, even the Developer describes them as "complementary" (NYSCEF Doc 93, at 38), while petitioner describes them as "integrated, interlocking" (NYSCEF Doc 1, at 27) and "inextricably linked" (NYSCEF Doc 97, at 4). Of course, also interlocked is the floor-area-ratio, or "FAR," Rule, which, as here relevant, limits total floor space to 12 times the size of the lot, and which also indirectly limits the height of buildings.

Logically, the Bulk Distribution and Tower Coverage Rules must work together in order to limit the height of buildings. The Bulk Distribution Rule without the Tower Coverage Rule would allow a large base topped with a needle-thin "pencil" tower reaching towards the heavens like the beanstalk that Jack climbed. The Tower Coverage Rule without the Bulk Distribution Rule would permit most allowable floor area to go above 150 feet, and would revert buildings to the disfavored, if not discredited, "Tower in a Plaza" model, that is, a tall building surrounded by "open space" that often became "dead space."

In a report titled "1993 City Planning Commission Lincoln Square Report" (Petition, Doc 1, Paragraph 17, fn. 5)[1] the CPC wrote (at 19) as follows:

[1] https://www1.nyc.gov/assets/planning/download/pdf/about/cpc/940127a.pdf

> These proposed regulations would introduce tower coverage controls for the base and tower portions of new development and require a minimum of 60 percent of a development's total floor area to be located below an elevation of 150 feet. This would produce building heights ranging from the mid-20 to the low-30 stories (including penthouse floors) on the remaining development sites.

The wrinkle in the instant case, which, in this Court's view, the Proposal seeks to exploit, is that the Lot, totaling 54,687 square feet, is split between two zoning districts: 64% of the Lot, 35,105 square feet, comprising five tax lots, is in a C4-7/R10 ("C4-7") zoning district, which runs along the south side of West 66th Street and which allows towers; and 36% of the Lot, 19,582 square feet, comprising one large tax lot, is in an R8 zoning district, which runs along the north side of West 65th Street and which prohibits towers. The dividing line between the zoning districts runs east-west right through the horizontal middle of the Lot, with the northern side zoned C4-7 and the southern side zoned R8. (See NYSCEF Doc 6, "Zoning Map.")

ZR § 77-02, the so-called "Split-Lot Rule," provides, as here relevant, as follows: "[w]henever a ***zoning lot*** is divided by a boundary between two or more districts … each portion of such ***zoning lot*** shall be regulated by all the provisions applicable to the district in which such portion of the ***zoning lot*** is located" (stylization in original). In other words, each portion of a lot must be evaluated independently and must comply with all the rules applicable to it. One obvious purpose of these rules is to prevent a developer from "picking and choosing," from applying a more liberal zoning rule to a more conservatively zoned portion of a lot. It cannot be stressed enough that the purpose of the rules is to limit the height of buildings. By not allowing the rules governing one portion of a lot to apply to another portion, the Split-Lot Rule mandates that each portion of a lot must stand or fall on its own, without reference to the other part(s) of the lot. The Proposal flouts that purpose, indeed, turns it on its head, by seeking to apply the Bulk Distribution Rule to the entire Lot, rather than have the C4-7 "portion of such zoning lot … regulated … by all the provisions applicable to the district in which such portion of the zoning lot is located." Such "regulation" and "application" renders the C4-7 portion of the Proposal illegal on its face, because 60% of the Building on the C4-7 portion of the Lot would not be below 150-feet high.

Here's the rub: the subject Permit considers all floor area, in both portions of the Lot, that is below 150 feet to be part of the base, for purposes of calculating the 60-40% Bulk Distribution Rule, but only considers the ground area of the C4-7 portion of the Lot, not also the ground area of the R8 portion of the Lot, for purposes of calculating the 30% Tower Coverage Rule. This is immediately suspect, violating that old legal maxim, "Sauce for the goose is sauce for the gander." The Developer cannot have it both ways, cannot mix-and-match what area of the Lot (a portion or all) is subject to what rule. As petitioner lucidly explains, without this subterfuge, in a unitary lot every foot of "base" is one less foot of "tower," because the FAR Rule limits the total number of feet. Adding to the base would be "Robbing Peter to pay Paul"; the amount of floor space in your base would increase, but the amount of floor space in your tower would decrease *in pari passu*. The Proposal does almost the exact opposite. Every foot of floor space it jams into the base in the R8 portion of the Lot actually increases the height of the tower, albeit not *in pari passu*, but to a significant 40% of a foot, because of the Bulk Distribution Rule. This is, quite

simply, an absurd result, and courts should not approve absurd results or turn a blind eye to "ha ha, gotcha" positions or arguments.

Indeed, as petitioner points out, the Building would be illegal if the entire Lot was zoned C4-7, because the tower would violate the Tower Coverage Rule; and the Building would be illegal if the entire Lot was zoned R8, because towers are illegal in R8 zones. In a September 22, 2020 letter to this Court, Pamela A. Koplik, Senior Counsel, Administrative Law Division, New York City Law Department ("the Koplik Letter"), at page 2, writes "[t]he proposed building would not be compliant with the Zoning Resolution if the entire lot was zoned C4-7/R10 or if the entire lot was zoned R8." Game over! Surely that the Lot is split between two zones does not legalize what otherwise would be illegal under either zoning designation. A split-lot is not alchemy that turns base metals into gold; there is no discernible reason that what would be illegal in either zone becomes legal because it is in both zones. In response to the same question that Ms. Koplik answered, the Developer, in a September 17 letter from Jason Cyrulnik, of Roche, Cyrulnik and Freedman, states, "If the entire lot were zoned C4-7… the minimum size of the tower floorplate would be increased." Translation: "the tower would have to be wider, and given the FAR Rule limitation on its floorspace, would have to be lower, i.e., shorter."

The question naturally arises as to why the City did not simply limit buildings to an absolute, quantitative height. When the subject rules were adopted, certain people were advocating, ultimately unsuccessfully, for exactly that, indeed, for a 275-foot limit, which is only 35% of the Proposal. A December 20, 1993 City Planning Report states as follows:

> In response to the Community Board's concern that a height limit of 275 feet should be applied throughout the district, the Commission believes that specific limits are not generally necessary in an area characterized by towers of various heights, and that the proposed mandated envelope [i.e., the Bulk Distribution] and coverage [i.e., the Tower Coverage] controls should predictably regulate the heights of any new development.

Thus, the subject rules were considered to be more creative and flexible, and less of a straight-jacket. But the fact remains that the Bulk, Tower, and FAR Rules are intended to limit the height of buildings.

Respondents' attempt to justify their approach is difficult to understand at first blush, because it is so strained, counter-intuitive, and far-fetched as to be almost farcical. They rely on the Bulk Distribution Rule's prefatory language, "[w]ithin the Special District . . .," which they interpret to mean that because both portions of the Lot are "within the Special District," the Bulk Distribution Rule applies to both portions of the Lot. Well, yes, it does, and, pursuant to the Split-Lot Rule, it applies to each portion of the Lot. Indeed, the Proposal violates both of the subject rules. It violates the Tower Coverage Rule, because the tower portion fails to cover 30% of the ground area of the Lot. And it violates the Bulk Distribution Rule because, more than 40% of the floorspace in the C4-7 portion of the Building is above 150-feet high. The fact that the Building has a "tail" extending from the C4-7 portion of the Lot into the R8 portion of the Lot does absolutely nothing to diminish the impact (on views, light, air, and esthetics) of the C4-7 portion of the Building. Allowing the R-8 portion of the base of the Building to increase the

tower on the C4-7 portion of the Building would be an extreme case of "the tail wagging the dog."

How much "wag" does the "tail" have? Without the "tail," without all that base floor space on the R8 portion of the lot figuring into the 60-40% Bulk Distribution Rule calculation, a building solely on the C4-7 portion of the Lot would, as the Developer has recognized, be limited to 33 floors, which is six floors, or 96-feet (tower floors being 16-feet high) lower than the Proposal, which is for 39 floors. The R8 portion of the Lot cannot be allowed to spring the C4-7 portion of the Building ever higher. You cannot just park floor space offsite in one portion of a lot to increase your height in another, distinct area. As petitioner argues, the FAR (12%), Bulk Distribution (60-40%), and Tower Coverage (30%) Rules work only if they are calculated for one-and-the-same area; you do not get to pick and choose which rule to apply to which area; that makes no sense. The City designed the rules to limit the height of buildings, not to boost them. In any event, as petitioner convincingly demonstrates, the "[w]ithin the Special District" phrase "was intended to distinguish the Special Lincoln Square District from the rest of Manhattan's high-density residential districts, where the Bulk Distribution Rule takes a slightly different form" (NYSCEF Doc 1, at 27). The prefatory language cannot be read, with a straight face, to obliterate the Split-Lot Rule, or to disengage the Bulk Distribution Rule from the Tower Coverage Rule. The Bulk Distribution Rule cannot be interpreted, construed, or applied in isolation, just because it happens to regulate the SLSD.

Somewhat Orwellian is the following statement in the Developer's Memorandum of Law in Opposition (NYSCEF Doc 93, at 39): "DOB's application of ZR 82-34 to the Project functioned to significantly reduce the amount of floor area within the tower and its height relative to what could be developed [43 floors] absent the bulk distribution requirement." Of course applying ZR § 82-34 operated to limit the height of the Building. That is its purpose, its sole purpose, and there is no way it could do otherwise. The question is whether applying that rule to all of a split-lot while applying its companion, ZR § 82-36, to only a portion of the Lot, is what the drafters intended. If they did, they could easily have said so.

The Developer understandably notes that in the SLSD nothing imposes absolute limits on the height of buildings, the height of floors, or the number of floors. This is all the more reason to hew prudently and cautiously to the carefully crafted, coordinated limits that the City has imposed in the ZR.

All of which calls to mind perhaps the finest words ever written about statutory interpretation, by the immortal Learned Hand:

> There is no more likely way to misapprehend the meaning of language - be it in a constitution, a statute, a will or a contract - than to read the words literally, forgetting the object which the document as a whole is meant to secure. Nor is a court ever less likely to do its duty than when, with an obsequious show of submission, it disregards the overriding purpose because the particular occasion which has arisen, was not foreseen. That there are hazards in this is quite true; there are hazards in all interpretation, at best a perilous course between dangers on

> either hand; but it scarcely helps to give so wide a berth to Charybdis's maw that one is in danger of being impaled upon Scylla's rocks.

Central Hanover Bank & Trust Co. v Commissioner of Internal Revenue, 159 F2d 167, 169 (2d Cir, 1947) (L. Hand, J.)

The Mechanical Space Rules

Respondents' attempts to validate the "mechanical floors" set forth in the Proposal are, if anything, more bizarre than their attempts to sever the related rules discussed above. Once again, "the forest" provides some guidance. Tall buildings need to house such items as elevator machinery, plumbing, and heating, ventilating and air conditioning equipment. ZR § 12-10 provides that the floor area of a building used to calculate FAR does not include "floor space used for mechanical equipment." These "mechanical floors," also boost the height of buildings, and this Court will take judicial notice of the fact that the higher an apartment, the higher the purchase price or rent it can command. Developers have, thus, increased the number and height of mechanical floors, called by some cynics "mechanical voids," to raise the height of buildings.

The Developer has taken this tactic to a whole new level.

According to petitioner, the original Proposal had two mechanical floors; the 17th, 160-feet high; and the 15th, 20-feet high; totaling 180 feet. After the City Fire Department objected on safety grounds, the Proposal now has four mechanical floors: the 15th, 20-feet high; the 17th, 64-feet high; the 18th, also 64-feet high; and the 19th, 48-feet high; totaling 196 feet.

According to the Developer and the City, the original Proposal had four mechanical floors the 15th, 22-feet high; the 17th, 16-feet high; the 18th, 160-feet high; and the 19th, 16-feet high; totaling 214 feet. After the City Fire Department objected on safety grounds, the Proposal still has four mechanical floors: the 15th, 22-feet high; the 17th, 64-feet high; the 18th, also 64-feet high; and the 19th, 48-feet high; totaling 198 feet.

There is no conceivable mechanical need for anything approaching this many floors, this much height, and this much empty space, and the Developer does not claim otherwise. By one standard measure, we are talking about the height of an 8-20 story building in the middle of an even taller building (sort of like having a frankfurter in the middle of your hamburger). Using the Developer's 198-feet figure, mostly empty space would constitute just over 25% of the Building's 775-feet height. One can glean from the record (and to a certain degree from common experience) that mechanical floors with mechanical equipment are usually no more than 25-feet high, and often are a good deal less; are usually non-contiguous, rather than stacked one on top of another; and are usually in basements or rooftop bulkheads; none of which is remotely the case here.

This blatant jacking-up of close to 200-feet (originally set at 214-feet, with a cavernous 160-feet floor, more appropriate for a satellite transmission tower or a circus big-top) is too brazen to be called a "subterfuge"; rather, the Developer simply thumbed its nose at the rules. The Proposal's mechanical voids would be ingenious if they were not so transparent (the word "chutzpah" comes to mind). No sane system of city planning, and no sane system of judicial adjudication,

would allow developers to end-run around height-limits by including in buildings gargantuan mechanical spaces that may not even contain mechanical equipment and have no purpose other than to augment height beyond otherwise legal limits. In fact, the Koplik Letter states:

> [I]t does matter whether equipment actually occupies the floor area of the mechanical space[,] and it does matter whether the equipment will be used. Equipment that does not occupy the floor area and/or equipment that will not be used cannot be exempted from floor area calculations.

Amen.

In a more legalistic mode, petitioner argues that the floor area of the four mechanical floors should not be excluded from zoning calculations because they are not "accessory uses," i.e., uses "customarily found in connection with residential uses," and because they are not "used for" mechanical equipment. This accords with common sense; neither the floor area nor the height of mechanical voids should be excluded from what is otherwise permissible. As Marisa Lago, Chair of the City Planning Commission, stated in a speech in early 2019, "[t]he notion that there are empty spaces for the sole purpose of making the building taller for the views at the top is not what was intended" by the ZR. Joe Anuto, Crain's New York Business, February 6, 2018, "City Wants to Cut Down Supertalls" (NYSCEF Doc 11, at 2). Respondents' "anything goes" argument proves too much; it would mean that a developer could add unlimited height to a building by the simple expedient of having empty space and calling it "mechanical space," never mind all those pesky rules meant to limit the height of buildings; it would mean edifices as tall as One World Trade Center, colloquially known as Freedom Tower (94 stories, 1776 feet), or the Burj Khalifa (163 Stories, 2,717 feet, double the Empire State Building's 1,250 feet, not including the latter's antenna) could be built in the SLSD.

This Court declines to embroil itself in the esoteric debate about whether a recent "modification" in the law, which very severely limits mechanical voids, is a "change" or a "clarification." The new rules appear to be a "clarification" in general but a "change" in the specifics, the issue being one of semantics and philosophy. The fact is that allowing a building to breach otherwise inaccessible barriers (and tower over its neighbors), by adding immense dead space, when the goal of the rules is to limit the height of buildings, is arbitrary and capricious. The City legislature has recognized and dealt with this, administrative agencies and the Courts should follow suit.

The BSA arguably (and the parties do argue about this) refused to consider the "mechanical voids" question because the BSA had already decided, in another case, that the ZR "does not control the floor-to-ceiling height of floor space used for mechanical equipment." Many decades ago, this Court was employed as a clerk in a small office in a department of NYC's vast bureaucracy. Every three months the office submitted a requisition for supplies such as pens, pencils and paper. Prior to this Court's appearing on the scene, the modus operandi for many years had been to submit the form with the same numbers every time. So, if the office were ordering too many pens and too few pencils, the mistake would be repeated every time, and the cumulative effect would be a plethora of pens and no pencils. Repetition should not immunize

mistakes from scrutiny. The four "mechanical floors" clearly are not designed to contain anywhere near four floors' worth of mechanical equipment (if any).

Highlighting just how ludicrous allowing multiple mechanical voids of no mechanical use and infinite height is, the Section Heading at page 13 of the Developer's Memorandum of Law in Opposition (NYSCEF Doc 93) reads as follows: "The DOB and BSA Properly Determined that the Project's Mechanical Spaces Comply with Operative Floor-to-Ceiling Height Regulations … The Operative Zoning Resolution Does Not Limit Floor-to-Ceiling Heights of Mechanical Spaces." Thus, the Developer complied with the mechanical floor height requirement because there is none, which sounds like "Alice in Wonderland," not responsible city planning and oversight. Huge mechanical voids make a mockery of every facet of height regulation.

A recent article in the *New York Times* titled "House Report Condemns Boeing and F.A.A. in 737 Max Disasters,"[2] begins as follows:

> The two crashes that killed 346 people aboard Boeing's 737 Max and led to the worldwide grounding of the plane were the "horrific culmination" of engineering flaws, mismanagement and a severe lack of federal oversight, the Democratic majority on the House Transportation and Infrastructure Committee said in a report on Wednesday.

Here, too, a business has gotten an administrative agency to approve a faulty, flawed plan, constituting a "severe lack of oversight" (albeit, nobody has or will die).

Miscellaneous

This Court has considered respondents' other arguments, including the Statute of Limitations argument, and finds them to be unavailing and/or non-dispositive.

CPLR Provisions

CPLR 7803(3) allows a petitioner to challenge administrative actions that are "affected by an error of law," or "arbitrary and capricious or an abuse of discretion." CPLR 3001 allows Supreme Court to "render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy."

Conclusion

Thus, for the reasons stated herein, BSA's determination that the floor area of the tower can be evaluated by referring only to the C4-7 portion of the Lot, while the floor area of the base can be evaluated by referring to both the C4-7 portion of the Lot and the R-8 portion of the Lot, is affected by an error of law; and BSA's determination that mechanical floors can be any number, any height, any contiguity, and any use, or lack thereof, without their floor area being counted towards the Building's FAR, and regardless of how much height they add to the Building, is

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[2] https://www.nytimes.com/2020/09/16/business/boeing-737-max-house-report.html?searchResultPosition=1

affected by an error of law and is an abuse of discretion. The Proposal fails to pass muster for both reasons.

The Clerk is hereby directed to enter judgment (1) declaring that the New York City Department of Buildings and the New York City Board of Standards and Appeals acted arbitrarily and capriciously and contrary to law in issuing and approving a certain permit for respondents Extell Development Company and West 66th Sponsor LLC to construct a building at 36 West 66th Street, New York, NY; (2) declaring that said permit is void; (3) declaring that the Split-Lot Rule of Zoning Resolution § 77-02 means that the structure on each portion of a zoning lot in different zones must individually comply with all regulations applicable to that portion of the lot; (4) declaring that "mechanical voids," meaning space in a building denoted as "mechanical" but without mechanical equipment or a mechanical purpose, or vastly larger than necessary for any mechanical purpose, are illegal, and that any such spaces must be included in all floor area and height calculations; and (5) enjoining anyone acting for, by, or through respondents Extell Development Company and West 66th Sponsor LLC from taking any steps further to construct physically a building at said location pursuant to the permit voided herein.

In the Court's discretion, and/or pursuant to law, each party shall bear its own costs, including attorney's fees.

Arthur F_ Engoron

Digitally signed by Arthur F_ Engoron
DN: C=US, OU=NY County Supreme Court, O=New York State Courts, CN=Arthur F_ Engoron, E=AENGORON@NYCOURTS.GOV
Reason: I authored, approved, am ordering, and/or officially issuing it.
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9/25/2020
DATE

ARTHUR F. ENGORON, J.S.C.

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