Yes, They Can Make You Tear Down a Finished Building

The Saga of 200 Amsterdam Avenue

Earlier this year, there was significant media coverage regarding the construction of 200 Amsterdam Avenue located on the Upper West Side in Manhattan.[1] The developers, SJP Properties and Mitsui Fudosan America, obtained a building permit in 2016 to construct a 55-story, 668 foot high building, making it the tallest building on the West Side north of 61st Street. To be able to construct a building this tall, the developers utilized the Transfer Development Rights (TDR's) to use the undeveloped rights of adjacent properties to benefit another lot to develop.

What was unique in this situation, is that the developers spent 28 years reaching agreements with adjacent properties to subdivide and merge partial land parcels and tax lots, to create a 39-sided zoning lot in order to design the building. Opponents of the project argued this was impermissible, pointing to the New York City Zoning Resolution which defines a "zoning lot" as "a tract of land, either unsubdivided or consisting of two or more lots that are contiguous for a minimum of ten linear feet, and located within a block and declared by all 'parties in interest' to be a 'zoning lot' in a recorded Zoning Lot Declaration of Restrictions."[2]

The developers, and initially the City, had relied upon a 1978 Departmental Memorandum of Acting Department of Buildings Commissioner Irving Minkin, in what became known as the "Minkin Memo," which interpreted the definition of a "single zoning lot" to "consist of one or more tax lots or parts of tax lots." Opponents appealed the issuance of the building permit to the Board of Standards and Appeals, which in New York City decides variances as well as appeals of Department of Buildings (DOB) determinations (this task is performed by a Board of Zoning Appeals (BZA) through the rest of the state). However, the DOB at this time stated that it now disagreed with the memorandum from over 40 years ago, and that partial tax lots should not be utilized. The BSA declined to invalidate the permit, as it was "adhering to an 'historical interpretation' of the term 'zoning lot.'"[3]

Two groups, the Committee for Environmentally Sound Development and the Municipal Art Society, commenced an Article 78 proceeding challenging the BSA's upholding the issuance of the permit. The New York County Supreme Court vacated the BSA's determination and remanded the case back to the BSA to review the permit again.[4]

The BSA once again upheld the issuance of the permit, relying in part on the DOB's position that the permit should still be issued since DOB relied on a 40-year determination from the then Acting Commissioner of the Department, and over 30 years of determinations relying on that interpretation for the zoning lots. However, Justice W. Franc Perry nullified the decision on the grounds that the BSA was not acting in accordance with the plain language of the Zoning Resolution. At the conclusion of his decision, Justice Perry "ADJUDGED that DOB revoke the Permit and **compel Owner to remove all floors that exceed bulk permitted under the Zoning Resolution**."[5] This could require the removal of up to 20 floors of the building.[6]

Parkview and Equitable Estoppel

As drastic and radical a remedy that Justice Perry's decision may seem, this is not the first time that such an action has been ordered. The seminal case on the ability of a court to order the removal of a significant part of a building is *Parkview v. City of New York*.[7] In *Parkview*, the builder applied for and received a valid building permit on November 21, 1985, to construct a 31-story residential building at 108 East 96th Street in Manhattan. After substantial construction, the Superintendent of the New York City DOB issued a Stop Work Order for that portion of the building over 19 stories.[8] The basis for this action was that upon further review, the DOB determined that the building permit should never have been issued in the first place.

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The DOB concluded that the building was located within a Special Park Improvement District (PID) that limited the height to 19 stories. The applicant misread the City's zoning map and made the interpretation that a taller building was allowed. This was based upon the map issued by the DOB which was missing a certain notation that a zoning boundary was in effect that significantly limited the height. The original Board of Estimate resolution containing the metes and bounds description of the zone was definitive that Parkview's building was within the PID limiting the height to 19 stories. The DOB then revoked the building permit on the grounds that the permit was invalid when it was initially issued.[9]

Parkview then followed the administrative route and appealed the revocation of the permit to the BSA. The BSA sustained the DOB's determination finding that the original resolution with the metes and bounds determination controlled over the map depicting the boundaries, even if the map could be misread.

Parkview then commenced an Article 78 proceeding seeking to set aside the revocation of the building permit arguing that the BSA determination was arbitrary and capricious because the original permit was properly issued; that its rights pursuant to that permit had vested; and that its reliance on the permit estopped the city from revoking the permit.

The case wound its way to the Court of Appeals which sustained the BSA's determination. Commenting on whether equitable estoppel should prevent the DOB from revoking a seemingly validly issued permit, the court held:

> [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.[10]

The court further admonished that even if there was an error in the map and the mistaken issuance of a permit, reasonable diligence by the builder would have revealed that the metes and bounds description in the enabling legislation made clear that the taller building would not be allowed.

Faced with this daunting future, Parkview then chose to apply for a variance to the BSA to allow the maintenance of the completed building. This attempt was unsuccessful, and the 12 stories were indeed torn down.

Challenging Determinations and Mootness

A private party who seeks to challenge the grant of a permit should not simply rest and allow the structure to be completed. In *Dreikausen v. Zoning Board of Appeals*, a developer sought to purchase a bankrupt marina and build a condominium in a zone restricted to homes in the City of Long Beach.[11] The developer sought a use variance, and after numerous attempts, was granted one by the ZBA. Petitioners, nearby residents of single-family homes, brought an Article 78 proceeding challenging the grant of the use variance. The Supreme Court, Nassau County dismissed the proceeding, and petitioners appealed. The developer by that time had torn down the marina, reconfigured the utilities, had foundation permits issued, and began pouring the foundations for the condominiums, but building permits for the actual condominiums had not yet been issued.

Petitioners then first sought injunctive relief before the Appellate Division, which was denied. The Appellate Division affirmed the Supreme Court's decision, and petitioners sought leave to appeal to the Court of Appeals, which was granted. By this point, 12 of the eight units has been completed. The Court of Appeals dismissed the appeal as moot because of substantial competition of the project. The Court of Appeals distinguished *Parkview* as an instance where mootness will not prevent a destruction remedy, for the court now characterized the events there as a situation where "a party proceeded in bad faith and without authority."[12]

Conclusion

The owners of 200 Amsterdam are, not surprisingly, appealing the Supreme Court's decision. They have significantly invested in the project, and the costs of deconstructing nearly half of the building will be substantial. As per the Court of Appeals in *Parkview*, there is precedent in mandating a developer to tear down a building that has essentially been constructed. The distinction here, is that in *Parkview*, it was not disputed that the building permit was erroneously issued. Both the builder and the DOB relied on an incorrect map leading the wrongful issuance of the permit.

In 200 Amsterdam Avenue, the case is not so clear. For 40 years, the New York City DOB allowed partial tax lots to constitute a "zoning lot" for TDR purposes. A court now says that that definition is incorrect and not in accordance with the plain reading of the zoning resolution. This new interpretation may lead to not only the tear down of a building, but also the invalidation of certificates of occupancy for buildings throughout New York City.[13]

This line of cases demonstrates the power of the judicial system. Judge Joseph Bellacosa, the author of the *Parkview* decision, remarked several years later:

> [W]hen I occasionally drive past the site and look at the restored open-air space, I marvel that the decree was actually fulfilled. Indeed, I facetiously muse that courts may leap, as it were, over tall buildings, and when they are found to be too tall, they can be cut down to size.[14]

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1. Vincent Barone, *Almost Half of UWS Tower Would Have to be Removed Under New Court Ruling*, N.Y.Post, February 17, 2020; Stefanos Chen, *Developers of West Side Condo Tower May Have to Deconstruct 20 Floors*, N.Y. Times, February 14, 2020.
2. New York City Zoning Resolution § 12-10(d).
3. *Committee for Environmentally Sound Development v. Amsterdam Ave. Redevelopment Assoc. LLC*, Index No. 157273/2019 (Sup. Ct., N.Y. Co. Feb. 27, 2020).
4. *Committee for Environmentally Sound Development v. Amsterdam Ave. Redevelopment Assoc. LLC*, 2019 Slip Op. 30621 (Sup. Ct., N.Y.Co. Mar. 14, 2019).
5. *Committee, supra* n.3 (emphasis added).
6. Chen, *supra* n.1.
7. 71 N.Y.2d 274 (1988).
8. *Id.*
9. *Id.* at 280.
10. *Id.* at 282.
11. 98 N.Y.2d 165 (2002).
12. *Id.* at 173.
13. Barone, *supra* n.1.
14. Joseph W. Bellacosa, *Judging Cases v. Courting Public Opinion*, 65 Fordham L. Rev. 2381, 2388 (1997).

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