

Real Estate Trends

ZONING AND LAND USE PLANNING

The Saga of a Long Island Tree House and the Law

By Anthony S. Guardino

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It has been just over five years since a Long Island father decided to build a tree house for his children. This seemingly simple and straightforward act somehow led to a dispute with his village and to years of federal and state court litigation and appeals. Ultimately, however, the battle over this Long Island tree house also led to a definitive statement of law, namely, that government officials charged with enforcing clear zoning rules have the authority to do so.

Background

John Lepper and his wife owned a home and property in the Village of Babylon, on the south shore of Long Island. In April 2018, Lepper found a hypodermic needle where the couple's young children played.

Soon after finding the needle, and concerned about his children's safety, Lepper began constructing a wooden tree house at the family home.

On May 10, 2018, after the village's building inspector learned what Lepper was doing, the building inspector sent Lepper a letter advising Lepper that he might need a permit for the structure and asking Lepper to contact him.

On May 21, 2018, the village issued a notice of violation to Lepper for failing to obtain a permit and informed him that he was in violation of Village of Babylon Code Section 365-26. That day, Lepper went to the village

hall to obtain a permit. His application did not include signed and sealed plans by a professional engineer or architect.

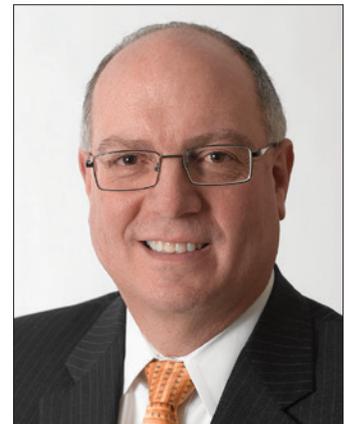
Although Lepper never received a permit and did not appeal or seek any other remedy from the village's zoning board of appeals concerning his permit application, he continued constructing the tree house.

Eventually, Lepper received a number of tickets from the building inspector for constructing the tree house without a permit. He met with the building inspector in July 2018 about the tickets.

The building inspector later stated that he told Lepper that he needed a permit before he could continue building; that because of the proximity of the tree house to the property line, he also needed a variance; and that he should submit signed and sealed plans and a survey prepared by a licensed surveyor to complete his application.

On Aug. 14, 2018, the building inspector issued a letter informing Lepper that the tree house was an "unsafe structure" and could not be occupied until a certificate of occupancy was issued.

That month, Lepper decided to fight the tickets in village court.



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Babylon Law

Village of Babylon Code § 365-26 provides:

No building shall hereafter be erected...or added to on any lot...until a permit authorizing the same shall have been issued by the Building Inspector. The Building Inspector shall require that the application for a permit and the accompanying plot plan, plans and specifications shall contain all information necessary to enable him to determine whether the proposed building addition or structural alterations or change of use to an existing building comply with the provisions of this chapter....

This section of the village code also states that “[a] building permit shall be required when an outdoor playground or gym (or any combination) exceeds a lot area of 90 square feet.”

Village Code §365-3 defines “building” as a “structure having a roof supported by columns or walls for the shelter, support or enclosure of persons, animals or chattels.” As defined, “structure” includes, among other things, “stadiums, swimming pools, gospel and circus tents, reviewing stands, platforms, stagings, observation towers, radio towers, sheds, coal bins, walls, gas pumps, fences over six feet in height and display signs.”

One thing stands clear: Municipal officials may properly enforce a zoning ordinance applicable to structures—including tree houses—where the law is well drafted and key terms are clearly defined.

The Leppers maintained that they did not need a permit for the tree house because the tree house was an outdoor playground/gym that had a lot area of less than 90 square feet. The village contended that the Leppers needed to obtain a permit for the tree house because it was a “building” that required a permit and that even if the tree house was considered an outdoor playground/gym, it had a lot area greater than 90 square feet and, therefore, still required a permit.

The village also contended that the tree house failed to comply with the setback requirements set forth in the village code and, as a result, the village asserted that the Leppers needed to obtain a variance.

Litigation Over the Tickets

On Oct. 17, 2018, after a bench trial in village justice court, Lepper was found guilty of violating Section 365-

26 and was assessed fines amounting to approximately \$500. The next day, the building inspector sent a letter to Lepper referencing the court’s decision and ordering him to stop work on the tree house. The letter also told Lepper that he “must remove the tree house in its entirety or summonses may be issued on a daily basis.”

Lepper appealed. On Oct. 10, 2019, the Appellate Term reversed, finding that the tickets were facially deficient. Specifically, the appellate court reasoned that the factual portions of the tickets stated only “WITHOUT A PERMIT-TREEHOUSE” and failed to allege facts establishing that the tree house constituted a building within the meaning of the village code and failed to allege facts establishing the nature of the work done on the tree house. *People v. Lepper*, 66 Misc.3d 133(A) (2d Dept. App. Term 2019).

In Federal Court

On Dec. 10, 2018, the Leppers filed a complaint in the U.S. District Court for the Eastern District of New York against the village and numerous village officials, including the mayor, building inspector and trustees in their official and individual capacities.

The Leppers sought damages and a declaratory judgment that Section 365-26 was unconstitutional. Against the individual defendants, the Leppers asserted federal claims of First Amendment retaliation, equal protection, due process, excessive fines in violation of the Eighth Amendment, double jeopardy, unconstitutional taking of property, malicious prosecution, abuse of process, and conspiracy.

The Leppers also raised state law claims for malicious prosecution, abuse of process, negligence, negligent and/or intentional infliction of emotional distress, defamation, and prima facie tort.

At three conferences in December 2018 and January 2019, the parties agreed that the village would not issue any additional tickets regarding the treehouse and that the Leppers’ children would not use the treehouse.

On June 18, 2020, the Leppers filed a motion for preliminary relief to allow their children to use the treehouse. On Aug. 17, 2020, the defendants moved for preliminary relief to remove the treehouse. The court denied the motions, informing the parties that they could submit motions for preliminary relief on the complete record once discovery was completed.

On Jan. 4, 2021, the Leppers filed a new action, which was consolidated with their initial action. On March 4,

2021, the Leppers filed an amended consolidated complaint.

The parties completed discovery in March 2021. Then, in *Lepper v. Village of Babylon*, No. 18-cv-7011 (JMA) (AYS) (E.D.N.Y. March 29, 2022), the court issued its decision, ruling in favor of the defendants.

District Court's Decision

The court first rejected the Leppers' request for a declaratory judgment that Section 365-26 was unconstitutional. The court found that the Leppers failed to put forward evidence in support of their contention that the ordinance was overbroad "beyond stating vaguely" in their amended consolidated complaint that the ordinance was overbroad.

The court also denied the Leppers' claims under the Due Process Clause that the ordinance was "vague, subject to arbitrary prosecution and does not afford persons of ordinary intelligence notice of what is illegal and legal."

In the court's view, the ordinance was not vague, the term "building" was "clearly defined" in the village code, and the village code was "equally clear" that a permit was required for a building and for an "outdoor playground or gym (or any combination) [that] exceeds a lot area of 90 square feet." The court agreed with the village that the tree house was a building within the meaning of the village code and that, even if it was considered an outdoor playground/gym, it had "a lot area of 111.7 square feet" and, accordingly, required a permit.

The court also rejected the Leppers' claims against the individual defendants. For example, with respect to the Leppers' First Amendment retaliation claim against the defendants, the court found that there was "simply not a sufficient connection" between any of the Leppers' statements about drug abuse in the village and the defendants' actions regarding the tree house for a jury to infer that the defendants' actions were in retaliation for the Leppers' statements.

Next, the court dismissed the Leppers' allegations that they were subject to "selective enforcement" of the village code and that the term "building" was selectively enforced against him. The court concluded that the Leppers failed to meet their burden of showing that Lepper

had been treated differently compared to others similarly situated.

The court also was not persuaded by the Leppers' "takings" claim, finding that the Leppers made no allegations and proffered no evidence to support a conclusion that the village's enforcement of the zoning ordinance and its decision to require Lepper to either conform to the zoning ordinance, obtain a permit, or tear down the tree house amounted to a "permanent physical occupation" of his property, or forced him to "sacrifice all economically beneficial uses in the name of the common good."

The court in addition granted summary judgment in favor of the defendants on the Leppers' claim for malicious prosecution despite the Appellate Term's decision finding that the tickets were facially deficient.

According to the court, the Leppers' malicious prosecution claim failed because they had not shown that the charges had been terminated in the Leppers' favor as required by New York law to succeed on a malicious prosecution claim and because the defendants had "sufficiently shown that there was probable cause to issue the tickets."

The court again explained that, based on the undisputed facts, Lepper was required to obtain a permit under the village code because either the tree house was a building, or it was a playground or gym with a lot area greater than 90 feet.

After rejecting the balance of the Leppers' claims and considering the applicability of immunity to the Leppers' claims against various of the defendants, the court concluded by granting summary judgment in favor of the defendants.

Conclusion

Lepper appealed the court's decision on his equal protection claims to the U.S. Court of Appeals for the Second Circuit, which recently affirmed in a short decision. *Lepper v. Scordino*, No. 22-1064 (2d Cir. June 15, 2023).

Presumably, litigation over the tree house now has come to an end. One thing, however, stands clear: Municipal officials may properly enforce a zoning ordinance applicable to structures—including tree houses—where the law is well drafted and key terms are clearly defined.