

New York Law Journal

Real Estate Trends

WWW.NYLJ.COM

VOLUME 263—NO. 57

An ALM Publication

WEDNESDAY, MARCH 25, 2020

ZONING AND LAND USE PLANNING

Zoning Remedy: Removing Unlawful Structures

By
**Anthony S.
Guardino**



A decision last month by the Supreme Court, New York County, in *Committee for Environmentally Sound Development v. Amsterdam Avenue Redevelopment Associates LLC*, No. 157273/2019 (Sup. Ct. N.Y. Co. Feb. 13, 2020), garnered significant attention as it could result in the developer of a condominium tower on the Upper West Side of Manhattan being forced to remove 20 or more floors from the high-rise building.

Appeals already have been filed in the case, but the potentially striking impact of the court's decision obscures the fact that although courts rarely require structures or parts of structures to be removed when zoning rules are violated, they can—and they do—so order.

Perhaps the most well-known instance of a court enforcing such a drastic remedy—at least before the *Amsterdam Avenue* decision—occurred in 1988 when the New York Court of Appeals

decided *Matter of Parkview Associates v. City of New York*, 71 N.Y.2d 274 (1988), and rejected a challenge to what the Court itself characterized as a “harsh” result.

This column discusses a number of recent decisions that have reached the same result, highlighting the broad variety of these situations, the objections that property owners typically raise, and the reasoning and analysis that courts rely on to decide these cases.

Home Addition

An addition to a home was at issue in *Matter of Massa v. City of Kingston*, 284 A.D.2d 836 (3d Dep't 2001).

The case arose after the upstate city of Kingston issued two building permits allowing a homeowner to construct an addition to her residence and a retaining wall along the western portion of her property. The city issued the addition permit on the express condition that the homeowner construct a retaining wall to replace the existing, deteriorating retaining wall, and the addition permit stated that it could be withdrawn or a stop-work order could be issued if the new retaining wall were not constructed.

After the homeowner began construction on the addition, the city issued a stop-work order covering both permits on the ground that she had not begun to construct the wall.

The city subsequently filed a civil action against the homeowner seeking, among other things, demolition of the addition to her residence.

The Supreme Court, Ulster County, ruled that the homeowner had illegally constructed the addition in violation of city building codes as well as the stop-work order and the terms of the addition permit. It ordered that the addition be demolished, and the homeowner appealed.

The Third Department affirmed, finding that the Supreme Court had not abused its discretion when it ordered the demolition of the addition as it had been “illegally constructed” in violation of the stop-work order, the city building code, and the terms of the addition permit.

The appellate court rejected the homeowner's contentions that the demolition remedy was “excessive” because the addition was “in a permitted district,” had been built in accordance with certified plans, and was “in

ANTHONY S. GUARDINO, a partner with Farrell Fritz, practices in the areas of land use, zoning, and environmental law. Resident in the firm's office in Hauppauge, Long Island, he can be reached at aguardino@farrellfritz.com.

compliance with the New York State Fire Prevention and Building Code.” The appellate court agreed with the city that the evidence presented to the Supreme Court established significant discrepancies between the conditionally approved plans and the structure that actually was constructed.

The appellate court also found “ample record evidence,” including photographs and testimony, to support the Supreme Court’s conclusion that a large percentage of the work on the addition was completed after the issuance of the stop-work order. Thus, the Third Department ruled, the remedy fashioned by the Supreme Court was “appropriate.”

The appellate court was not persuaded by the homeowner’s argument that the city should be estopped from making certain claims, opining that estoppel was not a defense against a government entity “in the absence of exceptional circumstances.”

Moreover, the Third Department found, the equities in the case were balanced in favor of the city primarily because the homeowner “proceeded with the work even though a stop-work order had been issued.” The Third Department concluded that the “drastic remedy of demolition” was justifiable even if the addition fully complied with the approved plans and building code given that “it was constructed in defiance of the stop-work order” and that it constituted a hazard as long as it stood “without an adequate retaining wall.”

Residential Camp

Town of Caroga v. Herms, 62 A.D.3d 1121 (3d Dep’t 2009), was an action

by the town of Caroga against a property owner seeking to compel him to remove a structure he built on real property along the shore of Canada Lake, allegedly in violation of zoning regulations.

The Supreme Court, Fulton County, found for the town and ordered the property owner to remove the structure (and to pay a \$50,000 civil penalty).

The Third Department affirmed.

First, the appellate court rejected the property owner’s contention that the Supreme Court had erred when

Although courts rarely require structures or parts of structures to be removed when zoning rules are violated, they can—and they do—so order.

it determined that the structure was not a boathouse as authorized by his building permit but a residential camp in violation of the town’s zoning regulations.

The Third Department explained that the structure lacked direct access to Canada Lake (as a boathouse was required to have) and that, if construction had not been halted by a stop-work order, the structure likely would have contained a kitchen and/or a bathroom. The appellate court added that the fact that the structure was intended for residential use also was demonstrated by the structure’s various amenities, including sheet-rocked interior partition walls forming interior rooms, mattresses in the uppermost level of the structure, a chest of drawers, an entertainment center with a television and video player, a microwave oven,

extensive electrical wiring, casement windows, glass doors, a gas stove, and telephone service.

Moreover, the Third Department pointed out, the structure’s size was beyond what was authorized in the building permit. The appellate court noted that the property owner was authorized to build a boathouse with dimensions of 30 feet by 41 feet but that, after the permit had been issued, he added decking to the structure, increasing its footprint to 34 feet, 8 inches, by 49 feet. As the appellate court noted, this increased the area of the structure to “well in excess of the 1,250 square feet afforded to boat-houses.”

Concluding that the property owner had “designed and built the structure for residential use with the express intent to circumvent [the town’s] regulations,” the Third Department rejected the property owner’s contention that the penalty was “excessive,” observing that, with reference to zoning regulations, removal of offending structures was “among the appropriate remedies” provided by Town Law Section 268(2).

A Billboard

The decision by the U.S. District Court for the Southern District of New York in *Universal Outdoor, Inc. v. City of New Rochelle*, 286 F.Supp.2d 268 (S.D.N.Y. 2003), involved a challenge by the city of New Rochelle to a billboard that had a permit to be constructed on “81 Rockdale Ave., Lot 50.” The city discovered that the billboard violated the applicable 50 foot “setback” requirement and that it actually had been erected on Lot 51.

After the city revoked building and sign permits and directed Clear Channel Outdoor, Inc., to remove the billboard, Clear Channel moved for an order enjoining New Rochelle from enforcing its order to take down the billboard and directing it to withdraw its revocation of the building permit. The district court denied the motion.

The district court first refused to order New Rochelle to allow Clear Channel to address the setback issue by reducing the billboard's size, finding that New Rochelle was under no obligation to agree to that modification.

The district court then turned to the location of the billboard. It noted that Clear Channel had applied for a permit for Lot 50 and had obtained a permit that conferred rights to build on (and only on) Lot 50. Clear Channel argued that the building permit for Lot 50 had been issued in error because it always had intended to erect the billboard on Lot 51, and that the city should be estopped from enforcing its zoning code due to "ministerial error," but the district court disagreed.

Citing the provision of New Rochelle's Zoning Code stating that "[o]ccupancy, use or any change in the use of the land" without a certificate of occupancy was an illegal use of the land, the district court concluded that although the city's inspectors may have made a mistake in issuing the permit for the wrong lot, City Channel did "not have a vested property right to a building permit issued erroneously by a building inspector, and there can be no estoppel against the government in such a situation."

Conclusion

Other recent decisions have involved different structures (such as a floating boathouse, *see Beneke v. Town of Santa Clara*, 45 A.D.3d 1164 (3d Dep't 2007)), as well as other legal issues.

In one case, *Town of North Elba v. Grinditch*, 131 A.D.3d 150 (3d Dep't 2015), the Third Department decided that neighbors – and not just local government officials – had standing to seek injunctive relief requiring the dismantling and removal of two boathouses allegedly constructed in violation of town zoning rules.

Courts appear to be more inclined to direct removal of a noncompliant structure where the landowner fails to exercise reasonable diligence or make a good faith inquiry to ascertain the applicable zoning rules.

In another case, *Town of New Baltimore v. Winslow*, 39 A.D.3d 1074 (3d Dep't 2007), the defendants' property held two mobile homes in violation of a town code provision prohibiting more than one mobile home on any given parcel of land. The appellate court concluded that, given the defendants' "repeated failures to comply" with an order permitting them to choose which mobile home to remove, the town could enter their property and remove one of the mobile homes itself.

As can be seen from these court rulings, there may be no structure that violates zoning rules and regulations that is necessarily immune to a court order requiring it to be removed. However,

courts appear to be more inclined to direct removal of a noncompliant structure where the landowner fails to exercise reasonable diligence or make a good faith inquiry to ascertain the applicable zoning rules. This harsh remedy is even more likely to be granted in situations where a builder knowingly engages in construction that violates zoning regulations or ignores a stop-work order.