

65 A.D.3d 1237, 887 N.Y.S.2d 119, 2009 N.Y. Slip Op. 06690  
(Cite as: 65 A.D.3d 1237, 887 N.Y.S.2d 119)

## C

Supreme Court, Appellate Division, Second Department, New York.  
In the Matter of Alex LYUBLINSKIY, respondent,  
v.  
Meenakshi SRINIVASAN, et al., appellants.  
Sept. 22, 2009.

**Background:** Homeowner brought Article 78 proceeding to review determination of the Board of Standards and Appeals of the City of New York which denied his application for a special permit to enlarge the residence. The Supreme Court, Kings County, [Ruchelsman, J.](#), granted the petition, annulled the determination, and directed the Board to grant the application. The Board appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

- (1) board was not estopped from denying permit, but
- (2) board's determination was arbitrary and capricious.

Affirmed as modified and remitted.

### West Headnotes

#### [1] Zoning and Planning 414 1770

414 Zoning and Planning  
414XI Enforcement of Regulations  
414k1767 Defenses to Enforcement  
414k1770 k. Estoppel or inducement.

#### Most Cited Cases

(Formerly 414k762)

#### Zoning and Planning 414 1778

414 Zoning and Planning  
414XI Enforcement of Regulations  
414k1778 k. Time for proceedings. [Most Cited Cases](#)  
(Formerly 414k782)

A municipality is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches.

#### [2] Zoning and Planning 414 1770

414 Zoning and Planning  
414XI Enforcement of Regulations  
414k1767 Defenses to Enforcement  
414k1770 k. Estoppel or inducement.

#### Most Cited Cases

(Formerly 414k762)

Issuance by city Department of Buildings of an alteration permit to homeowner to enlarge his residence did not estop the city's Board of Standards and Appeals from later determining that his residence was not an existing building which could be enlarged pursuant to a special permit, since Board was the ultimate administrative authority charged with enforcing the city's zoning resolution.

#### [3] Administrative Law and Procedure 15A 502

15A Administrative Law and Procedure  
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents  
15AIV(D) Hearings and Adjudications  
15Ak502 k. Stare decisis; estoppel to change decision. [Most Cited Cases](#)

#### Administrative Law and Procedure 15A 763

15A Administrative Law and Procedure  
15AV Judicial Review of Administrative Decisions  
15AV(D) Scope of Review in General  
15Ak763 k. Arbitrary, unreasonable or capricious action; illegality. [Most Cited Cases](#)

A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious and mandates reversal, even if there may otherwise be evidence in the record sufficient to support the

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determination.

#### [4] Zoning and Planning 414 ↪1359

##### 414 Zoning and Planning

414VIII Permits, Certificates, and Approvals

414VIII(A) In General

414k1358 Architectural and Structural  
Designs

414k1359 k. In general. **Most Cited**

##### Cases

(Formerly 414k385)

#### Zoning and Planning 414 ↪1713

##### 414 Zoning and Planning

414X Judicial Review or Relief

414X(D) Determination

414k1713 k. Affirmance, modification,  
reversal, vacation, or setting aside. **Most Cited**  
Cases

(Formerly 414k725)

City Board of Standards and Appeals, in determining that it was not empowered to grant homeowner a special permit to enlarge his residence, on grounds that, due to demolition work performed, the construction was not an enlargement within the meaning of the city's zoning resolution, failed to adhere to its own precedent in which it had found such authority on essentially the same facts and failed to properly distinguish its prior determination, and as such the board's determination was arbitrary and capricious and lacked a rational basis, and thus was properly annulled.

\*\*119 **Michael A. Cardozo**, Corporation Counsel, New York, N.Y. (**Leonard Koerner**, **Louise Moed**, and **Edward F. X. Hart** of counsel), for appellants.

Sheldon Lobel, P.C., New York, N.Y. (**Richard Lobel** of counsel), for respondent.

**PETER B. SKELOS**, J.P., **DANIEL D. ANGI-OLILLO**, **CHERYL E. CHAMBERS**, and **PLUM-MER E. LOTT**, JJ.

\*1238 In a proceeding pursuant to CPLR article 78, inter alia, to review a determination of the Board of Standards and Appeals of the City of New York dated April 24, 2007, which denied the petitioner's application \*\*120 for a special permit, the appeal is from a judgment of the Supreme Court, Kings County (Ruchelsman, J.), dated November 20, 2007, which granted the petition, annulled the determination, and directed the Board of Standards and Appeals of the City of New York to grant the application.

ORDERED that the judgment is modified, on the law, by deleting the provision thereof granting that branch of the petition which was to direct the Board of Standards and Appeals of the City of New York to grant the application; as so modified, the judgment is affirmed, without costs or disbursements, and the matter is remitted to the Board of Standards and Appeals of the City of New York for further proceedings in accordance herewith.

The petitioner owns property in Brooklyn in a residential R3-1 zoning district located within Community District 15. The premises was improved with a single-family residence. In January 2005 the petitioner began seeking to enlarge the residence. A contractor inspected the house and found extensive damaged wood caused by termites and age. In March 2005, the petitioner submitted site plans to the New York City Department of Buildings (hereinafter the DOB), seeking a permit to enlarge the residence. The site plans called for partial demolition and were professionally-certified as code compliant. The DOB issued an Alteration Type 2 permit. During construction, further testing revealed that the foundation was not structurally sound. As a consequence, all walls but a portion of the north wall were torn down and replaced during the construction. The DOB discovered that more demolition than was disclosed in the filed site plans had occurred and issued a stop work order. That order was rescinded and construction continued under the original alteration permit. Nine months later, the DOB inspected the premises and found that

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construction was exceeding permitted \*1239 bulk parameters. A second stop work order was issued, and construction ceased.

The petitioner then applied to the Board of Standards and Appeals of the City of New York (hereinafter the BSA) for a special permit pursuant to N.Y. City Zoning Resolution § 73-622 to enlarge his residence over the bulk parameters. After hearings, the BSA denied the application, finding that, due to the demolition, the construction was not an “enlargement,” which is defined in the Zoning Resolution, insofar as relevant, as “an addition to the floor area of an existing building” (N.Y. City Zoning Resolution § 12-10). The BSA determined that it did not therefore have the authority pursuant to N.Y. City Zoning Resolution § 73-622 to grant the special permit. The petitioner commenced this proceeding to review the BSA determination. The Supreme Court granted the petition, and the BSA appeals.

[1][2] “ ‘A municipality, it is settled, is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches’ ” ( *Matter of Parkview Assoc. v. City of New York*, 71 N.Y.2d 274, 282, 525 N.Y.S.2d 176, 519 N.E.2d 1372, quoting *Yonkers v. Rentways, Inc.*, 304 N.Y. 499, 505, 109 N.E.2d 597). “The BSA, consisting of experts in zoning and planning, is the ultimate administrative authority charged with enforcing the New York City Zoning Resolution” ( *Matter of Menachem Realty, Inc. v. Srinivasan*, 60 A.D.3d 854, 875 N.Y.S.2d 237; see N.Y. City Charter §§ 659, 666). Accordingly, contrary to the petitioner’s contention, DOB’s issuance of an alteration permit did not estop the BSA from determining that his residence was not an existing building which may be enlarged pursuant to a special permit (see \*\*121 *Matter of Parkview Assoc. v. City of New York*, 71 N.Y.2d at 282, 525 N.Y.S.2d 176, 519 N.E.2d 1372; *Town of Putnam Val. v. Sacramone*, 16 A.D.3d 669, 792 N.Y.S.2d 191; *McGannon v. Board of Trustees for Vil. of Pomona*, 239 A.D.2d 392, 657 N.Y.S.2d 745).

[3][4] However, “ ‘[a] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious’ and mandates reversal, even if there may otherwise be evidence in the record sufficient to support the determination” ( *Matter of Lucas v. Board of Appeals of Vil. of Mamaroneck*, 57 A.D.3d 784, 785, 870 N.Y.S.2d 78, quoting *Matter of Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of the Town of Huntington*, 97 N.Y.2d 86, 93, 735 N.Y.S.2d 873, 761 N.E.2d 565; see *Knight v. Amelkin*, 68 N.Y.2d 975, 510 N.Y.S.2d 550, 503 N.E.2d 106; *Matter of Menachem Realty, Inc. v. Srinivasan*, 60 A.D.3d 854, 875 N.Y.S.2d 237). In a prior matter, the BSA granted a special permit pursuant to N.Y. City Zoning Resolution § 73-622 legalizing the enlargement of a residence, the entire original framing of which had to be replaced during construction due to \*1240 severe damage caused by termites and age. In determining that it was not empowered to grant the petitioner a special permit, the BSA failed to adhere to its own precedent and to properly distinguish its prior determination in which it had found such authority on essentially the same facts. Accordingly, the BSA’s determination was arbitrary and capricious and lacked a rational basis, and was properly annulled (see *Knight v. Amelkin*, 68 N.Y.2d 975, 510 N.Y.S.2d 550, 503 N.E.2d 106; *Matter of Menachem Realty, Inc. v. Srinivasan*, 60 A.D.3d 854, 875 N.Y.S.2d 237; *Matter of Lucas v. Board of Appeals of Vil. of Mamaroneck*, 57 A.D.3d 784, 870 N.Y.S.2d 78).

Since the BSA erroneously concluded that it did not have the authority to grant the special permit, it failed to make the required findings regarding, among other factors, the impact of the enlarged building upon the essential character of the neighborhood (see N.Y. City Zoning Resolution §§ 73-622, 73-03). These findings are a condition precedent to the issuance of a special permit (see N.Y. City Zoning Resolution § 73-01; *Matter of Tandem Holding Corp. v. Board of Zoning Appeals of Town of Hempstead*, 43 N.Y.2d 801, 402 N.Y.S.2d 388,

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373 N.E.2d 282). Accordingly, the matter must be remitted to the BSA for a determination of whether the construction meets the standards of the Zoning Resolution for the issuance of a special permit (*see Matter of Mainstreet Makeover 2, Inc. v. Srinivasan*, 55 A.D.3d 910, 866 N.Y.S.2d 706).

N.Y.A.D. 2 Dept., 2009.

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