

VILLAGE OF MILLBROOK, NEW YORK

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In the matter of an Appeal Challenging a
Notice of Unsafe Buildings Issued by the
Zoning Enforcement Officer of the Village
Of Millbrook, New York,

by

BENNETT ACQUISITIONS, LLC
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DECISION
RICHARD B. GOLDEN
HEARING OFFICER

PRELIMINARY STATEMENT

This Decision is being issued in accordance with Millbrook Village Code § 86-2. It is a Decision born of a two-day hearing in which each party was provided ample opportunity to present their respective positions regarding a Village ordered demolition of private property. The undersigned Hearing Officer attended a site visit of the property at issue prior to the hearing, accompanied by the attorneys for the parties herein. The hearing was opened on April 29, 2010 and continued to June 29, 2010 at which time the hearing was closed. Post hearing memoranda were timely received on July 19, 2010.

At the outset I wish to commend the attorneys for the Village of Millbrook ("Village") and Bennett Acquisitions, LLC/Blumenthal-Brickman (collectively "Bennett") in presenting their respective cases clearly and professionally. Both the Village and Bennett were very well represented.

It should be noted here that although several issues were able to be stipulated to by the parties, no conclusion was reached by them as to whether this Decision is to have finality for the Village, or whether it is simply a recommendation to the Village Board of Trustees for their ultimate decision on the matter. Although I was not charged with determining that issue, I draw the Village's attention to Section 86-2 of the Village Code. That provision indicates that the Village Board of Trustees has an option as to whether to designate itself as a collective hearing officer, or to appoint a hearing officer (Village Code § 86-2(A)). However, regardless of whether the Board of Trustees acts as a hearing officer or a hearing officer is appointed, the Village Code provides that after the hearing the "hearing office[r] shall sustain, modify or withdraw the [Zoning Enforcement

Officer's] notice or order. If the notice or order is sustained or modified, such decision shall be deemed a final order." (Village Code § 86-2(C)).

FACTS AND DISCUSSION

The Village of Millbrook Zoning Enforcement Officer ("ZEO") issued a certain Notice of Unsafe Buildings ("Notice"), dated December 21, 2009 (although not served until January 2010), requiring the demolition and removal of six buildings on Bennett's property in the Village, collectively known as the "Halcyon Complex." The six buildings are identified as:

1. Halcyon Hall
2. Administration Center
3. Gage Hall
4. Aldrich Library
5. Alumnae Hall
6. Boiler Building

The ultimate issue to be decided is whether the Notice directing the demolition of the Halcyon Complex ought to be sustained, modified or withdrawn. (Village Code § 86-2(C)).

The Halcyon Complex is but part of a larger collection of buildings on approximately 27 acres known as Bennett College. The site was first developed in the late 19th century as a hotel. It was thereafter developed into the Bennett School for women, and experienced some expansion, including the additions of Gage Hall, Alumnae Hall and the Aldrich Library. The school was renamed Bennett College in the 1970s but was unable to survive and closed in 1977. For more than 30 years the Bennett College property has been neglected and, according to the owner's own cultural resources overview, has "fallen into a state of severe disrepair." Bennett College is proposed by its owners to be demolished in the course of the owner's plans for redevelopment of the property.¹ The property owner simply, but significantly, balks at the Village imposed deadline of this mutually agreeable goal.

¹ The progress of the proposed plans is advanced, although presently stalled, and the project has completed its State Environmental Quality Review ("SEQRA") process by receiving a determination of significance of a "Negative Declaration," *i.e.*, the proposed plan will not have a significant adverse impact on the environment. Such a determination concludes SEQRA; no additional SEQRA review is needed for the proposed plan. Although Dutchess County Supreme Court has apparently upheld this determination, the

Thus, the issue is distilled to the question of whether the Village properly ordered the demolition of the Halcyon Complex in a manner that is consistent with the stated purpose, procedure and standards set out in Chapter 86 of the Village Code. Although Bennett argues that it has taken appropriate steps to secure and safeguard the property so as to obviate the need for the Village's Notice, and regardless of the obvious evidence that such steps have proven less than effective in preventing intruders onto the site, the focus of this appeal is not whether Bennett's actions have been proper in this regard, but whether the Village ZEO acted appropriately and within his jurisdictional powers, both as to the timing directed in the Notice and substantively. Both issues must be considered in the context of all of the circumstances.

In order to address the situation of the deteriorating Halcyon Complex buildings the Village engaged a New York State licensed structural engineer (Wilfred Rohde) to inspect the premises and issue a report on the condition of the buildings. Mr. Rohde visited the site in September 2009 and issued a report the following month, assessing the structural integrity of the Halcyon Complex buildings, and other buildings on the property. As noted in his report the purpose of his engagement was to (1) verify two prior structural reports conducted by the The Weintraub Organization for Bennett in 2006 regarding Halcyon Complex (excluding Alumnae Hall and Boiler Building), (2) conduct an exterior inspection of the buildings, (3) review New York State Building Code requirements regarding unsafe buildings, and (4) prepare a report and recommendation. Utilizing the Village Code Chapter 86 and New York State Building Code criteria for unsafe buildings, Mr. Rohde confirmed Bennett's Weintraub conclusions that:

- A. Halcyon Hall, the Administration Center, Gage Hall and Aldrich Library were structurally unsound and beyond repair.
- B. Certain areas of the Administration Center had collapsed floor sections, while other areas were in a "state of imminent collapse."
- C. There was a "great" "possibility of continued progressive collapse in many other areas"

matter is presently on appeal. However, no stay is in effect according to Bennett's counsel. Consequently, there is nothing in the SEQRA process, or otherwise SEQRA related, that is inhibiting the demolition of the Halcyon Complex as ordered. Further, both the issuance of the Notice, and the work required to be performed in compliance with the Notice, are both "Type II" actions under SEQRA, requiring no further SEQRA review.

D. "Significant mold and asbestos may be present, thus posing a health hazard in the area."

Mr. Rohde also concluded that based upon his visual inspection of Alumnae Hall and the Boiler Building, that they were in such a state of neglect over many years that they were "beyond repair."

Ultimately, Mr. Rohde concluded that Halcyon Hall, Administration Center, Gage Hall, and Aldrich Library were "unsafe and dangerous and should be demolished" He further concluded that Alumnae Hall and the Boiler Building were unlikely to be able to be refurbished and "beyond repair," and that "[i]t is very likely that demolition or substantial reconstruction would be recommended for these buildings after an interior investigation is performed." In his testimony at the hearing he concluded that the wood framed buildings could not be secured, although the stone portions of the buildings might be able to be "preserved." However, his ultimate opinion was that the Halcyon Complex was "unsafe," and that in the event of a collapse the impacts of that collapse could, under certain circumstances, affect adjacent properties.

The ZEO testified at the hearing that he had visited the site and reviewed and relied upon the Rohde report prior to issuing his Notice. The Notice ordered the following buildings to be demolished and removed: Halcyon Hall, Administration Center, Gage hall, Aldrich Library, Alumnae Hall and the Boiler Building.

The ZEO testified that a collapse of buildings in the Halcyon Complex could affect adjacent properties. He also testified, consistent with Mr. Rohde, that the Halcyon Complex was "unsafe," although admitting that Alumnae Hall and Boiler Building were not in imminent danger of collapse but appeared to be "in a significant state of disrepair." He further stated that if it was determined that Alumnae Hall and the Boiler Building "could be salvaged, then by all means we would amend the requirements" of the Notice regarding those buildings. It appears that the ZEO considers both Alumnae Hall and the Boiler Building, as part of the Halcyon Complex, to be unsafe, even if they are not as unsafe as the other buildings in the Halcyon Complex, and is willing to reconsider his conclusion upon further evidence. However, until and unless Bennett provides such further evidence, both Alumnae Hall and the Boiler Building were deemed to be unsafe.

In 2009 the Village enacted a new Unsafe Buildings local law. Both sides stipulated that this new law governs the parties' rights and obligations. This local law is clearly an exercise of the Village's police power to act for the benefit of the people and property that the Village governs.

The Court of Appeals, in *Village of Carthage v. Frederick*, 122 N.Y. 268, 273 (1890), outlined the origins of the common law police power in New York:

“As early as 1785, by the charter of the city of Hudson, the right to legislate in regard to the 'police' power was expressly conferred. (Laws of 1785, chap. 83, § 11.) This power was then well known to the common law, and, twenty years before, had been defined by Blackstone as 'the due regulation and domestic order of the Kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners and to be decent, industrious and inoffensive in their respective stations.' (4 Black. Comm. 162.) Municipal corporations have exercised this power, *eo nomine*, for time out of mind by making regulations to preserve order, to promote freedom of communication and to facilitate the transaction of business in crowded communities.”

This common law “police power” resides only in the States, and not in the federal government (*see e.g., U.S. v. Morrison*, 529 U.S. 598, 618-619 (2000)). New York State, in its Constitution, has generally conferred its police power on local governments, including the Village of Millbrook, to adopt local laws on the subjects of, among others, “protection, order, conduct, safety, health and well-being of persons or property [within the boundaries of the local government].” N.Y. Constitution, Article 9, Section 2(c)(ii)(10). *See also, Berncolors-Poughkeepsie, Inc. v. City of Poughkeepsie*, 96 A.D.2d 595 (2d Dept.), *appeal dismissed*, 60 N.Y.2d 701 (1983).

In *Berncolors-Poughkeepsie*, the Second Department held:

“The delegation of the police power to a municipality is very broad. It includes 'everything essential to the public safety, health, and morals'. It has long been recognized that a local government, in the proper exercise of its delegated powers, may summarily abate a public nuisance, and it may compel the owner of the property involved to bear the cost of such abatement. In addition, the State Legislature has consistently recognized the need for a municipal body to be empowered to abate unsafe building conditions by demolition, and has vested such authority in the municipality's building inspector.”

Although *Berncolors-Poughkeepsie* involved specific statutory powers granted to cities under State law, Villages generally have the requisite general police power to enact local laws concerning demolition of buildings and structures. Villages are also the recipient of specific grants of authority from the State to order the demolition of buildings and structures and to collect the necessary related costs of demolition as an assessment on the property, "including reasonable and necessary legal expenses incidental to obtaining an order to demolish." See N.Y. Village Law § 4-414; N.Y. General Municipal Law § 78-b.

A threshold issue to be addressed in this hearing is the standard to judge the propriety of the Notice of the ZEO.

A particularly apt parallel in attempting to determine the standard of review of the Building Inspector's findings of an unsafe condition is the line of cases in condemnation jurisprudence. Both the condemnation processes concerning blighted areas, and the demolition processes of Chapter 86 concerning unsafe buildings, have at their core the exercise of the general governmental police power to destroy individual private property (and the concomitant property rights inherent therein) for the benefit of the general public. It is of no moment for our purposes whether we apply the law in relation to an urban blighted area or, as here, the demolition of decaying buildings in a bucolic Village setting, for we are not assessing whether the facts at hand rise to the particular elements necessary to support an order of condemnation, but whether the Village has the inherent right to enforce its police powers of an ordered demolition, and the deference that must be given to municipal officials in the application of these powers.

Last year the First Department, in *Develop Don't Destroy (Brooklyn) v. Urban Development Corp.*, 59 A.D.3d 312, 321-322 (1st Dept.), *lv. to appeal denied*, 13 N.Y.3d 713 (2009), summarized the reach of governmental power in this regard, and the judicial deference required. It held that:

"[federal and State case law,] as a matter of basic constitutional design, counsel extreme judicial circumspection in assessing the adequacy of the public purposes advanced by the legislature and its agencies in support of government actions falling, even arguably, within the state's police power. As Justice Douglas wrote in *Berman*, '[t]he definition [of the police power] is essentially the product of legislative determinations addressed to the purposes of government ... Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive' (348 U.S. at 32). This admonition

has been strictly followed and nowhere more so than in cases where the purpose advanced for the proposed governmental action is, as it was in *Berman* and is here, that of alleviating or preventing 'substandard and insanitary' conditions, or 'blight.'

"These terms, whose potentially capacious reference has not been meaningfully reduced by statutory definition (*see e.g.* UDCA 6253[12]), are to be understood 'liberally' so as not to unduly constrict the governmental prerogative to take measures directed at improving the urban environment (*see Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d 478, 481-484 [1975]). This definitional check upon judicial revision of determinations substantially and appropriately committed to the policy-making branches of government is complemented and reinforced by a standard of review that may with great understatement be described as lenient: 'When [the agencies to which the initial blight determination has been committed] have made their finding, not corruptly or irrationally or baselessly, there is nothing for the courts to do about it, unless every act and decision of other departments of government is subject to revision by the courts' (*Kaskel v. Impellitteri*, 306 N.Y. 73, 78 [1953], *cert. denied* 347 U.S. 934 [1954]).

Here, the ZEO has made a determination that the buildings noted were "unsafe." As the term "blight" was noted in *Develop Don't Destroy* not to be "meaningfully reduced by statutory definition," nor has the Millbrook Village Code meaningfully defined an "unsafe building." True, the Village Code generally defines an "unsafe building" to be buildings or structures "which are structurally unsafe, unsanitary or not provided with adequate egress, or which constitute a fire hazard or are otherwise dangerous to life, health or safety" (Section 86-1(A)). However, this definition simply begs the question as to the definitions of "structurally unsafe," "unsanitary," "adequa[cy]" of egress, "fire hazard," or "otherwise dangerous to life, health or safety." However, simply because every word is not precisely defined does not invalidate the local law or reduce the breadth of the police power involved. As noted by the Supreme Court in *Broadrick v. Oklahoma*, 413 U.S. 601, 607-608 (1973):

"Words inevitably contain germs of uncertainty and . . . there may be disputes over the meaning of . . . terms in [the statute] But what was said in *Letter Carriers, supra*, 413 U.S., at 578-579, 93 S.Ct., at 2897, is applicable here: 'there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising

ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.”

Thus, the issue at hand for decision may be framed as follows: Was the Zoning Enforcement Officer’s determination that the Halcyon Complex was “unsafe and dangerous pursuant to Village of Millbrook Village Code Chapter 86” a corrupt, irrational or baseless determination (*Develop Don’t Destroy, supra* at 321-322). I find that it was not. The Notice appears clearly to have been based upon a personal inspection of the site by the ZEO (who is a trained and experienced Building Inspector) and the conclusions of a structural engineer engaged to give his recommendations on the safety of the buildings.

Bennett argues that the Notice and actions of the Village are subject to an arbitrary and capricious standard, and that the ZEO’s actions fail that standard in the following respects: (1) the short timeframe demanded in the Notice for the demolition to occur, (2) the long time frame to accomplish the demolition enforcement and appeal, (3) ordering the demolition of buildings without specifically entering and inspecting their interiors, (4) ordering the demolition of Alumnae Hall and Boiler Building without a specific recommendation to do so by the Rohde report, (5) ordering the demolition of buildings that were assessed by the Town of Washington Assessor as having significant value, and (6) proceeding with a demolition directive without the Village determining that an emergency exists pursuant to either Section 86-3 or Section 86-1(F).

Even if one were to argue that the applicable standard is not the corrupt, irrational or baseless standard as proposed by *Develop Don’t Destroy, supra*, but instead whether the ZEO’s Notice and directives were supported by substantial evidence or were arbitrary or capricious (*see, e.g., Idewild 94-100 Clark, LLC v. City of New York, 27 Misc. 3d 1006 (Sup. Ct. 2010)*), I conclude and hereby find that the evidence detailed above clearly supports a finding that the ZEO’s Notice and findings therein are supported by substantial evidence and were not arbitrary or capricious.

The time frame noted in the Notice was indeed short and, according to the ZEO’s testimony, not intended to be the actual time frame for demolition. Clearly, a reasonable time frame must be set by the ZEO. However, the ZEO’s failure to do so in the Notice

does not render the Notice ineffective, and on this appeal the Hearing Officer has the power to modify the Notice in this regard.

Bennett's complaint of the extended time to resolve this matter does not rest with the Village. Most, if not all, of the time delay since the issuance of the Notice clearly is the consequence of Bennett's appeal of the Notice. That is not to say that Bennett ought not to have exercised its rights to appeal, but Bennett also cannot complain about the delay occasioned by its own actions in appealing the Notice, which effectively stayed enforcement of the Notice's directives. This time delay is the fault of neither party, and in any event does not render the Notice ineffective; it is simply a by-product of the appeal process occasioned by challenging the Notice.

Bennett's objection that it was arbitrary and capricious for the ZEO to order the demolition of buildings without entering and inspecting the interiors also falls flat. The ZEO inspected the exterior of the buildings during his site visits and relied on a structural engineer's report. I find that it is reasonable to rely upon the advice of a structural engineer and the personal exterior inspection of the buildings by an experienced and trained Building Inspector and ZEO to determine whether a building is unsafe. There is no requirement apparent in Chapter 86 or elsewhere, and Bennett proffered none, that demands that a decision of a building's safety can only be made after an internal building inspection. I also find it reasonable that both Alumnae Hall and the Boiler Building could be concluded to be unsafe by the ZEO, given the conclusions in the Rohde report, which were confirmed in both Rohde's and the ZEO's testimony. *See St. David's Anglican Catholic Church, Inc. v. Town of Halfmoon*, 11 A.D.3d 874 (3d Dept. 2004).

Bennett's suggestion that a building cannot be deemed to be unsafe if it is assigned a significant assessment value by the Town Assessor is also without merit. The calculations of assessed value by the Town Assessor on a particular parcel of property, intended to maximize the spreading of the tax burden on all properties in the Town, are different from the Village Code issues underpinning a determination of the unsafe nature of a building. In any event, there is nothing in the record, including the testimony of the Town Assessor (who did not take part in assessing the value of the Bennett property, and has never visited the property for assessment purposes) that concluded that the issue of the unsafe nature of the Halcyon Complex was actually taken into consideration by the

prior Town Assessor that established the specific valuation for the property. Therefore, all the testimony and exhibits in this regard are irrelevant.

Bennett also errs in trying to engraft a requirement that an emergency must exist and be declared as a condition precedent to the issuance of a Notice of Unsafe Buildings. The statutory scheme in Chapter 86 provides no support for such a conclusion. Both Section 86-3 and Section 86-1(F) allow for immediate action by the Village without an opportunity of the property owner to be heard prior to such action, which is more extreme than the process followed here for uninhabited buildings. Any such extreme actions by the Village, accomplished without a property owner having an opportunity to be heard under such emergency provisions, were not deemed necessary in the Bennett matter, and in any event would alter the standard of review for such actions different than those that apply to the Notice actually issued. *See, e.g., Rapps v. City of New York*, 54 A.D.3d 923 (2d Dept. 2008). In the end, there is simply no requirement or need in Chapter 86 for an action to be declared an emergency for a Notice of Unsafe Buildings to be valid.

The only infirmity that appears in the ZEO's Notice ordering the demolition and removal of the noted buildings is the basis noted by the ZEO that the Alumnae Hall and Boiler Building would not be "cost effective" to refurbish to a safe condition. It is not within the purview of the ZEO to ascertain the cost effectiveness of refurbishment. Chapter 86 strictly prescribes his authority. Whether particular work is cost effective is necessarily the product of several factors uniquely within the province of a property owner, balancing not only the cost, but also the timing of the cost, and the goals of the property owner, including the development of its property. However, this infirmity in the Notice has no consequence as it is stated by the ZEO to be in the alternative, *i.e.*, the refurbishing and reuse of the noted buildings were determined to be both impossible and not cost effective. Therefore, there is a sufficient finding by the ZEO that both Alumnae Hall and Boiler Building were beyond repair and not possible to refurbish. The "cost effectiveness" language is simply surplusage.

Finally, the timeframe noted in the Notice of Unsafe Buildings is clearly now irrelevant, if it was ever relevant. The date of February 28, 2010 has passed, and the ZEO testified that it was not a true date for concluding demolition, but only a date for discussion purposes.

In conclusion, and based upon the entirety of the Record and the memoranda submitted by counsel, I hereby sustain the Notice of Unsafe Buildings issued in regard to the Halcyon Complex, except to order that it be modified to require that the ZEO, within 30 days of the date of the filing of this Decision with the ZEO, determine a reasonable start date and a reasonable completion date for the demolition of all of the structures required by the Notice to be demolished. These start and completion dates must take into consideration reasonable time frames for the owner to secure all of the necessary permit approvals required to perform the work. These dates should only be established after consultation with the New York State Office of Parks, Recreation and Historic Preservation, the New York State Department of Environmental Conservation, such public utilities as necessary to accomplish the purported need for relocation of utility lines, and any other relevant permitting authority. It shall then be the responsibility of the property owner to carry out that demolition in such time frame as the ZEO determines.

Dated: August 29, 2010



RICHARD B. GOLDEN, HEARING OFFICER