No. 197
Rocky Point Drive-In, L.P.,
Appellant,
v.
Town of Brookhaven, et al.,
Respondents.

Linda U. Margolin, for appellant.
Maureen T. Liccione, for respondents.
Long Island Builders Institute, Inc.; Association of Towns of the State of New York, amici curiae.

Rivera, J. :

Rocky Point Drive-In, L.P. ("Rocky Point"), a land owner seeking to develop property located in the Town of Brookhaven ("Town"), appeals an order of the Appellate Division which reversed a declaratory judgment of the Supreme Court on the

law and facts, and which determined that Rocky Point's site plan application should not be reviewed under a former, more favorable, zoning provision. We find no basis to overturn the Appellate Division's order and affirm.

Rocky Point owns a parcel of land approximating 17 acres ("the parcel") in the Town. Over several years Rocky Point, and its predecessor in interest, Sans Argent, Inc. ("Sans Argent"), have tried unsuccessfully to secure approval from the Town to develop this parcel as a site for a 152,050 square foot Lowe's Home Improvement Center ("Lowe's Center").

The factual history is extensive but, as relevant here, ostensibly begins in 1997, when the Town adopted a comprehensive plan creating a new "commercial recreation" ("CR")zoning classification.[1] The plan cited the desire to draw visitors, and the potential to "attract new types of private recreation, such as sports complexes, amusement and theme parks, ice hockey and ice skating rinks." The parcel had been zoned as "J Business 2" (J-2), which permitted retail stores as of right, but did not permit "commercial centers" which were defined by Brookhaven Town

[1]Zoning laws must be enacted in accordance with a comprehensive land use plan (*see* Town Law § 263; *Asian Americans for Equality v Koch*, 72 NY2d 121, 131 [1988]). "The requirement of a comprehensive...plan not only insures that local authorities act for the benefit of the community as a whole but protects individuals from arbitrary restrictions on the use of their land" (*id*.) Essentially, this requirement acknowledges that "consideration must be given to the needs of the community as a whole" (*Udell v Haas*, 21 NY2d 463, 469 [1968]).

Code as "[a]ny building or buildings . . . used by one (1) or more enterprises for a commercial purpose . . . where the proposed use occupies a site of five (5) acres or more." Accordingly, all of the parcel's previous uses--a drive-in movie theater and golf driving range--were non-conforming. Although the plan did not target the parcel, the parcel's previous uses would have been brought into compliance if it was rezoned to CR.

The Town had not taken any measures in pursuance of the CR classification, as per the comprehensive plan, until February, 2000, when the Brookhaven Town Board ("Board") discussed, for the first time, specifically rezoning the subject parcel to CR. The Board announced a date for a public meeting to be held on the issue. Shortly before the hearing, on March 2, 2000, Sans Argent submitted a site plan application to the Town for the Lowe's Center to be built on the parcel. The proposed Lowe's Center would not have complied with the CR zone classification. The Board thereafter held a public hearing to vote to rezone the subject property to CR. Sans Argent, aware of the impending vote, and seeking to avoid the rezoning, submitted a protest, triggering Town Law § 265 and its requirement that the zoning change pass by a super majority vote.[2] Five of the seven Board members voted to rezone, thus falling short of the super majority

[2]Town Law § 265 reads, in pertinent part: "except that any such amendment shall require the approval of at least three-fourths of the members of the town board in the event such amendment is the subject of a written protest."

requirement.[3] Nevertheless, the Town declared the parcel rezoned to CR and declined to continue processing Sans Argent's application.

Sans Argent then filed suit in Supreme Court, Suffolk County, challenging the Board's rezoning as invalid. While the suit was pending, the parties entered into an agreement under which respondents would continue processing Sans Argent's application if Sans Argent submitted a new site plan with an accompanying application for a use variance to the Zoning Board of Appeals ("ZBA").

Respondents issued a notice of violation and on December 1, 2000, Sans Argent submitted a new site plan and application for a use variance. A few months later, in March, Supreme Court held null and void the Town's rezoning of the parcel, for failure to secure the requisite super majority vote.

Shortly thereafter, the Town Board adopted a second resolution that rezoned the parcel to CR--again without the requisite super majority. Sans Argent challenged this vote, and after commencement of a second action, Supreme Court declared the second rezoning null and void. In June, 2002, the Town Board amended the Brookhaven Town Code to allow for a simple majority vote of approval over protests for rezoning of property, rather than a super majority vote. Then, in October 2002, the Town

[3]Three members voted in favor, one in opposition and one recused himself.

adopted a resolution, for the third time, rezoning the parcel to CR.

Rocky Point, as the successor in interest to Sans Argent, filed the instant action seeking a judgement declaring that the site plan application was subject to review under the previous J-2 zoning classification because the Town had unduly delayed the review of the application. In 2004, Supreme Court granted the Town summary judgment, and the Appellate Division, Second Department, reversed, finding that triable issues of fact existed as to whether special facts warranted application of the J-2 zoning classification, and concluding that there was proof indicating selective enforcement of the Town's zoning provision (37 AD3d 805 [2d Dept. 2007]).

At a non-jury trial, Rocky Point introduced several various site plan applications submitted to the Town between 1986 and 2003. All, it claimed, proved the Town was selectively enforcing the CR classification. Supreme Court agreed that the Town treated Rocky Point's application differently from other applications, and that there was significant delay in the process. Therefore, special facts warranted the application of the previous J-2 zoning classification to Rocky Point's application. The Town appealed and the Second Department reversed, finding Supreme Court's determinations were not supported by the evidence adduced at trial (93 AD3d 653, 654 [2d Dept. 2012]). We granted Rocky Point leave to appeal and now

affirm.

As a general matter, a case must be decided upon the law as it exists at the time of the decision (*see Pokoik v Silsdorf*, 40 NY2d 769, 772 [1976]). In land use cases, the law in effect when the application is decided applies, regardless of any intervening amendments to the zoning law (*id*. at 773). Rocky Point seeks to avoid this rule and have the zoning law in effect at the time it submitted its application apply to its request, arguing it falls within the "special facts" exception to the general time of decision rule.

Under the special facts exception, where the land owner establishes that they are entitled as a matter of right to the underlying land use application---here, a "site plan"--the application is determined under the zoning law in effect at the time the application is submitted (*id*. at 772 [citing *Boardwalk & Seashore Corp. v Murdock* , 286 NY 494[1941]; *Rosano v Town Bd. of Town of Riverhead*, 43 AD2d 728 [2d Dept 1973]]). In order for a land owner to establish entitlement to the request as a matter of right, the land owner must be in "full compliance with the requirements at the time of the application," such that "proper action upon the permit would have given [the land owner] time to acquire a vested right" (*Pokoik*, 40 NY2d at 773 [citing *Marsh v Town of Huntington*, 39 AD2d 945 [2d Dept 1972]; *Golisano v Town Bd. of Town of Macedon*, 31 AD2d 85 [4th Dept 1968]]). In addition to showing entitlement to the request as a matter of right, the

land owner must also show "extensive delay indicative of bad faith," (*Alscot Inv. Corp. v Inc. Vil. of Rockville Ctr .*, 64 NY2d 921, 922 [1985]), "unjustifiable actions" by the municipal officials, (*Pokoik*, 40 NY2d at 773), or "abuse of administrative procedures" (*id*. at 773["the village improperly delayed reviewing the application and the board presented unsatisfactory reasons for denial, resulting in the disregard of petitioner's rights"]).

As the record establishes, Rocky Point fails to meet the threshold requirement that it was entitled to the requested land use permit under the law as it existed when it filed its application. Rocky Point does not dispute--and it cannot--that it was out of compliance with the zoning classification in effect when it submitted the application. At that time, a substantial portion of the parcel was zoned J-2, which did not permit "commercial centers" of the type Rocky Point sought to build. That is, J-2 prohibited commercial buildings that "occup[y] a site of five (5) acres or more". The proposed Lowe's Center, as planned, exceeded this spatial limit.

Rocky Point argues that the special facts exception should apply to its case even though it does not technically meet the J-2 requirements as of right, because the Town historically ignored the zoning requirements. According to Rocky Point, the Town targeted Rocky Point for selective enforcement, seeking to subject Rocky Point to the zoning requirements while intentionally failing to impose it on similarly situated

applicants. Rocky Point argues, therefore, it should not be held to the strict language of the zoning requirement.

The Appellate Division rejected this claim, based on a lack of factual support in the record (93 AD3d at 654). When the Appellate Division decides that a factual finding is against the weight of the evidence, that is itself a new finding of fact (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 498 [1978]). In such case, our review of the Appellate Division's decision is limited; we review the record to determine which factual findings "more nearly comport with the weight of the evidence" (*State v Daniel F.*, 19 NY3d 1086, 1087 [2012]).

The Appellate Division, reviewing the facts, disagreed with the Supreme Court's conclusion that "[respondents] intentionally and in bad faith delayed processing the [Rocky Point's] site plan application, and selectively enforced the prohibition against commercial centers in a J-2 zoning district against [Rocky Point]" (93 AD3d at 654). The record clearly demonstrates that similarly situated applicants referred to by Rocky Point were not similarly situated at all; they either fell within an exception or were within compliance with the J-2 zoning classification. Thus, the Appellate Division's finding more nearly comports with the weight of the evidence.

Rocky Point also argues that the Appellate Division erred when it applied a "bad faith" requirement, rather than a negligence standard to its claim. In support of this argument

Rocky Point asserts that we have previously held that negligence may trigger application of the special facts exception. Rocky Point places significant reliance on our decision in *Faymor Dev. Co., Inc. v Bd. of Standards and Appeals of City of New York* in support of its argument. In *Faymor* the applicant would have had, in the absence of municipal wrongdoing, a vested right (45 NY2d 560,566[1978]). Here, as Rocky Point concedes, it cannot meet the zoning requirements and did not have a vested right. Rocky Point has failed to meet the threshold requirement of entitlement as of right, and we have no reason to upset the Appellate Division's factual findings of a lack of record support for selective enforcement by the Town, because the special facts exception is inapplicable to his case, under any standard.

Accordingly, the order of the Appellate Division should be affirmed with costs.

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Order affirmed, with costs. Opinion by Judge Rivera. Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott and Abdus-Salaam concur.

Decided November 14, 2013