Matter of Moore v Zoning Bd. of Appeals, Town of Mamakating, N.Y.

2006 NY Slip Op 30872(U)

May 17, 2006

Supreme Court, Sullivan County

Docket Number: Index No. 188/06

Judge: Robert A. Sackett

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

In the Matter of the Application of

PATRICIA AND KEVIN MOORE,

Petitioners,

Decision & Judgment

- against -

ZONING BOARD OF APPEALS, TOWN OF MAMAKATING, NEW YORK, JAMES BARNETT, as Chair, CLIFF ASDAL, WILLIAM FEDUN, FERN LAKS, ANDREW LEWIS, as Members,

Respondent,

YUKIGUNI MAITAKE MANUFACTURING CORPORATION OF AMERICA,
as appellant to the Zoning Board,

Respondent,

For a judgment pursuant to Article 78 of the Civil Practice Laws and Rules, Annulling and Voiding the Decision and Resolution of the Zoning Board, dated December 22, 2005 Granting Variances to Respondent.

Motion Return Date: March 31, 2006
RJI No.: 52-24813-06
Index No.: 188/06

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SACKETT, J.:

Petitioners Patricia A. Moore and Kevin M. Moore commenced this CPLR article 78 proceeding to review a determination of the Zoning Board of Appeals [ZBA] of the Town of Mamakating, Sullivan County, New York, dated December 22, 2005, granting variances to respondent Yukiguni Maitake Manufacturing Corporation of America for construction of its proposed mushroom manufacturing facility, on the ground, *inter alia*, that the ZBA exceeded its jurisdiction and usurped the power of the Planning Board by granting said variances.

Respondents ZBA, James Barnett, as Chair, Cliff Asdal, William Fedun, Fern Laks, and Andrew Lewis, as members, [collectively referred to as respondent ZBA] appear and oppose the motion, as does respondent Yukiguni Maitake Manufacturing Corporation of America [Yukiguni].

Respondent Yukiguni proposes to build a mushroom plant on an approximately 48-acre parcel, zoned for light industrial/office development and located at the southeast corner of the intersection of New York State Route 209 and McDonald Road. The plant will be constructed in phases. Upon completion, the main plant will be four stories with a footprint of 206, 344 square feet and have a total of 825, 377 square feet of floor space. The height of the main production building will be 65 feet with utility structures that extend an additional 15 feet in height, requiring Yukiguni to apply to the ZBA for height variances from the permissible three stories and 45-foot maximum height. Variances were also required for the height of the accessory enclosed utilities on top of the buildings, the reduction of the number of loading docks and the development coverage from 35% to 45% for this use. There were two public hearings, the latter of which was concluded on April 28, 2005. In addition, there were several public meetings, occurring on February 26, 2004, November 3, 2005, and the final one on December 22, 2005, after which the ZBA issue its decision and resolution, granting Yukiguni's application for these variances.

Petitioners claim that the primary building, at almost 1 million square feet and standing 80 feet tall, will be the largest building in the Town of Mamakating. The proposed facility is also

almost three times larger than the next largest building, the Kohls' warehouse facility, which is approximately 600,000 square feet.

Prefatorily, petitioners argue that because the ZBA rendered its decision on the appeal more than 62 days after the public hearing on April 28, 2005, the decision is null and void by operation of law. Town Law §267-a(8), reads as follows: "The board of appeals shall decide upon the appeal within sixty-two days after the conduct of said hearing. The time within which the board of appeals must render its decision may be extended by mutual consent of the applicant and the board."

Town Law §267-a(13)(b), entitled "Default denial of appeal" reads, as follows:

> "In exercising its appellate jurisdiction only, if an affirmative vote of a majority of all members of the board is not attained on a motion or resolution to grant a variance or reverse any order, requirement, decision or determination of the enforcement official within the time allowed by subdivision eight of this section, the appeal is denied. The board may amend the failed resolution within the time allowed without being subject to the rehearing process as set forth in subdivision twelve of this section."

All parties concede that at the February 26, 2004 ZBA meeting, Yukiguni consented to an extension of the 62-day period. Petitioners argue, however, that the extension was not open-ended but rather was to commence upon the conclusion of the ZBA public hearings, to wit, on April 28, 2005. Because the ZBA failed to act within the statutory time period, petitioners contend that pursuant to Town Law §267-a(13)(b), the appeal was denied by operation of law. The Court concurs with petitioners that the record from the February 24, 2005 ZBA meeting evinces a consent by Yukiguni to extend the time within which the subject appeal was to be decided upon within 62 days after the close of the public hearing which occurred on April 28, 2005. Nevertheless, the Court does not find that the ZBA's failure to act within the statutory time period renders the decision in question void as a matter of law.

To this end, the Court finds petitioners' reliance on Matter of Tall Trees Construction Corp. v Zoning Bd. of Appeals of the Town of Huntington, (97 NY2d 86 [2001]), for the proposition that an unambiguous reading of the Town Code and the Town Law render the ZBA determination at issue herein null and void misplaced. Rather, Town Law §267-a(13)(b), added as a 2003 amendment to Town Law §257-a, is relevant to the ZBA's voting requirements to the extent that "an

appeal or variance is considered to be denied by statute if a **majority vote** (emphasis added) cannot be obtained to grant a variance or to reverse a determination appealed from within the time prescribed therefor" (Rice, Practice Commentaries, McKinney's Cons Laws of NY, Book 61, Town Law §267-a, at 274). Considering the practical applications of the aforesaid section of the Town Law, the Court is inclined to agree with respondent Yukiguni that if one were to subscribe to petitioners' interpretation, an untenable scenario would result in which the ZBA chose not to act within the 62-day statutory time frame, making failure to decide tantamount to a denial. The more logical interpretation of Town Law §267-a(5), is that the applicant, in a case delayed longer than the specified time, is entitled to apply for judicial review based on exhaustion of remedies.

Turning to the merits, it is well established that when reviewing a determination of a zoning board of appeals, a court is limited to determining whether the board's action is illegal, arbitrary, or an abuse of discretion (Matter of Bivona v Town of Plattekill Zoning Bd. of Appeals, 268 AD2d 877, 879 [2000]). In the present case, the Court finds that the ZBA did not exceed its jurisdiction in granting YMMC the requested variances. Of the four variances YMMC appealed, one was to permit construction of a building 65 feet in height, where the maximum building height permitted by Town Code §199-7, Schedule I, is forty-five; and one to permit construction of accessory utilities atop the proposed building 15 feet in height, where the maximum height for rooftop utilities permitted by Town Code §199-11(B)(1) is 10 percent of the building height.

Succinctly stated, petitioners contend that the ZBA was without legal authority under the requirements of the Mamakating Town Code to grant the aforesaid variances relating to the height of the accessory utilities to be located atop of the proposed building, and that this authority rests solely with the Town Planning Board. In addition, petitioners argue that although Yukiguni described the proposed plant as a four-story building, with a utility structure on top, the utility structure actually comprised a fifth floor which is not permitted by the Town Code.

With respect to the first prong of petitioners' argument, it is uncontested that Yugikuni asked for a variance from Mamakating Code §199-11(B)(1)(b), with respect to utility structure height. Said code, entitled "Height regulations," which refers, *inter alia*, to the heating, ventilation, air conditioning and other accessory utilities, provides that "[f]or accessory utilities atop buildings in the LIO, IO, and PO Districts, the same restrictions apply; however, the Planning Board, at its

discretion, may approve an accessory utility height in excess of 10% of the building's height, provided the following: [1] The Planning Board shall require a visual simulation of the height and its effect on the surrounds in accordance with §199-26X(11)(c) of this chapter; and [2] The building on which said utility is situated is set back from every lot line a distance at least equal to the height."

According to petitioners, the aforesaid language clearly and unequivocally divests the ZBA from jurisdiction to grant variances relating to the height of accessory utilities. The Court is not similarly persuaded, particularly in light of the State Environmental Quality Review Act ["SEQRA"] Findings Statement issued by the Planning Board on May 24, 2005, wherein it acknowledged the problems inherent in the language contained in Town Code §199-11. More specifically, the Planning Board stated:

> "While Section 199-11 of the Mamakating Code does in fact give the Planning Board some discretion regarding the height of the accessory utilities, in a situation as presented here where the accessory utilities will be enclosed and screened pursuant to Section 199-13(I) of the Mamakating Code, there was some ambiguity, at worse, or duplication of jurisdiction, at best, regarding the request for an approval of the height for the accessory utilities and their enclosure. Section 199-13(I) provides that mechanical equipment and other utility hardware on roofs shall be located and/or screened so as not to be visible from any public ways. Section 199-13 of the Mamakating Code regulates "accessory structures" generally. It is the opinion of the Planning Board, and apparently the opinion of the applicant as well, that by enclosing the accessory utilities the enclosure can be categorized as an accessory structure which must comply in all respects with the requirements of the Code applicable to the principle building (see Section 199-13(D)), thereby investing the Zoning Board of Appeals with the authority and obligation to determine the applicant's request for a height exceeding 10% of the building's height as a variance request, in lieu of a determination of the Planning Board under Section 199-11. In this matter, the applicant itself has requested the Zoning Board of Appeals to entertain jurisdiction apparently pursuant to its own interpretation of the Mamakating Code."

In light of the foregoing, it was determined by both the Planning Board and the ZBA that the ZBA had jurisdiction to review and decide the issue of the height of the rooftop accessory utilities. Contrary to petitioners' arguments, the ZBA did not exercise its power in such a way as to, in effect,

usurp the Planning Board's jurisdiction.

Petitioners next argue that there is no provision of Town Code §199 authorizing the ZBA to grant variances for "utility structures," the term used by Yukiguni during the public hearings. In sum, petitioners claim that since what Yugikuni proposed to build does not comply with any legal provisions of the Mamakating Town Code, it manufactured a description of a "utility structure," and that, in fact, the 15-foot high utility area on the roof of the subject building is a "building" under Town Code §199-6. More specifically, petitioners contend that the ZBA's granting of a variance under Town Code §199-13(D) for additional stories is not authorized by the Town Code. The Court agrees with petitioners that YMMC used a variety of words, such as, a penthouse, to describe the utility structure. Petitioners are also correct in their assertion that the International Building Code definition of a utility penthouse (as provided to the ZBA by the applicant at the November 3, 2005 meeting) is irrelevant to the language cited in the Town Code, but nevertheless it is clear from the transcripts of the hearings that the subject 15-foot high structure is not a "fifth" floor or a building, as petitioners so vigorously suggest, but a rooftop enclosure to be used to house and protect the accessory utilities. In this regard, the fact that the ZBA granted the requested variance for "accessory utilities" when, in fact, the appeal requested a variance from the utility structure height is of no moment. Significantly, notwithstanding the purported confusion engendered by what petitioners describe as Yukiguni's "semantic approach to [the] variance appeal process", it appears that based on the record of the public meetings and hearings, there was much discussion and deliberation by the ZBA on the design and purpose of the structure in question. In any event, in granting the requested variances, the ZBA recognized this and stated:

> "A question has arisen as to whether this penthouse constitutes an attached 'accessory structure' or is part of the proposed rooftop accessory utilities (See SEQRA Finfings Statement at p. "3"). It has been suggested that if the penthouse constitutes an accessory structure, then a variance from Town Code §199-13(D) is also necessary.
> The Board finds that the penthouse is part of the rooftop accessory utilities. Moreover, even if Town Code §199-13(D) were applicable, this section of the Code merely requires that accessory structures comply with the zoning requirements applicable to principal buildings. It is duplicative of the applicant's requests for variances needed to construct the proposed facility. Therefore, to the extent

> that relief from Town Code §199-13(D) may be necessary (if at all), the Board shall also consider granting it on this application" (ZBA Decision and Resolution, December 23, 2005, at 2-3).

Thus, setting aside semantics, the Court finds that the ZBA's Decision and Resolution clearly determined that the applicable section of the Town Code governing "accessory utilities atop buildings" was, indeed, Town Code §199-11(B)(1) and granted Yukiguni's application based upon that conclusion.

Petitioners make much of the fact that the confusion surrounding the design and purpose of the 15-foot high utility enclosure stemmed, in large part, from Yukiguni's variance request, a fact discussed by ZBA members at their November 3, 2005 public meeting. But this is, in and of itself, insufficient to support petitioners' argument that the proposed structure is actually a building under Town Code §199-6. Because the specific code reference to the height of heating, ventilation, air conditioning and other accessory utilities appears in Town Code §199-11(B)(1), this provision is applicable to the variance requested by Yukiguni.

Finally, contrary to petitioners' contentions, the Court's review of the record demonstrates clearly that the ZBA, in reaching its determination with respect to the separate variances requested, properly applied the balancing test and appropriately considered the statutory factors (*see* Town Law §267-b(3); Town Code §199-56[D]). Pursuant to Town Law §267-b(3), the zoning board must engage in a balancing test by weighing the benefit the grant of the area variance would have to the applicant against the detriment to the health, safety and welfare of the neighborhood. The factors to be considered by the zoning board are as follows: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance (Town Law §267-b[3][b]).

A review of the ZBA's determination demonstrates that it faithfully adhered to the prescribed statutory criteria and weighing analysis and that its rationality is supported by sufficient evidence in the record. Petitioners correctly argue that a negative declaration under SEQRA is not dispositive on the issue of an application's impact on a neighborhood (*see* Matter of Chadwick Gardens Assocs., LLC v City of Newburgh Zoning Bd. of Appeals, 273 AD2d 232 [2000]). However, there is no merit to petitioners' argument that the ZBA requirement to fully consider the specified criteria was effectively rendered meaningless by the legal advice the ZBA received from its "Special Counsel," who allegedly informed the ZBA members that they were required to act consistently with the Planning Board's SEQRA Findings Statement. In fact, although ZBA counsel advised the ZBA board members that the Findings Statement was something the board members were required to consider so that their "ultimate determination dovetail[ed] with those findings," he also stated that the findings were not "determinative" of the ZBA's consideration of the town law (November 3, 2005 ZBA meeting, at 76). Nor is there evidence that anyone other than one ZBA member, Andrew Lewis, did not read the Environmental Impact Statement (December 22, 2005 ZBA meeting, at 23).

The action of the ZBA in granting the area variances to Yukiguni to permit the construction of the mushroom plant pursuant to Town Law §267-b(3) is rational and not arbitrary and capricious, notwithstanding that the applicant's difficulty was self-created because YMMC purchased the subject property knowing of the Town of Mamakating's restrictive bulk requirements for that parcel. As required by Town Law §267-b(3)(b), the ZBA addressed the five specific criteria. First, it determined that no undesirable change would be produced in the character of the neighborhood, which is within the LIO zoning district and which has substantial commercial/light industrial development, including the Kohl's Distribution Center warehouse, the Sullivan Industries warehouse, and a small office building, and that the addition of the applicant's mushroom plant will not result in an undesirable change to nearby properties due to noise, water, odors, increased traffic or lighting. The ZBA's conclusion that the variances would have a minimal impact on nearby properties is supported by evidence that YMMC will incorporate into its plans certain measures and safeguards with respect to the proposed facility's well, lighting and landscaping, the color of the proposed buildings and their roofs, and traffic safety measures.

Further, the ZBA concluded that as to lot coverage, building height and the height of the roof-

top utility enclosing structure, Yukiguni could not construct the proposed facility without the grant of the requested variances, and that while Yukiguni could construct the facility with a lesser number of loading docks, to do so would add unnecessary expense to the project and compromise the mushroom plant's utility as a building. The ZBA also concluded that the increase in lot coverage – the Town Code permits 35% lot coverage, whereas Yukiguni proposes 45% – is necessitated only by the fact that substantial portions of the lot are comprised of wetlands, streams and buffer zones, and the size of the variance is not substantively significant for the proposed facility. Moreover, while the ZBA recognized that the requested height variances are significant, such variances are necessary for the proposed project and will not adversely impact on the character of the neighborhood or nearby properties.

The ZBA's conclusion that the proposed variances would not adversely impact the physical or environmental conditions of the neighborhood is also supported by the record which includes the Environmental Impact Statement and the SEQRA Findings Statement. Reviewing the evidence in the record in light of the ZBA's compliance with its obligation to apply the statutory balancing test, the Court concludes there is a rational basis for the determination granting the variances. "That there may also be evidence in the record to support a denial of the variances, as argued by petitioners, is irrelevant since this Court may not substitute its judgment for that of the ZBA, where, as here, the determination is neither irrational not arbitrary and capricious [citation omitted]" (Matter of Sacandaga Park Civic Assn., Inc. v Zoning Bd. of Appeals of Town of Northhampton, 296 AD2d 807, 808 [2002]).

Finally, petitioners claim that the ZBA erred in granting the variance from Town Code §199-13(D) without first referring the application to the Sullivan County Division of Planning and Community Development pursuant to General Municipal Law §239-m. As alleged in the petition, the basis for this claim is that state law requires that before granting a use or area variance, that each referring body, such as the ZBA herein, "shall, before taking final action on proposed actions included in subdivision three of this section, refer the same to the county planning agency or regional planning council" (GML §239-m[2],[3][v]). However, given the language contained in the ZBA's decision and resolution granting the variances, it is clear that the Board determined that Yukiguni's installation and construction of accessory utilities atop the proposed building required a variance

from Town Code §199-11(B)(1). Accordingly, the Court finds no merit to petitioners' claim that the ZBA failed to comply with the referral requirement of the statute.

Therefore, it is

ORDERED and ADJUDGED that the petition is in all respects denied.

This shall constitute the decision and judgment of this Court. The original decision and judgment and all papers are being forwarded to the Sullivan County Clerk's Office for filing. Counsel are not relieved from the provisions of CPLR 2220 regarding service with notice of entry.

SO ORDERED & ADJUDGED.

Dated: Monticello, New York
May 17, 2006

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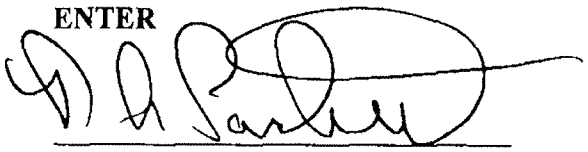

Hon. Robert A. Sackett, JSC

Papers considered:

Notice of petition and verified petition, dated January 20, 2006, with exhibits; affidavit of Patricia Moore, dated January 20, 2006, and memorandum of law; verified answer of Zoning Board of Appeals, dated March 9, 2006, and affidavit of William Fedun, dated March 9, 2006, with exhibits, and memorandum of law; verified answer o Yukiguni, dated March 10, 2006, affidavit of Kazunori Kameyama, dated March 10, 2006, and memorandum of law; and petitioners' reply memorandum of law, with exhibit; and complete record