Matter of Malone v Zoning Bd. of Appeals of Inc. Vil. of Westhampton Beach
2007 NY Slip Op 31346(U)
May 21, 2007
Supreme Court, Suffolk County
Docket Number: 0016316/2006
Judge: Paul J. Baisley

MEMORANDUM

COPY

SUPREME COURT - SUFFOLK COUNTY
PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

I.A.S. PART 36

By: Baisley, J.S.C.

Dated: May 21, 2007

INDEX NO.: 16316/2006

MOT. NO. 001 MG

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In the Matter of the Application of

GEORGIA MALONE,

Petitioner,

-against-

ZONING BOARD OF APPEALS OF THE INCORPORATED VILLAGE OF WESTHAMPTON BEACH,

Respondents,

For Relief Pursuant to Article 78 of the New York Civil Practice Law and Rules.

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Petitioner commenced the instant Article 78 proceeding for a judgment annulling, reversing and setting aside a certain determination of the respondent Zoning Board of Appeals of the Incorporated Village of Westhampton Beach (the "Board"), dated May 18, 2006, wherein respondent, among other things, denied petitioner's appeal from the denial by the Village Building and Zoning Administrator (the "Administrator") of her application for a building permit for proposed improvements to premises known as 333 Dune Road, Westhampton Beach; directing respondent to grant the relief requested with regard to Chapter 74 ("Coastal Erosion Management") of the Code of the Village of Westhampton Beach (the "Code"); and remanding this matter to respondent for consideration of any variances or permits as specified in the petition.[1]

The submissions reflect that in August 2005, petitioner purchased the subject property, an oceanfront parcel located south of Dune Road in Westhampton Beach, for $3,750,000.00. The property is in the R-3 zoning district within a "coastal erosion hazard area" as defined in Chapter 74 of the Code and is improved with a non-conforming three-story framed dwelling with decks and a boardwalk over the dunes for all of which structures a certificate of occupancy exists.

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[1] The building inspector is designated as the local official responsible for administering and enforcing Chapter 74 and denominated the "Administrator" thereof.

In December 2005, petitioner submitted an application to the Administrator for a building permit for numerous planned improvements to the property, including replacement of existing windows and sliding doors, replacement of existing deck railings, installation of additional windows, replacement of kitchen cabinets, replacement of existing interior stairway, replacement of existing fireplace and fireplace mantel, modification of existing interior support columns, and replacement of front door. In addition, petitioner sought to remove an existing rear dormer and replace it with a larger dormer containing new awning windows, and to enclose an existing third-floor balcony and convert it to additional interior living space. Petitioner alleges that all of the improvements are cosmetic and aesthetic in nature and are designed to remove obstructions and maximize waterviews from the dwelling, to make the house more contemporary in style, and to maximize usable interior living space. Petitioner further alleges that all of the proposed work is to be encompassed within the existing footprint of the house and will not increase the ground area coverage of the existing structure, nor will it materially alter the condition of the land on which the dwelling is situated. The proposed work is estimated to cost approximately $299,400.00.

The submissions reflect that on January 5, 2005, the Administrator denied the application for a building permit, citing §197-5(A)(1) of the Code, which prohibits construction that does not conform with the dimensional requirements of the zoning district; and §74-8(C) of the Code, which assertedly prohibits "restoration" of existing structures located in the dune area. The Administrator determined that the proposed work was a "continuation" of a prior "restoration" by the previous owner of the property, for which a variance had been granted, and was thus prohibited by the Code.

Petitioner thereafter applied to the Board for a determination that the Administrator erred in his determination that the proposed work is a "restoration" as defined in Code §74-3 and that the cost of the "restoration" exceeds 50% of the estimated full replacement cost of the structure. Rather, petitioner argued, the proposed work is only a "modification," and is permissible under §74-3 because the work will be encompassed within the existing footprint of the building, will remain the same height, and will have the same total floor area when completed. Moreover, petitioner argued that she meets the general standard set forth in Code §74-5(B) for the issuance of a coastal erosion management permit or, alternatively, is entitled to a variance under the standards of §74-13 in order to permit the proposed improvements. In addition, petitioner sought necessary area variances under Chapter 197 of the Code.

Chapter 74 of the Code was enacted in 1988 pursuant to Article 34 of the Environmental Conservation Law. Its purpose, as set forth at §74-1, is to minimize and prevent damage to structures and man-made property from coastal flooding and erosion and to protect natural protective features, other natural resources, and human life. In furtherance of that purpose, §74-3 (the "Definitions" section) defines a "regulated activity" as "[t]he construction, modification, restoration or placement of a structure or major addition to a structure..." "Restoration" is further defined as "[t]he reconstruction, without modification, of a structure, the cost of which equals or exceeds 50% of the estimated full replacement cost of the structure at the time of restoration." The statute goes on to provide that "[m]odifications, however, may be allowed if they do not exceed preexisting size limits and are intended to mitigate impacts to natural protective features and other natural resources." Pursuant to Code §74-5, "no person may engage in any regulated activity....without first obtaining a coastal erosion management permit" which may be issued only upon a finding that the proposed regulated activity is reasonable and necessary, not likely to cause a measurable increase in erosion at the proposed site and at other locations, and prevents or minimizes adverse effects on natural protective features, existing erosion protection structures and natural resources. Where strict application of Chapter 74 results in "practical difficulty" or "unnecessary hardship, " a variance may be granted pursuant to §74-13, provided certain enumerated criteria are met.

The submissions reflect that in 1999, the prior owners of the property sought to remove and rebuild the second story of the house and to add additional decking on the east and north sides. They applied for and were granted a side-yard variance to allow for reconstruction of the second story and the extension of the deck. In its determination approving the application, the Board noted that the increase in ground area coverage of the structure would be less than 25%, so the proposed work would be permitted under Code §74-8.[2] The Board concluded that "[i]n granting this variance, the Board has not considered whether the proposed work will exceed 50% of the estimated full replacement cost of the structure and, therefore, be a restoration, which is not permitted under Chapter 74 of the Code. The applicant is advised by this decision that he must comply with the limitation as to the amount of work that is permitted."

The submissions reflect that after the prior owners received a building permit and commenced the work, the Administrator issued a stop-work order predicated on his determination that the work being performed exceeded 50% of the replacement cost of the structure. The prior owners then appealed to the Board, initially, for an "interpretation" that the work was in compliance with the submitted plans and estimates and with Chapter 74 of the Code, and thereafter, upon an amended application, for a variance from the provisions of Chapter 74 of the Code. On March 21, 2002, the Board granted the prior owners a variance from Chapter 74.

In granting the prior owners a variance, the Board did not make an express finding that the work being performed exceeded 50% of the replacement cost of the structure. Rather, the Board found that the applicant had established the basis for the variance "based upon the cost estimates the applicant previously filed with the building inspector" and the applicant's testimony that the work could be completed within the cost estimates previously filed. Since the Board granted the prior owners a variance, it denied the request for an interpretation that the work being performed was in compliance with Chapter 74 of the Code.

In determining the current petitioner's application, the Board rejected petitioner's claim that the proposed work is a "modification" which is permitted under Chapter 74, finding that although a "modification" is included within the definition of a "regulated activity," "it would only be permitted if it were set forth within Section 74-8 A."[3] It continued, "[a] modification is not set forth in Section 74-8 A and, therefore, it is pursuant to Section 74-8 C a prohibited activity." The Board then found that since the prior owners had been granted a variance under Chapter 74 for the work undertaken in 2002, that work was a "restoration," reasoning that "[i]f the Board in 2002 found that the work did not exceed 50% of the replacement costs, no variance would have been needed to complete the work." It further found that "[s]ince the 50% threshold was exceeded in 2002, *any work* undertaken in 2006 is a regulated activity, a restoration and is prohibited" [emphasis added]. It thus agreed with the Administrator's finding that the proposed work constitutes a "continuation" of the 2002 "restoration" by the prior owners, and cannot be undertaken without a Chapter 74 variance. The Board then purported to apply the standards of §74-13 to conclude that petitioner had not established a basis for a variance.

A plain reading of Code §74-3 supports the Board's finding that petitioner's proposed work is

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[2] The determination says "75-8," but it appears that the Board was actually referring to §74-8.

[3] Section 74-8, entitled "Dune area restrictions," enumerates certain restrictions that apply to regulated activities in dune areas. Since "modifications" are among the specifically enumerated "regulated activities" set forth in §74-3, which are permissible provided a coastal erosion management permit is obtained, the Board's assertion that "modifications" are prohibited by §74-8 is puzzling.

a "regulated activity" (defined in the Code as the "construction, modification, restoration or placement of a structure or major addition to a structure...") The Board erred, however, in concluding that the proposed work constitutes a "restoration" and is thus prohibited under the Code. "Restoration" is defined in the Code as "[t]he *reconstruction, without modification*, of a structure, the cost of which equals or exceeds 50% of the estimated full replacement cost of the structure *at the time of the restoration* " [emphasis added]. It is well established that in construing a statute or ordinance, words should be given their natural and ordinary meaning. (McKinney's Cons. Laws of NY, Book 1, Statutes § 232, at 392-393. "Reconstruction" of a structure suggests that the structure has been damaged or destroyed. It is apparent from the record that the work proposed by petitioner does not consist of a "reconstruction" of the dwelling, which is intact and fully functional, but contemplates discretionary alterations to the exterior and interior of the dwelling that are principally cosmetic and aesthetic in nature.

Moreover, the unrefuted evidence before the Board established that the estimated full replacement cost of petitioner's dwelling at the time of the work was $1,180,000.00; 50% of the estimated full replacement cost is thus $590,000.00. The estimated cost of petitioner's proposed work was established to be approximately $299,400.00. Manifestly the cost of the proposed work does not exceed 50% of the estimated full replacement cost. Accordingly, petitioner's proposed work does not meet the definition of a "restoration" under the Code.

The record reflects that in reaching the conclusion that the proposed work is a "restoration," the Board looked solely at the scope of the work undertaken by the prior owners, which it deemed to be a "restoration" because a Chapter 74 variance had been granted. The Board held that where work has been undertaken in prior years, that percentage of prior work must be subtracted from the 50% limit to determine the value of work, if any, that can be undertaken presently. Having concluded that there had already been a prior "restoration," meaning that the 50% limit had already been met or exceeded, the Board took the position that *any* further improvements to the property would constitute a "restoration" and be prohibited. The Board's position, however, is unsupported by the Code or any applicable regulations.

The express language of the ordinance provides that the 50% cost determination is to be made "at the time of restoration."[4] There is no language that requires or permits the Board to factor into the determination the cost of all prior restoration work, or that prohibits any future improvements to the premises once the 50% limit has been reached. While a municipality's interpretation of its own ordinances is given substantial deference, that interpretation must be supported by the plain language of the ordinance. *Chrysler Realty Corp. v. Orneck*, 196 A.D.2d 631, 601 N.Y.S.2d 194 (2d Dept. 1993). By aggregating the percentage of work performed by the prior owners with that proposed to be performed presently, the Board impermissibly grafted onto the ordinance a new and onerous requirement that does not appear on its face.[5] *Vink v. N.Y. State Div. of Hous. & Cmty. Renewal*, 285 A.D.2d 203, 729 N.Y.S.2d 697 (1st Dept. 2001).

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[4] Petitioner does not challenge -- and accordingly the Court accepts for purposes of this decision – respondent's assertion that a "restoration" (defined as the reconstruction of a structure, the cost of which equals or exceeds 50% of the estimated full replacement value of the structure at the time of the restoration) is prohibited under Chapter 74, notwithstanding that "restoration" is defined as a "regulated activity" under §74-3 which is permissible provided a coastal erosion management permit is obtained.

[5] Notably, the definition of a "major addition" contained in §74-3 does have cumulative language, so under the principle of *expressio unius est exclusio alterius*, the lack of cumulative language in the definition of "restoration" suggests a legislative intent that prior "restoration" costs not be aggregated.

Moreover, the Board's assertion that petitioner may only be permitted to undertake additional work if the percentage of prior work was less than 50% of the replacement value at that time is inconsistent and illogical, since if the cost of the prior work was less than 50% of the then-replacement value, it would not meet the definition of a "restoration"and thus would not have to be considered in connection with a subsequent application under the ordinance as interpreted by the Board.

The record reflects that contrary to respondent's determination, petitioner is not undertaking a "restoration" but is proposing to make mere "modifications" to the dwelling, the majority of which are cosmetic and not structural, are in large measure confined to the interior of the dwelling, and which do not implicate the erosion-prevention and flood-control purposes of Chapter 74. The record before the Board established that petitioner's proposed modifications are reasonable and necessary, are not likely to cause a measurable increase in erosion, and will not have an adverse effect on natural protective features or existing erosion protection structures and natural resources, thus a coastal erosion management permit should have been issued pursuant to Code §74-5.

In light of the foregoing, the Court finds the Board's determination to be arbitrary and capricious, an abuse of discretion, and affected by an error of law. Accordingly, the matter is remitted to the Board for further proceedings consistent herewith, including a hearing and determination with respect to petitioner's request for zoning variances, which was not previously considered by the Board in light of its prior determination.

Settle judgment.

Dated: May 21, 2007

HON. PAUL J. BAISLEY, JR.

J.S.C.