

Bank of Smithtown v Giannadeo

2007 NY Slip Op 31442(U)

May 29, 2007

Supreme Court, Suffolk County

Docket Number: 0034243/2006

Judge: Martin J. Kerins

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SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 12 - SUFFOLK COUNTY

COPY

MOTION DATE: 01-11-07
ADJ. DATE: 05-10-07
MOT. SEQ: 002-MD CDISP

PRESENT:

Hon. MARTIN J. KERINS
J.S.C.

-----X
THE BANK OF SMITHTOWN, :
 :
 :
 Petitioner(s), :
 :
 :
 - against - :
 :
 ADRIENNE GIANNADEO, Chairperson, :
 DOMINICK SALERNO, ANTHONY TANZI, JR., :
 EDWARD BENZ and WILLIAM VALENTINE, :
 Constituting The Board of Zoning Appeals of the :
 Town of Smithtown, County of Suffolk, State of :
 New York and the BOARD OF ZONING APPEALS :
 OF THE TOWN OF SMITHTOWN, :
 :
 Respondent(s). :
-----X

VINCENT J. TRIMARCO, ESQ.
Attorney for the Petitioner
1040 West Jericho Turnpike
Smithtown, NY 11787

YVONNE LEIFFRIG, ESQ.
Town Attorney
Attorney for Respondent(s)
Town of Smithtown
99 West Main Street
Smithtown, NY 11787

Upon the following papers numbered 1 to 18 read on this petition _____; Notice of petition and supporting papers 1-10; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 11-16; Replying Affidavits and supporting papers 17-18; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this petition (seq. 002) is dismissed; and it is further

ORDERED that counsel for the petitioner shall serve a copy of this Order with Notice of Entry upon counsel for respondent, within twenty (20) days of the date the order is entered pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court.

The Bank of Smithtown v Adrienne Giannadeo, Chairperson, Dominick Salerno, Anthony Tanzi, Jr., Edward Benz and William Valentine, Constituting The Board of Zoning Appeals of the Town of Smithtown, County of Suffolk, State of New York and the Board of Zoning Appeals of the Town of Smithtown

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Petitioner commenced this Article 78 proceeding seeking a judgement to review, annul and reverse the determination of the Zoning Board of Appeals of the Town of Smithtown (hereinafter "Board") dated November 14, 2006, which partly denied his application for an area variance. Petitioner had made application to increase the maximum height of a wall sign from 15 feet to 33 feet and to permit a proposed 54 square foot wall sign, on the western side of the building that does not face a public street. The request was granted to the extent that petitioner was permitted to erect a 20 square foot wall sign. Petitioner contends that respondent failed to make formal findings of fact supporting their decision and did not provide Petitioner with the required findings of fact upon which they based their determination.

Petitioner's building is located in the Mayfair Shopping Center, Commack, NY and claims that neighboring buildings in the same Shopping Center received sign variances. The North Fork Bank and Outback Steakhouse both have signs located on the sides of their respective buildings and do not face public streets. While petitioner concedes that its sign would be larger than the ones existing on either of those sites, it argues that its building is set further back than the others from Jericho Turnpike and its building is much larger than the other two. North Fork and Outback were given variances for proportionately larger signs.

It is well established that in consideration of an area variance, a local zoning board must engage in a balancing test, weighing the benefit to the applicant, against the detriment to the health and welfare of the neighborhood or community if the area variance was granted. Boards are given broad discretion in their consideration of applications for area variances (*Inlet Homes Corp. v. Zoning Bd. of Appeals*, 2 N.Y.3d 769; *Ifrah v Utschig*, 98 NY2d 304). Moreover, Town Law §267-b(3) regulates area variance and requires the Zoning Board to engage in a balancing test in which the benefit to the applicant is weighed against the detriment to the health, safety, and welfare of the community.

To fulfill this function, the Board must consider five separate elements which include: 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 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 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.

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Local zoning boards have broad discretion in considering applications for area variances and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary and capricious, or an abuse of discretion (see *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613; *Matter of Ifrah v Utschig*, 98 N.Y.2d 304, 308, *supra.*). Therefore, the determination of a zoning board should be sustained if it has a rational basis and is not illegal or an abuse of discretion (see *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, *supra.*; *Matter of Sasso v Osgood*, 86 N.Y.2d 374; *Matter of Russia House at Kings Point, Inc. v. Zoning Bd. of Appeals of Vil. of Kings Point*, 2007 N.Y. App. Div. LEXIS 5875 [2^d Dept. 2007]).

A Zoning Board's determination must be supported by "substantial evidence." Further, the scope of judicial review is limited to a conclusion of whether the action taken by the Board was arbitrary or an abuse of discretion. If the determination is supported by substantial evidence and has a rational basis it must be upheld (*Mtr of Doyle v Amster*, 79 NY2d 592; *Mtr of Fuhst v Foley*, 45 NY2d 441; *Chrisma Holding Corp. v Zoning Bd. Of Appeals, Town of Lewisboro*, 266 AD2d 540). The reviewing Court in a proceeding pursuant to Article 78 may not substitute its judgment for that of a planning or zoning board unless the board's determination is arbitrary and capricious, illegal or an abuse of discretion (*Pagnozzi v Village of Piermont*, 292 AD2d 613).

In this matter, the Board's members noted that they had viewed the site on several occasions and had made comparisons between this particular bank and other branches of the Bank of Smithtown. They also made comparisons between this particular bank and other buildings within the Mayfair Shopping Center. As a result of their research, they determined that approval would be detrimental to the surrounding area and the Town of Smithtown as a whole. Further, they did not believe their decision would substantially harm the Bank of Smithtown. They noted that the position and size of the building would leave little doubt to a passerby that it was the Bank of Smithtown. Also, they noted that such signs were changing the character of their town. Contrary to petitioner's claim that it was unfair to deny their variance when others received variances for proportionately higher signs, the Board noted that same was exactly the reason for their approval. However, once a patron was in the Mayfair Shopping Center, there would be no confusion as to which building belonged to the Bank of Smithtown. Finally, it should be noted that a variance was granted even though the size requested was not.

Under all the circumstances presented, the Board did not act arbitrarily in denying an area variance. The Zoning Board in fact granted petitioner a variance. Its conclusions in denying the request for a sign larger than was granted, are amply supported by the record, and the Board's determination was not irrational, arbitrary or capricious. Further, petitioner's remaining arguments regarding the timing of the finding of fact are unavailing. The Board rendered its decision on

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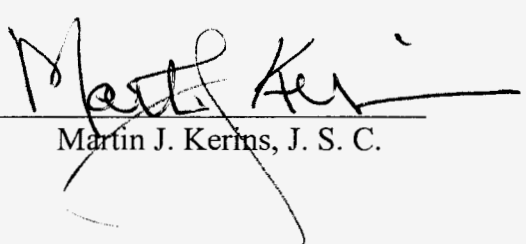
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November 14, 2006. The Notice of Petition is dated December 13, 2006. Accordingly, petitioner's argument in this regard is without support.

In light of the foregoing, the petition is dismissed.

Dated: May 29, 2007
RIVERHEAD, NY



Martin J. Kerns, J. S. C.

FINAL DISPOSITION ✓

NON-FINAL DISPOSITION _____

To: Office of the Board of Zoning Appeals
Town of Smithtown
99 West Main Street
Smithtown, New York 11787
Attention: Agnes J. Vion, Secretary

Vincent Puleo
Town Clerk
Town of Smithtown
99 West Main Street
Smithtown, New York 11787