

Matter of Phillips v Verruto

2007 NY Slip Op 33252(U)

September 28, 2007

Supreme Court, Suffolk County

Docket Number: 0035640/2006

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 35640/2006

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 Application of BILLIE PHILLIPS,

Petitioner,

For Judgment Pursuant to CPLR Article 78

-against-

MICHAEL VERRUTO, LEE ROSNER and
 CHARLES KENNY as members of The Board
 of Zoning Appeals of the Incorporated Village
 of Port Jefferson,

Respondents.

ORIG. RETURN DATE: JANUARY 29, 2007
 FINAL SUBMISSION DATE: JULY 26, 2007
 MTN. SEQ. #: 001
 MOTION: MD *CASEDISP*

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Upon the following papers numbered 1 to 8 read on this motion _____

FOR A JUDGMENT PURSUANT TO ARTICLE 78

Notice of Petition and supporting papers 1-3; Verified Answer and supporting papers 4, 5;
 Memorandum of Law 6; Return and supporting papers 7; Reply Memorandum and
 supporting papers 8; it is,

ORDERED that this petition for a judgment, pursuant to Article 78 of the CPLR, directing respondents to grant petitioner's application for an area variance to permit the construction of a building with the floor area ratio as proposed, is hereby **DENIED**.

Petitioner commenced this Article 78 proceeding to direct respondents to grant petitioner's application, dated January 4, 2006 and amended on or about July 18, 2006, for an area variance to permit the construction of a building with the floor area ratio as proposed. Petitioner is the owner of real property located at 109 Main Street, in the Incorporated Village of Port Jefferson, State of New York. The property is located in a commercial area

of the Village, and is improved by a two-story building occupied by three retail stores and one restaurant. Petitioner proposes to demolish the existing structure and build a new structure that will occupy the entire lot, as does the existing structure. Petitioner proposes to construct a second and third floor on the new building, which will each contain eight apartments.

Petitioner alleges that at the Planning Board stage, discussions were had regarding both the floor area ratio and compliance with the Village's parking requirements for such a building. Petitioner further alleges that as the proposed floor area ratio exceeded the permissible ratio, petitioner had to apply to the Zoning Board of Appeals for an area variance. Petitioner also contends that a disagreement arose as to the number of "parking credits" that petitioner was entitled to. Petitioner alleges that the Planning Board suggested that petitioner resolve this dispute with the Zoning Board. When petitioner followed that suggestion, the Zoning Board informed petitioner that the issue was solely under the jurisdiction of the Planning Board.

Petitioner submits that his proposal exceeded the maximum floor area ratio as the proposed sixteen apartments were approximately 725 square feet each. Petitioner argues that the larger apartments were designed to attract tenants who are less likely to be transient. Petitioner's architect subsequently devised a new plan to reduce the floor area ratio of the entire building by reducing the size of a proposed courtyard/garden area. As such, petitioner argues that the new plan could increase the floor area ratio without changing the exterior dimensions or appearance of the building, thereby having no effect on the surrounding community.

Petitioner claims that at a hearing, respondents focused all of their attention on parking issues; respondents were concerned that if the variance relative to the floor area ratio was granted, then the parking demands for the building would be increased. In response, petitioner alleged that floor space does not have an effect on parking, but rather pursuant to the Port Jefferson Zoning Code, parking spaces are based upon number of bedrooms, not the size thereof. Notwithstanding the foregoing, petitioner submits that by decision dated November 21, 2006, respondent denied his application for an area variance largely due to the alleged increase on the parking demands in the Village.

In opposition, respondent alleges that the maximum floor area ratio allowable for this property is two. Therefore, as the subject parcel is 7,873

square feet, the maximum floor area allowed pursuant to the Village Code is 15,746 square feet. Petitioner initially proposed a building with 16,916 square feet, and then amended his application to propose a building with 18,366 square feet.

Respondent alleges that the issues surrounding petitioner's application were addressed at three public hearings held on May 18, July 20, and September 21, 2006. At the hearing on May 18, 2006, respondent expressed its view that the increase in the need for off-street parking would result in an undesirable change in the neighborhood and would impact the environment, as the Planning Board had advised petitioner that his proposal would require an additional twenty-four parking spaces.

Respondent argues that after extensive consideration of all testimony and documentation, respondent unanimously denied petitioner's application by decision dated November 21, 2006. In the aforementioned decision, respondent concluded the petitioner's proposed building far exceeds what can reasonably be supported at this location, and that by complying with the existing maximum floor area ratio, petitioner can more than double the square footage of the building, maintain the existing retail spaces on the first floor, and add a substantial number of apartments to the new second and third floors. As such, respondent argues that, pursuant to Section 250-49 of the Village Code, it properly took into consideration the benefit to the applicant as weighed against the detriment to the health, safety and welfare of the surrounding community.

In a proceeding under CPLR article 78 when reviewing a determination of an administrative tribunal, courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence (*Pell v Board of Education*, 34 NY2d 222 [1974]; *Matter of Isaksson-Wilder v New York State Div. of Human Rights*, 2007 NY Slip Op 6681 [2d Dept]; *Allen v Bane*, 208 AD2d 721 [1994]). This approach is the same when the issue concerns the exercise of discretion by the administrative tribunal (*Pell v Board of Education*, 34 NY2d 222, *supra*). The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious (*Gilman v N.Y. State Div. of Hous. & Cmty. Renewal*, 99 NY2d 144 [2002]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 2007 NY Slip Op 6879 [2d Dept]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and

whether the administrative action is without foundation in fact (*Pell v Board of Education*, 34 NY2d 222, *supra*). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Pell v Board of Education*, 34 NY2d 222, *supra*). Where a hearing is held, the determination must be supported by substantial evidence (CPLR 7803[4]).

Moreover, local zoning boards have broad discretion in considering applications for area variances and the judicial function in reviewing such decisions is a limited one (*Pecoraro v Bd. of Appeals*, 2 NY3d 608 [2004]). Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure (*Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*). A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence (*Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*; *Matter of Hannett v Scheyer*, 37 AD3d 603 [2007]; *Matter of B.Z.V. Enter. Corp. v Srinivasan*, 35 AD3d 732 [2006]).

Here, the Court finds that the denial by respondent of petitioner's application for an area variance has a rational basis and is supported by substantial evidence. After conducting three hearings on the matter, respondent properly considered the benefit to petitioner as weighed against the detriment to the health, safety and welfare of the surrounding community, in compliance with Village Law § 7-712-b and Village of Port Jefferson Code § 250-49. Respondent's determination that an area variance would have an adverse impact on the environment and produce an undesirable change in the character of the neighborhood had a rational basis, was supported by the evidence presented, and was not an abuse of discretion. Accordingly, the instant petition is **DENIED** and this special proceeding is dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: September 28, 2007


HON. JOSEPH FARNETI
Acting Justice Supreme Court