

Matter of F.O.O.D. Southhampton LLC v Chaudhry

2008 NY Slip Op 31334(U)

May 5, 2008

Supreme Court, Suffolk County

Docket Number: 0037621/2007

Judge: Arthur G. Pitts

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Supreme Court of the State of New York
IAS Part 43 - County of Suffolk

PRESENT: HON. ARTHUR G. PITTS

 In the Matter of the Application of
 F.O.O.D. SOUTHAMPTON LLC and
 56 NUGENT STREET CORP.,

Petitioners,

For a Judgment under Article 78 of the
 Civil Practice Law and Rules

-against-

HUMAYUN J. CHAUDHRY, D.O., M.S. as
 COMMISSIONER OF THE SUFFOLK COUNTY
 DEPARTMENT OF HEALTH SERVICES , AND
 THE BOARD OF REVIEW OF THE SUFFOLK
 COUNTY DEPARTMENT OF HEALTH
 SERVICES.

Defendants.

ORIG. RETURN DATE: 12/28/07
FINAL SUBMIT DATE: 2/21/08
MOTION SEQ. NO.: 001-MOT-D

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Upon the following papers numbered 1 to 46 read on this motion article 78
 Notice of Motion/OSC and supporting papers 1-9 Notice of Cross-Motion and supporting papers _____;
 Affirmation/affidavit in opposition and supporting papers 10-42; Affirmation/affidavit in reply and supporting papers 43-45; Other 46; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that the petitioners F.O.O.D. Southampton LLC and 56 Nugent Street Corp.'s application, pursuant to CPLR Article 78, for a judgment vacating, reversing and annulling the decision of respondents Humayun J. Chaundry, D.O., M.S., as Commissioner of the Suffolk County Department of Health Services and the Board of Review of the Suffolk County Department of Health Services which denied their application for a sewage disposal facilities for other than single family residences for the property located at 56 Nugent Street, Village of Southampton, Suffolk County, New York, denied their application for variance or waiver from regulations or specifications for the same property and instead granted a variance for the installation of a new sewage disposal system subject to certain specified conditions and remanding the appeal to the respondents directing them to grant the variance applied for without conditions is granted to the extent that the matter is remanded to the respondent Board of Review of the Suffolk County Department of Health Services for rehearing. It is further

ORDERED that the rehearing of this matter is directed to be held within sixty (60) days of service of the within order with notice of entry.

Petitioner F.O.O.D. Southampton LLC ("FOOD") is the owner of a restaurant located at 56 Nugent Street, Southampton, Suffolk County, New York. Petitioner 56 Nugent Street Corp. is the owner of the subject property having acquired title on November 8, 2005. The property consists of .086 acres and is improved by a one story 1,945 square foot building used as a restaurant by the previous owners. In 1963 the respondent Suffolk County Department of Health Services ("SCDHS") approved the existing on site sewage disposal system and also continuously issued permits to operate a 70 seat restaurant at the site. The existing sewage disposal facility does not comply with current regulations but was approved prior to 1981 and as such was "grandfathered" and its use was allowed to continue. In September, 2005 the petitioners applied to the respondent SCDHS for a permit to operate a food establishment at the subject property. In January, 2006 the petitioners submitted an application for sewage disposal facilities for other than single family residences for the subject premises together with an application for variance or waiver from regulations or specifications, the purpose of such application was to upgrade the existing septic system presently on the property.

The petitioners submit that the existing sewage disposal system had insufficient containment of the wastewater flow from the restaurant and as a result the system had to be pumped out on a daily basis and a new system would obviate the need for regular pumping. On July 19, 2007 the respondent Board of Review of the Suffolk County Department of Health Services ("Board of Review") held a public hearing on the petitioners' application. By decision dated August 7, 2007 the application for a variance as specifically sought by the petitioners was denied, however the Board of Review granted a conditional variance for the installation of a new sewage disposal system. The conditions included the following: Reduce the previously approved seating capacity of the restaurant from 70 to 30 and execute and record a covenant that provides that the sanitary system does not comply with standards and that extensive costs may be incurred in the future if repairs or expansion are necessary; established a new allowable design flow of 300 gpd (sanitary, 900 gpd total) for the subject receiving parcel; abandons any claims for grandfathering of density from previous uses; holds the department harmless from any damages on-site or to adjacent sites

resulting from the installation or use of the sewage disposal system.

In support of the instant petition the petitioners allege that the respondent Board of Review based its determination on "Findings of Fact" which are inaccurate and flawed; that is, that the new disposal system will replace a failed sewage disposal system on the site and that the existing system has failed. The petitioners aver that the respondent Board of Review's decision was arbitrary and capricious and not based on substantial evidence because it is based upon an erroneous conclusion that the existing and previously approved sewage disposal system was a failed sewage disposal system. In support thereof, the petitioners proffer that the disposal system at the subject property had functioned in the same manner as it had for many years prior to the January 2006 application to upgrade the system and the respondent SCDHS had continually issued permits to operate a food establishment on the premises during that time, the last being issued on May 4, 2004. The issuance of such permits, the petitioners argue, is an express acknowledgment by SCDHS that the on-site sewage disposal system was satisfactory and within the requirements of the Suffolk County Sanitary Code 760-1303 (A) and section 760-1351 of Article 13 of the Code which sets forth the sewage disposal requirement for food establishments and provides that "all sewage, including liquid wastes, shall be disposed of in a public sewer or, in the absence thereof, in a manner satisfactory to the Department."

" In article 78 proceedings, 'the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; * * * 'the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence.' (Cohen and Karger, Powers of the New York Court of Appeals, s 108, p. 460; 1 N.Y.Jur., Administrative Law, ss 177, 185; see *Matter of Halloran v. Kirwan*, 28 N.Y.2d 689, 690, 320 N.Y.S.2d 742, 743, 269 N.E.2d 403 (dissenting opn. of Breitel, J.)). 'The approach is the same when the issue concerns the exercise of discretion by the administrative tribunals [34 N.Y.2d 231] The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious.' (Cohen and Karger, Powers of the New York Court of Appeals, pp. 460--461; see, also, 8 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 7803.04 Et seq.; 1 N.Y.Jur., Administrative Law, ss 177, 184; *Matter of Colton v. Berman*, 21 N.Y.2d 322, 329, 287 N.Y.S.2d 647, 650--651, 234 N.E.2d 679, 681). 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.' (1 N.Y.Jur., Administrative Law, s 184, p. 609). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts. *In Matter of Colton v. Berman* (Supra, p. 329, 287 N.Y.S.2d p. 651, 234 N.E.2d p. 681) this court (per Breitel, J.) said 'the proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law.' Where, however, a hearing is held, the determination must be supported by substantial evidence (CPLR 7803, subd. 4); and where a determination is made and the person acting has not acted in excess of his jurisdiction, in violation of lawful procedure, arbitrarily, or in abuse of his discretionary power, including discretion as to the penalty imposed, the courts have no alternative but to confirm his determination (CPLR 7803, subd. 3; *Matter of Procaccino v. Stewart*, 25 N.Y.2d 301, 304 N.Y.S.2d 433, 251 N.E.2d 802; but see *Matter of Picconi v. Lowery*, 35 A.D.2d 693, 314 N.Y.S.2d 606, affd. 28 N.Y.2d 962, 323 N.Y.S.2d 703, 272 N.E.2d 77). Rationality is what is reviewed under both the substantial evidence

rule and the arbitrary and capricious standard. (*Matter of 125 Bar Corp. v. State Liq. Auth.*, 24 N.Y.2d 174, 178, 299 N.Y.S.2d 194, 197--198, 247 N.E.2d 157, 158--159; 1 N.Y.Jur., Administrative Law, s 184.)” (*Pell v. Board of Education*, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 839-840 [1974])

Section 760-609 of the Suffolk County Sanitary Code provides in part as follows:

A. Variances and Waivers. The Commissioner of the Department of Health Services in his discretion, and upon recommendation of the Board of Review, may grant or deny a variance or waiver from the specific sections of this Article after an application requesting such relief is made and supporting evidence has been presented to the Board of Review. The Commissioner may grant an application only if the variance or waiver will be in harmony with the general purpose and intent of this Article to protect groundwater, drinking water supplies, surface water and other natural resources, and public health, safety and welfare.

1. The determination whether the variance or waiver will be in harmony with the general purpose and intent of this Article shall be made upon findings relating to the following criteria:

- a. Whether the use is in general conformity with this Article;
- b. Whether the uses of groundwater, surface water, and drinking water supplies will be impaired, taking into account the direction of the groundwater flow;
- c. Whether the application of the proposed variance or waiver to other parcels within the same groundwater management zone will unreasonably impair groundwater, surface water, and drinking water supplies;
- d. Whether the application conforms to a comprehensive groundwater management plan;
- e. Whether granting the proposed variance or waiver will adversely affect the design of an adequate on-site water supply and/or sewage disposal system, taking into account soil conditions, depth to groundwater, direction of groundwater flow, and site specific physical conditions;
- f. Whether the amount of sewage flow from the project based upon sewage flow design criteria will adversely affect groundwater, surface water and drinking water supplies;
- g. Whether the application can be modified so that the project will not violate the Sanitary Code;
- h. Whether an application for a variance or waiver to another municipal entity would obviate the need for consideration of the application before the Board, and if it would, whether such application has been made and ruled on;

i. Any other factor which the review Board in its discretion deems necessary to consider in order to determine whether the granting of a variance or waiver will be in harmony with the general purpose and intent of this Article, provided that the application is given notice of additional factors and reasonable opportunity to present evidence to the Board with regard thereto.

A review of the record clearly indicates that when the respondent Board considered the criteria set forth above in making its determination it based such decision in part on a finding that the prior system on-site sewage system failed. However, testimony elicited at the subject hearing from Donald Jewell, an architect retained by the petitioners, clearly indicated that there were no records that the system had failed when a 70 seat restaurant had operated on the premises. Nevertheless, absent any evidence proffered at the hearing that such failure had occurred, the respondent Board in its findings of fact concluded that such failure had occurred and made its determination denying the petitioners application on documents that were not in the record.

It is apparent that the petitioners were not given prior notice of the documents relied upon by the respondent Board of Review in concluding that the existing sewage system had failed. Although it is well established that administrative review boards are not bound by the formal rules of evidence (see *Silveri v. Nolte*, 128 A.D.2d 711, 513 N.Y.S.2d 205 [2nd Dept 1987]), where evidence has been received under the circumstances which denies a party an opportunity to appraise or rebut it, Courts have deemed such conduct sufficient to support a judgment annulling a review board's determination. (see *Stein v. Board of Appeals of the Town of Islip*, 100 A.D.2d 590, 473 N.Y.S.2d 535 [2nd Dept. 1984]) Herein the respondent Board of Review relied on certain evidence to support its conclusion that the existing sewage system had failed which was not given to the petitioners prior to the public hearing. As such, the petitioners were not given an opportunity to rebut such evidence. Accordingly, under the circumstances presented herein, the petition is granted to the extent that this matter is remanded to the respondent Board of Review for rehearing wherein the petitioners will be granted the opportunity to rebut and present evidence on the record as to whether or not the present sewage system had failed prior to the petitioner's application of January, 2006.

This shall constitute the decision and order of the Court.

Submit judgment on notice.

So ordered.

Dated: Riverhead, New York
May 5, 2008



J.S.C.

CHECK ONE: FINAL DISPOSITION NON-FINAL DISPOSITION DO NOT SCAN