S

DECISION AND JUDGMENT

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

In the Matter of the Application of
VINCENT DONARUMA,

Petitioner,

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

-against-

THE PLANNING BOARD OF THE VILLAGE OF
LATTINGTOWN,

Respondents.

Motion Sequence #1
Submitted April 7, 2008

INDEX NO: 2360/08

The following papers were read on this petition:

Notice of Petition, Petition and Exhibits.....1
Verified Answer.....,2
Picoli Affidavit in Opposition.....3
Moed Affidavit in Opposition.....4
Respondent's Memorandum of Law.....5
Certified Transcript and Record.....6
Reply Affirmation.....7

Petitioner, VINCENT DONARUMA, petitions the Court, pursuant to CPLR Article 78, for an order annulling or reversing the Notice of Decision of the respondent, THE PLANNING BOARD OF THE VILLAGE OF LATTINGTOWN (hereinafter referred to as the "VILLAGE BOARD"), dated December 10, 2007, and for an order directing the VILLAGE

BOARD to grant and approve petitioner's application. Counsel for the VILLAGE BOARD opposes the petition, which is determined as follows:

Petitioner states that he owns the parcel of real property located at 59 Ryefield Road, Lattingtown, New York, which is located in the Incorporated Village of Lattingtown, and that the VILLAGE BOARD is the duly constituted Planning Board for said VILLAGE. Petitioner states that he purchased the property by deed, dated September 23, 1998, with a one (1) family dwelling on the southerly side of the property with the building relatively close to the street. He claims that the total area of the property is 2.249 acres, and that it is similar to many properties in the neighborhood which contain a one (1) family house on two (2) acre lots, with home closely abutting the street with large sloping back yards.

Petitioner states that, while residing in the home with his wife and young daughter, and in the interest of improving the property, he applied to the VILLAGE BOARD for a variance to enlarge and improve the home on the property. He states that said variance was granted in 2006 and work was commenced on the property. He claims that during construction, he was caused to raise the grade of the rear of the property in order to complete the construction, and in line with and similar to the grades of other properties in the neighborhood, but soon thereafter received a stop work order from the VILLAGE, with which he complied. He claims that, thereafter, the VILLAGE applied for and was granted a temporary restraining order (TRO) from the Supreme Court (Feinman, J.), dated September 12, 2007, and simultaneously commenced an action against petitioner for a permanent injunction enjoining and restraining him from any other work on the property until the stop work order is lifted, enjoining and restraining him from carting any fill, debris

or other materials to the premises, enjoining and restraining him from further damaging or destroying any trees at the property and immediately stabilizing any trees whose root systems have been compromised, and enjoining and restraining him from occupying any portion of the residence until such time as a Certificate of Occupancy is issued by the Building Department. The initiating order to show cause, dated September 12, 2007, essentially granted all of the requested relief on an interim basis.

In the first cause of the action of the verified complaint , the VILLAGE asserted that, beginning in around April 2007, respondent (petitioner herein) dumped massive quantities of uncertified fill on his property without prior VILLAGE review or approval; that the fill has resulted in a change of grade relative to adjoining properties of about 20 feet; that the VILLAGE has demanded that the dirt, sand and other debris be removed from the property and has requested that further storm water runoff and sedimentation be prevented; that respondent has admitted his actions but has taken no steps to abate his continuing nuisance and damage to adjoining properties; that the damages are offensive and destructive to the health comfort and property values of the adjoining property owners, and that the VILLAGE has no adequate remedy at law.

In the second cause of action, the VILLAGE alleged that, on or about May 15, 2007, the VILLAGE Code Enforcement Officer inspected the premises and observed that construction work was continuing on the premises; that the VILLAGE had received numerous complaints about the continuing work; that on September 4, 2007, the Nassau County Police Department inspected the premises and observed that additional construction continued; that the VILLAGE has no adequate remedy of law.

In the third cause of action, the VILLAGE alleged that the VILLAGE Arborist inspected the property and concluded that the fill has severely compacted and burdened the root systems of at least 40 trees, with the death of several trees, presenting a significant and imminent threat to the adjoining properties; that the fill material has also resulted in a significant change in grade, resulting in sediment of unknown material flowing onto neighbors properties during rainstorms; that respondent has refused to stop work, has refused to remove the fill and has refused to restore the damaged works, for which the VILLAGE has no adequate remedy of law. In the fourth cause of action, the VILLAGE alleged that respondent, his wife and child continue to reside at the property, which does not meet the New York State Building Residential or Fire Code and that no Certificate of Occupancy has been issued for the residence currently under construction.

Petitioner herein states that he responded to said order to show cause and the motion is presently *sub judice* before Justice Feinman. Petitioner claims that, in an effort to resolve the situation, the parties, through their attorneys entered into negotiations but that all suggestions from petitioner were rebuffed by the VILLAGE and he continued to receive numerous summonses returnable before the VILLAGE Court. Petitioner states that, in hopes of rectifying the situation, he made two (2) applications to the VILLAGE BOARD, a request for an Evacuation/Grading Permit and a Tree Removal Application. In essence, petitioner proposed to remove approximately 6000 cubic yards of the approximately 9000 cubic yards of rejected fill, which included construction debris, crushed porcelain and glass, concrete, wrought iron, discarded wood, and gravel and soil, and to build concrete block retaining walls to hold in the remaining 3000 cubic yards of the

rejected fill and to install screen planting to screen the retaining walls. It appears that a notice was issued by the VILLAGE BOARD to the Landscape Architect hired by petitioner, which scheduled the hearing on the applications for November 12, 2007, but because said date was Veteran's Day, a Federal holiday, the architect mistakenly believed that the hearing would not be held and he did not appear. Petitioner states that, despite his failure to appear, the hearing was held and the VILLAGE BOARD voted and approved a draft decision with respect to his applications. When petitioner requested that the hearing be rescheduled, said request was granted and a new hearing was held on December 10, 2007. At that time, petitioner asserts that evidence on his behalf was offered that clearly should have been approved, but that the decision of the VILLAGE BOARD was substantially the same after the second hearing as it was in the proposed decision, drafted after the first meeting on November 12, 2007.

On the instant application, petitioner states that despite the substantial testimony and evidence submitted by petitioner, the VILLAGE BOARD denied his application. It is petitioner's position that the VILLAGE BOARD's denial of his application was arbitrary and capricious, unreasonable and illegal, improper, an abuse of discretion and not based on substantial evidence in the record, a violation of petitioner's rights and due process and contrary to law.

In opposition to the petition, the VILLAGE BOARD submits the affidavit of Peter Picoli, a member of the VILLAGE BOARD, who relates the lengthy process followed by the VILLAGE BOARD in arriving at its decision, which denied petitioner's application and directed him to remove the waste and construction debris used as fill at the site. Also

submitted is the affidavit of Matthew I. Moed, the VILLAGE Engineer and VILLAGE Building Inspector, who states that the debris pile has been improperly and dangerously deposited on the property. He asserts that the waste and construction debris presents a grave concern to the health, safety and welfare of adjoining property owners, contains a vast assortment of materials having no common connection other than being construction waste, that the chemical nature of the debris is unknown and at times has pungent odors similar to petroleum smells, and that no amount of probing of the debris property assure the true nature of the material which is unstable and filled with putrescible materials that will leave large unstable voids beneath the surface when it rots. He advises that the massive filling is significantly elevated in relation to the adjoining properties and the threats of erosion, water runoff and the visual impacts are self evident. He claims that, although petitioner states that it was necessary to bring the debris material to the property so that he could perform his reconstruction work, Mr. Moed states that is patently untrue as the property was a gentle sloping property from south to north, containing woodlands and improved with a single family dwelling prior to the waste being trucked.

The VILLAGE BOARD also submits the Certified Transcript and Record of the proceeding before the VILLAGE BOARD.

Where the issue raised in a CPLR Article 78 proceeding is "whether the determination following an evidentiary hearing is supported by substantial evidence", the CPLR requires transfer of the proceeding to the Appellate Division (CPLR §7804[g]; *Matter of Hosmer v New York State Office Of Children And Family Services*, 289 AD2d 1042, 735 NYS2d 289 [4th Dept 2001]). CPLR §7804(g) also provides, in relevant part, that "the court

shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata, without reaching the substantial evidence issue" (CPLR §7804[g]). If determination of the other objections does not terminate the proceeding, "the court shall make an order that it be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced" (CPLR §7804[g]).

After a careful reading of the submissions herein, and the Court having determined that the petition raises a substantial evidence question, and the Court finding no other objections that could have terminated the entire proceeding (CPLR § 7804[g]), it is hereby

ORDERED, that this application is hereby transferred for disposition to a term of the Appellate Division, Second Department, for a determination as to whether the determination of respondent following an evidentiary hearing is supported by substantial evidence (CPLR §7804[g]).

All further requested relief not specifically granted is denied.

This constitutes the decision and judgment of the Court.

Dated: July 1, 2008

WILLIAM R. LaMARCA, J.S.C.

TO: John L. Maccarone, Esq.
Attorney for Petitioner
41 Forest Avenue
Glen Cover, NY 11542

Humes & Wagner, LLP
Attorneys for Respondent
147 Forest Avenue
Locust Valley, NY 11560

donaruma-planningboardlattingtown,#1/art78