SHORT FORM ORDER

INDEX NUMBER: 28127-2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 23, SUFFOLK COUNTY

Present:

HON. EMILY PINES
J. S. C.

Original Motion Date: 09-26-2007
Motion Submit Date: 06-12-2008
Motion Sequence No's.: 003 MD; 004 MG
CASEDISP

X

PAUL ALBANO III,

Petitioner,
For a Judgment pursuant CPLR Article 78

-against-

TOWN OF ISLIP AND DAVID JANOVER AS TOWN ENGINEER,

Respondent.

X

Attorney for Petitioner
Lawrence J. Holt, Esq.
910 Middle Country Road
Selden, New York 11784

Attorney for Respondents
Robert L. Cicale
Islip Town Attorney
655 Main Street
Islip, New York 11751

ORDERED, that the Article 78 proceeding brought on by Order to Show Cause (PITTS, J.) dated September 10, 2007 seeking an Order annulling and reversing the decision of the Islip Town Engineer and directing the issuance of a building permit is determined as set forth herein; and it is further

ORDERED, the respondents' motion pursuant to CPLR §3211 to dismiss the petition is determined as set forth herein below.

FACTUAL and PROCEDURAL HISTORY

Petitioner commenced this Article 78 proceeding challenging the determination of the respondent, Islip Town Engineer, David Janover, regarding property located on Connetquot Drive, Oakdale, New York and more particularly described on the Suffolk County Tax Map as district 0500, section 350.00, block 01.00, lot 003.00 (the "subject premises"). The submissions reflect that in or about July 25, 2006, petitioner applied to the Town of Islip Board of Appeals (the "Board") for an area variance to construct a single family dwelling on the subject premises. After a public hearing on July 25, 2006, the Board reserved decision. The application was again placed on the Board's calendar on October 10, 2006 and the application was adjourned until December 5, 2006. On December 5, 2006, the Board voted to give the matter an "open adjournment", that is, without a

specific date to be heard or decided. The matter was placed on the calendar on February 13, 2007 and the Board reserved decision once again. Finally, on April 10, 2007, the Board voted, 3-2 to grant the application "**with the condition** that the applicant cannot build until he has clearance from the Engineering Department on this site" (emphasis in original).

Thereafter, by memo dated June 26, 2007, respondent Janover advised the Board that there was drainage and flooding concerns and concluded that the proposed construction on the subject premises would "have an adverse impact on the environment, as the development would further exacerbate the drainage problems in the area." He thus concluded that development of the subject premises would have "an adverse impact on the surrounding neighborhood from a storm water management and water quality perspective, and that no adequate mitigation measures exist that can mitigate the impacts expected from this proposal on the adjacent wetlands." Based on this memo, by correspondence dated August 13, 2007, petitioner's representative was advised that his permit application was denied pursuant to Islip Town Code §67 Wetlands & Watercourses.

Petitioner then commenced the instant Article 78 proceeding seeking to annul the determination of Janover which resulted in the denial of the permit. Petitioner argues that the determination by Janover was arbitrary, capricious and an abuse of discretion. Moreover, he asserts that the Town's actions constitute a constructive taking of his property. Petitioner argues that pursuant to Islip Town Code §67-1B (annexed to the moving papers), upland and water bourne development which "materially affects the existing condition, use or appearance of the river south of Sunrise Highway should be permitted under regulations that will prevent adverse effects upon its scenic and recreational qualities", and that in the instant case, respondents have not demonstrated that there will be any affect upon the condition, use or appearance of the river. Additionally, petitioner argues that none of the acts enumerated in §67-5 of the Code, which require a permit, are going to be performed by petitioner. Specifically, he argues that the construction is not going to take place on the wetlands and there is going to be a 20-25 foot vegetated buffer, as set forth in the affidavit of William P. Bowman ("Bowman"), PhD, Environmental Scientist (annexed to moving papers). Bowman further states that the Town is allowing the discharge of storm-water onto the subject premises in violation of §67-5(A)(5) of the Town Code. Additionally, he states that the proposed construction contains sufficient storm-water detention capacity to ensure that runoff from proposed impervious surfaces will not significantly, adversely impact the Connetquot River and adjacent wetlands.

Petitioner also annexes an affidavit in support from Charles H. Weidner ("Weidner"), a licensed engineer. Weidner states that he met with Janover prior to the Board's granting of the

variance, that Janover made certain suggestions regarding widening and deepening the trench and addition of certain type of drainage chambers to better contain on site drainage. In accordance therewith, Weidener states he amended the plans to adopt Janover's suggestions and no further comments were raised by the town engineers prior to the granting of the variance. Weidner argues that the proposed drainage is superior to the existing conditions on the site in that there is currently no functioning drainage system.

Based on the foregoing, petitioner argues that the decision to deny the permit was arbitrary and capricious and an abuse of discretion and must be annulled and the Town be directed to issue a permit.

Respondents cross-move to dismiss the petition on the grounds that it fails to state a claim upon which relief may be granted, that mandamus relief is not appropriate and failure to name a necessary party. Specifically, respondents argue that the Board acted within its authority when it granted petitioner's application conditioned upon clearance from the Engineering Department, that petitioner did not challenge the Board's determination and the thirty (30) day statute of limitations has expired on the claim. Additionally, respondents argue that relief in the nature of mandamus to compel the issuance of the permit is not appropriate because it is a discretionary, rather than ministerial act. Finally, respondents assert that petitioner has failed to name a necessary party, to wit, the Building Division of the Department of Planning and Development, the agency with sole discretion to issue building permits. Thus, respondents urge the Court to dismiss the Petition in its entirety.

In opposition to the cross-motion and further support of Petition, petitioner argues that he is not challenging the Board's conditional grant, but rather that the determination by Janover lacked a rational basis and the Court has the power to review this determination pursuant to CPLR Article 78. Additionally, petitioner notes that the New York State Department of Environmental Conservation has issued a permit for the subject premises and that respondents' cross-motion does not address the affidavits from his engineer and environmental scientist.

In further reply, respondents reiterate their claim that petitioner is really challenging the Board's conditional grant, and the statute of limitations has expired on such claim. They continue to assert that mandamus relief is not appropriate to compel the performance of a discretionary act and that petitioner has failed to join the Building Division as a necessary party. Regarding the failure to address the merits of petitioner's expert affidavits, respondents state that they will address such claims if the motion to dismiss is denied.

STATUTE OF LIMITATIONS

Initially, the Court must address respondents' argument regarding the statute of limitations. Respondents assert that petitioner is actually challenging the condition imposed by the Zoning Board of Appeals on the variance, and that such is untimely as the proceeding was not commenced within thirty (30) days of the determination. Such argument is wholly without merit based upon the plain language of the Islip Town Code. Petitioner was advised on or about August 13, 2007 that his wetlands permit[1] was denied "per Town Code §67", a copy of which was annexed in its entirety to the Petition. The Court having reviewed the entirety of §67, happened upon the following provision, interestingly, cited by neither petitioner nor respondents. Section 67-20 states in relevant part as follows:

> **§67-20. Procedures upon denial or approval.**
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> If the permit application is denied or approved:
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> A. Any decision of the Department regarding a permit application shall be judicially reviewable.

Here, the August 13, 2007 correspondence clearly states that the permit was being denied in accordance with §67. Pursuant to §67-20, such denial is reviewable by this Court, and thus, respondents' argument that petitioner was required to challenge the Zoning Board's conditional grant is without merit. Since petitioner commenced this proceeding within thirty (30) days of the August 13, 2007 determination, the Court finds the proceeding was timely commenced.

MANDAMUS RELIEF

The law is well settled that mandamus relief may not be awarded to "compel an act in respect to which the officer may exercise judgment or discretion." ***Town of Riverhead v. New York State Department of Environmental Conservation,*** 50 A.D.3d 811, 858 N.Y.S.2d 183 (2d Dept. 2008) (internal citations omitted). Respondents assert that mandamus relief is not available in the case at

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[1] Although both petitioner and respondents referred to the permit as a "building permit", the record reflects that what was actually denied was a "wetlands permit".

bar to compel the issuance of a building permit[2] since same is a discretionary, rather than ministerial act.

Here, the Court agrees with respondents that mandamus relief is not available. Both §67 of the Islip Town Code and the grant by the Zoning Board of Appeals bestow discretion upon the Department of Planning and Development in the issuance of wetlands permits. Thus, that portion of the Petition seeking relief in the form of mandamus to compel the issuance of a permit is denied.

FAILURE TO JOIN A NECESSARY PARTY

CPLR §1001 provides in relevant part as follows:

> (a) Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refused to do so he may be made a defendant.
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> (b) When joinder excused. When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider:
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> 1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
> 2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
> 3. whether and by whom prejudice might have been avoided or may in the future be avoided;
> 4. the feasibility of a protective provision by order of the court or in the judgment; and
> 5. whether an effective judgment may be rendered in the absence of the person who is not joined.

Respondents argue that petitioner's failure to join the Building Division of the Department

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[2] See FN. 1 above.

of Planning and Development as a necessary party mandates dismissal of the action. Upon application of the balancing test set forth in CPLR §1001(b), however, the Court disagrees. First, if the proceeding is dismissed for nonjoinder, petitioner does not have another effective remedy as the statute of limitations has expired for purposes of commencing a proceeding against the Department of Planning and Development. Second, there would be no prejudice from the nonjoinder to either the respondents or the Department of Planning and Development, as their interests are so intertwined. ***See, Long Island Contractors' Assn v. Town of Riverhead,*** 17 A.D.3d 590, 793 N.Y.S.2d 494 (2d Dept. 2005). Moreover, although petitioner could have avoided any potential prejudice by joining the Department of Planning and Development in the first instance, the Court can still afford the present parties complete relief in their absence, in light of the Court's determination dismissing that portion of the Petition seeking mandamus relief. ***See, Glen Head-Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay,*** 88 A.D.2d 484, 453 N.Y.S.2d 732 (2d Dept. 1982). That is, even if the Court were to ultimately grant the Petition, the matter would merely be remitted for further proceedings and the Court could not direct the issuance of the permit.

Based on the foregoing and in the exercise of this Court's discretion, the motion to dismiss the petition based upon nonjoinder of a necessary party is denied. Petitioner shall serve a copy of this Order upon respondents within ten (10) days from the date herein. Respondents shall serve a Verified Answer and Return within twenty (20) days of service of a copy this Order and petitioner shall have ten (10) days to serve a Reply. This proceeding shall be submitted to the Court for consideration on September 4, 2008.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: July 28, 2008
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.