

Matter of Case v Guidera
2008 NY Slip Op 32311(U)
August 15, 2008
Supreme Court, Suffolk County
Docket Number: 0008542/2008
Judge: Thomas F. Whelan
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disregard or over-accommodation of the accommodation standard under *Cornell Univ. v Bagnardi*, 68 NY2d 583, 510 NYS2d 861 (1986), and errors of law with respect to SEQRA.

The SEQRA challenge is further divided into four claims: no analysis nor any discussion about environmental impacts on or from the Rear Lot (lot 3.3); a failure to provide any traffic counts or studies for Fridays and Saturdays during the “high season” from May - October; no analysis or discussion regarding the potential for segmentation; and a failure to conduct a full coordinated review with the Suffolk County Department of Public Works (“DPW”). At oral argument, petitioners conceded that the DPW is not an involved agency and withdrew the claim of lack of coordinated review under SEQRA.

In the prior decision, this Court foreshadowed the instant determination, that is, the Board’s ultimate conclusion that a limited church use, operating on a small, non-conforming lot with less on-site parking than required, while mitigating interference with the privacy and enjoyment of the neighboring properties, is obtainable. With the expanded record, this Court believes that the Board has satisfied its zoning and SEQRA obligations.

In the new decision, the Board concluded that the Chabad’s application failed under the five-factor balancing test of Village Law § 7-712-b (“we find and conclude that the detriment to the neighborhood outweighs the benefit to Chabad in light of Chabad’s self-created difficulty and the substantial multiple variances here involved”) (Decision, p 28), but should be granted under the “accommodation standard” of *Cornell Univ. v Bagnardi*, 68 NY2d 583, *supra*.

Unlike the prior decision, where the Board failed to follow the appropriate legal standard, here, in evaluating the Chabad permit request, the Board set forth a separate analysis of the five factors in its new determination. The Board found that the application failed under the first, third, fourth, and fifth factors (*see* Return, Ex. 17-8, item 107, Decision, pp 23-28).

Here, the Board did apply the five-part balancing test before it applied the accommodation standard. Petitioners claim that the Board only makes references to the five factors without a careful analysis of each. Upon reading the entire 43-page decision, this Court must disagree. The Decision is detailed and addresses all of the concerns set forth in this Court’s prior Order.

As this Court previously noted, religious uses enjoy “a preferred status which curtails the permissible review authority of local administrative agencies” (Rice, Supp. Practice Commentaries, McKinney’s Cons Laws of NY, Book 61, Town Law §267-a, 2007 Pocket Part, at 53), but a reviewing board must still examine the five factors under the balancing test for a variance when examining a special permit application for a place of worship (*see Matter of Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Zoning Bd. of Appeals of Town/Village of Harrison*, 296 AD2d 460, 745 NYS2d 76 [2002]; *Matter of Apostolic Holiness Church v Zoning Bd. of Appeals of the Town of Babylon*, 220 AD2d 740, 633 NYS2d 321 [2d Dept 1995]; *see also Matter of Richmond v City of New Rochelle Bd. of Appeals on Zoning*, 24

AD3d 782, 809 NYS2d 110 [2d Dept 2005]; *Matter of Rosenfeld v Zoning Bd. of Appeals of the Town of Ramapo*, 6 AD3d 450, 774 NYS2d 359 [2d Dept 2004]).

If a zoning board makes findings against the variance request with respect to the five factors, then the board must, whenever possible, make every effort to accommodate a religious use by the imposition of conditions (see *Church of Jesus Christ of Latter-Day Saints*, *supra*; *Apostolic Holiness Church*, *supra* (conditions relating to occupancy and parking); *Matter of Islamic Socy. of Westchester and Rockland, Inc. v Foley*, 96 AD2d 536, 464 NYS2d 844 [2d Dept 1983] (conditions that mitigate the detrimental or adverse effects upon the surrounding community); *Cornell Univ. v Bagnardi*, 68 NY2d 583, *supra*).

A religious institution does not enjoy a “conclusive presumption of an entitlement to an exemption from zoning ordinances” (*Cornell Univ. v Bagnardi*, 68 NY2d at 594, *supra*). The Court of Appeals has reaffirmed the right of zoning boards, after the appropriate balancing process, to deny a special use permit, when presented with evidence of significant impacts and where the use may actually detract from the public’s health, safety, welfare, or morals (see *Matter of Pine Knolls Alliance Church v Zoning Bd. of Appeals of the Town of Moreau*, 5 NY3d 407, 804 NYS2d 708 [2005] [denial of permission to construct a secondary driveway was appropriate where board directed widening of existing driveway as a mitigating condition]; see also *McGann v Incorporated Vil. of Old Westbury*, 293 AD2d 581, 741 NYS2d 75 [2d Dept 2002]; *Matter of W. New York District, Inc. of the Wesleyan Church and the Vine Wesleyan Church v Village of Lancaster*, 17 Misc3d 798, 841 NYS2d 740 [Sup Ct, Erie County, 2007]).

Petitioners complain that the Board “went to extraordinary lengths to completely reconfigure how this tiny postage stamp size parcel is to be reconstructed in order to justify granting the application” (Memorandum of Law, p 8). However, the Board was required to “suggest measures to accommodate the proposed religious use while mitigating the adverse effects on the surrounding community to the greatest extent possible” (*Matter of St. Thomas Malankara Orthodox Church v Board of Appeals of Town of Hempstead*, 23 AD3d 666, 804 NYS2d 801 [2d Dept 2005]).

The Court notes that while petitioners’ planning consultant offered much criticism, there was no criticism of the alternative to alter the existing driveway and replace same with a common driveway. While the dimensions of the driveway are challenged, the Board offered support for its design and its claim that it will provide safe access.

This Court finds similarities in the instant application and the circumstance facing the board in the *Apostolic Holiness Church* case, *supra*, where, despite the substantiality of the variances requested, the court concluded that construction on smaller than code-size required lots was permitted and held that the religious use should be permitted with appropriate conditions relating to occupancy and parking.

Additionally, contrary to the petitioners’ claim, the Court finds that the Board’s Decision with respect to SEQRA (see 6 NYCRR Part 617), comports with the required strict procedural compliance. Included in the environmental review is the affect of the application on the adjoining flag lot, that is, the newly acquired

rear lot, commonly known by its Suffolk County Tax Map Number as lot 3.3 (*see* Return, Ex. 95, Expanded EAF, pp 12 -13).

As noted in this Court's prior decision, courts have interpreted required literal compliance with the review procedures set forth in SEQRA and its regulations (*see Aldrich v Pattison*, 107 AD2d at 263, *supra*; *Matter of McNally*, 90 NY2d 742, 750, 665 NYS2d 605 [1997]). At the same time, the courts have tempered this view with regard to substantive compliance with SEQRA. The Court of Appeals in *Matter of Eadie v Town Bd. of the Town of N. Greenbush*, 7 NY2d 306, 821 NYS2d 142 (2006), recently reaffirmed the 'rule of reason' standard with regard to substantive compliance and further declared that "[w]here an agency has followed the procedures required by SEQRA, a court's review of the substance of an agency's determination is limited."

Unlike the prior EAF, which was prepared and reviewed only with regard to the Chabad parcel, the applicant and the Board have reviewed the proposal as set forth in the second amended application. Contrary to petitioners' claim, the Board, and particularly its expert, provided analysis of the zoning and environmental impacts on the Rear Lot (lot 3.3) (*see* Return, Ex. 95, Expanded EAF, pp 12 -13). It was noted that the portion of Lot 3.3 that abuts the subject lot is itself used for off-street parking (*see* Decision, p 16). In any event, setback variances are a Type II activity under SEQRA. The Board explained that the impacts on lot 3.3 are minimal, while the reduction of on-street parking along Hill Street will create a favorable impact.

With regard to the concern of increased traffic along Hill Street, it is conceded by all parties that Hill Street is one of the major entrance roads into the Village, serves as the truck route system for travel from the westerly Village line easterly, and records substantial traffic counts. The most important mitigation measure is the occupancy limitation of 65 persons from May1 through October 31 (*see* Decision, p 12). The Board found that there exists 27 on-street parking spaces within 300 feet of the parcel (*see* Decision, p 15). As noted by the Board's expert, "[t]he anticipated gathering of 35 to 65 seasonal Chabad members is not expected to impact the surrounding neighborhood character as a result" (Return, Ex. 95, Expanded EAF, p 7). The expert's traffic analysis (*see* Return, Ex. 95, Expanded EAF, pp 9 -11; 16; *see also* Ex. 95, EAF Part 2, p 18) adequately addresses the worst-case scenario concerns. With over 12,000 vehicles traveling the road each day, this limited religious use adds, at best, a modest amount of additional traffic to the area (*see also* Return, Ex 106, Declaration of Negative Declaration, item 10, pp 4 -5).

Here, unlike the initial review, the Board rendered a separate SEQRA determination that the proposed action will not have a significant adverse impact on the environment (*see* Return, Ex 106; *see also* Decision, pp 19 - 22). The Decision goes on to note that "[w]e find that no credible evidence has been presented showing that this project may result in any large adverse impact on the environment" (Decision, p 20). The Decision (*see* p 19) states that it credits the analysis of its chosen expert, which it is permitted to do (*see Matter of Ball v New York State Dept. of Env'tl. Conservation*, 35 AD3d 732, 826 NYS2d 698 [2d Dept 2006]; *Matter of Gladstone v Zoning Bd. of Appeals of Inc. Vil. of Southampton*, 13 AD3d 445, 785 NYS2d 697 [2d Dept 2004]).

This Court is satisfied that the procedural defects have been corrected and the Board issued an appropriate negative declaration. That negative declaration established that this project will not result in any significant adverse environmental impacts and that the required “hard look” at the environmental impacts associated with the second amended application was undertaken by the Board.

In all, the record, that is, the Expanded EAF and EAF Part 2, in conjunction with the Board’s Negative Declaration (*see Return, Ex.106, pp. 2 - 5*) and Decision (*see Return, Ex.107, pp. 10 - 17, 19 - 22*), demonstrates that the Board identified potential impacts, took a “hard look” at them, and made a “reasoned elaboration” of the basis for its negative declaration. In reading this entire record, the Court can find no evidence that refutes the conclusion of the Board and its expert that this project will have small to moderate adverse impacts on the environment (ten [10] are listed and examined) but will not result in any large adverse impact.

Petitioners failed to present credible evidence that these small to moderate impacts may result in any potentially large or adverse impact on the environment. Petitioners’ reliance upon the comments of the Board’s prior consultant, David Emilita, is misplaced since the project has been modified from that 2005 review. Moreover, the claim that the granting of such substantial variances may set a precedent, is explained by the Board’s expert to be limited to this “unique project and set of circumstances [and] would not be expected to set an adverse precedent for future decisions” (*see Return, Ex. 95, Expanded EAF, p 16*)

Finally, the Court disagrees with the claim that the Board’s review constitutes segmentation in violation of SEQRA. An agency is not required to speculate as to possible future uses of property in rendering its SEQRA determination (*see Matter of David’s Lane-Pondview Preser. Assn. v Planning Bd. of Vil. of East Hampton*, 216 AD2d 389, 628 NYS2d 341 [2d Dept 1995]; *Matter of Vil. of Tarrytown v Planning Bd. of Vil. of Sleepy Hollow*, 292 AD2d 617, 741 NYS2d 44 [2d Dept 2002]).

Petitioners strain to create a segmentation issue that does not exist in the record before the Court. In fact, the Decision of the Board sets forth the existing and planned uses for the religious use (*see Decision, condition 17, p 42-3*). The Court agrees with Chabad that the occupancy limitations controls all current and future activities which might be conducted on the premises. This claim is simply not comparable to the facts set forth in such cases as *Matter of Teich v Buchheit*, 221 AD2d 452, 633 NYS2d 805 (2d Dept 1995), *Matter of AC 1 Shore Road, LLC v Incorporated Vil. of Great Neck*, 43 AD3d 439, 841 NYS2d 344 (2d Dept 2007) or *Matter of Waldbaum, Inc. v Incorporated Vil. of Great Neck*, 10 Misc3d 1078[A], 814 NYS2d 893 (Sup Ct, Nassau County, 2006). There is no showing that this project constitutes a part or segment of a long-range plan.

The Court is also satisfied with the fact that the Chabad dwelling’s sprinklers and fire alarm system have been approved by the Village Fire Marshal (*see Return, Ex 100*), thereby ensuring compliance with fire safety regulations.

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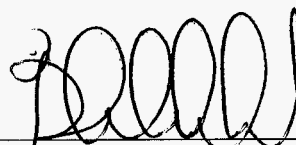
Once again, petitioners have failed to offer proof that Chabad substantially impairs the privacy, enjoyment, and use of the neighboring residential properties.

The petitioners have failed to submit convincing claims that the Board acted in an arbitrary or capricious manner in applying the requirements of the zoning code in a more flexible manner for this religious use (see *Matter of Islamic Socy. of Westchester and Rockland, Inc. v Foley*, 96 AD2d 536, *supra*). “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” (*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613, 781 NYS2d 234 [2004]; see also *Matter of DeCarlo Capital Inv. Group, LLC v Voekler*, 32 AD3d 852, 821 NYS2d 610 [2d Dept 2006]).

Accordingly, the petition is denied in its entirety. This constitutes the decision and Judgment of the Court.

DATED: _____

8/15/08



THOMAS F. WHELAN, J.S.C.