SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 7

NASSAU COUNTY

SHUTTLE CONTRACTING CORP.,

Plaintiff,

-against-

MOTION DATE: 5/21/08

MOTION SEQ. NO.: 001

PLANNING BOARD OF THE INCORPORATED VILLAGE OF GREAT NECK, CHARLES W. SEGAL, BART SOBEL, RAYMIND IRYMAI, ROBIN BORDON, BRUCE ROTHSTEIN, AS MEMBERS OF THE PLANNING BOARD AND BEHZAD PEIKARIAN AND FARIBA PEIKARIAN

INDEX NO.: 12613/2007

Defendants.

The following papers having been read on the motion (numbered 1-3):

Notice of Petititon.....1
Memorandum of Law.....2
Verified Answer.....3

This is an Article 78 proceeding wherein the petitioner is seeking to annul the determination of the respondent Planning Board of the Incorporated Village of Great Neck (hereinafter referred to as "the Planning Board") which granted preliminary and subsequently final approval of a certain subdivision.

Petitioner Shuttle Contracting Corp. (hereinafter referred to as "Shuttle") is the owner of a certain parcel of property commonly known as Section 1, Block 201, Lot 57, located in the Incorporated Village of Great Neck. A portion of the premises is commonly referred to as Dwight Lane. Respondents Behzad Peikarian and Fariba Peikarian are the owners of premises located at 199 Dwight Lane, (West Shore Road), known as Section 1, Block 201, Lots 47, 48 and 49,

Incorporated Village of Great Neck. The property owned by Shuttle abuts and adjoins the property owned by respondents Behzad Peikarian and Fariba Peikarian on one side and a private right of way commonly known as Dwight Lane is on the other side.

In February, 2006, the Peikarians sought a variance from § 575-53A and § 575-51(A) of the Code of the Village of Great Neck for a proposed subdivision of one building lot into three building lots, one of which would not satisfy the required 100-foot lot depth requirement; one of which would not have the required street frontage of 60 feet; and one of which would not satisfy the required 100-foot lot depth requirement or have the required street frontage of 60 feet.

By resolution dated October 5, 2006, the Zoning Board of Appeals granted the application upon the following conditions:

> ONE. The subdivision shall be substantially in accordance with the plans submitted with the application entitled " 'Peikarian' " Subdivision"; prepared by Leonard J. Strandberg and Associates, Consulting Engineers and Land Surveyors, P.C., surveyed on May 17, 2005 and last amended on February 16, 2006.
>
> TWO. Other than the variances set forth herein with regard to lot depth for Lots 47 and 48 and street frontage for Lots 48 and 49, all development and construction on the Premises shall conform to all other zoning requirements of the Village.

THREE. There shall be no further subdivisions of any of the three Lots and such prohibition shall be set forth in a declaration of covenants and restrictions, running with the land to the benefit of the Board of Trustees of the Village, in a form approved by General Counsel to the Village. No subdivision shall be effectuated and no building permits shall be issued for any of the three Lots until such declaration has been recorded in the Nassau County Clerk's office and the applicants have reimbursed the Village for its costs in having said declaration reviewed, approved, and recorded.

FOUR. This approval is subject to the applicants receiving subdivision approval and site plan approval from the Village Planning Board. In seeking such approvals, the applicants shall provide the Planning Board with a copy of this decision, so that the Planning Board may review the comments and recommendations set forth in this Board's findings of fact.

FIVE. No building permit shall be issued pursuant to this approval until after the Village Planning Board has received from the Village Engineer a certificate of compliance with Chapter 492 of the Village Code.

After the Zoning Board of Appeals granted the variance application, the Peikarians applied to the Planning Board for subdivision approval.

In January, April and June, 2007, the Planning Board conducted several public hearings on the preliminary subdivision application. Shuttle was represented by Avrum Rosen, Esq., via letters and at a hearing. Shuttle's counsel argued, *inter alia*, that the Peikarians were not entitled to the widened portion of Dwight Lane ("the bulge") for utilities and ingress and egress as they were limited to a 30-foot wide right of way.

On June 21, 2007, the Planning Board granted preliminary subdivision approval.

Shuttle thereafter commenced this Article 78 proceeding to annul the Planning Board's decision on the grounds that the Peikarians did not have the right of way to utilize the widened portion of Dwight Lane for utilities and access for a second house (Lot 47); the preliminary subdivision approval constituted a taking of Shuttle's property; and the notices of the public hearing were defective because they were addressed to Mr. Lieberman and not to Shuttle.

Shuttle contends that the explicit terms of the easement limit the Peikarians to a 30 foot wide right of way across Dwight Lane, that the widened portion of Dwight Lane falls outside of this 30 foot wide right of way, and that the Peikarians are therefore precluded from using it for utilities or access to Lot 47. In response, respondents assert that all of the evidence submitted by the Peikarians to the Planing Board–the Easement, Tax Map, Subdivision Map, title insurance report, and an opinion letter from a title company–confirms that the Peikarians have an unrestricted right to the proposed use of Dwight Lane.

LEGAL ANALYSIS

Initially, this court notes that the Board of Appeals decision rendered by the Zoning Board of Appeals was filed in the Village Clerk's office on October 6, 2006. Neither Shuttle nor anyone else commenced an Article 78 proceeding challenging the Zoning Board's approval within the 30-day statute of limitations set forth in Village Law §7-712-c. Instead, this action was commenced in July, 2007. Since Shuttle had the obligation to challenge the resolution within the prescribed period of limitations and failed to do so, it is foreclosed from challenging the Zoning Board's decision.

With this background in mind, we conclude that the Planning Board's decision approving the subdivision application was rational and supported by the evidence (*Pecoraro v Board of Appeals*, 2 NY3d 608 [2004]).

The Court of Appeals has noted that local zoning boards have broad discretion in considering applications for area variances and the judicial function in reviewing such decisions is a limited one (*Id.* at p. 613).

"In reviewing the decision of a planning board, this Court will not substitute its judgment for that of the planning board unless it acted in an arbitrary, capricious or illegal manner" (*Matter of MLB, LLC v Schmidt*, 50 AD3d 1422 [3rd Dept. 2008] quoting *Matter of Sheer Pleasure Lingerie, Inc. v Town of Colonie Planning Board*, 251 AD2d 859, 869 [3rd Dept .1998]).

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 Board of Appeals, 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. *Id.*

The rationale for the limited role of the Courts was stated in *Matter of*

Cowan v Kern, 41 NY2d 591, 599 [1977], *rearg den.* 42 NY2d 910 [1977]. In *Matter of Cowan*, at page 599, the Court stated as follows:

> "The crux of the matter is that the responsibility for making zoning decisions has been committed primarily to quasi-legislative, quasi-administrative boards composed of representatives from the local community. Local officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community. Absent arbitrariness, it is for locally selected and locally responsible officials to determine where the public interest in zoning lies."

The Court further stated at page 614 that:

> "It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them" (*Id.*)

Generally, the extent of an easement is determined by the language of the grantor (*Phillips v Jacobsen*, 117 AD2d 785 [2nd Dept .1986]). "Where necessary, the construction of the grant may be aided by a consideration of the surrounding circumstances tending to show the intention of the parties (*see Matter of City of*

New York [West Tenth St. Realty], 267 NY 212 [1935]). However, the terms of the grant are to be construed most strongly against the grantor in ascertaining the extent of the easement (*see Dillon v Moore*, 270 App Div 79 [3rd Dept. 1945], *aff'd.* 296 NY 561 [1946]). An easement granted in general terms must be construed to include any reasonable use to which it may be devoted, provided the use is lawful and is one contemplated by the grant (*see Missionary Socy. of Salesian Congregation v Evrotas*, 256 NY 86 [1931])" (*Phillips v Jacobson, supra* at p. 786; *see also Somers v Shatz*, 22 AD3d 565 [2nd Dept. 2005].

In the case at bar, the Peikarians' right to use Dwight Lane for utilities and ingress and egress was granted in an easement dated January 5, 1950 and recorded in the Nassau County Clerk's Office in Liber 4319, Page 512. A plain reading of the easement reveals that it does not contain the 30 foot wide limitation claimed by Shuttle. Instead, the easement explicitly grants:

> "[a]n unlimited right of way in common with others over said premises known as Dwight Lane, as herein above or particularly described in either direction.
>
> Together with the right to use in common with others the gas mains, water mains, sewerage mains, electric light lines and telephone lines heretofore constructed and installed on or under said Dwight Lane."

Absent countervailing factors, the extent of the easement contemplated the inclusion of the disputed area known as the "bulge." The easement contains a metes and bounds description of all of Dwight Lane, including the widened

portion along its north side abutting Lot 47. Accordingly, the bulge area is within the metes and bounds description in the easement. Hence, the Peikarians' proposed use is within the scope of the grant. In this respect, Mr. Leiberman of Shuttle, a sophisticated businessman, should have contemplated that the easement would be used for ingress and egress to the property owned by the Peikarians (*see Phillips v Jacobsen, supra*).

Further, "[w]here, as here, conflicting inferences may be drawn, it was the responsibility of the Board, not this Court, to weigh the evidence and exercise its discretion in approving or denying approval to the subdivision plat" (*Matter of MLB LLC v Schmidt, supra; see Matter of Razzano v Planning Bd. of Town of N. Elba*, 223 AD2d 815, 816 [3rd Dept .1996]; *Matter of M & M Partnership v Sweenor*, 210 AD2d 757, 576-577 [1994]; *Matter of Currier v Planning Bd. of Town of Huntington*, 74 AD2d 872, 872 [1980], *aff'd.* 52 NY2d 772 [1980]).

Petitioner's contention that the Planning Board's approval of the Peikarians' subdivision application constitutes a taking of its property is not properly before this Court. Petitioner's sole remedy for an alleged violation of the easement is a private action against the Peikarians (*see Gersten v Cullen*, 203 AD2d 744 [3rd Dept. 1944]).

As the court stated in *Matter of Friends of the Shawangunks v Knowlton*, 64 NY2d 387 [1985]):

> "The use that may be made of land under a zoning ordinance and the use of the same land under an easement or restrictive covenant are, as a general rule, separate and distinct matters, the ordinance being a legislative enactment and the easement or covenant a

> matter of private agreement (*see Ginsberg v Yeshiva of Far Rockaway*, 36 NY2d 706, *affg* 45 AD2d 334, 337-338; 4 Rathkopf, The Law of Zoning and Planning § 57.02 [4th ed.]. Thus, a particular use of land may be enjoined as in violation of a restrictive covenant, although the use is permissible under the zoning ordinance (*Gordon v Incorporated Vil. of Lawrence*, 56 NY2d 1003, *affg* 84 AD2d 558, 559; *Regan v Tobin*, 89 AD2d 586, 587), and the issuance of a permit for a use allowed by a zoning ordinance may not be denied because the proposed use would be in violation of a restrictive covenant."

Petitioner's assertion that this constitutes a *de facto* taking is also rejected by this court. A *de facto* taking requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property (*City of Buffalo v J.W. Clement Company, Inc.*, 28 NY2d 241 [1971], *rearg den.* 29 NY2d 649 [1971]). No such action has taken place here.

Nor will the court disturb the Board's conclusion that Shuttle had adequate notice of the hearings conducted by the Zoning Board of Appeals and Planning Board hearings. Notably, Shuttle did not appear or otherwise object to the variance application submitted by the Peikarians. Shuttle did, however, appear both before and during the Planning Board's preliminary subdivision hearing and was

represented by counsel. Shuttle, therefore, cannot be heard to argue that it did not receive the notice or that it was somehow prejudiced because some notices were addressed to Mr. Lieberman instead of Shuttle (*see Petronella v Zoning Board of Appeals of the City of Yonkers*, 138 AD2d 712 [2nd Dept. 1998]).

Finally, this Court did not consider the July 19, 2007 transcript of the Peikarians' application for final subdivision approval as petitioner is challenging the Planning Board's preliminary approval of the subdivision application.

In sum, the Board of appeals decision was not challenged and the planning boards determination was not irrational and was neither arbitrary nor capricious. As there was a rational basis to support the Planning Board's grant of the subdivision application, the determination should be upheld (*see Pecoraro v Board of Appeals, supra; see also Matter of MLP BBC v Schmidt, supra).* Accordingly, the application by petitioner for a judgment pursuant to Article 78 of the CPLR annulling the determination of the respondent Board is **denied** and the petition is hereby **dismissed.**

This constitutes the Order of the Court.

Dated: 8/30/08

ENTER:

J.S.C.