Matter of Petikas v Baranello

2008 NY Slip Op 33432(U)

December 3, 2008

Supreme Court, Nassau County

Docket Number: 4126/08

Judge: Antonio I. Brandveen

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

In the Matter of the Application of

NICK PETIKAS and VS BROTHERS, LLC,

Petitioners,

for Judgment Pursuant to Article 78, Civil Practice Law and Rules

- against -

PATRICIA A. BARANELLO, Chairwoman, JOSEPH BORDINO, SCOTT F. GUARDINO, JACQUELINE A. WATTERS, SUSAN CLONINGER, JOHN J. FANNING, and LOIS SCHMITT, constituting the members of the Zoning Board of Appeals of the Town of Oyster Bay,

Respondents.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 4126/08

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Petition, Affidavits, & Exhibits	1
Answering Affidavits	2
Replying Affidavits	3
Briefs: Plaintiff's / Petitioner's	4
Defendant's / Respondent's	5

The petitioners seek a judgment pursuant to CPLR Article 78 annuling and reversing the decision of the respondents, constituting the members of the Zoning Board of Appeals of the Town of Oyster Bay, which denying the petitioners' application for zoning "area" variances required in order to permit the construction of three new single

family dwellings with respect to premises located on the westerly side of Humphrey Drive, north of Jericho Turnpike, Syosset, within the Town of Oyster Bay. The respondents respond in opposition with a verified answer and an affirmation dated April 17, 2008, by counsel. This Court has carefully reviewed all of the papers submitted with respect to this motion.

The petitioners seek judicial review of three decisions and findings of the respondents which denied the petitioners' request for subdivision, and an area variance for relief from frontage requirements of the subject parcel located in an R1-7 zoning district. The premises are presently improved by a single family home and detached garage, and the petitioners seek to demolish the existing premises, and subdivide the lot into three lots, and construct three new colonial style single family dwellings, each with such structure and an attached garage.

The verified petition dated March 3, 2008 states, there are several nearby properties, referred to by the petitioner's expert, which do not conform to the lot frontage requirements of the R1-7 zoning district. The verified petition states the application to subdivide the premises and construct the three new dwellings with garages were denied on the basis that each of the dwellings was to be constructed on a parcel with a lot width of 50 feet where 70 feet was required. The verified petition indicates the proposal complied with all other zoning ordinance requirements, including lot area, lot coverage, front, rear and side yard setbacks and height. The verified petition points out the

petitioner Nick Petikas applied to the respondents for the zoning "area" variances to obtain permits to subdivide the premises, and to construct the new single family dwellings with garages as proposed. The verified petition points to the hearing held by the respondents on January 25, 2008, where evidence was submitted showing numerous nonconforming parcels within a 100-foot radius of the proposed subdivision; the respondents granted a variance to premises directly north of the subject premises creating two parcels 50 feet in width; the subject premises are just 155 feet north of Jericho Turnpike, a high trafficked roadway abutting a King Kullen shopping center to its west, and opposite a Burger King restaurant to its east; the petitioners' credentialed real estate expert, Barry Nelson, testified and concluded the proposed development would have no adverse impact upon the surrounding property values, but would have a substantial economic benefit to the petitioners far exceeding any perceived detriment to the surrounding community; the petitioners satisfied all requirements of Town Law § 267-b (3) (b), so they are entitled to the requested variances. The verified petition states the respondents' decisions denying the petitioners applications are irrational, capricious, unreasonable, and contrary to the evidence in the record. The verified petition claims the denial was predicated solely upon generalized community opposition, and is not in any manner supported by substantial evidence in the record. The attorney for the petitioners argues, in detail, in a legal memorandum dated October 30, 2008, the respondents' decision fails to adhere to its own precedent nor offer a valid explanation for a derivation

from that precedent, and requires the petition be granted, since the respondents' decision denying the petitioners' application for zoning "area" variances was arbitrary, capricious and unsupported by substantial evidence.

The attorney for the respondents points out, in the opposing affirmation dated April 17, 2008, the applicant does not presently reside in the dwelling on the premises, and should the application be granted Petikas would not reside in any of the three proposed new dwellings, but would realize a $300,000.00 profit from the subdivision. The attorney for the respondents asserts the nearby allegedly nonconforming properties, developed in the 1970's have larger frontages than the three proposed new dwellings of the petitioners. The attorney for the respondents avers, after consideration of all of the statutory factors, the respondents voted to deny the application, and found the application did not meet any of those five factors. The attorney for the respondents notes the respondents determined that application was substantial pursuant to Town Law § 267-b (3) (b) (1), and the petitioners could achieve the benefit sought by another method pursuant to Town Law § 267-b (3) (b) (2), specifically by subdividing the parcel into two conforming lots rather than three nonconforming lots, and building larger residences on each lot. The attorney for the respondents contends the petitioners would not have had to seek a variance if they opted to subdivide the parcel into two lots. The attorney for the respondents claims the respondents may properly take into account the testimony of the residents in the community affected by the application. The attorney for the respondents

contends the record establishes the determination of the respondents is based upon substantial evidence proffered at the hearing, so that determination was not arbitrary nor capricious, and the record established an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties with an adverse effect or impact on the physical or environmental conditions in the neighborhood. The attorney for the respondents argues, based upon the record, after weighing the applicable statutory factors, local laws and ordinances, case law, the detriment to the neighborhood outweighs the benefit to the petitioners if the requested area variances from frontage requirements is granted, so the decision of the respondents should be left undisturbed by the Court, and the petition dismissed. The attorney for the respondents notes the record is clear the respondents were not alone in making such findings since the Nassau County Planning Commission, in Resolution number 9345-08 made identical findings with respect to both the change in the character of the neighborhood, as well as the detrimental impacts on nearby properties and recommended a modification to the application to subdivide the parcel into two rather than three lots which would not require a variance. The attorney for the respondents observes the Nassau County Planning Commission also found, as well as the respondents, the proposed subdivision, and accompanying frontage variances likely would increase congestion in an already constrained section of Humphrey Drive that experiences congestion at present, and would create a precedent for the creation of other substandard lots in the neighborhood. The attorney for the respondents points out the

respondents found the proposed subdivision lots would be narrower than any allowed in any residential zone in the Town of Oyster Bay, even in the R1-6 area which permits frontages of 60 feet. The attorney for the respondents maintains the provisions of the Code of the Town of Oyster Bay have deemed wide yards and quiet neighborhoods as being of paramount importance, and should not be disputed.

The Second Department recognizes:

> Municipal land use agencies like the Zoning Board are "quasi-legislative, quasi-administrative" bodies, and the public hearings they conduct are "informational in nature and [do] not involve the receipt of sworn testimony or taking of 'evidence' within the meaning of CPLR 7803 (4)". While parties may have a right to be heard by such agencies and to present facts in support of their position, the forum in which they do so is not "a quasi-judicial proceeding involving the cross-examination of witnesses and the making of a record within the meaning of CPLR 7803 (4)". Accordingly, determinations of such agencies are reviewed under the "arbitrary and capricious" standard of CPLR 7803(3), and not the "substantial evidence" standard of CPLR 7803 (4) [citations omitted]

Halperin v. City of New Rochelle, 24 A.D.3d 768, 770-771, 809 N.Y.S.2d 98 [2nd Dept., 2005].

CPLR 7803 provides, in pertinent:

> The only questions that may be raised in a proceeding under this article are: (3) whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed.

The New York State Court of Appeals has enunciated the standard, by stating:

> We begin, as we must, by reiterating the well-established rule that local zoning boards have discretion in considering applications for variances and the judicial function is a limited one. A zoning board determination should not be set aside unless there is a showing of illegality, arbitrariness or abuse

> of discretion. (***Conley v Town of Brookhaven Zoning Bd. of Appeals***, 40 NY2d 309.) That is to say, the determination of responsible local officials in the affected community will be sustained if it has a rational basis and is supported by substantial evidence. (***Matter of Cowan v Kern***, 41 NY2d 591, 599; ***McGowan v Cohalan***, 41 NY2d 434, 438; ***Matter of Wilcox v Zoning Bd. of Appeals of City of Yonkers***, 17 NY2d 249, 255)

Fuhst v. Foley, 45 N.Y.2d 441, 444-445, 410 N.Y.S.2d 56 [1978].

The Second Department holds: "[a] determination will be deemed rational if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition. A reviewing court, however, does not consider whether the determination is supported by "substantial evidence," within the meaning of CPLR 7803(4)" (***Halperin v. City of New Rochelle, supra*** at 772).

> In passing on an application for an area variance, a city zoning board is required to "take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant" (General City Law § 81-b[4][b]). In making its determination, the zoning board must also consider: "(i) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance, (ii) whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue, other than an area variance; (iii) whether the requested area variance is substantial; (iv) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (v) whether the alleged difficulty was self-created" (General City Law § 81-b [4] [b]).

(***Halperin v. City of New Rochelle, supra*** at 773).

Here, this Court determines the respondents did balance and weigh the statutory factors, and the respondents findings were based on objective facts appearing in the record. The respondents' determinations to deny the applications were rational and not

arbitrary and capricious.

Accordingly, the petition is dismissed and denied. This constitutes the order and judgment of the court.

So ordered.

Dated: **December 3, 2008**

ENTER:

HON. ANTONIO I. BRANDVEEN

L.S.

FINAL DISPOSITION xxx NON FINAL DISPOSITION

ENTERED
DEC 15 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE