

**Matter of Atlantic Shores Builders & Developers, Inc.
v Modelewski**

2008 NY Slip Op 33559(U)

December 30, 2008

Supreme Court, Suffolk County

Docket Number: 10549-07

Judge: Peter Fox Cohalan

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MEMORANDUM OF LAW

SUPREME COURT, SUFFOLK COUNTY

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In the Matter of the Application of

ATLANTIC SHORES BUILDERS & DEVELOPERS, INC.,

Petitioner,

-against-

Christopher Modelewski, Chairman, Scott M. Frayler, Vice-Chairman, Robert F. Slingo, Carol Gaughran, Jeffrey N. Nanness and James Rogers, constituting the

ZONING BOARD OF APPEALS OF THE TOWN OF HUNTINGTON,

Respondent,

For Relief Pursuant to Article 78 of the New York Civil Practice Law and Rules,
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I.A.S. PART 24

By: Cohalan, J.S.C.
Dated: December 30, 2008

Index No. 10549-07

Mot. Seq. #003

CDISPSUBJ

Return Date: May 31, 2007
Calendar Date: March 19, 2008

This is an Article 78 special proceeding brought by the petitioner seeking to reverse, annul and set aside a determination and denial by the respondents, Zoning Board of Appeals of the Town of Huntington (hereinafter ZBA) of an application for approval of a subdivision on property located on the south side of Breeze Hill Road in Northport, Suffolk County on Long Island, New York.

The petitioner, Atlantic Shores Builders & Developers, Inc., is the owner of a residential parcel of real estate with an oversized lot area of 3.37 acres on the south side of Breeze Hill Road approximately 59 feet east of Makamah Road in Northport, Suffolk County on Long Island, New York. This parcel is located in the R-40 Residential Zoning District which permits a single family dwelling on a minimum of one (1) acre. On September 15, 2006, the petitioner submitted a letter of intent to the Town of Huntington (hereinafter Town) seeking to subdivide the property into two residential lots maintaining one lot with the present residence on 2.37 acres (103,560 square feet) and the second lot would be a R-40 residential building lot of one acre for a proposed residence. The Town denied the request in a formal letter on September 20, 2006 and the petitioner thereafter filed an appeal to the ZBA and sought approval to subdivide the property. The proposed subdivision conforms with all requirements of the Town Code except for public road frontage which the proposed one acre lot would not have. Its access would be provided by a private right of way to Breeze Hill Road. This private right of way is recited in the petitioner's deed and the petitioner points out that the other four (4) existing homes in the area do not have frontage along a public roadway but use the private right of way as their sole means of ingress and egress to the public roadway.

The petitioner, in its application to the ZBA, notes to this Court that the proposed Zoning Code with regard to front yard setback, minimum side yard setback, aggregate side yard setback, minimum rear yard setbacks and height limitations as well as area and dimensional requirements for the R-40 zoning district. The only lacking requirement was the requirement of frontage along a public roadway and it was this requirement which required relief from the ZBA under New York Town Law §280-a which requires frontage on a public road. At the hearing on January 11, 2007 and continued on March 8, 2007 the petitioner produced a real estate expert who noted that the proposed subdivision would not adversely affect the character or value of the surrounding area and the proposed subdivision into only two (2) parcels was less intense than what is permitted in the R-40 residential zone requirements; a traffic engineer who studied the area and concluded the proposed subdivision would not adversely impact traffic patterns or conditions and would accommodate emergency vehicle traffic to all parcels; and an engineer who addressed the site plan, drainage conditions and the impact issues. The petitioner also agreed with the Town Planning Board's recommendation when it approved the subdivision of providing for a conservation easement to prohibit future development and repairing, repaving and widening the private right of way. The petitioner argues that the only opposition to the proposed subdivision came from some neighbors who expressed their opposition in conclusory claims and no one adduced any evidence to discount or rebut the expert witnesses presented by the petitioner.

In a three (3) page decision, dated March 15, 2007, the ZBA denied the petitioner's request for subdivision approval and a Town Law §280-a variance for no frontage on a Town public roadway. The petitioner thereafter brought this Article 78 proceeding claiming that the ZBA's denial of its application was arbitrary, capricious, against the weight of the substantial evidence presented and was legally without merit.

For the following reasons, the petitioner's Article 78 special proceeding seeking to annul the decision of the ZBA is granted, and Court finds that the decision and findings of the ZBA are arbitrary, capricious and against the weight of the substantial evidence submitted at the hearings held. The petitioner's application is granted and the Court remits the matter to the respondent ZBA to grant the necessary variance, permits and subdivision approval.

It is well settled law "that in a proceeding seeking judicial review of administrative action the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary or capricious." ***Flacke v. Onondaga Landfill Systems, Inc.***, 69 NY2d 355, 363, 514 NYS2d 689,693 (1987).

The proper standard for a reviewing court is whether the challenged administrative ruling lacked a rational basis for the action taken and was arbitrary and capricious. As set forth by the Court in ***Matter of Halpern v. City of New Rochelle***, 24 AD3d 768, 809 NYS2 98 (2nd Dept. 2005).

"In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a

rational basis. Under this standard, a determination should not be disturbed unless the record shows that the agency's action was 'arbitrary, unreasonable, irrational or indicative of bad faith' (***Matter of Cowan v. Kern***, 41 NY2d 591, 599; see ***Matter of Pell v. Board of Educ.***, 34 NY2d 222, 231 ["Arbitrary action is without sound basis in reason and is generally taken without regard to the facts"]).

In ***Halpern***, supra, the Court went on to state:

"The Court of Appeals has long recognized the 'settled rule' that 'in reviewing board actions as to variances or special exceptions the courts...restrict themselves to ascertaining whether there has been illegality, arbitrariness, or abuse of discretion' (***Matter of Lemir Realty Corp. v. Larkin***, 11 NY2d 20, 24 [collecting cases]; see ***People ex rel. Hudson-Harlem Val. Tit. & Mtgw. Co. v. Walker***, 282 NY 400, 405 [determination of zoning board of appeals 'may not be set aside unless it appears to be arbitrary or contrary to law'] [collecting cases]). The Court of Appeals has continued to articulate the CPLR 7803 (3) standard of review in zoning cases, emphasizing the deference that must be afforded to local officials in making judgments concerning land use in their community (see ***Matter of Pecoraro v. Board of Appeals of Town of Hempstead***, 2 NY3d 608, 613 ['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 Ifrah v. Utschig***, 98 NY2d 304, 308 ['Local zoning boards have broad discretion in considering applications for variances and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion']; ***Matter of Cowan v. Kern***, supra at 599 ['Where there is a rational basis for the local decision, that decision should be sustained']).

Thus the Courts may set aside a ZBA determination only where the record indicates the ZBA acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure. ***Pecoraro v. Board of Appeals of the Town of Hempstead***, 2 NY3d 608, 781 NYS2d 234 (2004). The determination of the ZBA must be upheld if it is rational, and supported by substantial evidence. ***Khan v. Zoning Board of Appeals of Village of Irvington***, 87 NY2d 344, 639 NYS2d 302 (1996) rehearing den. 87 NY2d 1056, 644 NYS2d 148. The consideration of "substantial evidence" is limited to determining "whether the record contains sufficient evidence to support the rationality of the [Respondent's] determination." ***Sasso v. Osgood***, 86 NY2d 374, 633 NYS2d 259 (1995). When the evidence of opposition is limited and the record reflects the denial was rendered without findings or limited findings, based upon community pressure (which is impermissible), the

petition must be granted and the matter remanded to respondent. See, *Buckley v. Amityville Village Clerk*, 264 AD2d 732, 694 NYS2d 739 (2nd Dept. 1999).

A review of the record presented to the Court establishes that the ZBA in its decision seemed to give credence to the argument that the proposed subdivision was within the Crabmeadow watershed area just east of the New York State Department of Environmental Conservation designated fresh water assemblage. The ZBA even went on to state that the Crabmeadow wetlands had been designated as a critical environmental area but it never assembled or quantified such findings with the testimony of an expert. The un rebutted testimony of the petitioner's experts indicated that no known environmental impact would result from the proposed subdivision. The petitioner also had the approval of the Town Planning Board while the ZBA had presented in its decision only a conclusory opinion which indicated that the petition had substantial and vocal opposition of the neighbors in the area. The ZBA's decision was based upon a "finding" without testimony or expert reports that the alleged site conditions were unfavorable. As an example the petitioner established through an expert engineer that the proposed development would not impact on the sanitary systems, site drainage, collection of runoff or anticipated impacts of the proposed development. The ZBA, in its decision, pointed to testimony, unexplained, and to "graphic photographs" to establish its argument that there would be "significant drainage issues as a result of the high water table and poor draining soils." Yet, the Suffolk County (New York) Department of Health approved the proposed plans. The ZBA's memorandum of law contains constant reference to "substantial evidence" and "substantial documentary evidence" regarding site plan issues without any explanation or review of the very "substantial evidence" it claims supports its conclusions and which contravenes the testimony presented by the petitioner. While highlighting this alleged and unsupported "substantial evidence," the ZBA ignored the overwhelming evidence presented by the petitioner to the contrary. See, *SCI Funeral Services of New York, Inc. v. Planning Bd. of Babylon*, 277 AD2d 319, 715 NYS2d 744 (2nd Dept. 2000).

The petitioner, in support of its application, presented evidence from witnesses of the impact of the proposed subdivision, the approvals of the agencies required for the subdivision, including the Town Planning Board and the only evidence in opposition was testimony of neighbors and photographs along with a claim that the private right of way was in poor condition, a fact reflected in the Town Planning Board's recommendation to widen, repair and re-pave the right of way for use by the other four (4) existing homes in the area. While the ZBA opined about soil conditions, high water table and poor draining soils, the Court was unable to document these alleged conclusions from the evidence presented to the ZBA. In fact, the ZBA makes constant reference to substantial evidence in opposition which position is unsupported by any factual or documentary evidence. The use of the term "substantial evidence" requires more than just the constant conclusory use of that term. It requires evidence which the ZBA can point to in support of its conclusions in denying what is a minimally invasive variance dealing only with the lack of frontage on a public road.

Even more compelling, the petitioner proposed and accepted the Town Planning Board's recommendations to widen, repair and re-pave the private right of way used by the other four


(4) homes at petitioner's cost to provide a more ideal ingress and egress for the neighborhood. Further, it seems contrary to the spirit of a rational and independent review to cite to "graphic photos" as a basis to support a denial of a minimal variance without explanation. The Court can find nothing which supports the use of the term "graphic photos" in the photographs submitted or why they become graphic or even what the ZBA's intent was behind the use of the term "graphic photos" and the difference between "graphic" and "non-graphic" photographs. What about the photographs made them "graphic"? The substantial evidence presented was in support of the application not against it. The ZBA decision to deny the petition was against the "substantial evidence" presented in favor of the petition notwithstanding the ZBA's constant reference to "graphic photos" and "substantial evidence", unsupported in the record. For those reasons, its decision to deny this minimal variance dealing with the issue of public road frontage was "arbitrary, capricious, against the weight of the substantial evidence".

Based upon the entire record before it, and balancing all the factors established, the ZBA's decision and findings are unsupported and are against the "substantial evidence" presented in support of the petitioner's application and the ZBA's determination denying the requested relief was arbitrary and capricious and against the weight of the evidence. ***Matter of Ifrah v. Utschig***, supra. The petitioner's Article 78 special proceeding seeking to annul the decision of the ZBA is granted in all respects and the matter is remitted to the ZBA to approve and grant the petition for subdivision and to grant the variance requested for public road frontage.

Settle Judgment

The foregoing constitutes the decision of this Court.

Date: December 30, 2008



J.S.C.