STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

In the matter of an Article 78 Proceeding
NADIA TAFT and CATHY MOYER,

Petitioners

-vs- Index#62619

2007

VILLAGE OF NEWARK PLANNING BOARD,

Respondent.

APPEARANCES:

Robert M. Place, Esq., Of Counsel
PLACE & ARNOLD
Attorneys for Petitioners

Arthur B. Williams, Esq., Of Counsel
NESBITT & WILLIAMS
Attorneys for Respondent

DECISION

DANIEL J. DOYLE, J.

The Petitioners commenced this proceeding, pursuant to CPLR Article 78, seeking a determination that the Respondent's denial of approval of the proposed use and site plan was arbitrary, capricious and an unwarranted exercise of its discretion. They seek an order and judgment directing the Respondent to approve the Petitioners' special use permit and site plan .

The subject property, located at 501 West Maple Avenue, is located in an R-1 district

and consists of an approximately 4,200 square foot residence situated on 1.925 acres. The Petitioners propose to use the property as a home for the elderly. The home would house ten residents as well as the Petitioners who would be caretakers of the elderly residents. The Petitioner, Nadia Taft, is the owner of the property and the Petitioner, Cathy Moyer, is the proposed co-operator of the home.

Section 170-8 of the Village of Newark code permits the following uses within the R-1 District:

A. One-family dwelling
B. Professional residence-office
C. Religious institution
D. School
E. Public outdoor recreation
F. Accessory uses
G. Other uses upon the finding of the Planning Board that such use is of the same general character as those permitted or which will not be detrimental to the other uses within the district or to the adjoining land uses.

The ordinance defines a "family" as follows:

> One or more persons related by blood, marriage or adoption, living and cooking together, exclusive of household servants; a number of persons living together as a single housekeeping unit, although not related by blood, adoption or marriage shall be deemed to constitute a family unit. (§170-3 [B]).

On June 4, 2007, the Petitioners submitted an application for a special permit and site plan review for a proposed enriched home for the elderly. The Petitioners requested that the Village Planning Board determine whether their proposed use was a permitted use under §170-8 (G) of the Village Code.

On June 30, 2007, a public hearing was held. The Respondent declared its intent to

act as lead agency for purposes of the State Environmental Quality Review Act and thereafter determined that converting a single-family dwelling into an enriched home for the elderly would not have a significant effect on the environment and should be considered as an Unlisted Action, and therefore a Negative Declaration would be filed. Whereupon a motion was made that "the Planning Board find as fact that the proposal to convert a single-family dwelling into an enriched home for the elderly (proposed ten residents) at 501 West Maple Avenue is **not** of the same general character as those permitted in an R-1 district (the first prong of Village of Newark Code §170-8 [G])." The following findings were made:

> 1. The proposed use is a change of use from an R-1 Residential use to a commercial or business use.
>
> 2. The proposed use introduces a business use, and the Short Form EAF form actually refers to the applicants as "business owners".
>
> 3. The proposed change of use is more akin to a multi-family residence, a rooming house, a dormitory or a convalescent home, none of which would be permitted in an R-1 District.
>
> 4. The proposed use is clearly not a one-family dwelling, is not a professional residence-office (the business or commercial nature of which must be clearly secondary to the dwelling use for living purposes), is not a religious institution, is not a school, nor by its nature, is not an accessory use."

The motion passed and the application was denied. A copy of the minutes were filed on July 6, 2007.

Thereafter, the Petitioner filed this proceeding. On January 17, 2008 Hon. Stephen R. Sirkin referred the matter back to the Planning Board to make findings on the second prong of Village of Newark Code §170-8 (G). A second hearing was held on March 3, 2008, and the Board, without taking further testimony, found that the use of the dwelling for an enriched home for the elderly would be detrimental to the other uses within the district or to

the adjoining land uses and denied the application. The following findings were made by the Board:

> 1. Approval of this proposal would establish a precedent by introducing a commercial use that operates 24 hours a day, 7 days a week, 52 weeks a year within an R-1 residential neighborhood, thereby placing all owners of single family homes at risk of exposure to business or commercial development in their respective neighborhoods.
>
> 2. This application proposes a distinct change of use in the neighborhood for a residential to a "for-profit" venture, unlike any other neighboring residence, and if permitted, would change the character of this historic residential neighborhood by allowing income or investment property to co-exist with single family residential uses.
>
> 3. Several village of Newark residents have expressed concern that the Village, as a community, must conserve and preserve the residential and historic neighborhoods as these were set out and originally planned to be as single family homes, and to avoid "commercial transitioning" to business entities looking to enhance profits at the expense of family styled, quality of life, residential neighborhoods.
>
> 4. The Wayne County Planning Board, on March 29, 2001, went on record recommending denial of a similar application of the "Perkins" residence at 502 West Maple Avenue, by Crab Apple land Company, a division of Blossom View Nursing Home, citing "character of neighborhood issues."
>
> 5. Approval of this proposal would create the potential of adversely impacting property values of neighboring residential properties. Owners of residences in R-1 Districts purchased their homes and invested in improvements to their properties in reliance upon local Zoning Regulations that will not allow or permit the encroachment of business and commercial uses into their residential neighborhoods. The record discloses that more than 160 resident owners of single family dwellings in this Village have signed and filed letters of protest in opposition to this proposed use.
>
> 6. Approval of this proposal would also create the potential of adversely impacting the marketability of neighborhood residential properties, as well as the future marketability of the subject parcel, and would amount to a rezoning of the entire neighborhood.
>
> 7. Because of the nature of the proposed use, there could possibly be a need for increased support staff, as well as increased traffic and increased noise that could be generated in this residential neighborhood.

On April 3, 2008 a supplemental petition was filed with the Court . The Petitioners make two alternative arguments in support of their petition. First, they argue that the proposed residents constitutes a "family" a defined by the code and therefore the proposed

use is for use as a single-family dwelling. Second, they argue that the denial of the site plan, on the basis that it (1) was not of the same general character as those permitted in an R-1 District (June 28, 2007 findings) and (2) would be detrimental to the other uses within the district or to the adjoining land uses" (March 3, 2008 findings), was not supported by the evidence presented and were therefore arbitrary, capricious and an unwarranted exercise of its discretion. The Petitioner's also argue that the Respondent has violated the Americans with Disabilities Act and the Fair Housing Act .

The Village of Newark Planning Board argues that findings were supported by substantial evidence. It also argues that the village zoning code affords reasonable accommodation for this type of use in other appropriate zoning districts. The Respondent argues that Petitioners can apply for a use variance from Zoning Board of Appeals pursuant to Chapter 170-91 of code. Finally, the Respondent argues that Section 170-8 (G) of the Village Code does not provide for the issuance of a "Special Use Permit."

As a preliminary matter, the Court finds that there is no requirement that the Petitioners apply for a special use permit. Other sections of the code contain nearly identical language except that they impose the additional requirement of a special use permit by the Zoning Board of Appeals (See Residence District R-2 , §170-13 [11]; Neighborhood business District B-1, §170-18 [B]; General Business District B-2,§ 170-20 [B].) Neither is there necessarily a requirement that the Petitioners apply to the Zoning Board of Appeals for a use variance as argued by the Respondent.

First, the Court finds that the proposed residents constitute a "family" as defined by the code and therefore the proposed use is for use as a single-family dwelling. The ordinance, in pertinent part, defines family as "... a number of persons living together as a single housekeeping unit, although not related by blood, adoption or marriage shall be deemed to constitute a family unit." (§170-3 [B]). Significantly, that definition was made by amendment to the Village Code in 1998 following a string of cases, beginning with *City of White Plains v. Ferraioli,* 34 NY2d 300 (1974), in which the courts reviewed the constitutionality of definitions "family" under municipal zoning ordinances .

In *City of White Plains v. Ferraioli,* the Court of Appeals found that a group home consisting of a couple with two children and ten foster children constituted a family. Likewise in *Group House of Port Washington v. Board of Zoning and Appeals of the Town of North Hempstead* 45 NY2d 266 (1978) that a group home consisting of two permanent surrogate parents and seven children constituted a the functional equivalent of a family. In *McMinn v. Town of Oyster Bay* 66 NY2d 544 (1985) the ordinance that defined family as "Any number of persons, related by blood, marriage , or legal adoption, living and cooking on the premises together as a single, nonprofit housekeeping unit or any two persons not related by blood marriage , or legal adoption, living and cooking on the premises together as a single, nonprofit housekeeping unity, both of whom are sixty-two (62) years of age or over, and residing on the premises" was held unconstitutional as applied to four unrelated young men living together in a single family house. In *Baer v. Town of Brookhaven* 73 NY2d 942

(1989) an ordinance that defined family as "one or more persons relation by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding four, living and cooking together as a single housekeeping unit though not related by blood , adoption or marriage, shall be deemed to constitute a family" was unconstitutional as applied to five unrelated elderly women because the ordinance restricts the size of a functionally equivalent family by not the size of a traditional family. In *Children's Village v. Holbrook*, 171 A.D.2d 298 (3d Dept. 1991) the Court held that an ordinance defining "family" as "any number of individuals related by blood, marriage or adoption or not more than five (5) individuals who are not so related, living together as a single housekeeping unit" was found invalid because it restricts the number of persons living as a "functionally equivalent family" but not restrict the size of a traditional family. The court found that a proposed group home for juveniles supervised by a rotating professional staff constitutes a family and that, therefore, it was an authorized use which did not require a special use permit. In *Unification Theological Seminary v. City of Poughkeepsie*, 201 A.D.2d 484 (2d Dept. 1994), the Court upheld a rebuttable presumption that four or more unrelated individuals living together do not constitute the functional equivalent of a traditional family because it provided criteria to rebut the presumption to establish that a group is the functional equivalent of a family.

The Village of Newark , when it amended its zoning ordinance, chose a broad definition of family when it provided that "... a number of persons living together as a single

housekeeping unit, although not related by blood, adoption or marriage shall be deemed to constitute a family unit." Zoning laws are made in derogation of the common law, therefore they must be strictly construed against the municipality which has enacted *Allen v. Adami*, 39 NY2d 275, 277 (1976), *AHEPA 91, Inc. v. Town of Lancaster*, 237 A.D.2d 978 (4th Dept 1997). The Court finds that the Petitioners' proposed use as an enriched home for ten elders residents does constitute a family as defined by the ordinance and is therefore a permitted use under the Village Zoning Ordinance.

Even if the occupants of the proposed home for the elderly didn't constitute a "family," denial of the site plan was arbitrary and capricious and not support by substantial evidence. The board found that the proposed use did not satisfy either prong of subdivision "G" of 170 - 8. Specifically, on June 28, 2007, the board found that the proposed use was not of the same general character as those permitted in an R-1 District and on March 3, 2008, found that the proposed use would be detrimental to the other uses within the district or to the adjoining land uses." In the Court's opinion, there is no credible evidence to support the Board's findings and conclusions.

(1) Proposed use is not of the same general character as those permitted in an R-1 District

Commercial or Business Use

The first two findings made by the Board relate to business or commercial nature of the proposed use. The Board's found, that "The proposed use is a change of use from an R-1 Residential use to a commercial or business use," secondly, that "The proposed use

introduces a business use, and the Short Form EAF form actually refers to the applicants as 'business owners'". The finding is conclusory and the Board made no analysis to distinguish the proposed use from other uses permitted in the district.

One Family Dwelling

The second two findings made by the Board relate to the issue of whether or not the residents of the facility constitute a "family unit" under the statute. The board found first that "The proposed change of use is more akin to a multi-family residence, a rooming house, a dormitory or a convalescent home, none of which would be permitted in an R-1 District" and secondly, that " The proposed use is clearly not a one-family dwelling, is not a professional residence-office (the business or commercial nature of which must be clearly secondary to the dwelling use for living purposes), is not a religious institution, is not a school, nor by its nature, is not an accessory use." This finding is conclusory and disregards the definition of family as set forth in the code, to wit "One or more persons related by blood, marriage or adoption, living and cooking together, exclusive of household servants; a number of persons living together as a single housekeeping unit, although not related by blood, adoption .... (§170-3 [B]).

2) Proposed use would be detrimental to the other uses within the district or to the adjoining land uses.

Introduction of Commercial Use

The first finding made by the board was that "Approval of this proposal would establish a precedent by introducing a commercial use that operates 24 hours a day, 7 days a week,

52 weeks a year within an R-1 residential neighborhood, thereby placing all owners of single family homes at risk of exposure to business or commercial development in their respective neighborhoods." Professional residence offices are permitted in the neighborhood. The Court notes that within this district, at least one variance was granted for a Bed and Breakfast at 310 High Street. On the date of this application, the owners of the 310 High Street property sought, and were granted, a variance to provide parking for up to 150 people for weddings, showers, fund-raisers and corporate events.

Change of Use and Character of the Neighborhood

The Board found "This application proposes a distinct change of use in the neighborhood for a residential to a "for-profit" venture, unlike any other neighboring residence, and if permitted, would change the character of this historic residential neighborhood by allowing income or investment property to co-exist with single family residential uses." Generalized complaints that there would be a change in the character of the neighborhood, or other impact upon adjacent property, uncorroborated by empirical evidence or expert testimony are insufficient to support such denial (*Pecoraro v. Board of Appeals of Town of Hemstead,* 304 AD2d 757 [2nd Dept.2003]; *DeMarco v. Village of Elbridge,* 251 AD2d 91, supra).

Generalized Community Objections

The Board found that "Several village of Newark residents have expressed concern that the Village, as a community, must conserve and preserve the residential and historic

neighborhoods as these were set out and originally planned to be as single family homes, and to avoid 'commercial transitioning' to business entities looking to enhance profits at the expense of family styled, quality of life, residential neighborhoods." The decision to approve or disapprove of the site plan must be based upon substantial evidence, and a denial should be based upon some reason particular to a proposed project, rather than because of generalized community objections or that it is deemed an undesirable project. (See *Twin County Recycling Corp. v. Yevoli,* 90 NY2d 1000, supra; *Matter of Robert Lee Realty Co. v. Village of Spring Valley,* 61 NY2d 892 [1984]; *Matter of Pleasant Valley Home Construction, Ltd. v. Van Wagner,* 41 NY2d 1028 [1977].)

Denial of site plan approval must be supported substantial evidence, and comments or statements from community members, without any factual data, are insufficient to support such determination (*Matter of WEOK Broadcasting Corp. v. Planning Board of the Town of Lloyd,* 79 NY2d 373, supra; *Van Wormer v. Planning Board of the Town of Richmond*, 158 AD2d 995 [4th Dept. 1990]). Furthermore, a denial of an application for site plan approval cannot be supported if the grounds are contrary to the undisputed evidence, and based upon generalized objections or conclusions without evidence in the record (*Matter of John Dodson v. Planning Board of the Town of Highlands,* 163 AD2d 804 [3rd Dept. 1990]).

Wayne County Planning Board's Denial of "Perkins" Residence

The finding that the Wayne County Planning Board "went on record

recommending denial of a similar application" is inadequate to support the a finding that the proposed use would be detrimental to other uses or the adjoining land.

Potential of Adversely Impacting Property Values/Potential of Adversely Impacting Marketability of the Neighborhood Properties

The fifth and sixth finding were as follows

Approval of this proposal would create the potential of adversely impacting property values of neighboring residential properties. Owners of residences in R-1 Districts purchased their homes and invested in improvements to their properties in reliance upon local Zoning Regulations that will not allow or permit the encroachment of business and commercial uses into their residential neighborhoods. The record discloses that more than 160 resident owners of single family dwellings in this Village have signed and filed letters of protest in opposition to this proposed use."

Approval of this proposal would also create the potential of adversely impacting the marketability of neighborhood residential properties, as well as the future marketability of the subject parcel, and would amount to a rezoning of the entire neighborhood.

These findings, in addition to setting forth again the community objections, adds without, any proof, that property values will be diminished. Denial of an application for site plan approval, should be based upon empirical evidence or expert opinion (See e.g. *Matter of Ernalex Construction Realty Corp. v. Bellissimo,* 256 AD2d 338 [2nd Dept. 1998]). The findings are speculative and not based upon any empirical data.

Traffic

Finally the Board found:

> Because of the nature of the proposed use, there could possibly be a need for increased support staff, as well as increased traffic and increased noise that could be generated in this residential neighborhood.

Traffic concerns, like other reasons for denying an application for site plan approval, should be based upon empirical evidence or expert opinion (See e.g. *Matter of Ernalex Construction Realty Corp. v. Bellissimo,* 256 AD2d 338 [2nd Dept. 1998]). The findings and conclusions of the Board, in regard to traffic increases is, again, speculative, and not based upon any empirical data.

The Fourth Department has recently addressed the standard applicable to interpretation of zoning ordinances in *Matter of Turner v. Andersen*. The Court stated "Although it is true that the interpretation of a zoning ordinance by a zoning board is entitled to deference . . ., it is equally true that the zoning board's interpretation of the ordinance is not entitled to unquestioning judicial deference, since the ultimate responsibility of interpreting the law is with the court .....Under a zoning ordinance which authorizes interpretation of its requirements by the [zoning] board of appeals, specific application of a term of the ordinance to a particular property is . . . governed by the board's interpretation, unless unreasonable or irrational" (internal citations omitted) *Matter of Turner v. Andersen*, 50 AD3d 1562(4th Dept. 2008). In the case at bar, the Court finds that the denial of site plan approval was arbitrary and capricious, and not supported by substantial evidence.

For the reasons set forth above the Court need not address the applicability of Petitioners' claims under the Americans with Disabilities Act and the Fair Housing Act.

Conclusions

The Petitioners' application is granted insofar as it seeks a determination the Respondent's denial of approval of the proposed use and site plan was arbitrary, capricious and an unwarranted exercise of its discretion. The Court denies Petitioners' application directing the Respondent to approve the Petitioners' special use permit on the ground that a special use permit is not necessary. The Court remits the matter to the Planning Board of the Village of Newark for further proceeding on the site-plan application limited solely to the factors set forth in Section 134-3 of the Newark Code.

Dated: February 23, 2009

Hon. Daniel J. Doyle, JSC