| **Joseph-Hunter v Town of Cairo** |
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| 2009 NY Slip Op 30852(U) |
| April 17, 2009 |
| Supreme Court, Greene County |
| Docket Number: 09-0353 |
| Judge: Joseph C. Teresi |
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STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

GALEN JOSEPH-HUNTER and
FREE103POINT9, INC.,

Petitioners,

-against-

**DECISION and ORDER**
**INDEX NO. 09-0353**
**RJI NO. 19-09-4140**

THE TOWN OF CAIRO, THE TOWN OF CAIRO
PLANNING BOARD,

Respondents.

Supreme Court Greene County All Purpose Term, March 30, 2009
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

Petitioners are the owner and proposed user of a parcel of property located in the Town of Cairo, New York. They desire to use the property as their home and as a not-for-profit art study center. To obtain approval of the proposed art study center building and parking area, petitioners submitted a site plan application to the Town of Cairo's Planning Board (hereinafter the "Board"). The Board, after considering the application for approximately ten months, denied

petitioners' application on September 3, 2008. This Court, upon reviewing the Board's proceedings and decision, voided its denial and remanded the matter back to the Board "for further consideration... utiliz[ing] the Town of Cairo Local Law 1 of the Year 2006 [hereinafter referred to as the "Town of Cairo Site Plan Review Law"]... to review [petitioners'] application." At the first available Board meeting after remand, the Board denied petitioners' request to make a written submission, made no further findings, took no further testimony and read into the record a prepared resolution. The Board voted, four to two, to deny petitioners' application (hereinafter "February 4, 2009 resolution").

This proceeding challenges the Board's February 4, 2009 resolution and claims it is arbitrary, capricious and contrary to law. Respondents answered the petition and set forth four "affirmative defense[s] and/or objection[s] in pont of law" along with a copy of the record of proceedings below. Because petitioners demonstrated that respondents' denial of their petition was arbitrary and capricious, the petition is granted and the matter remanded.

"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". (MLB, LLC v. Schmidt,50 AD3d 1433, 1434 [3d Dept. 2008] quoting Sheer Pleasure Lingerie Inc. v. Town of Colonie Planning Bd., 251 AD2d 859 [3d Dept. 1998]; see also Pearlman v. Mills, 24 AD3d 837 [3d Dept. 2005]).

The February 4, 2009 resolution sets forth numerous reasons for denying petitioners' application. Upon a close analysis of each reason, however, all but one is wholly unsupported by the record, causing the Board's decision as a whole to be arbitrary and capricious.

First, the Board denied petitioners' application claiming that petitioners did not submit

"documentation that the proposed sewage disposal system design has been approved by the NYSDOH." Such ground, however, is contradicted by the record. Petitioners submit the August 14, 2008 "NYSDOH" letter which approved their proposed septic system. Petitioners further demonstrated that they submitted the "NYSDOH" approval letter to the Board. As the Board's reason for denial is directly and specifically contradicted by the record, this purported reason is arbitrary and capricious.

Second, the Board's denial was premised upon petitioners' claimed failure to submit an entrance/exit driveway approved by the "the Town Highway Department or NYSDOT... or if the Site Plan were approved that those agencies might accept the proposal". The petitioners demonstrated that their property is not bounded by a Town roadway; and "the Town Highway Department" has no jurisdiction over its entrance, which enters and exits onto a state roadway. Petitioners further demonstrated that they submitted their plans to "NYSDOT", which reviewed and commented upon their plans, but did not approve them. Petitioners allege, and respondents do not controvert, that "NYSDOT" will not approve an entrance/exit until the final site plan is approved by the Board. Thus, the Board's denial of petitioners' site plan on this reason effectively usurps NYSDOT's role in reviewing entrances and exits onto state roadways, by barring such review before it begins. Additionally, that portion of the Board's reasoning which requires petitioners to submit evidence demonstrating that the NYSDOT "might accept the proposal" after the site plan is approved, is wholly arbitrary and not a matter of "consideration" the Town of Cairo Site Plan Review Law authorizes. As the Board has no authority to deny a site plan based upon its above stated reason, its denial on this basis is arbitrary and capricious.

Third, the Board denied petitioners' application alleging that petitioners failed to

demonstrate the "proposed/prematurely and unpermitted constructed... building... [was] built in accordance [with] properly engineered plans in accordance with the NYS Building Code." While the Board has authority to review a site plan application for the adequacy of the proposed building's "location, arrangement, size, design, and general site compatibility", such review does not extend to specific building code compliance. Rather, the Town of Cairo has established a building department with a code enforcement officer, for such purpose. The Board's denial of petitioners' application due to a claimed failure to comply with the NYS Building Code, exceeds their authority. (Woodland Community Ass'n v. Planning Bd. of Town of Shandaken, 52 AD3d 991 [3d Dept. 2008] citing Moriarty v. Planning Bd. of Village of Sloatsburg, 119 AD2d 188 [2d Dept 1986]). Moreover, the Town of Cairo's Building Department specifically inspected the petitioners' building and stated that "a building permit to continue construction can be forthcoming" because they believed all parties were willing to comply with the applicable codes. Accordingly, this purported reason for denial was arbitrary and capricious.

Similarly, fourth, the Board also exceeded its authority by denying petitioners' application for its stated reason that petitioners could not "abdicate[] its responsibility" to the Town to enforce compliance with a New York State Liquor License. Contrary to the Board's reasoning, this record demonstrates that petitioners proposed to obtain all necessary New York State Liquor Authority licenses for their events. The petitioners, by obtaining the liquor licence, would ensure compliance with its terms and did not request or seek the Town's "enforcement" of the liquor license. Petitioners merely opined that if "enforcement" was necessary, after their adherence to the liquor licence's terms, that either state or local officials would enforce the laws. The Board's stated reason impliedly seeks to shift enforcement of the law onto these petitioners,

which the Town of Cairo Site Plan Review Law gives them no authority to do. Accordingly, this reason is also arbitrary and capricious.

Fifth, the Board denied petitioners' application because petitioners' plan was inadequate to control and prevent "litter being allowed to exit the property", "trespassing" on neighbors' property, and excessive "noise generation". Petitioners' site plan specifically notes the placement of trash receptacles, and petitioners testified that trash would be removed from the site on the day after any large event. Petitioners also stated that they would contain and supervise their patrons to ensure no trespassing would occur, and limit the noise generated at their large events. They specifically addressed the noise level leaving the property, agreeing to contain the decibel level at the art study center building and the property's borders. Other than the conclusory allegation that the petitioners' plans are insufficient, this record contains no evidence of a specific danger that trash, trespassing or noise will adversely affect neighboring properties. These "generalized community objections" are not a legitimate basis for denial, and this reason is wholly unsupported on this record. (450 Sunrise Highway, LLC v. Town of Oyster Bay, 287 AD2d 714 [2d Dept. 2001]). Moreover, each of these reasons for denial are directed at the use petitioners propose for the property. However, the use proposed is not prohibited and the Town of Cairo's Site Plan Review Law does not authorize the Board to consider the "use" of the property. Similarly, petitioners allege and respondents do not controvert, that the Town of Cairo has no noise ordinance that otherwise restrict petitioners' noise levels and support the Board's denial. Accordingly, this reason is also arbitrary and capricious.

Sixth, the Board denied petitioners' application because it claims the "undesirable impacts" of the site plan "could be mitigated if the applicant had either not constructed the

building prior to making the within application or by working to make project modifications to the project." Again, this reason is simply not set forth in the Town of Cairo Site Plan Review Law as one of the considerations the Board may use when reviewing a site plan application. Because this reason, cited by the Board, is wholly outside the scope of the Town of Cairo Site Plan Review Law, it is arbitrary and capricious.

Seventh, the Board further denied petitioners' application because the "screening, berming and buffers are inadequate". While such consideration is authorized by the Town of Cairo's Site Plan Review Law, the Board's denial is unsupported on this record. The site plan submitted by petitioners exhibits a dense forest surrounding the art study center structure and parking lot on three sides. Petitioners allege such forest will be substantially undisturbed. On the third side, the petitioners proposed a berm and tree planting for screening of the parking area. The Board's engineer did not request or suggest any additional screening, nor does this record contain any specific objections to the "screening berming and buffering". On this record, the Board's "inadequate" finding is conclusory, unsupported by any factual showing, and as such is arbitrary and capricious. Moreover, the Board's denial based upon the art study center building's architectural incompatibility is not a "consideration" the Board is authorized to examine under the Town of Cairo Site Plan Review Law.

Eighth, the Board's final reason for denial claimed that petitioners proposed "off-street parking" was insufficient to handle two way traffic and parking, and to accommodate the capacity of petitioners proposed "large events". This reason is not specifically contradicted by the record, however, the standard the Board used to made its determination was not supported by foundationary evidence of its accuracy, applicability or general acceptability. While the Board's

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reasoning in this regard is not wholly arbitrary and capricious, the record is not clear that based upon this factor alone the Board would have denied petitioners' site plan application.

Accordingly, the Board's February 4, 2009 resolution is vacated and this matter is remanded to the respondents for further consideration in accord with this Decision and Order and the Decision and Order of this Court, dated January 6, 2009. Upon reconsideration the petitioners may specifically address the sole remaining "parking" issue by submitting both written and oral testimony, if they so choose, which shall be considered by the Board. Upon remand the Board shall consider the petitioners' application in its entirety, including the additional submissions as authorized herein, prior to voting on or issuing a resolution.

All papers, including this Decision and Order, are being returned to the attorney for the petitioners. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: April 17, 2009
Albany, New York

JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Petition, dated March 5, 2009, Verified Petition of Andrew Howard, dated March 5, 2009; with Affidavit of George Schmitt, dated March 5, 2009, and Exhibits A-J
2. Verified Answer, dated March 25, 2009; with Record: R-1 - R-39.
3. Verified Reply of Andrew Howard, dated March 27, 2009.