SHORT FORM ORDER

INDEX NO. 11151/2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

In the Matter of the Application of

WILLIAM A. MALLINS,

Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

BRIAN X. FOLEY, Supervisor, STEVE FIORE-ROSENFELD, KEVIN McCARRICK, KATHLEEN WALSH, CONNIE KEPERT, TIMOTHY MAZZEI, and CAROL BISSONETTE, constituting the TOWN BOARD OF THE TOWN OF BROOKHAVEN, and the TOWN OF BROOKHAVEN,

Respondents.

ORIG. RETURN DATE: APRIL 23, 2008
FINAL SUBMISSION DATE: JULY 10, 2008
MTN. SEQ. #: 002 (001)
MOTION: MD

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Upon the following papers numbered 1 to 10 read on this motion FOR A JUDGMENT PURSUANT TO ARTICLE 78.
Notice of Petition and supporting papers 1-3; Verified Answer and supporting papers 4, 5; Amended Verified Answer and supporting papers 6, 7; Respondents' Return 8; Amended Respondents' Return and supporting papers 9; Reply Affidavit and supporting papers 10; it is,

ORDERED that this verified petition for a judgment, pursuant to Article 78 of the CPLR: (a) reversing the decision of respondent TOWN BOARD OF THE TOWN OF BROOKHAVEN ("Town Board") in an Amended Resolution of Denial, issued after a meeting on November 20, 2007, which denied an

application to amend a restrictive covenant for petitioner WILLIAM A. MALLINS and non-party WILLIAM ENTENMANN on property located in Brookhaven; (b) a determination that petitioner's civil rights have been violated under 42 U.S.C. § 1983; and (c) that the power of the Town is being used for unreasonable and unfair burdens on petitioner's property, is hereby **DENIED** for the reasons set forth hereinafter. Respondents have filed a verified answer and return in response to the verified petition, and thereafter an amended verified answer and an amended return.

Petitioner is one of the owners of a parcel of real property ("property") located at the intersection of Montauk Highway and Montana Avenue, an unopened paper street. The property is approximately 36,000 square feet, or slightly larger than three quarters (3/4) of an acre. Petitioner informs the Court that in 2001, the zoning for the property was changed from J-7, which no longer exists, to L-1. At the time of the re-zoning, a covenant was requested by the Town concerning buffers, which resulted in a Declaration of Covenants and Restrictions, dated September 21, 2001 ("Covenant"), executed by the petitioner herein and WILLIAM ENTENMANN ("Declarant"), and recorded with the Clerk of Suffolk County on May 16, 2002. The Covenant recites that the owners of the property had applied for a change of zoning for the property from A-1 Residential to L-1 Industrial, which was granted at a meeting of the Town Board on March 20, 2001, after a public hearing held on January 26, 2001. The Covenant further recites that the "Declarant deems it advisable for the best interest of the Town of Brookhaven to impose certain covenants and restrictions upon the said property," to wit:

(1) A one-hundred (100') foot natural and substantially landscaped/revegetated buffer shall be provided along the northerly rear yard.

(2) A seventy-five (75') foot natural and substantially landscaped revegetated buffer shall be provided along the westerly side yard.

(3) A fifty (50') foot landscaped front yard shall be provided along Montauk Highway with the exception of access and utilities.

(4) That these covenants and restrictions shall run with the land, subject to the right of the Town Board of the Town of Brookhaven with the consent of the Declarant, or the Declarant's heirs, successors or assigns, to amend, annul or repeal any or all of the foregoing covenants and restrictions at any time.

Petitioner argues that circumstances have changed since the Covenant in 2001 that warrant a waiver of the buffer requirements. Specifically, petitioner alleges that the one-hundred (100') foot buffer along the northerly side was created to buffer a cemetery which had a right-of-way of 50' behind the property. Petitioner alleges that the right-of-way has been abandoned and thus acts as a 50' buffer by itself. With respect to the westerly border, petitioner contends that there exists a private road, which once led to the right-of-way, but is now blocked off. On the east side of the property, petitioner alleges that a private nursery business exists, with outdoor storage for nursery equipment and a fence along the border. Petitioner indicates that the nursery business is not open to the public. Regarding the buffer along Montauk Highway, petitioner contends that if a landscaped buffer were to exist there it would completely hide the property from the highway so it could not be used for any purpose.

Further, petitioner alerts the Court that in the northeast corner of the property a restaurant known as "Varneys" operates, which has no buffer and is nonconforming as to parking, and would be impacted by a buffer as parking would be reduced. Moreover, petitioner argues that the required buffers total approximately one-third of an acre, or forty (40%) percent of the property, in an area where no other property provides such buffers. Petitioner alleges that it became impossible to use or sell the property, rendering it "almost valueless."

Based upon the foregoing, petitioner and co-owner William Entenmann submitted an application to the Town Board, pursuant to Section 85-37 of the Town Code, for a repeal of the Covenant on the basis that circumstances had changed since the change of zone was enacted. In June of 2005, petitioner commenced an Article 78 proceeding seeking mandamus relief to compel the Town Board to schedule a hearing on the application. The petition alleged that the Town Board had delayed an unreasonable period of time in scheduling petitioner's application for a public hearing after it was deemed legally

sufficient by the Town Attorney in March of 2005. By Order dated June 1, 2006 (Pines, J.), the Court granted the petition to the extent that the matter was remitted to the Town Board, and the Town Board was directed to fix the time and place of a public hearing on petitioner's application within sixty (60) days of the date thereof. The hearing was to be scheduled in accordance with the provisions of Town Law § 264 and Section 85-37 of the Town Code.

The matter was heard before the Town Board on July 25, 2006, wherein petitioner presented expert testimony of a realtor who testified that with more than thirty-five (35%) percent of the property restricted by buffers, and all views from Montauk Highway completely blocked by a 50' buffer, the property could not be sold. The Town Board thereafter voted to deny the application, without explanation. As such, petitioner commenced a second Article 78 proceeding, which resulted in an Order dated August 20, 2007 (Pines, J.). That Order remitted the matter to the Town Board for the issuance of Findings and Conclusions in accordance with the Order.

The Town Board then issued an "Amended Resolution of Denial" (Resolution No. 1082-07, hereinafter "Amended Resolution"), after a meeting on November 20, 2007, which provided the Findings and Conclusions of the Town Board in reaching its decision. Petitioner has now commenced the instant Article 78 proceeding for a judgment reversing the Amended Resolution, determining that petitioner's civil rights have been violated under 42 U.S.C. § 1983, and finding that the power of the Town is being used for unreasonable and unfair burdens on petitioner's property. By Order dated June 20, 2008, Justice Pines recused herself from hearing this matter, and the matter was thereafter randomly reassigned to this Court.

In opposition, respondents allege that there was substantial evidence to support the Town Board's determination, and that petitioner has not overcome the discretionary power of the Town Board. Respondents argue that petitioner merely indicates that the buffer requirements make the sale of the property "hampered," as distinguished from rendering the property invaluable. Further, respondents contend that the application to amend the Covenant is operating in a vacuum, in that the application was not filed in connection with any proposed site plan or building permit application, and therefore the Town Board could not view the entire site as a whole. Moreover, respondents allege that petitioner has not proffered any "concrete" evidence that the property's value is diminished because of the buffers. Respondents indicate that the role of the Town Board is to make

rational zoning decisions, not to assist a land owner in getting the most money for a parcel of property.

In addition, respondents argue that pursuant to Town Law §§ 263 and 264, the Town Board may impose reasonable conditions in rezoning property that protect neighboring property owners and the public in general, as in the instant matter. Respondents allege that the buffers to the west, south and east will help to preserve the character of the surrounding neighborhood, which is an A-1 residence district. Respondents contends that the requested relief would result in non-conformity with other properties in an L-1 zoning district, and would not preserve the character of the district. Further, respondents cite the testimony of Deputy Commissioner Brenda Prusinowski from the July 25, 2006 hearing, wherein Commissioner Prusinowski testified that the Covenant imposed by the Town Board is analogous to the buffer requirements of the 2003 Town Code amendments. In the alternative, respondents argue that even if the Covenant was amended, the property would still be subject to Town Code § 85-50 as adopted in 2003, which requires similar buffer zones along the front, side and rear yards of the premises.[1] Therefore, respondents allege that the decision of the Town Board had a rational basis and was supported by substantial evidence in the record.

In reply, petitioner contends that although there are buffer requirements on the neighboring properties, those properties do not maintain any such buffers. Therefore, petitioner argues that it is discriminatory to require petitioner to maintain buffers that are even greater than those required by the Town Code when the neighboring properties are without any buffers.

In a proceeding under Article 78 of the CPLR when reviewing a determination of an administrative tribunal, courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is

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[1] Town Code § 85-50 requires a 75' buffer along the northerly rear yard and the Covenant imposes a 100' buffer. The Town Board found that the difference of 25' would not affect the ability to sell the property, as there was no evidence submitted by petitioner to support this contention. In addition, the Town Boards also found that there is a thirty (30%) percent landscaped and natural requirement on the property, and the Covenant imposes a thirty-two (32%) percent landscaped and natural buffer. Therefore, the Town Board found that the additional two (2%) percent was not an unreasonable imposition on petitioner (Amended Resolution, ¶ 4).

substantial evidence (*Pell v Board of Education*, 34 NY2d 222 [1974]; *Matter of Isaksson-Wilder v New York State Div. of Human Rights*, 43 AD3d 921 [2007]; *Allen v Bane*, 208 AD2d 721 [1994]). This approach is the same when the issue concerns the exercise of discretion by the administrative tribunal (*Pell v Board of Education*, 34 NY2d 222, *supra*). The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious (*Gilman v N.Y. State Div. of Hous. & Cmty. Renewal*, 99 NY2d 144 [2002]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 43 AD3d 1057 [2007]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact (*Pell v Board of Education*, 34 NY2d 222, *supra*)

Moreover, it is well-settled that a Court may not substitute its own judgment for that of a reviewing board (*see Janiak v Planning Board of the Town of Greenville*, 159 AD2d 574 [1990], *appeal denied* 76 NY2d 707 [1990]; *Mascony Transport and Ferry Service v. Richmond*, 71 AD2d 896 [1979], *aff'd* 49 NY2d 969 [1980]). Therefore, if the decision rendered by the reviewing board is within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is arbitrary, capricious or unlawful (*see Castle Properties Co. v Ackerson*, 163 AD2d 785 [1990]).

Here, the Court finds that the decision by respondents to deny petitioner's application to amend the Covenant was neither arbitrary nor capricious, and with a rational basis in fact and law (*see e.g. Hughes v. Doherty*, 5 NY3d 100 [2005]; *Pell v Board of Education*, 34 NY2d 222 [1974]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 43 AD3d 1057 [2007]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). Initially, the Court notes that petitioner consented to the imposition of the Covenant upon the property in 2001 in connection with petitioner's request for a change of zone. Further, a town board may impose reasonable conditions for the protection of neighboring property owners (*see* Town Law § 264; *Church v Town of Islip*, 8 NY2d 254 [1960]). The Court of Appeals has held that the rezoning of property for commercial uses had been properly conditioned on the requirement that the owners thereof "execute and record restrictive covenants relating to the maximum area to be occupied by buildings, the erection of a fence, and the planting of shrubbery" (*Matter of St. Onge v Donovan*, 71 NY2d 507 [1988], citing *Church v Town of Islip*, 8 NY2d 254, *supra*; *City of New York v Delafield 246 Corp.*, 236

AD2d 11 [1997]). Petitioner's argument that other properties in the area do not maintain buffers is unpersuasive. The requested relief would result in non-conformity with other properties in the L-1 zoning district, and as discussed hereinabove, Section 85-50 of the Town Code imposes similar buffer requirements to those contained in the Covenant (*see* footnote 1, *supra*).

With respect to petitioner's argument that the Covenant has affected the value of the property, there is no evidence that the Covenant deprives the owners of all economically viable uses of the property, and therefore the Court finds that the actions of the Town Board have not amounted to a taking of the property (*see District Intown Props. Ltd Partnership v District of Columbia*, 198 F3d 874 [1999]). A court must look to the effect of the government action on the value of the property as a whole, and determine whether a particular governmental action has effected a taking, focusing both on the character of the action and on the nature and extent of the interference with rights in the property as a whole (*see Penn Cent. Transp. Co. v City of New York*, 438 US 104 [1978]; *see also Keystone Bituminous Coal Assn. v DeBenedictis*, 480 US 470 [1987]). In the instant matter, while petitioner claims that the sale of the property has been "hampered," there is no evidence in the record to suggest that the Covenant has denied petitioner all economically viable uses of the property.

Finally, the Court notes that petitioner has not developed his argument that the actions of the Town Board violated petitioner's civil rights pursuant to 42 U.S.C. § 1983. In any event, as the actions of the Town Board were not arbitrary and capricious, and had a rational basis in fact and law, the Court finds that petitioner's civil rights have not been violated.

In view of the foregoing, the instant petition is **DENIED** in its entirety.

The foregoing constitutes the decision and Order of the Court.

Dated: July 24, 2009

HON. JOSEPH FARNETI
Acting Justice Supreme Court