

**West Olive, LLC v Zoning Bd. of Appeals of the City
of Long Beach**

2009 NY Slip Op 32073(U)

August 25, 2009

Supreme Court, Nassau County

Docket Number: 08-22445

Judge: Joseph P. Spinola

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SHORT FORM ORDER
SUPREME COURT, STATE OF NEW YORK
COUNTY OF NASSAU

WEST OLIVE, LLC,
Plaintiff

Trial/IAS Part 17
Index No. 08-22445
Sequence No. 01, 02
Submit Date 4/7/09
XXX

against

ZONING BOARD OF APPEALS OF THE
CITY OF LONG BEACH and
THE CITY OF LONG BEACH,
Defendants

The following papers read on this motion:

- Notice of Motion/Order to Show Cause..... X**
- Cross-Motions..... X**
- Answering Affidavits..... X**

PRESENT: HON. JOSEPH P. SPINOLA

Application by the petitioner pursuant to CPLR 7803(4) to vacate the decision of the respondent Zoning Board of Appeals of the City of Long Beach (Zoning Board) dated November 24, 2008 and for judgment declaring § 9-105.4(j) Residence DD District of Appendix A (Zoning) of the Code of Ordinances of Long Beach, New York (Code) unconstitutional is determined as hereinafter provided.

Cross motion by respondent Zoning Board pursuant to CPLR 7804(f) and CPLR 3211 to dismiss the proceeding is granted.

FACTS

In this hybrid Article 78 Declaratory Judgment proceeding petitioner seeks to annul/vacate the decision of the Zoning Board dated November 24, 2008 which, after a public hearing, denied petitioner's application for area variances required to subdivide an 80' x 50' parcel of land located at 722 West Olive Street, Long Beach, New York, presently encumbered by an existing, vacant, single family residence and attached garage,

into two lots and construct two new single family houses. The property¹, purchased by the petitioner on June 22, 2007 for \$395,500 as an investment, has remained unoccupied since it was purchased and is situated in an historic neighborhood known as the Walks where many parcels of land do not abut streets and can only be accessed through pedestrian walkways. As noted in the Findings of Fact dated February 23, 2009

“[t]he homes are landlocked and located on various ‘walks’, which are unable to sustain any off-street parking facilities on their premises * * * out of approximately 340 parcels in the small six-block area only 120 (1/3) of them have off street parking.”

The history of this matter involves an initial request in December, 2007 by petitioner to the City of Long Beach Department of Assessment to subdivide the premises. The request was denied on or about March 24, 2008. After a public hearing held on April 24, 2008, petitioner’s first application for a variance to subdivide the premises was denied on May 19, 2008. During the pendency of an Article 78 proceeding to annul that decision, the parties entered into a stipulation dated June 17, 2008 pursuant to which the petition was withdrawn without prejudice as petitioner was in the process of submitting a new application to the Zoning Board. The stipulation provides, in pertinent part, as follows:

“[s]hould a rehearing be denied, or upon a rehearing, should the new application to the Respondent Zoning Board of Appeals be denied the variances requested, Petitioner may petition this Court for redress of the said denial and may renew all claims made in the Notice of Petition and Petition dated June 5, 2008.”

When, on August 28, 2008 petitioner’s second request to subdivide the premises was denied, petitioner submitted another application to the Zoning Board for a variance which was denied, after a public hearing conducted on October 23, 2008. This proceeding ensued.

ANALYSIS

A zoning board is vested with broad discretion in considering an application for an area variance. 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

¹The property has been maintained as a single-family home since its construction in 1925.

merely succumbed to generalized community pressure. *Zaniewski v Zoning Bd. of Appeals of Town of Riverhead*, 64 AD3d 720 [2nd Dept. 2009]; *Foti v Town of Easthampton, New York, Zoning Board of Appeals*, 60 AD3d 1057 [2nd Dept. 2009]. Thus a zoning board's determination which is rationally based i.e., is based on objective facts—and not solely on subjective considerations such as general community opposition—should be sustained. *Kearney v Kita*, 62 AD3d 1000, 1001 [2nd Dept. 2009].

In determining whether to grant an area variance, a zoning board must engage in a balancing test weighing the benefit to the applicant against the health, safety and welfare of the neighborhood or community. General City Law § 81-b(4)(b); *Gallo v Rosell*, 52 AD3d 514, 515 [2nd Dept. 2008]. The zoning board must consider whether 1) 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; 2) the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; 3) the requested area is substantial; 4) the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood; and 5) the alleged difficulty was self created. *DiPaolo v Zoning Bd. of Appeals of Town/Village of Harrison*, 62 AD2d 792, 793 [2nd Dept. 2009]. A zoning board is not required to justify its determination with respect to each of the five factors as long as its ultimate determination, reached after a balancing of the relevant considerations, is rational. Moreover, scientific or other expert testimony is not necessarily required. Objections based on facts may be sufficient. *Merlotto v Town of Paterson Zoning Bd. of Appeals*, 43 AD3d 926, 929 [2nd Dept. 2007].

Here, the respondent Zoning Board engaged in the requisite balancing test and considered the relevant statutory factors. Contrary to petitioner's contentions, the denial of the requested variances is rationally based and is neither arbitrary nor capricious. The requested variances were, in the view of the Zoning Board, substantial and because of the location of the subject property—and the unique problems in the Walks i.e., an already dire parking situation, over-development in the area, aged plumbing, proximity to a popular restaurant—the Zoning Board's finding that the proposed subdivision would have a substantial detrimental effect on the character of the neighborhood, where bungalow style houses predominate, was neither arbitrary nor capricious.

The Zoning Board's determination that the division of the property and construction of two new houses would exacerbate already existing traffic and parking problems has a rational basis. *Rivero v Voelker*, 38 AD3d 784, 785 [2nd Dept. 2007], *leave to appeal denied* 9 NY3d 810 [2007]. The need to alleviate traffic congestion by requiring adequate parking facilities is a legitimate concern for consideration by a zoning board. *FNR Home Const. Corp. v Downs*, 57 AD3d 540, 542 [2nd Dept. 2008].

Petitioner is presumed to have had knowledge of applicable zoning restrictions in effect when it purchased the property. As such, any hardship which might be sustained as a result of its inability to subdivide the property in question in order to build two, two-story houses on two smaller lots measuring 40' x 50' is self created.

The court notes that in its Findings of Fact² the Zoning Board addressed the three cases on which petitioner relied at the hearing and distinguished them on the grounds, *inter alia*, that in each case the subdivision of the property could be performed without demolishing an existing structure in violation of § 9-105.4(j) of the Code. In any event, “the fact that one property owner is denied a variance while others similarly situated are granted such variances, does not, in and of itself, indicate that the difference in result is due to impermissible discrimination or arbitrariness. *Spandorf v Board of Appeals of Village of East Hills*, 167 AD2d 546, 547 [2nd Dept. 1990]. In the absence of any showing that the Zoning Board reached a different result on the same facts, the fact that the Zoning Board granted other variances from the off street parking requirement is insufficient to establish that the Zoning Board’s denial of petitioner’s application was arbitrary or capricious. *Arata v Morelli*, 40 AD3d 991, 992 [2nd Dept. 2007].

CHALLENGED ORDINANCE

Petitioner/plaintiff challenges the constitutionality of § 9-105.4(j) of the Code which prohibits the demolition of an existing building or structure to accomplish the subdivision of a plot of land into two or more legal building lots, on the grounds that, as a result the Zoning Board’s application of the ordinance, petitioner/plaintiff was deprived of its property without due process of law and the Zoning Board’s “selective enforcement” of the subject provision violated petitioner/plaintiff’s right to equal protection under the Fourteenth Amendment of the United States Constitution and Article 1 § § 6, 11 of the New York State Constitution.

The equal protection clause of the Fourteenth Amendment of the United States Constitution commands that no state “shall deny to any person within its jurisdiction the equal protection of the laws,” which is essentially a direction that all persons similarly situated should be treated alike. *Village of Willowbrook v Olech*, 528 U.S. 562, 564 [2000]; *City of Cleburne v Cleburne Living Ctr.*, 473 U.S. 432, 437 [1985]. It is firmly established that a strong presumption of constitutionality attaches to zoning legislation (*Stringfellow’s of New York, Ltd. v City of New York*, 91 NY2d 382, 395 [1998]), so that a party challenging a zoning provision as unconstitutional must overcome the presumption

²The fact that the Zoning Board issued its Findings of Fact after the instant proceeding was commenced is not a procedural defect as petitioner suggests. *North Shore F.C.P. v Mammina*, 22 AD3d 759, 761 [2nd Dept. 2005].

by proof beyond a reasonable doubt. The test is whether the ordinance was enacted in furtherance of a legitimate governmental purpose and is reasonably related to the end sought to be achieved. *Spilka v Town of Inlet*, 8 AD3d 812, 815 [3rd Dept. 2004].

The strong presumption of constitutionality can be overcome only by showing, beyond a reasonable doubt, that there is no rational basis for the local law at issue or, (*Asian Americans for Equality v Koch*, 72 NY2d 121, 131-132 [1988]), in other words, by showing that the ordinance is clearly unreasonable and not really designed to accomplish a legitimate purpose affecting public health, safety, morals or general welfare.

The fact that an ordinance limits the use of, and may, in some instances, depreciate the value of property, will not render it unconstitutional unless it can be shown that the measure is either unreasonable in terms of necessity or the diminution in value is such as to be tantamount to a confiscation. *Redco v Town of Oyster Bay*, 160 AD2d 984 [2nd Dept. 1990].

The record at bar is devoid of a factual foundation to negate the presumption of constitutionality and petitioner/plaintiff makes no credible showing that the ordinance, as applied to its applications, was discriminatory *vis a vis* other property owners who sought to subdivide premises under the same facts. Further, the record is devoid of any evidentiary showing to indicate that the provision was not designed to further a legitimate governmental objective. In the absence of such a showing petitioner/plaintiff cannot be deemed to have met its burden with respect to denial of its equal protection claim.

Considering the ordinance at issue, and its particular application to the property herein, there is no factual predicate alleged sufficient to support the claim that petitioner/plaintiff was deprived of property without due process of law as a result of the ordinance. A party alleging a deprivation of property must demonstrate the existence of a protectable property interest. *Huntington Yacht Club v Incorporated Village of Huntington Bay*, 1 AD3d 480, 481 [2nd Dept. 2003]. The allegations of the first and second causes of action of the complaint i.e., that the ordinance is an arbitrary or irrational exercise of power by the City of Long Beach, that others similarly situated to petitioner/plaintiff were granted variances in the past and that the selective enforcement of § 9-105.4(j) was done with malice and bad faith—are wholly conclusory. Movant has failed to allege any facts specifying the manner in which petitioner/plaintiffs' rights to due process and/or equal protection were violated. Denial of an application for permission to develop property does not implicate a protectable property interest where a governmental authority has the discretion to grant or deny the application. The granting of subdivision approval is a discretionary function. *Bower Associates v Town of Pleasant Valley*, 304 AD2d 259, 262-263 [2nd Dept. 2003], *aff'd*. 2 NY3d 617 [2004].

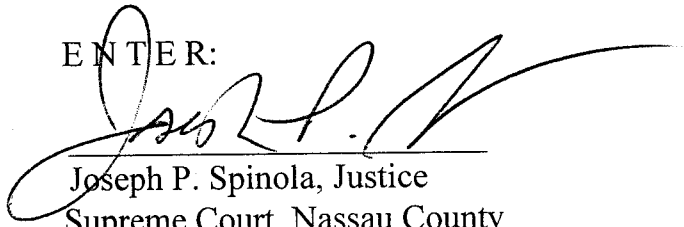
CONCLUSION

Accordingly the application to annul the November 24, 2008 determination of the Zoning Board denying petitioner's request to subdivide the property at issue and to construct two new one-family houses is denied.

Petitioner/plaintiff having failed to overcome the validity of the challenged ordinance, it is hereby declared that §9-105.4(j) of the code is constitutional and the hybrid proceeding is hereby dismissed.

This constitutes the decision and order of the Court.

ENTER:



Joseph P. Spinola, Justice
Supreme Court, Nassau County

XXX

Dated: August 25, 2009

ENTERED

SEP 03 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**