

Matter of Drybrook Holdings, LLC v Dittko
2009 NY Slip Op 33022(U)
December 10, 2009
Supreme Court, Suffolk County
Docket Number: 35659/2008
Judge: Joseph Farneti
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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

In the Matter of the Application of

DRYBROOK HOLDINGS, LLC.,

Petitioner,

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

-against-

DOUGLAS DITTKO, Chairman, MARY L.
 DAUM, M. CECILE FORTE, VINCENT
 PASCALE, RICHARD A. SMITH, KAREN M.
 WILUTIS and TARA A. KAVANAGH,
 constituting the PLANNING BOARD of the
 TOWN OF BROOKHAVEN, and the
 PLANNING BOARD of the TOWN OF
 BROOKHAVEN, and the TOWN OF
 BROOKHAVEN,

Respondents.

ORIG. RETURN DATE: NOVEMBER 3, 2008
 FINAL SUBMISSION DATE: JANUARY 8, 2009
 MTN. SEQ. #: 001
 MOTION: MG

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Upon the following papers numbered 1 to 8 read on this petition _____
 FOR A JUDGMENT PURSUANT TO ARTICLE 78 _____

Notice of Petition and supporting papers 1-3; Verified Answer and supporting papers 4, 5;
 Respondents' Return 6; Replying Affidavit and supporting papers 7, 8; it is,

ORDERED that this petition for a judgment, pursuant to Article 78 of the CPLR, annulling and setting aside the determination of respondent PLANNING BOARD of the TOWN OF BROOKHAVEN ("Planning Board") and ruling that the subject property does not have to maintain more buffers than is called for by statute, is hereby **GRANTED** to the extent set forth hereinafter.

Respondents have filed a verified answer and return in response to the verified petition.

Petitioner is the fee owner of a parcel of real property of approximately 11.7 acres located on Manor-Yaphank Road, in the Hamlet of Manorville, Town of Brookhaven, State of New York ("property"). Petitioner indicates that the zoning for the property is currently L-1, light industrial. Petitioner informs the Court that in 2007, petitioner submitted an application to the TOWN OF BROOKHAVEN for a four-lot industrial subdivision of the property, which petitioner alleges required no variances and was an as-of-right use. Petitioner claims that the subdivision required no road work, complied in all respects with the requirements of an L-1 industrial zoning district property, and complied with Suffolk County Health Department standards. In connection with the proposed subdivision, petitioner hired Thomas Cramer of Cramer Consulting.

The Planning Board ultimately held a hearing on petitioner's application on September 10, 2007. Petitioner indicates that Mr. Cramer testified at the hearing on behalf of petitioner and agreed to all the conditions imposed by the Planning Board, save one, the condition of a 75' natural and undisturbed buffer along the westerly property line. Petitioner argues that the Code of the Town of Brookhaven only requires a 25' buffer. Petitioner alleges that if it is required to maintain a 75' buffer, the buffer alone would constitute 103,700 square feet (approximately 2.5 acres), or an additional 69,133 square feet over the requirements of the Code. Further, petitioner alleges that such a buffer would render the southern parcel unusable. Petitioner alleges that the property is bordered on the west by residential properties, and the Planning Board sought to protect those properties from this industrial property by imposing the additional buffer requirement. By letter from Chairman Dittko to petitioner, dated September 12, 2007, the Planning Board approved petitioner's land division application with cluster treatment and also imposed certain conditions and covenants, including covenant "4(D)," the covenant requiring a 75' natural buffer along the westerly property lines of all lots.

Petitioner indicates that Mr. Cramer subsequently drafted a letter to the Chairman of the Planning Board, dated June 12, 2008, requesting a reconsideration of the size of the buffer to reduce it from 75' to 50', which would still be twice the size required by the Town Code. Petitioner alleges that the Planning Department staff approved the reduction with respect to Lots #3 and 4 only, with Lots #1 and 2 maintaining a 75' buffer, and that petitioner agreed to

such modification. However, at a hearing held on September 8, 2008, the Planning Board denied petitioner's request for a reduction. Moreover, petitioner alleges that the Planning Board failed to provide the findings or reasons for its denial. As such, petitioner commenced the instant special proceeding, pursuant to Article 78 of the CPLR, to annul that denial, arguing that the denial was arbitrary and capricious, in violation of the Town Code, and in violation of petitioner's due process and equal protection rights guaranteed by the Constitution of the United States.

In opposition, respondents argue that this special proceeding was untimely commenced, as it should have been filed within thirty (30) days of the Planning Board's decision of September 12, 2007 (see Town Law § 282). Respondents further argue that petitioner has not overcome the discretionary power of the Planning Board, in that the imposition of buffers in excess of the Town Code had a reasonable and rational basis. Respondents contend that pursuant to Town Law §§ 276 and 277, the Planning Board, when granting an application for a subdivision of property, may require that land be used safely for building purposes and may impose reasonable conditions that protect the health, safety and welfare of the public in the neighboring properties.

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 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*). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Pell v Board of Education*, 34 NY2d 222, *supra*). Where a hearing is held, the determination must be supported by substantial evidence (CPLR 7803 [4]).

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]).

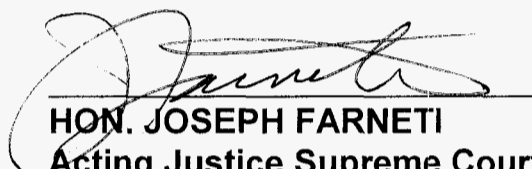
Initially, the Court finds that the instant proceeding was timely commenced. The Planning Board held a hearing on petitioner's request to reduce the buffer requirement on September 8, 2008, and a written denial was issued on September 23, 2008. The instant petition was filed on October 9, 2008, within thirty (30) days of the denial by the Planning Board (see Town Law § 282).

The Court finds that the decision by the Planning Board to deny petitioner's application for a reduction of the buffer requirement from 75' to 50' was arbitrary and capricious, and without a rational basis in fact and law. Brookhaven Town Code § 85-360 (B) provides in pertinent part that "[a] land division that does not require variances shall be subject to the review and approval of the Planning Board, which approval may be subject to the imposition of reasonable conditions as said Planning Board shall determine." Thus, respondents correctly argue that the Planning Board may impose reasonable conditions on the approval of a subdivision of a plat. However, Brookhaven Town Code § 85-50 (B) (2) (a) provides that "[a] minimum perimeter buffer area of 25 feet adjacent to any residential use or zone, with a density and quality of plantings equal to a double row of evergreen plantings seven feet high and five feet on center shall be required in connection with an L Industrial 1 District use" (Town Code § 85-50 [B] [2] [a]). At the hearings, there was no testimony or other evidence to suggest that the imposition of a 75' buffer was crucial to maintaining the public's health, safety, or welfare, or was necessary for the protection of the surrounding neighborhood. The only opposition to the application was testimony from the president of a local civic association who claimed that the "buffer zone is critical to maintaining the integrity of the residential neighborhood apart from the L-1 Industrial." However, as discussed, the Town Code addresses the situation where, as here, an L-1 zoning district abuts a residential zone, and merely requires a 25' buffer. As such, the Court finds that the condition of a 75' buffer was without foundation in law or fact, and not supported by substantial evidence.

Accordingly, this verified petition for a judgment annulling and setting aside the denial of the Planning Board with respect to petitioner's request to reduce the buffer requirements from 75' to 50' as a condition of approval of petitioner's subdivision application, is **GRANTED**. However, that branch of the petition seeking a ruling that the subject property does not have to maintain more buffers than is called for by statute, to wit: 25', is **DENIED**, as the denial of the Planning Board herein was with respect to petitioner's application to reduce the buffer from 75' to 50', not from 75' to 25'.

The foregoing constitutes the decision and Order of the Court.

Dated: December 10, 2009



HON. JOSEPH FARNETI
Acting Justice Supreme Court