SUPREME COURT - STATE OF NEW YORK

Present:
HON. ARTHUR M. DIAMOND
Justice Supreme Court

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In the Matter of the Application of

TULIP GARDENS, INC. and HIDIR YILDIZ

Petitioner,

-against-

ZONING BOARD OF APPEALS, INCORPORATED VILLAGE OF HEMPSTEAD,

Respondents.

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TRIAL PART: 19

NASSAU COUNTY

INDEX NO: 17947/09

MOTION SEQ. NO: 1

SUBMIT DATE: 11/20/09

The following papers having been read on this motion:

Notice of Petition 1
Memorandum.....2
Opposition.....3
Reply.....4

This Petition pursuant to Article 78 of the CPLR for a judgment annulling the determination of the respondent Zoning Board of Appeals of the Incorporated Village of Hempstead ("Board") which denied the petitioners Tulip Gardens, Inc. and Hidir Yildiz' application for a variance is determined as provided herein.

Tulip Gardens, Inc., of which petitioner Hidir Yildiz is the sole shareholder, owns property at 699 Fulton Avenue in Hempstead. It acquired that property which consists of an automobile gas and service station in April 2008. Shortly thereafter, the petitioners requested the Village's permission to convert the three service bays to a convenience store. The Village denied that application on January 21, 2009 because that use is not permitted in the BG zone under the Village Zoning Code. Only gas stations and accessory minor servicing of motor vehicles is permitted in that zone. Hempstead Village Code §§ 139-6, 139-113.

The petitioners sought a variance from the Board. At the hearing, the petitioners established

that there are six gasoline service stations within the BG zone that have accessory convenience stores with one directly across the street from the petitioners' station and more of them within the Village and along Hempstead Turnpike. They also noted that a convenience store would not pose the same environmental concerns as a service station does. And, they alleged financial hardship maintaining that the service bays could not be rented and were not generating any profit but a convenience store would. Many area residents spoke in opposition to the application, opining, *inter alia*, that a convenience store would result in increased traffic and attract vagrants and undesirables.

Following the hearing, applying the criteria set forth at Village Law § 7-712(b)(3), by decision dated August 6, 2009, the Board denied the variance. The Board concluded that "the quality of life in the area would be negatively impacted quite severely because of the added traffic and vehicles in the area going in and out of the premises [and that] [t]he existence of a convenience store would also increase foot traffic of undesirables congregating in the area after hours." It further noted that there are a significant number of convenience stores in the area which would compete with the petitioners' store. It also noted that the petitioners should have known that a variance would be required when it bought the property and that the petitioners would not suffer a hardship if the variance was not granted because the automobile service station would be a good business. It opined that if granted, the variance would not add value to the community.

Local zoning boards have broad discretion in considering applications for use variances and its determination should be upheld if it is rational and not arbitrary and capricious (citations omitted)." Caspian Realty, Inc. v Zoning Board of Appeals of Town of Greenburgh, __ AD2d __, 886 NYS2d 442 (2nd Dept. 2009). "A determination is rational 'if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition (citations omitted).' " Caspian Realty, Inc. v Zoning Board of Appeals of Town of Greenburgh, supra, quoting Matter of Halperin v City of New Rochelle, 24 AD3d 768, 772 (2nd Dept. 2005), lv dism. 6 NY3d 890 (2006).

The petitioners sought a use variance. Accordingly, pursuant to Village Law § 7-712-b(2)(b), the petitioners are required to demonstrate that applicable zoning regulations and restrictions have caused them unnecessary hardship. To prove unnecessary hardship, the petitioners must demonstrate that it cannot realize a reasonable return and to demonstrate by "competent financial evidence" "that

the lack of return is substantial." It also must establish that the alleged hardship is unique and does not apply to a substantial portion of the district; that the use variance would not alter the essential character of the neighborhood; and, that the alleged hardship was not self-created. In granting a use variance, the Board is required to "grant the minimum variance that it shall deem necessary and adequate to address the unnecessary hardship proved by the applicant, and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community." Village Law § 7-712-b(2)(c).

Here, the Board applied the criteria applicable to the review of an application for an area variance (see, Village Law § 7-712-b[3]), which are markedly different than those that apply to the review of a use variance application. This matter must be remanded for a proper review and a new determination.

As for Board member Monteverde's alleged failure to disclose his home's proximity to the petitioners' property, his disqualification is not required under the General Municipal Law § 809(2) or the Village Code. Compare, Heustis v Town of Ticonderoga Planning Board, 11 AD3d 868 (3rd Dept. 2004). "Resolutions of questions of conflict of interest requires a case-by-case examination of the relevant facts and circumstances." Matter of Parker v Town of Gardiner Planning Bd., 184 AD2d 937, 938 (3rd Dept. 1992), lv den., 80 NY2d 761 (1992), citing 3 McQuillin, Municipal Corporations § 12:136, at 631 (3d rev. ed.) "In determining whether a disqualifying conflict exists, the extent of the interest at issue must be considered and where a substantial conflict is inevitable, the public official should not act." Matter of Parker v Town of Gardiner Planning Bd., supra, at p. 938, citing 1984 Opinions Attorney General, 86, 160). "[T]he mere fact of employment or similar financial interest does not mandate disqualification of the public official involved in every interest." Matter of Parker v Town of Gardiner Planning Bd., supra, at p. 938. As the Court noted in Lucas v Board of Appeals of Village of Mamaroneck (14 Misc3d 1214[A] [Supreme Court Westchester County 2007]) because of the difficulty a small village would encounter, standing alone, a social relationship between an applicant and a zoning board member do not require his or her recusal. Ownership of property in an area that will be financially impacted by the Board's decision does not require disqualification, either, as again, that " 'would make all but a handful of property owners in the village ineligible to sit on the board in such matters.' " Segalla v Planning Bd. of Town of

Amenia, 204 AD2d 332, 333 (2nd Dept. 1994), citing Town of North Hempstead v Village of North Hills, 38 NY2d 334, 344 (1975). Requiring recusal based solely on the proximity of a board member's residence to the applicant's property bodes similarly. Standing alone, that does not require Monteverde's disqualification. In view of the petitioners present awareness of Monteverde's alleged "interest" in the determination, the hearing shall be reopened and continued upon remand solely to allow petitioners to further investigate it.

The court notes that in reissuing its determination, the Board should be mindful that "[a] neighboring business lacks standing to challenge variances granted to a competitor if its only injury is increased competition" (Sun-Brite Car Wash, Inc. v Board of Zoning and Appeals of Town of North Hempstead, 69 NY2d 406, 423 [1987], rearg den., 70 NY2d 694 [1987], citing Cord Meyer Development Co. v Bell Bay Drugs, 20 NY2d 211, 211 [2nd Dept. 1966], rearg den. 20 NY2d 970 [1967]) because business competition is not an interest protected by the zoning laws (Sun-Brite Care Wash, Inc. v Town of Board of Zoning and Appeal of Town of North Hempstead, supra; citing Cord Meyer Dev. Co. v Bell Bay Drugs, supra, at p. 211; Matter of Paolangeli v Stevens, 19 AD2d 763 [3rd Dept. 1963]; 4 Anderson, American Law of Zoning § 27.17 [3rd ed.]; 3 Rathkopf, Zoning and Planning § 43.06; see also, Fox v Favre, 218 AD2d 655 [2nd Dept. 1995]). Thus, that the variance if granted would intensify competition between convenience stores is not an appropriate factor to be considered in making the determination.

This constitutes the decision and order of this Court.

ENTER

DATED: December 22, 2009

ENTERED
DEC 24 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

HON. ARTHUR M. DIAMOND
J. S.C.

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