Matter of Matejko v Board of Zoning Appeals of the Town of Brookhaven
2009 NY Slip Op 33167(U)
December 30, 2009
Supreme Court, Suffolk County
Docket Number: 33905/2008
Judge: Joseph Farneti

SHORT FORM ORDER

INDEX NO. 33905/2008

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

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

ORIG. RETURN DATE: SEPTEMBER 29, 2008
FINAL SUBMISSION DATE: JANUARY 29, 2009
MTN. SEQ. #: 001
MOTION: MD

In the Matter of the Application of

GEORGE MATEJKO,

Petitioner,

for a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

BOARD OF ZONING APPEALS OF THE TOWN OF BROOKHAVEN and TOWN OF BROOKHAVEN,

Respondents.

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Upon the following papers numbered 1 to 6 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; it is,

ORDERED that this verified petition for a judgment, pursuant to Article 78 of the CPLR: (1) annulling and setting aside the determination of respondent BOARD OF ZONING APPEALS OF THE TOWN OF BROOKHAVEN ("Zoning Board"); and (2) remanding petitioner's application for division of an oversized parcel into two lots exceeding lot area requirements but requiring flag lot frontage variances for each of the lots thereby created to the Zoning Board with directions to grant the application, upon the grounds that the Zoning Board's determination was made solely in response to non-substantive community opposition without support in the record; was barred by the doctrine of administrative estoppel by virtue of the prior grant of similar applications in the

immediate vicinity; was made in violation of lawful procedure; was affected by errors of law; was arbitrary and capricious; was an abuse of discretion; and was not supported by substantial evidence, is hereby **DENIED** for the reasons set forth hereinafter. Respondents have filed a verified answer and return in response to the verified petition.

Petitioner is the owner of an improved parcel of real property commonly known as 47 Elm Street, Lake Ronkonkoma, in the Town of Brookhaven, State of New York ("property"). Petitioner informs the Court that the property is an oversized developed residential parcel, which is improved with a single family residence on the western end (proposed Lot 1), and wooded and vacant on the eastern end (proposed Lot 2). The property is 43,649 square feet and is located in a "C" Residence Zoning District, which requires only 9,000 square feet per lot. Petitioner alleges that he wished to construct a new 2,450 square foot single-family dwelling for his daughter on Lot 2, to be accessed via a "typical flag lot configuration." Petitioner sought to divide his property into two lots of approximately 20,000 square feet each, which petitioner claims would conform with over 85% of the lots in the area, but would require flag lot frontage variances for each of the lots created.

As such, on or about October 13, 2004, petitioner filed applications to subdivide his property into the aforementioned two lots. Proposed access to Lot 2 would be accomplished via an easement over Lot 1 of approximately 260 feet in length located along the southern property line. On June 4, 2008, a public hearing was held on the matter. Petitioner informs the Court that several local residents appeared at the hearing and spoke in opposition to the application, particularly with respect to the flag lot configuration; access for emergency vehicles; the use of the existing residence as a rental property; and complaints about drainage in the area. In addition, the local residents submitted a petition, signed by thirty-three (33) members of the surrounding community, to stop the proposal, deny the variances requested, and "not allow another one family dwelling to be built on said parcel." However, it was noted at the hearing that the Zoning Board had recently approved a similar flag lot configuration situated 275 feet from petitioner's property.

Moreover, petitioner indicates that a report from the Zoning Board's Environmental Planner was also made part of the record, wherein the Planner recommended certain mitigation measures, including measures regarding drainage, all of which were accepted by petitioner. According to the report, the

Planner found that no significant environmental impact was anticipated by the subdivision, and therefore recommended a Negative Declaration. On July 16, 2008, the Zoning Board unanimously voted to deny petitioner's application, and issued its "Findings and Conclusions" of even date, which denial is the subject of the within special proceeding.

Petitioner argues that the denial was made in response to community opposition without support in the record; was barred by the doctrine of administrative estoppel by virtue of the prior grant of similar applications in the immediate vicinity; was made in violation of lawful procedure; was affected by errors of law; was arbitrary and capricious; was an abuse of discretion; and was not supported by substantial evidence. Specifically, petitioner alleges that the Zoning Board acted in excess of its jurisdiction and without evidence in the record when it based the denial upon, among other things, roadway drainage and other environmental concerns when its own Planner recommended a Negative Declaration; community opposition to the rental use of the property; concerns for access of emergency vehicles; and that the subdivision would create an undesirable change in the character of the surrounding neighborhood, when in fact the proposed lots conform or exceed almost every other parcel in the area and the proposed new structure would be shielded by natural and planted screening buffers and would thus not be visible from the roadway. Based upon the foregoing, petitioner seeks a judgment annulling and setting aside the denial of the Zoning Board, and remanding petitioner's application to the Zoning Board with directions to grant the application.

In opposition, the Zoning Board alleges that it properly balanced and weighed the factors set forth in Town Law § 267-b and the holding of the Court of Appeals in *Sasso v Osgood*, 86 NY2d 374 (1995) when reaching its determination, and therefore the denial cannot be deemed arbitrary or capricious. Initially, the Zoning Board concedes that the two proposed lots would be in conformity in terms of lot area; however, the Zoning Board argues that the issue before the Board was the request for variances for lot frontage, which the Zoning Board found to be substantial, and that the granting of such variances would have an adverse impact on the neighborhood and cause an undesirable change in the character of the neighborhood. Specifically, the Zoning Board found that the variances requested were for a lot frontage of 35 feet for Lot 1, and a lot frontage of 15 feet for Lot 2, where Brookhaven Town Code § 85-62 requires lot frontage of 75 feet in a "C" Residence Zoning District. As such, the relaxation from the Code would be 53% and 80% respectively, and the Zoning Board found this to be

substantial. In addition, the Zoning Board found that such lot frontage would only conform to one (1%) percent of the surrounding area, or one lot. The Zoning Board distinguished the prior grant of a flag lot configuration in the neighborhood by reasoning that the previously subdivided parcel enjoyed greater frontage on Elm Street and allowed for better accommodation of driveways and vegetation. Further, the Zoning Board alleges that the two lots immediately adjacent to the subject property and analogous to the property are both developed as single family dwellings situated upon approximately an acre of land.

Thus, the Zoning Board concluded, based upon the testimony and evidence presented, that the proposed application, if granted, would only maintain one (1%) percent lot conformity for lot frontage to the surrounding community; the variances requested were substantial in nature; the requested relief was outside the nature and character of the area; petitioner had other feasible alternatives, in that his daughter could reside in the existing dwelling as petitioner does not reside therein; the application would be precedent-setting, adding to further degradation of the surrounding area; and that the difficulty was self-created, as petitioner acquired the property in 2004 with the current "C" Residence Zoning District already in place.

In a proceeding under CPLR article 78 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*, 2007 NY Slip Op 6681 [2d Dept]; *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*, 2007 NY Slip Op 6879 [2d Dept]; *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, local zoning boards have broad discretion in considering applications for area variances and the judicial function in reviewing such decisions is a limited one (*Pecoraro v Bd. of Appeals*, 2 NY3d 608 [2004]). 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 merely succumbed to generalized community pressure (*Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*). A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence (*Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*; *Matter of Hannett v Scheyer*, 37 AD3d 603 [2007]; *Matter of B.Z.V. Enter. Corp. v Srinivasan*, 35 AD3d 732 [2006]).

Pursuant to Town Law § 267-b (3), when determining whether to grant an area variance, a zoning board of appeals must weigh the benefit of the grant to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted (*see Matter of Ifrah v Utschig*, 98 NY2d 304 [2002]; *Matter of Sasso v Osgood*, 86 NY2d 374, *supra*). The zoning board is also required to consider whether: (1) granting the area variance will produce an undesirable change in the character of the neighborhood or a detriment to nearby properties; (2) the benefit sought by the applicant can be achieved by some method, feasible to the applicant, other than a variance; (3) the requested area variance is substantial; (4) granting the proposed variance would have an adverse effect or impact on physical or environmental conditions in the neighborhood or district; and (5) the alleged difficulty is self-created. While the last factor is not dispositive, it is also not irrelevant (*see Matter of Ifrah v Utschig*, 98 NY2d 304, *supra*; *Matter of Sasso v Osgood*, 86 NY2d 374, *supra*).

Here, the Court finds that the denial by the Zoning Board had a rational basis and was supported by the evidence presented. After conducting a hearing on the matter in which petitioner appeared by a representative, the Zoning Board properly considered the benefit to petitioner as weighed against the detriment to the health, safety and welfare of the surrounding community. The Zoning Board also weighed and applied the five aforementioned factors, in compliance with Town Law § 267-b (3) (b) and controlling case law, when reaching its decision on petitioner's application. The Zoning Board's determination was based upon, among other things, the finding that the requested area variances were substantial, would have an adverse impact on the surrounding neighborhood, and raise safety and other concerns relative to the proposed access driveway/easement for Lot 2 (*see e.g. Tetra Builders, Inc. v.*

Scheyer, 251 AD2d 589 [1998]). In addition, neighbors testified at the hearing against petitioner's application, alleging that the character of the neighborhood would be changed by the proposed subdivision. While petitioner is correct that a Zoning Board may not merely succumb to generalized community pressure (*see Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*), a Zoning Board may consider community testimony, among other factors, and may require that issues raised by such testimony be addressed by the applicant (*see Ifrah v Utschig*, 98 NY2d 304, *supra*; *Michelson v Warshavsky*, 236 AD2d 406 [1997]; *Matter of AHU Realty Corp. v Goodwin*, 81 AD2d 637 [1981]).

The owners of adjacent and neighboring parcels testified at the hearing that the surrounding area was subject to severe flooding, and provided the Zoning Board with photographs in support thereof. Further, a letter to the Zoning Board from Mark Palermo, Esq. of 39 Elm Street, Lake Ronkonkoma, dated October 3, 2007, was referenced on the record, entitled "Environmental Crisis on Elm Street," which describes a condition on Elm Street where there is no adequate drainage, consistent flooding resulting in mosquito infestation, recurring cesspool overflows and erosion. The allegations in Mr. Palermo's letter were based upon his personal experiences from living on Elm Street for twenty-five (25) years. The Zoning Board, in its discretion, found that petitioner's proposed subdivision would further exacerbate the pre-existing flooding condition. This testimony and evidence, which was based on long-term personal observations, was not the type of conclusory or general objections found insufficient in prior case law, but rather was sufficient to raise legitimate and serious questions about the effect of the proposed subdivision and ensuing construction on the flooding condition and overall character of the neighborhood (*see Michelson v Warshavsky*, 236 AD2d 406, *supra*). Accordingly, on the record before it, the Court finds that the Zoning Board's determination that the proposed subdivision should be denied was supported by substantial evidence (*see Retail Prop. Trust v Bd. of Zoning Appeals*, 98 NY2d 190 [2002]; *300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY2d 176 [1978]).

Finally, the fact that a similar application was granted to petitioner's neighbor for a flag lot does not suffice to establish that the Zoning Board's action was arbitrary, as a zoning board "may refuse to duplicate previous error; . . . change its views as to what is for the best interests of the [Town]; [or] . . . give weight to slight differences which are not easily discernible" (*Matter of Cowan v Kern*, 41 NY2d 591, 595 [1977]; *see Ifrah v Utschig*, 98 NY2d 304, *supra*; *Josato, Inc. v Wright*, 35 AD3d 470 [2006]; *Matter of Spandorf v Board of Appeals of Vil. of E. Hills*, 167 AD2d 546 [1990]).

In view of the foregoing, the Court finds that the Zoning Board's denial had a rational basis in fact and law, was supported by the evidence presented, and cannot be deemed an abuse of discretion. Accordingly, the instant petition is **DENIED** and this special proceeding is dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: December 30, 2009

HON. JOSEPH FARNETI
Acting Justice Supreme Court