SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No. 80317/09
Motion No.:001

In the Matter of the Application of

DEVONSHIRE ENTERPRISES, INC.,

Petitioner,

DECISION & ORDER

HON. JOSEPH J. MALTESE

For an Order and Judgment pursuant to Article 78 of the CPLR

against

MEENAKSHI SRINIVASAN,
CHRISTOPHER COLLINS,
DARA OTTLEY-BROWN,
SUSAN HINKSON,
BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, and
THE DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK,

Respondents,

The following items were considered in the review of the following petition for Article 78 review.

Papers	Numbered
Notice of Petition and Affidavits Annexed	1
Verified Answer	2
Memorandum of Law In Opposition to Petition	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The petitioner, Devonshire Enterprises, Inc. ("Devonshire"), petitions this court to review the determination of the Board of Standards and Appeals ("BSA") that denied its application for a zoning variance pursuant to Article 78 of the Civil Practice Law and Rules. Devonshire's petition is denied.

Facts

Devonshire is a New York corporation that owns real property located on Staten Island at Block 3803 and Lot 29, known commonly as 546 Midland Avenue a/k/a 287 Freeborn Street ("the Premises"). On September 25, 2008 Devonshire requested that BSA approve a variance application pursuant to §72-21 of the Zoning Resolution to permit the commercial use of the Premises located in a residential zoning district. On November 26, 2008 the BSA issued a Notice of Comments to Devonshire requesting additional information and documentation. Devonshire responded to the BSA's request by letter dated February 2, 2009 that included additional documents and information, and a revised Statement of Facts & Findings. BSA issued a second Notice of Comments to Devonshire requesting further documentation on April 7, 2009. Devonshire responded once again by letter dated April 15, 2009 and it further revised its Statement of Facts & Findings.

Devonshire's application for a zoning variance stated that the Premises included photographs of the site, zoning computations, architectural drawings, a radius map showing the properties in the surrounding area, a list of surrounding property owners, a statement of proposed facts, an economic feasibility analysis, an environmental analysis and other supporting documentation required by the BSA. In assessing the petitioner's request for a variance the BSA summarized Devonshire's application as follows:

> . . . the applicant asserts that the following are unique physical conditions that lead to practical difficulties in developing the subject site in strict compliance with underlying district regulations: (1) the proximity to Use Group 16 uses and the commercial nature of the subject block; (2) the shallow depth of the lot; (3) the traffic condition of Midland Avenue; and (4) location at the border of an AE10 flood zone. . .

The court finds this rendition a proper statement of the petitioner's position with respect to the

uniqueness of the Premises.

Additionally, petitioner maintains that the current residential zoning creates an undue economic hardship, that can be remedied by granting a variance to construct a commercial structure. The petitioner asserts that the Premises is surrounded by commercial properties. In particular Devonshire pointed out that a dry cleaner is immediately adjacent to the premises and several automotive use properties are directly across the street. Indeed photographic evidence of the commercial nature of the area are contained in the record provided by the respondents.

In connection with Devonshire's application for a zoning variance the BSA conducted hearings on May 19, 2009, June 23, 2009, July 28, 2009 and September 22, 2009. Even in light of the fact that Devonshire's application for a zoning variance was supported by Community Board 2 and the Midland Beach Civic Association, and the fact that the BSA had previously granted zoning variances in the neighborhood the BSA denied Devonshire's application.

The petitioners now seek an Article 78 review of the BSA's determination denying its application for a zoning variance.

Discussion

In a proceeding pursuant to CPLR Article § 78 to review a determination of zoning board appeals, judicial review is limited to ascertaining whether the action taken is illegal, arbitrary and capricious, or an abuse of discretion. In addition, a zoning board's interpretation of its zoning ordinance is entitled to great deference, and will not be overturned by a court unless unreasonable or irrational. However, any ambiguities in the zoning ordinance must be resolved in favor of the property owner.[1]

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[1] *Mejias v. Town of Shelter Island Zoning Bd of Appeals,* 298 AD2d 458, [2d Dept 2002]; *See also, Cortland, LLC v. Zonging Bd. of Appeals of Village of Roslyn Estates,* 21 AD3d 371, [2d Dept 2006].

In order to obtain a variance, New York City Zoning Resolution § 72-21 provides that five requirements must be met: (a) there must be unique physical circumstances, including irregularity, narrowness or shallowness of lot size or other physical conditions peculiar to the zoning lot, and that as a result of such conditions, practical difficulties or unnecessary hardship arise in complying strictly with the use or building provisions of the zoning resolution; (b) the land in question cannot yield a reasonable return if used only for a purpose allowed by the zoning resolution; (c) the variance, if granted, will not alter the character of the neighborhood or district where the land is located; (d) the practical difficulties or unnecessary hardship have not been created by the owner (except that, where all other findings are made, the purchase of a zoning lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship); and (e) the variance is the minimum necessary to afford relief.[2]

The petitioner contends that the BSA's findings with respect to requirement (a) are arbitrary and capricious. In this case the BSA issued a resolution that thoroughly addressed the petitioner's application for a zoning variance specifically with respect to subsection (a) and (b). The BSA set forth nearly two pages reasoning in its resolution that detailed the basis for finding its finding that the Premises was not unique. This court will not repeat the extensive findings of the BSA in this decision.

However, the petitioner's argument that the BSA's resolution is arbitrary and capricious because of its failure to adhere to prior BSA resolutions granting zoning variances requires consideration. The petitioner directs the court's attention to the Court of Appeals decision in *Knight v. Amelkin*, wherein the Court held that decisions of administrative agencies must adhere to their own prior precedent or indicate their reasoning for reaching a different result in similar factual situations.[3] However, the rule set forth by the Court in the *Knight* decision does not

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[2] ZR § 72-21.

[3] 68 NY2d 975, 1986.

require blind conformity to an agency's past decisions.[4] Here the BSA found:

> . . . a careful reading of these resolutions reveals that the applicant's reliance on these particular grants is misplaced, as, although each site is in close proximity, they can all be distinguished . . .

The BSA then spends approximately 7 paragraphs setting forth the distinguishing facts between the zoning variance applications that were previously granted and the current application for consideration. Where, as is the case here, the agency takes steps to distinguish its prior resolutions from its current resolution it cannot be considered arbitrary and capricious.

In addition, the BSA evaluated the petitioner's contention pursuant to requirement (b) wherein it determined that the conditions of the Premises did not create an inability to realize a reasonable return on its investment. Specifically, the BSA found that the petitioner's own site plan reflects that residential dwelling units could be erected on the Premises. This court finds that the BSA's findings with respect to requirement (b) are not illegal, arbitrary and capricious, or an abuse of discretion.

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Conclusion

It is well settled that judicial review of an administrative determination is limited in that the determination should be upheld if supported by a rational basis.[5] It is the finding of this court that the resolution issued by the BSA denying the petitioner's zoning variance was rationally arrived upon.

Accordingly, it is hereby:

ORDERED, that Devonshire Enterprises, Inc.'s petition is denied in its entirety.

ENTER,

DATED: March 17, 2010

Joseph J. Maltese
Justice of the Supreme Court

[5] *Richcar Tavern, Inc., v. New York State Liquor Authority*, 160 AD2d 881, [2d Dept 1990].