

Matter of Kin & Ann Realty, Inc. v Baranello
2010 NY Slip Op 31225(U)
May 13, 2010
Supreme Court, Nassau County
Docket Number: 12165/07
Judge: Ute W. Lally
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCAN

MG

MEMORANDUM DECISION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY
Justice

In the Matter of the Application of
KIN and ANN REALTY, INC.,

Motion Sequence #1
Submitted April 9, 2010
XXX

Petitioner,

For a Judgment Pursuant to Article 78,
Civil Practice law and Rules,

-against-

INDEX NO: 12165/07

PATRICIA A. BARANELLO, Chairwoman,
JOSEPH BORDINO, SCOTT F. GUARDINO,
JACQUELINE A. WATTERS, SUSAN CLONINGER,
JOHN J. FANNING, and LOIS SCHMITT,
constituting the members of the Zoning Board
of Appeals of the Town of Oyster Bay,

Respondents.

Appearances:

For Petitioner:

Goldstein & Avrutine, Esqs.
Attorneys for Petitioner
575 Undershill Boulevard, Suite 140
Syosset, NY 11791

For Respondents:

Sinnreich Kosakoff & Messina, LLP
Attorneys for Respondents Patricia A.
Baranello, Joseph Bordino, Scott F.
Guardino, Jacquelin A. Watters, Susan
Cloninger, John J. Fanning and Lois
Schmitt
267 Carleton Avenue, Suite 301
Central Islip, NY 11722

This is a proceeding brought by the petitioner, Kin and Ann Realty, Inc. ("Petitioner"), owner of a parcel of property located in Plainview, Nassau County, State of New York, seeking a judgment pursuant to Article 78 of the New York Civil Practice Law and Rules reversing that portion of the decision of respondents, who constitute the Zoning Board of Appeals of the Town of Oyster Bay (the "Respondent" or the "Board"), which conditioned approval of the Petitioner's request for zoning variances to construct a 2,000 square foot retail building on the petitioner's premises on the express restriction that said premises be occupied by one tenant only. The premises under application is located on the southerly side of Old Country Road, 193.87 feet west of Grohmans Lane in Plainview and has a street address of 785 Old Country Road and is also known as Section 46, Block 517, Lot 22 on the Nassau Land and Tax Map (the subject premises).

In the summer of 2006, the Petitioner filed applications with the Department of Building of the Town of Oyster Bay seeking a permit to develop the subject premises with a one-story building containing 2,400 square feet of retail space and accessory parking. The application was denied since the subject premises maintained 8,515 square feet of area where a minimum of 10,000 square feet of area is required. In addition, the proposal sought to create a front yard setback for the new structure of 91 feet where a maximum of 50 feet is permitted. Lastly, the proposal sought to maintain a rear yard of 5 feet where 20 feet is required. As a result, the Petitioner applied to the Board for zoning "area" variances in order to obtain permits to construct the proposed retail building as proposed. A hearing was scheduled by the Board for November 30, 2006. That hearing was adjourned to February 8, 2007.

After continuing dialogue between the parties, the respondents determined that the application would be favorably considered if: (a) the size of the building was reduced from 2,400 square feet in area to 2,000 square feet in area, (b) the rear yard was increased from 5 feet to 10 feet, and (3) the premises was tenanted by one (1) tenant only. The Petitioner submitted a revised plan reducing the size of the proposed building from 2,400 square feet to 2,000 square feet and increasing the rear yard from 5 feet to 10 feet. However, the respondents conditioned approval upon the subject premises being occupied by only one (1) tenant.

By Notice of Decision dated April 26, 2007 and filed in the Town Clerk's Office of the Town of Oyster Bay on June 21, 2007, the Board granted the zoning variance requests made by the Petitioner with the following condition: "Premises To Be Occupied by One (1) Single Tenant Only."

After issuance of the Board's decision, the Petitioner commenced the within Article 78 proceeding contesting the condition imposed that the premises be occupied by only a single tenant.

A second public hearing held before the Board on July 24, 2008. The Petitioner specifically requested that the Board remove the condition on the basis that it has no relation to the use of the property or to the relief granted.

The Petitioner and the Respondent acknowledge that there is no transcript available with respect to the second public hearing held on July 24, 2008 by the Zoning Board of the Appeals in connection with this proceeding. The transcript was inadvertently lost or destroyed. As a result, the parties have submitted an Agreed Statement of Facts dated January 8, 2010 upon which, along with the accompanying transcript from the first hearing,

it is requested the Court decide the sole issue of whether the subject premises can only be occupied by one tenant.

At the second hearing, the Petitioner contended that the variances granted were all meritorious. The first variance pertained to lot area. The code requires 10,000 square feet minimum while 8,515 square feet was provided. The property exists as a legal building lot and had been developed previously. The Board granted the lot area variance. The Board also approved a rear yard of ten (10) feet where twenty (20) feet is required. With respect to the required parking, ten (10) parking spaces are required and fourteen (14) parking spaces are provided - four (4) in excess of the minimum. The proposed retail use is a permitted use in the "NB" Neighborhood District. At the public hearing, the Petitioner argued that there is no apparent purpose to the condition that the premises be occupied by a single tenant only. The Petitioner further argued that the only purpose that the condition serves is to limit the Petitioner's ability to utilize its premises in a legal fashion.

Testimony was offered at the second hearing by Robert Eschbacher, P.E., an expert in the area of parking and traffic. Mr. Eschbacher testified that there is no greater parking or traffic demand from a single tenant user versus multiple tenants in the same amount of retail space. The Petitioner demonstrated to the Respondent that the Zoning Code of the Town of Oyster Bay sets forth parking requirements for retail use based on the total square footage of space, not the number of tenancies and that the development proposal provided more parking than required.

The Petitioner argues that limiting the number of stores is unlawful because it regulates the manner of operation of the Petitioner's business, not the use of the land. (New York Town Law § 261; *Louhal Properties, Inc. v Strada*, 191 Misc. 2d 746, 743 (Sup.

Ct. Nassau County 2002), *aff'd* 307 AD2d 1029, 763; *Old Country Burgers Co., Inc. v Town Board of the Town of Oyster Bay*, 160 AD2d 805).

Town Law § 267-(b) provides that:

“Imposition of conditions. The board of appeals shall, in the granting of both use variances and area variances, have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property. Such conditions shall be consistent with the spirit and intent of the zoning ordinance or local law, and shall be imposed for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community.”

The Respondent argues that the condition is proper because it relates directly to the use of the land and any use or plan seeking to add an additional tenant into the already “maxed out” plan would go beyond the breaking point and be too much for a parcel already “bursting at the seams” (see *Charisma Holding Corp. v Zoning Bd. of Appeals Town of Lewisboro*, 266 AD2d 540). In further opposition to the motion, the Respondent asserts that the Petitioner sought multiple variance relief for a proposal that was, by the admission of the Petitioner’s own planners, an extremely tight and difficult fit. The Petitioner sought three (3) separate variances, each of which was substantial in its own right, and when taken together were overwhelmingly substantial. The Petitioner sought 15% variance relief from the applicable lot area requirement (building upon 8515 square feet where the minimum is 10,000 feet). The Petitioner additionally sought 80% variance relief from the front yard setback requirement (90 feet where 50 feet is the maximum). The Petitioner also sought 75% variance relief from the rear yard setback requirement (5 foot setback where 20 feet is required). In addition, the application was going to require an upgrade to the traffic signal to deal with the increased volume and activity.

In reviewing a determination of a zoning board, courts should presume that the decision was correct (see 2 Anderson, *New York Zoning Law and Practice*, § 26.17 [3d ed.]). However, a determination of a zoning board will be set aside if it is arbitrary and capricious. (*Preston v Board of Zoning Appeals of Town of North Hempstead*, 229 AD2d 585). A zoning board's determination "must be sustained if it has a rational basis and is supported by substantial evidence" (*Matter of Toys "R" Us v Silva*, 89 NY2d 411). The court in *Cowan v Kern*, 41 NY2d 591, 599 stated:

"The crux of the matter is that the responsibility for making zoning decisions has been committed primarily to quasi-legislative, quasi-administrative boards composed of representatives from the local community. Local officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community. Absent arbitrariness, it is for locally selected and locally responsible officials to determine where the public interest in zoning lies."

Even where a contrary determination would be reasonable and sustainable, a reviewing court may not substitute its judgment for that of the agency if the determination is supported by substantial evidence. (*Matter of Consolidated Edison Co. of N.Y. v New York State Div. of Human Rights (Easton)*, 77 NY2d 411). Substantial evidence has been defined as "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc v State Div. of Human Rights*, 45 NY2d 176).

Substantial evidence to support the Respondent's determination is lacking. The report of the Petitioner's traffic expert as to the inconsequential effect of two retail stores instead of one is totally uncontradicted. Such expert opinion regarding traffic problems

may not be disregarded in the absence of contradictory substantial evidence. (*Veysey v Zoning Bd. of Appeals of City of Glens Falls*, 154 AD2d 819, 821; see also *Mason v Zoning Bd. of Appeals of Town of Clifton Park*, 72 AD2d 889). Nor does the Respondent refute Petitioner's showing that the parking was based on the area of the building, not the number of stores and that the subject premises had adequate space for parking.

Therefore, the Petitioner's request for judgment pursuant to Article 78 of the CPLR annulling that portion of the decision of the Respondents that conditioned approval of Petitioner's request for zoning variances to construct a 2000 square foot retail building on Petitioner's premises on the express condition that said premises be occupied by only one retail store, is granted.

Settle Judgment on notice.

Dated: May 13, 2010



UTE WOLFF LALLY, J.S.C.