

Albano v Town of Islip

2010 NY Slip Op 33232(U)

November 8, 2010

Supreme Court, Suffolk County

Docket Number: 28127-2007

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 23, SUFFOLK COUNTY

COPY

Present: **HON. EMILY PINES**
 J. S. C.

Original Motion Date: 09-26-2007
 Motion Submit Date: 08-03-2010
 Motion Sequence : 003 MDCASEDISP

[X] FINAL DISP
 [] NON - FINAL DISP

_____ X

PAUL ALBANO III,

Petitioner,

For a Judgment pursuant CPLR Article 78

-against-

**TOWN OF ISLIP AND DAVID JANOVER AS
 TOWN ENGINEER,**

Respondents.

_____ X

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Attorney for Defendant
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ORDERED, that the Petition (motion sequence number 003) brought on by Order to Show Cause (PITTS, J.) dated September 10, 2007, is denied and this proceeding is dismissed.

In this Article 78 proceeding, petitioner challenges the determination of the respondent, Islip Town Engineer, David Janover (“Janover”), which denied his application for a wetlands permit to construct a single family residence on property located on Connetquot Drive, Oakdale, New York (the “subject premises”). The parties’ familiarity with the factual history is presumed and it is also reflected in this Court’s prior Order dated July 28, 2008 (the “prior Order”). In the prior Order determining respondents’ motion to dismiss the Petition, the Court rejected the arguments that the proceeding was barred by the statute of limitations or that respondents failed to name a necessary party (the Building Division of the Department of Planning and Development). However, the Court did determine that

petitioner was not entitled to relief in the form of mandamus to compel the issuance of the wetlands permit, and denied that portion of the petition. The Court directed respondents to serve a Verified Answer and Return and the matter was submitted to the Court for consideration on August 3, 2010. Petitioner did not submit any further papers in this proceeding.

The gravamen of petitioner's claim is that the denial of the wetlands permit by the Islip Town Engineer, after the Town of Islip Board of Appeals (the "Board") granted a variance for the construction of a single family dwelling on the subject premises¹ was arbitrary, capricious and an abuse of discretion. Further, petitioner argues that the denial amounts to a constructive taking of the subject premises without compensation. Petitioner submits an affirmation of counsel, an affidavit of William Bowman, Phd ("Bowman"), an environmental scientist, and an affidavit of Charles Weidner, PE, a licensed engineer, all in support of the Petition. Bowman states that the Town of Islip has failed to install proper drainage systems in the area of the subject premises, and thus, it has been a "de facto recharge basin" for the neighborhood. Bowman indicates that the proposed development of the subject premises contains "sufficient storm-water detention capacity to ensure that runoff from proposed impervious surfaces will not significantly, adversely impact" the Connetquot River or adjacent wetlands. He concludes that the proposed project is in compliance with the intent of Chapter 67 of the Islip Town Code.

Weidner, the former Town Engineer for the Town of Islip, describes the subject premises as fronting on Connetquot Drive and having the Connetquot River in its rear yard and explains the proposed drainage petitioner would construct on the property. Weidner further explains that he met with Janover before the Board granted the variance, and incorporated his suggestions regarding the drainage, into the plans. Weidner believes that the drainage designed for the project at the subject premises is superior to the existing conditions, where no current drainage system exists, and the wetlands permit should be granted.

Respondents submit a Verified Answer, Certified Return, Affidavits of Janover and Sean Colgan ("Colgan"), Senior Planner for the Town of Islip Planning Department, and Memorandum of Law.

¹As set forth in the prior Order, the Board granted Petitioner's application for a variance for the construction of a single family dwelling on the subject premises "with the condition that the applicant cannot build until he has clearance from the Engineering Department on this site". The Town Engineer, respondent Janover thereafter advised the Board that there were flooding and drainage concerns in the area of the subject premises and that there were no adequate mitigation measures. Based on this report, the wetlands permit was denied.

Janover, in his affidavit, details the history of his inspections of the subject premises and his recommendations and concerns regarding the proposed construction on the subject premises. Ultimately, however, Janover concluded, in a memo dated June 26, 2007, that the proposed construction would have an adverse impact on the environment, as the development would “further exacerbate the drainage problems in the area.” Janover believed that the proposed construction would result in additional flooding of the road (Connetquot Drive) and adjacent properties and would cause more pollutants to pass into the Connetquot River and the Great South Bay. Finally, he concluded that there were no adequate mitigation measures to ameliorate the impact on the adjacent wetlands.

Colgan states that he initially reviewed petitioner’s application for a wetlands permit in 2005 and denied same because the property required a variance from the Board. He further indicates that the wetlands permit was ultimately denied based on several factors, including the impact on the Connetquot River and that the development of the parcel would not be in accordance with the intent of Islip Town Code §67 Wetlands & Watercourses, which is to provide for the protection, preservation and proper maintenance of the Town’s waterways. Therefore petitioner’s application for a wetlands permit was denied.

Respondents argue that based on the foregoing, the denial of the wetlands permit had a rational basis and was not arbitrary or capricious and the Petition must be dismissed. Respondents assert that petitioner had the opportunity to be heard and the case merely represents a difference of opinion between experts and that respondents are entitled to rely on their own expert opinion. Respondents thoroughly reviewed petitioner’s application and denied such application in accordance with the relevant provisions of the Islip Town Code. Thus, the determination was rational and not arbitrary or capricious or affected by an error of law.

With regard to petitioner’s claim that the denial of the permit constitutes an unconstitutional taking, respondents initially note that petitioner purchased the subject premises with full knowledge of the wetlands regulations. Additionally, petitioner failed to establish that the property as zoned could not yield an economically reasonable return in that he did not offer proof of the market value of the property at the time of acquisition and current market value. Instead, petitioner offered only the conclusory statement that the property would be deprived of all value. Thus, the constitutional taking claim must

also fail.²

Petitioner has not submitted any reply papers.

In considering an Article 78 proceeding pursuant to CPLR §7803(3) to determine whether a determination was arbitrary and capricious, the Court must inquire as to whether the determination had a rational basis and “a determination should not be disturbed unless the record shows that the agency’s action was arbitrary, unreasonable, irrational or indicative of bad faith.” *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 809 N.Y.S.2d 98 (2d Dept. 2005)(internal quotations omitted). A court may not substitute its judgment for that of the agency responsible for making the decision. *Ball v. New York State Department of Environmental Conservation*, 35 A.D.3d 732, 826 N.Y.S.2d 698 (2d Dept. 2006). Where there are conflicting conclusions of the experts, the agency’s decision to rely on its own expert does not render the determination arbitrary, capricious or lacking in rational basis. *Id.* *See also, Gladstone v. Zoning Board of Village of Southampton*, 13 A.D.3d 445, 785 N.Y.S.2d 697 (2d Dept. 2004); *Green v. Planning Board of New Castle*, 220 A.D.2d 415, 632 N.Y.S.2d 151 (2d Dept. 1995).

In the case at bar, the determination to deny petitioner’s application for a wetlands permit was neither arbitrary, capricious nor an abuse of discretion. Instead, Janover’s determination that the approval of the permit would have a negative impact on the Connetquot River and exacerbate the flooding conditions in the neighborhood had a rational basis and was based upon his review of the application on several occasions as well as §67 of the Islip Town Code. Although Janover’s opinion conflicted with that of petitioner’s experts, respondents were entitled to rely on their own expert’s opinion in denying the application. Therefore, the request for mandamus relief to review the determination is denied.

Turning to the constitutional taking argument, this too must fail. Petitioner has only offered conclusory testimony that the property cannot yield an economically reasonable return, which is insufficient to establish an inverse condemnation. *Linzenberg v. Town of Ramapo*, 1 A.D.3d 321, 766


²Respondents also assert that petitioner failed to name a necessary party, to wit, the Building Division, however, the Court rejected this argument in the prior Order on the motion to dismiss and it is the law of the case.

N.Y.S.2d 217 (2d Dept. 2003), *see also, Loujean Properties, Inc., v. Town of Oyster Bay*, 160 A.D.2d 797, 553 N.Y.S.2d 835 (2d Dept. 1990)(landowner must offer proof of the market value at the time of acquisition and must also prove the current market value of the property as presently zoned); *Kransteuber v. Scheyer*, 176 A.D.2d 724, 574 N.y.S.2d 968 (2d Dept. 1991).

Based on the foregoing, the Petition is denied in its entirety and the proceeding is dismissed.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: November 8, 2010
Riverhead, New York


EMILY PINES
J. S. C.

FINAL DISP
 NON - FINAL DISP