SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5

NASSAU COUNTY

In the Matter of the Application of FRANCIS BERNARD MALONEY as EXECUTOR of the ESTATE of JOHN J. MALONEY JR. a/k/a JOHN JOSEPH MALONEY JR., (Nassau County Surrogates file No. SCPRCT01, Case No. 342677)

Plaintiffs,

-against-

MOTION SEQ. NO.: 001, 002
MOTION DATE: 4/15/10

BOARD OF APPEALS OF THE INCORPORATED VILLAGE OF GARDEN CITY,

INDEX NO.: 5611/09

Defendants.

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

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The following papers having been read on the motion (numbered 1-6):

Notice of Petition.....1
Verified Answer and Return.....2
Notice of Motion.....3
Affirmation in Opposition to Motion to Dismiss.....4
Reply Affirmation.....5
Sur-Reply Affirmation in Opposition to Motion to Dismiss.....6

Proceeding by the petitioner, Frances Bernard Maloney, *et. al.*, pursuant to CPLR Article 78 for a judgment annulling a determination of the respondent Board of Appeals of the Incorporated Village of Garden City, dated February 24, 2009, which, after a hearing, denied the petitioner's application for a stated area variance.

Motion pursuant to CPLR 3211[a][7], 7804[f] by the respondent Board of Appeals of the Incorporated Village of Garden City for an order dismissing the verified petition.

In August of 2005, the petitioner Frances Bernard Maloney, as executor of the Estate of his father, John Maloney, Jr., acquired title to an oversized 44,918 square foot parcel improved with a single-family residence, which at the time, was located in a "R-20" residential zone, on the southwest corner of Rockaway Avenue and Fourth Street in Garden City, New York (Pet., ¶¶ 1-6).

The residence – a large colonial style home, located in the so-called "Central Section" of Garden City – was originally constructed in the later 1880's and was last occupied in 2006.

Pursuant to the then-applicable zoning requirements, a buildable lot in a R-20 zone must contain 20,000 square feet and possess a minimum plot width of 125 feet at the established set back (Garden City Code § 200-15).

At some point in late 2008, the petitioner decided to subdivide the property into two separate lots, as depicted in a survey last revised in November of 2008, which created lots possessing 22,560 and 22,358 square feet each (Pet., ¶¶ 8-11; Exh., "3").

Approximately one month later in December, the petitioner appeared before the Planning Commission in connection with the proposed, November, 2008 survey and subdivision plan (Pet., ¶¶ 9-12 *see also*, January 2009 Board of Appeals Hearing Tr., at 8 ["H__"]). According to the petitioner, the November 2008 survey was conforming in all respects to all then applicable zoning requirements and constituted an "as of right" subdivision under the Code – requiring only the ministerial act of securing a demolition permit (Pet., ¶¶ 17-18). In any event, the petitioner asserts that at the Planning Commission meeting, a Commission member referred to the subdivided lots as "bad planning," and suggested that the plots be divided so as to eliminate an irregularly drawn partition line which was part of the proposed November, 2008 survey (Pet., ¶¶ 10-11; H8-9; Biscone Surr Reply Aff., ¶ 6).

The petitioner's counsel decided to implement the suggested alterations which would create lots having ample lot area – but which would then also require (for the northerly lot), a "minimal variance" from the applicable, 125-foot width requirement, *i.e.*, a variance of approximately 2.64 inches (Pet., ¶¶ 11-12; H9-10). Despite this potential complication, the original, November 2008 survey was thereafter modified by the revised survey dated December, 2008 (Pet., ¶¶ 12-13). The December, 2008 revision eliminated the irregular property line and implemented the Commission's suggestion relative to the dividing lot line (Pet., ¶¶ 12-13). As noted, however, the newly revised survey/subdivision now required the previously mentioned, 2.64 inch variance from the 125-foot Code width requirement (Pet., ¶¶ 13-14)(Village Code, §§ 200-3; 200-15).

Accordingly, the petitioner then applied to the BZA for the variance and the matter appeared before the BZA for a hearing on the application in late January of 2009 (Pet., ¶¶ 14-15).

At approximately the same time, the petitioner's counsel wrote to the Building Department Superintendent, requesting a formal determination from the Department to

the effect that the *original,* "as of right" November, 2008 survey plan complied with the Zoning Code Chapter 200 – and also that the original survey constituted a "minor subdivision" under Code section 38-4, for which Planning Commission Approval was not needed.

Approximately three weeks, later the Building Department superintendent replied and, in fact, confirmed that this was so, *i.e.*, the Department informed counsel that: (1) pursuant to Chapter 38 of the Village Code, entitled "Planning Commission; Subdivision Review", the original, November, 2008 subdivision was a "minor subdivision" which did not require approval by the Planning Commission"; and (2) that the subdivision met 'the requirements of Chapter 200" of the Code; meaning that no variance was required (Pet., Exh., "3"; Biscone Surr Reply Aff., ¶ 3).

On February 27, 2009, the separate deeds representing the two plots created pursuant to the *original*, November 2008 subdivision/survey were duly recorded in the office of the Nassau County Clerk (Pet., ¶¶ 8-9).

Shortly thereafter, by letter decision dated March 9, 2009, the BZA advised the petitioner that his variance application relating to the revised, December, 2008 survey had been denied. Although the March, 2009 letter does not elaborate upon the reasoning underlying the denial, a pre-decision transcript dated February, 2009 – which memorializes the BZA's negative, 3-2 vote – reveals that the majority concluded that the variance was as "out of character with the Central Section of Garden City"; that any difficulties were self-created; and that the petitioner did not otherwise meet the requirements of Village Law § 7-712-B (Pet., Exh., "8").

By verified petition dated March 24, 2009, the petitioner then commenced the within proceeding pursuant to CPLR Article 78 to set aside the BZA's determination denying the variance application relating to the revised, December 2008 survey.

Thereafter, by written decision dated June, 2009, the BZA issued a full written determination elaborating on its prior denial of the petitioner's variance application (Biscone Surr Reply Aff., Exh., "5"). Notably, the petitioner's counsel claims that he did not receive the written decision until the end of August, 2009 (Biscone Aff., in Opp., ¶¶ 19-20).

In material part, the decision makes findings to the effect that, the predominate character of the area is that "of stately corner houses with significant space between corner houses and adjacent lots"; that granting the variance would create a subdivision with a corner lot lacking characteristic depth of other corner lots in the Central Section and create an undesirable change in the character of the neighborhood; that the subject lot can be divided as of right in accord with the original subdivision plan, and thus the

benefit of subdividing the property could be achieved by alternate means; that although the variance requested was not substantial, the resulting subdivision would negatively impact physical and environmental conditions in the neighborhood, and detract from the "spacious" and "open" tone of the area (Decision at 5–7).

Based on these considerations, the Board concluded that "[t]he proposed variance is based upon a subdivision, which will eliminate a deep corner lot and create a gerrymandered configuration of two smaller lots, both out of character with the neighborhood and clearly distinguishable from other neighborhood plots" (Decision at 5).

Some three months later in August of 2009 – and while the subject proceeding was pending – the Village adopted Local Law 4-2009, amending Article III of the Code so as to add a new section 200-16.3, establishing so-called "Residence R-20C Corner Overlay Districts" (*see also*, Return Exh., "21). The new law now requires a single lot area of 40,000 square feet – thereby doubling the area requirement which existed at the time the petitioner's variance application was denied.

The Act's preamble recounts that its intended purpose was to preserved the original layout of the Village, which entailed the creation of "large corner lots on the larger boulevard streets." According to the Act, the Trustees were of the view that subdividing these lots (which would include the petitioner's lot) would diminish "the character of the village in general; and the Central Section in particular" (§ 1 "legislative intent").

In substance, the new law provides that "no corner lot shall be buildable unless the resulting corner lot complies with all R-40 District requirements, *i.e.*, the requirement that a single lot contain at least 40,000 square feet in area.

The petition is now before the Court for review and disposition. The Village opposes the petition and moves for an order dismissing the verified petition based on the foregoing, amended code provision.

Specifically, the Village contends that since the petitioner's lot is within the area now encompassed by the amendment, the subject variance proceeding is academic, since the underlying subdivision (as contemplated by the revised survey) does not conform to the newly amended code provision. The Court agrees.

Preliminarily, while the parties have advanced conflicting claims with respect to viability and existence of the November, 2008 subdivision plan – and the separate, pre-amendment deeds recorded pursuant thereto in February of 2009 – there is no reviewable, administrative determination before the Court with respect to the legality of that allegedly as-of-right subdivision filing (*see, e.g.*, Biscone Surr Reply Aff., ¶¶ 3-4; Scalera Reply Aff., ¶ 4).

Rather, the matters currently before the Court for Article 78 review include: (1) the legality of the Board's variance determination with respect to revised (December 2008) lot configuration (as to which no deeds have been recorded to date); and (2) the respondent's motion to dismiss the petition based on the recent Code amendment increasing the minium corner lot size to 40,000 square feet. With respect to the latter issue, the respondent contends that if the amended Code provision is applicable, the petitioner's variance application relating to the December 2008 survey would be effectively academic, since the property would no longer be buildable in accord with that version of the survey.

Turning first to the applicability of the amended code provision, it is settled that "[a] court will apply the zoning ordinance currently in existence at the time a decision is rendered * * *" (*Lucrezia v. Board of Appeals of Town of Haverstraw*, 2 AD3d 861, 862 *see also, Matter of Alscot Inv. Corp. v. Incorporated Vil. of Rockville Ctr.*, 64 NY2d 921, 922 [1985]; *Pokoik v. Silsdorf*, 40 NY2d 769 [1976]; *Westbury Laundromat, Inc. v. Mammina*, 62 AD3d 888, 890; *Greene v. Zoning Bd. of Appeal of Town of Islip*, 25 AD3d 612, 613; *Marasco v. Zoning Bd. of Appeals of Village of Westbury*, 242 AD2d 724).

This is so unless "'special facts' are present to demonstrate that the municipality acted in bad faith and unduly delayed acting upon an application while the zoning law was changed'" *i.e.*, that "some form of misconduct or extraordinary delay" occurred (*Matter of Lawrence School Corp.*, 167 AD2d at 467-468 *see*, *Alfano v. Zoning Bd. of Appeals of Village of Farmingdale*, 74 AD3d 961; *Matter of Paintball Sports v. Pierpont*, 284 AD2d 537, 53 *see generally*, *Pokoik v. Silsdorf*, *supra; BBJ Associates, LLC v. Zoning Bd. of Appeals of Town of Kent,* 65 AD3d 154, 159; *Lawrence School Corp. v. Morris*, 167 AD2d 467).

In general, "[t]he law is that a property owner acquires vested rights [only] when, 'pursuant to a legally issued permit, he demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development' "(*Matter of Genser v. Board of Zoning & Appeals of Town of N. Hempstead,* 65 AD3d 1144, 1146-1147, *quoting from, Town of Orangetown v. Magee*, 88 NY2d 41, 47-48 [1996]; *Westbury Laundromat, Inc. v. Mammina*, *supra,* 62 AD3d at 890).

Accordingly, the new code provision is applicable unless the petitioner can establish the existence of special facts; namely, that any delays which ensued were "the product of malice, oppression, manipulation, corruption, bad faith, or a method of delaying the petitioner from acquiring vested rights while the zoning amendment was under consideration" (*Logiudice v. Southold Town Bd. of Trustees,* 50 AD3d 800; *Greene v. Zoning Bd. of Appeals of Town of Islip*, *supra*, 25 AD3d at 613; *Lawrence School Corp. v. Morris*, *supra*, 167 AD2d 467 *see also, Alfano v. Zoning Bd. of Appeals of*

Village of Farmingdale, 74 AD3d 961). Even upon favorable viewing of the petitioner's allegations, he has failed to do so.

Here, there is no evidence that vested rights accrued relative to the December 2008 proposed survey prior to the amendment. Moreover, the Board disposed of the petitioner's application prior to the enactment of the new law, as evidenced by the letter the petitioner received dated March 9, 2009, informing him that, in fact, his variance application had been denied – after which he then commenced the instant proceeding challenging that denial (Pet., Exh., "7"; Scalara Aff., ¶ 7)(*cf., Golden Horizon Terryville Corp. v. Prusinowski*, 63 AD3d 930, 932-933).

Although the Board did not issue a full, written determination until after the petitioner's article 78 proceeding was commenced, the fact that the written decision was issued after the petitioner's Article 78 proceeding was commenced, is not improper, and does not establish bad faith (*see, Monroe Beach, Inc. v. Zoning Bd. of Appeals of City of Long Beach,* 71 AD3d 1150, 1152; *In re Waidler*, 63 AD3d 953, 954; *Thirty West Park Corp. v. Zoning Bd. of Appeals of City of Long Beach*, 43 AD3d 1068, 1069; *Efraim v. Trotta*, 17 AD3d 463).

Similarly unavailing is the contention that Board created excessive and improper delay by failing to timely retain new counsel after its original counsel recused itself from the proceedings (*see generally, Logiudice v. Southold Town Bd. of Trustees, supra*, at 801). While the Board apparently did not retain new counsel until several months after the petition was originally served in March of 2009 (Biscone Aff., in Opp., ¶¶ 20-21), the assertion that this delay was a dilatory tactic related in some sense to the impending code amendment, is speculative and unsubstantiated on the record presented (Biscone Surr Reply Aff., ¶¶ 26-27). It bears noting that the petitioner himself states that the proposed amendment was "public knowledge for months prior to its enactment [in August 2009] and covered in local publications" as well (Biscone Surr Reply Aff., ¶ 25).

Further, the related theory that absent the delays which ensued the petition would have been before the Court and ready for disposition prior to the adoption of the new law, is also conjectural and speculative (Biscone [Opp] Aff., ¶¶ 19-21; Biscone Surr Reply Aff., ¶¶ 26-27).

Nor does the record support the petitioner's contention that the any extensions and/or adjournments which he himself granted, were exclusively limited to extending the respondent's time to file an answer – as opposed to the making of other species of relief, including the making of a motion to dismiss (*see*, Return, Exh., "22"; Biscone [Opp] Aff., ¶ 12).

Additionally, and upon the record presented, the further claims that, *inter alia*, the new law constituted impermissible "spot zoning" or that the petitioner possessed vested

rights in the revised subdivision plan, are both unsubstantiated and lacking in merit (*see, Citizens for Responsible Zoning v. Common Council of City of Albany,* 56 AD3d 1060; 1062; *Little Joseph Realty, Inc. v. Town Bd. of Town of Babylon*, 52 AD3d 478, 479; *Jul-Bet Enterprises, LLC v. Town Bd. of Town of Riverhead,* 48 AD3d 567, 568 *see generally, Collard v. Incorporated Village of Flower Hill*, 52 NY2d 594, 600-601 [1981]; *Miller v. Kozakiewicz,* 289 AD2d 494, 495; *Calverton Industries, LLC v. Town of Riverhead*, 278 AD2d 319, 320-321).

The record fails to otherwise support the assertion that the proceeding was delayed in bad faith; that any other special circumstances exist; and/or that the amendment was aimed specifically at the petitioner's residence (Biscone Surr Reply Aff., ¶¶ 25-26).

Lastly, since the new Code provision is applicable to the revised subdivision proposal, the petitioner's underlying variance application is academic. It is, therefore, unnecessary to consider the merits of the Board's June, 2009 written determination.

The Court notes that, prior to receiving the March 2009 informal decision on his variance application, petitioner elected to proceed with the subdivision of the property according to the November, 2008 subdivision survey/plan. In February of 2009, petitioner recorded two separate deeds, representing the two plots created pursuant to the original November 2008 subdivision plan, in the office of the Nassau County Clerk. The Court expresses no opinion with respect to the import and effectiveness of the deeds filed in connection with the original survey dated November, 2008 – which filing occurred well prior to the enactment of the amended Code provision. The Court notes, however, that to the extent that the subject property was effectively subdivided into two plots as of the February 2009 filing, the subsequent variance determination pertaining to the December, 2008 survery/plan, is rendered academic.

The Court has considered the petitioner's remaining contentions and concludes that they are lacking in merit.

Accordingly, it is,

ORDERED that the motion to dismiss the verified petition by the respondent Board of Zoning Appeals of the Incorporated Village Garden City, is **granted**, the petition is **denied**, and the proceeding is **dismissed** on the m

This constitutes the Order of the Court.

ENTERED
NOV 29 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: 9/30/2010 ENTER: