SHORT FORM ORDER

INDEX No. 10-12459

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

***PRESENT:***

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 5-26-10 (#001)
MOTION DATE 6-30-10 (#002)
ADJ. DATE 9-1-10
MNEMONIC: # 001 - CASEDISP
# 002 - MG

In the Matter of the Application of FREDERIC PAPERT,

Petitioner,

- against -

ZONING BOARD OF APPEALS OF THE INCORPORATED VILLAGE OF QUOGUE and JULES PEETE, LLC,

Respondents.

CAHN & CAHN, LLP
Attorneys for Petitioner
22 High Street, # 3
Huntington, New York 11743

RICHARD E. DePETRIS, ESQ.
Attorney for Respondent Zoning Board of Appeals of Incorporated Village of Quogue
21 South Main Street, P.O. Box 2297
Southampton, New York 11969

CERTILMAN BALIN ADLER & HYMAN, LLP
Attorneys for Respondent Jules Peete, LLC
1393 Veterans Memorial Highway, Suite 301S
Hauppauge, New York 11788

Upon the following papers numbered 1 to 60 read on this Article 78 proceeding and motion to dismiss; Notice of Petition and supporting papers 1 - 23; Notice of Motion and supporting papers 24 - 36; Answering Affidavits and supporting papers 37 - 42; 43 - 47; Replying Affidavits and supporting papers 48 - 52; 53-57; 58 - 60; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that this motion by the respondent Jules Peete, LLC for an order pursuant to CPLR §404 (a) and CPLR §7804 (f) dismissing the petition in this CPLR Article 78 proceeding is granted.

Frederic Papert (hereinafter Petitioner), is the neighboring landowner of an oceanfront parcel of real property owned by the respondent Jules Peete, LLC (hereinafter Peete), which is located at 194 Dune Road, within the Incorporated Village of Quogue (hereinafter Village), Suffolk County, New York. There is an existing home on the property, built between 1910 and 1920, located in a primary dune area, south of the coastal erosion hazard line, in a Residence A-1 District.

On May 26, 2009, Peete applied to the respondent Zoning Board of Appeals (hereinafter ZBA) of the Village for variances from the Village Code §196-12 (zoning districts and required conformity) and §196-47 (height of certain buildings) to renovate and modify the existing home, to make alterations to conform to the Federal Emergency Management Agency (hereinafter FEMA) regulations, and for the renewal of prior variances. Specifically, Peete requested a height

variance in a required rear yard to 37 feet (a height variance of 35 feet had previously been granted) and dune setback/coastal erosion hazard area and rear yard variances to permit the proposed alterations to the existing dwelling. The application indicated that the footprint of the dwelling would not be expanded and that the property was located in the VE-12 FEMA zone requiring construction of a dwelling on pilings.

During a public hearing on June 19, 2009, the ZBA received evidence on Peete's application as presented by its attorney, owner and principal, project architect, and builder representative. The petitioner's agent, Michael C. Nobiletti (hereinafter Nobiletti), was present at said hearing and opposed the granting of the variances. He noted that the lower level of the project appeared to be a garage and storage and there was an absence of clear flow-through capability and calculations for wind velocity of 120 miles per hour. Nobiletti requested more time to review the engineering issues and the submissions on the reconstruction cost. The ZBA decided to further consider the application in executive session. After executive session on June 19, 2009, the ZBA granted Peete's "application for the variances requested." The ZBA's decision was filed on July 13, 2009.

Chapter 80 of the Village Code is the Coastal Erosion Hazard Area Law (hereinafter CEHA). The Building Inspector who, pursuant to Village Code § 80-3, is also the CEHA Administrator, issued a building permit, dated September 14, 2009, and a CEHA/FEMA permit (hereinafter Coastal Erosion Management Permit or CEMP), dated November 13, 2009, for this project.

On October 7, 2009, the petitioner appealed the issuance of the Peete building permit to the ZBA. Then, the petitioner amended his application to appeal "the Building Inspector's Issuance of a Coastal Erosion Management Permit, dated November 13, 2009, in Support of Building Permit, dated September 14, 2009." The petitioner argued in his amended application to the ZBA, dated November 16, 2009, that the Building Inspector erred in issuing the CEMP after issuing the building permit without properly evaluating the validity of Peete's appraisals of a $425.00 to $450.00 per square feet replacement cost for the existing home pursuant to Village Code § 80-10 (B) (1) (j), failed to impose any permit conditions as required by Village Code § 80-10 (e) for nonmajor additions to existing structures, failed to require the review and approval of the project by the Suffolk County (New York) Department of Health Services, (hereinafter SCHD) and failed to complete a State Environmental Quality Review Act (hereinafter SEQRA) review as required by Village Code §§ 80-29 (environmental quality review) and 87-1 (purpose of environmental quality review) and 6 NYCRR Part 617. The petitioner argued that the invalidity of the CEMP rendered the building permit invalid and requested that both be annulled and rescinded.

In its March 27, 2010 determination of the petitioner's appeal, the ZBA noted that the petitioner had not commenced a CPLR Article 78 proceeding challenging its June 19, 2009 determination and was therefore precluded from challenging various issues involved therein. The ZBA allowed the petitioner to appeal that portion of the determination concerning the issuance of the CEMP based on the Building Inspector's finding that the cost of the proposed construction work was less than 50 % of the estimated full replacement cost of the existing structure. The ZBA explained that it authorized the issuance of the CEMP based on Peete's

representation that the cost of the proposed construction work was less than 50% of the estimated full replacement cost of the existing structure or 50% cost limitation under Village Code § 80-10 (B) (1) (j), leaving the actual determination of the validity of said representation to the Building Inspector.

The ZBA noted that the petitioner's appeal did not dispute the proof submitted by Peete to the Building Inspector that the cost of the proposed construction work was $629,320.00. Rather, the petitioner disputed the estimated full replacement cost of the existing structure of about $1,467,450 based on an average cost of $450.00 per square feet or based on $425.00 to $450.00 per square feet. The ZBA indicated that the Building Inspector's determination was based on his familiarity with the existing house and his experience and that the reconstruction cost of $629,320.00 would be less than the 50% cost limitation which estimated full replacement cost as at least $1,260,000.00 The ZBA considered the substantially different estimates submitted by Peete, based on a familiarity with the existing house, and, by the petitioner, not based on familiarity because his experts were not allowed access for inspection of the house. The only evidence submitted that provided a detailed cost breakdown of the full replacement cost was from Peete, indicating an estimated full replacement cost of $1,358,400.00 which, if divided by 3,261 square feet, would result in an average cost of $417.00 per square feet. The ZBA found said evidence to be persuasive that the cost of the reconstruction was less than 50% of the estimated full replacement cost and affirmed the determination of the Building Inspector.

The ZBA also determined that the project clearly constituted a Type II action under SEQRA and found that the petitioner failed to present any evidence to the contrary or in support of his argument that the project did not meet the standards of Village Code § 80-6 for issuance of a CEMP. The ZBA indicated that it had determined compliance with Village Code § 80-6 in its June 19, 2009 decision, which the petitioner was precluded from challenging. The ZBA further found that the petitioner failed to demonstrate that the ZBA had jurisdiction to review any issue regarding the building permit or the SCHD standards. The ZBA concluded by affirming the determination of the Building Inspector.

The petitioner subsequently commenced this CPLR Article 78 proceeding on April 28, 2010 seeking a judgment setting aside and annulling the ZBA's March 27, 2010 determination because it was unlawful, arbitrary and capricious. The petitioner argues that the ZBA erroneously treated his challenge to the issuance of the building permit as withdrawn and treated its June 19, 2009 decision as a grant of a CEHA variance, authorized work in a primary dune in violation of 22 NYCRR Part 505 and the CEHA, authorized new construction rather than restoration, failed to receive evidence or make proper findings on the variance criteria of Village Code § 80-17, granted permission to construct where the cost was clearly more than the 50% cost limitation, failed to receive evidence that there was no reasonable, prudent, alternative site available under Village Code § 80-17, and acted without SCHD approval as required by Village Code § 196-59 (B).

In support of the petition, Nobiletti submits his affidavit, dated April 27, 2010, in which he argues that there is a reasonable and prudent alternative location for the house which was not considered by the ZBA under Village Code §§ 80-6 (A) and 80-17, and that the application for the variance should have first been reviewed by the Building Inspector. He also indicates that the

petitioner made his request for a "stop work" order by letter, dated January 28, 2010, from his counsel to the ZBA, which request was denied, and attaches a copy of said letter as well as photographs depicting the construction in progress on the project.

Peete moves to dismiss the petition because the petitioner's lawsuit is barred by laches, and has been rendered moot by the substantial construction completed on the project in full view of the petitioner and the failure of the petitioner to obtain preliminary injunctive relief halting or suspending construction. Peete asserts, with affidavits in support from its project architect and a subcontractor of the general contractor and photographs, that as of the filing date of this lawsuit the house was already 60% completed and that as of May 2010, the structural portion of the house was 95% completed at considerable expense and in good faith reliance on the issued permits. Peete emphasizes that the immediate construction was prudent and necessary given the substantial storm damage to nearby dunes in the late fall and early winter of 2009. Peete warns that dismantling the completed construction will be at substantial expense and will be detrimental to the neighborhood in the event of a hurricane or severe storm.

In opposition to the motion, the petitioner contends that he sought the only remedy available to him to immediately stop the construction at its start which was a "stop work" order from the ZBA pursuant to Village Code §§ 80-22 and 15-6 (D). In addition, the petitioner argues that Peete's bad faith is evident from its ongoing removal and reconstruction of the house, despite being on notice of the petitioner's appeals to the ZBA and knowing that the petitioner could not seek relief from the Court until the ZBA had rendered its decision. The petitioner also argues that Peete has failed to demonstrate with its submitted figures, rather than photographs, that the construction is substantially complete. The petitioner questions the imminency of danger from storms warranting the immediate construction. Nobiletti states in his affidavit, dated March 24, 2011, that he has communicated extensively with the State Department of Environmental Conservation (hereinafter DEC) regarding the subject project and has been unable to obtain the actual costs of the project from the Building Inspector. He submits letters from the DEC to the Building Inspector and to the Village Mayor, dated August 31, 2010 and December 10, 2010 respectively, seeking documentation of the actual construction costs to date and the prior full replacement estimates of the subject project as well as others on Dune Road. In said letters, the DEC explains that it is examining whether the Village's CEHA program is being properly implemented.

In reply, Peete argues that the petitioner could have commenced a CPLR Article 78 proceeding to review the ZBA's denial of his request for a "stop work" order and did not have to wait to seek judicial relief until the ZBA determined his appeal to halt construction of the project. Peete adds that, in any event, the petitioner requested a "stop work" order from the wrong entity, noting that the Building Inspector has original power under Village Code § 15-6 to order that work cease on a construction project. Peete also argues that the petitioner's ineffective attempts to preserve the status quo are insufficient to avoid a finding that this proceeding is moot. Peete denies that the construction was rushed and contends that the petitioner is improperly raising arguments concerning total cost of the project and the existence of the home's temporary relocation site north of the primary dune as an available, reasonable, prudent alternative site pursuant to Village Code § 80-17 (A) that were never raised before the ZBA. Peete further argues that the DEC letters are irrelevant to this proceeding, submits a letter of response, dated

February 10, 2011, of the Village Mayor to the DEC, and notes that DEC has not taken any actions to revoke its certification of the Village's CEHA program. Peete also submits a copy of the Certificate of Compliance, dated March 23, 2011, for this project issued by the Village Zoning Administrator.

Village Law § 7-712-c [1] provides that "[a]ny person or persons, jointly or severally aggrieved by any decision of the board of appeals or any officer, department, board or bureau of the village, may apply to the supreme court for review by a proceeding under article seventy-eight of the civil practice law and rules. Such proceeding shall be instituted within thirty days after the filing of a decision of the board in the office of the village clerk."

The majority of the petitioner's claims challenge the ZBA's review of Peete's application and its granting of the requested variances, including the CEHA variance. Inasmuch as the petitioner, through his agent Nobiletti, actively participated in the June 19, 2009 ZBA hearing, was aggrieved by the granting of the variances, and never commenced an Article 78 proceeding with respect to the ZBA's decision filed on July 13, 2009, his claims relating to the ZBA's determination granting the variances are dismissed as untimely (*see* Village Law § 7-712-c [1] ; ***Kroll v Village of East Hampton***, 293 AD2d 614, 741 NYS2d 98 [2nd Dept 2002]; ***Bayer v Zoning Bd. of Appeals of Vil. of Elmsford***, 133 AD2d 83, 518 NYS2d 429 [2nd Dept 1987]).

With respect to the petitioner's claims that the ZBA erroneously treated his challenge to the issuance of the building permit as withdrawn and allowed the building permit to be issued without SCHD approval and a DEC permit as required by Village Code §§ 196-59 (B), (C), the Court notes that the petitioner's amended application to the ZBA did not independently challenge the issuance of the building permit nor did it mention Village Code §§ 196-59 (B), (C). Instead, the amended application challenged the sequence of issuance of the building permit, followed by the CEMP, as improper. A litigant is required to address his or her "complaints initially to administrative tribunals, rather than to the courts, and to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts" (*see* ***Young Men's Christian Assn. v Rochester Pure Waters Dist.***, 37 NY2d 371, 375, 372 NYS2d 633 [1975]). In a CPLR Article 78 proceeding, the Court's review is limited to the arguments and record adduced before the agency (*see*, ***Kaufman v Incorporated Vil. of Kings Point***, 52 AD3d 604, 607, 860 NYS2d 573 [2nd Dept 2008]). Here, inasmuch as said issues were not raised until the petitioners commenced this CPLR Article 78 proceeding, the Court cannot consider them (*see id.*).

As to the petitioner's remaining claims concerning the issuance of the CEMP, Peete argues that the substantial completion of the project has resulted in a change in circumstances rendering the controversy moot. "Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy" (***Dreikausen v Zoning Bd. of Appeals of City of Long Beach***, 98 NY2d 165, 172, 746 NYS2d 429 [2002]). "Recognizing that a race to completion cannot be determinative, and cannot frustrate appropriate administrative review, courts have found several factors significant in evaluating claims of mootness. Chief among them has been a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation" (*id.* at 172-

173). Factors that weigh against mootness may include, whether a party proceeded in bad faith and without authority, where novel issues or public interests such as environmental concerns warrant continuing review, and where a challenged modification is readily undone, without undue hardship (*see id.* at 173). Also, the issue of mootness may be raised at any time, for when a matter becomes moot a court is deprived of an actual controversy, "an essential wherewithal of a court's jurisdiction" (***Cerniglia v Ambach***, 145 AD2d 893, 894, 536 NYS2d 227 [3rd Dept 1988], *lv denied* 74 NY2d 603, 543 NYS2d 396 [1989]).

Peete has sufficiently demonstrated through affidavits and photographs that the subject project is substantially complete. The evidentiary submissions reveal that by the time this proceeding was commenced on April 28, 2010, Peete had obtained the building permit and the CEMP, and that in February 2010 the existing home's interior walls in the ground floor had been demolished, the house had been raised from its concrete block foundation and moved to a temporary location on the property, the original concrete block foundation had been demolished, wooden pilings had been installed in the graded off foundation, and on March 5, 2010 the house had been moved back to its original location onto the new pile foundation, all at significant expense (*see* ***Sherman v Planning Bd. of Vil. of Scarsdale***, 82 AD3d 899, 918 NYS2d 878 [2nd Dept 2011]). The petitioner's unsuccessful though prompt attempts to preserve the status quo were largely self-created by his failure to challenge the ZBA's initial determination on the variances (*cf.* ***Silvera v Town of Amenia Zoning Bd. of Appeals***, 33 AD3d 706, 823 NYS2d 430 [2nd Dept 2006]). There is no evidence that the construction work was performed in bad faith and that such work could be readily undone without undue hardship (*see* ***Sutherland v New York City Hous. Dev. Corp.***, 61 AD3d 479, 479, 877 NYS2d 43 [1st Dept 2009], *lv denied* 13 NY3d 703, 886 NYS2d 94 [2009]; *see also* ***Citineighbors Coalition of Historic Carnegie Hill ex rel. Kazickas v New York City Landmarks Preserv. Commn.***, 2 NY3d 727, 778 NYS2d 740 [2004]). Under the instant circumstances, Peete would suffer substantial prejudice if the petitioner prevailed (*see* ***Sherman v Planning Bd. of Vil. of Scarsdale***, 82 AD3d at 899). The DEC correspondence with the Village concerning the Village's administration of its CEHA program and disclosure of the actual construction costs of this project does not alter this determination. Therefore, the remaining claims of the petitioner concerning the issuance of the CEMP are denied as academic.

Accordingly, the motion to dismiss the petition is granted and the petition is dismissed in its entirety.

Dated: APR 20 2011

J.S.C.

**__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION**