MEMORANDUM

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

---

906 Realty, LLC,

Petitioner,

-against-

Adrienne Giannadeo, Chairperson, Steven Garguilo, Anthony L. Tanzi, Jr., Edward Benz and William Valentine, constituting the Board of Zoning Appeals of the Town of Smithtown, County of Sufolk, State of New York and the Board of Zoning Appeals of the Town of Smithtown,

Respondents.

Motion Sequence No.: 001; MOT.D CDISPO; SUBJ

Motion Date: 3/22/11
Submitted: 4/20/11

Index No.: 04855/2011

Attorney for Petitioner:

Vincent J. Trimarco, Esq.
1038 West Jericho Turnpike
Smithtown, NY 11787

Attorney For Respondent Zoning Board of Appeals:

Valerie S. Manzo, Esq.
16 DeMont Street
Smithtown, NY 11787

Attorney for Respondent Town of Smithtown:

Yvonne Leiffrig, Esq.
99 West Main Street
Smithtown, NY 11787

In this article 78 proceeding, the petitioner seeks judgment reversing and annulling the determination of the Zoning Board of Appeals of the Town of Smithtown ("the ZBA") dated January 26, 2011, which denied the petitioner's application for a certificate of existing use (CEU), a variance to reduce the building setback for an adult retail shop from 500 feet to 45 feet and a variance to increase the permitted square footage of an existing sign from 40 square feet to 54 square feet and judgment directing the respondents to grant and issue a CEU for an adult retail

shop and to grant the aforesaid variances. In addition, the petitioner requests that the Court stay 12 summonses issued by the Town of Smithtown (Town) regarding alleged violations of the Town's zoning ordinances at the subject premises.

Initially, the Court denies all requests for oral argument herein. In addition, the Court notes that the instant petition demands relief, *inter alia*, granting the "petitioner's application as presented to the Board of Zoning Appeals," and "directing that the Respondents grant the Petitioner's application without conditions." The application before the ZBA included approximately ten requests for relief under the zoning ordinance. However, other than the determinations enumerated above, the petitioner does not challenge or address any of the additional determinations made by the ZBA based on its applications for a CEU and multiple variances. The Court finds that the remaining determinations of the ZBA, including the conditions imposed therein, have not been challenged in this special proceeding, or have been resolved by the petitioner's concession of the issues (see, Welden v. Rivera, 301 AD2d 934 [3rd Dept., 2003]; Hajderlli v. Wiljohn 59 LLC, 15 NY3d 713 [2010].

The petitioner purchased the subject premises located at 906-910 West Jericho Turnpike, in the hamlet and Town of Smithtown, New York, on December 31, 2004. The premises consists of a one-story masonry building measuring approximately 79 feet wide by 93 feet deep. The site was originally developed as a warehouse in 1974, based on a site plan approval dated December 11, 1973, which included a condition requiring any change in use to be approved by the Town's board of site plan review. Currently, the building is divided into two leased areas with the eastern third of the building used as an adult video rental store by the petitioner and owner of the business. Pursuant to the Town's building zone ordinance, the site is zoned wholesale and service industry (WSI) which does not permit retail use. The ordinance was amended in 1994 to allow certain specified exceptional uses, including "adult uses." In April, May and July of 2009, the petitioner received 12 summonses based, *inter alia*, on its alleged failure to obtain a certificate of occupancy for the adult video rental store, to obtain site plan approval for said store and for operating an adult retail store within 500 feet of a residential zoning district.

The petitioner subsequently made applications for a building permit and a sign permit, which were denied by the Building Director on May 21, 2010. On or about April 23, 2009, the petitioner made application to the ZBA for a certificate of existing use and multiple variances permitting the continued operation of the premises as currently used and configured.

On August 10, 2011, the ZBA conducted a public hearing regarding the petitioner's applications for a CEU and the subject variances. At the hearing, the petitioner asserted, through the testimony of its counsel, that the video rental business was established in 1978, that the petitioner purchased the video rental business ten to twelve years prior to the hearing and that the business sign has been in existence since 1974. The testimony by counsel for the petitioner also included the statement that "[i]t was a video store for at least 30 years. Most of the time it was

an adult video store." The petitioner acknowledged that the current use as an adult video rental store requires a variance to reduce the building setback for an adult retail shop from 500 feet to 45 feet, while arguing that the "spirit" of the ordinance was met by the fact that the building is separated from the nearby residential district by a significant change in elevation and two fences. Members of the public who spoke at the hearing supported denial of the CEU and the variance to reduce the 500-foot building setback on the grounds that children and teenagers from the residential neighborhood pass by the subject premises on a regular basis to get to school and various stores across the road from the subject premises.

It is well settled that in a special proceeding seeking judicial review of administrative action, the Court must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious (see, Flacke v. Onondaga Landfill Sys., 69 NY2d 355 [1987]; Matter of Warder v. Board of Regents of Univ. of State of N.Y., 53 NY2d 186 [1981]). In reviewing an administrative action a court may not substitute its judgment for that of the agency responsible for making the determination (see, Flacke v. Onondaga Landfill Sys., 69 NY2d 355 [1987]; Matter of Warder v. Board of Regents of Univ. of State of N.Y., 53 NY2d 186 [1981]). In applying the "arbitrary and capricious" standard, a court looks only to whether the determination lacks a rational basis, *i.e.*, whether it was without sound basis in reason and without regard to the facts (see, Matter of Pell v. Board of Educ., 34 NY2d 222 [1974]; Matter of Halperin v. City of New Rochelle, 24 AD3d 768 [2nd Dept., 2005], *app dism* 6 NY3d 890, *lv den* 7 NY3d 708 [2006]).

"It is the law of this state that nonconforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance" (People v. Miller, 304 NY 105, 107 [1952]; see also, Glacial Aggregates LLC v. Town of Yorkshire, 14 NY3d 127 [2010]). However, a nonconforming use may not be established through an existing use of land which was commenced or maintained in violation of a zoning ordinance (see, Matter of Rudolf Steiner Fellowship Found. v. De Luccia, 90 NY2d 453 [1997]; Matter of Quatraro v. Village of Kenmore Zoning Bd. of Appeals, 277 AD2d 1001 [4th Dept., 2000]; Keller v. Haller, 226 AD2d 639 [2nd Dept., 1996]; Besthoff v. Zoning Bd. of Appeals of Town of Clarkstown, 34 AD2d 782 [2nd Dept., 1970]). An owner who raises a claim of a nonconforming use must establish that the allegedly pre-existing use was legal prior to the enactment of the prohibitive zoning ordinance which purportedly rendered it nonconforming (see, Squire v. Conway, 256 AD2d 771 [3rd Dept., 1998]; Incorporated Vil. of Old Westbury v. Alljay Farms, 100 AD2d 574 [2nd Dept., 1984], *affd as mod* 64 NY2d 798 [1985]).

Here, based upon the proof adduced at the hearing, the ZBA properly determined that the use of the subject property as an adult video rental store was not a legal, preexisting, nonconforming use and, thus, properly denied the petitioner's application for a CEU. The findings of the ZBA adopted at a public meeting held on January 25, 2011, including the finding

that the use of the premises as a video rental store and adult video rental store was in violation of the 1973 zoning ordinance, was not arbitrary or capricious. In addition, the Court finds that the determination by the ZBA that the denial of the application for a CEU made the application for a variance of the 500-foot building setback a moot issue was not arbitrary and capricious.

The Court now turns to the petitioner's claim that the ZBA's denial of the variance to increase the permitted square footage of an existing sign from 40 square feet to 54 square feet was arbitrary and capricious. Local zoning boards have broad discretion in considering applications for variances and the judicial function in reviewing such decisions is a limited one. Courts may set aside a zoning determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion or that it merely succumbed to the generalized community pressure (see, Pecoraro v. Board of Appeals of the Town of Hempstead, 2 NY3d 608 [2004]; Matter of Tsunis v. Zoning Bd. of Appeals of Inc. Vil. of Poquott, 59 AD3d 726 [2nd Dept., 2009]). A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence (see, Pecoraro v. Board of Appeals of the Town of Hempstead, 2 NY3d 608 [2004]). When reviewing the determinations of a Zoning Board, the Court considers substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination (see, Matter of DiPaolo v. Zoning Bd. of Appeals of the Town/Vil. of Harrison, 62 AD3d 792 [2nd Dept., 2009]; Matter of Gallo v. Rosell, 52 AD3d 514 [2nd Dept., 2009]).

A zoning board considering a request for an area variance is required, pursuant to Town Law 267-b (3), to engage in a balancing test, weighing the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the area variance is granted (see, Matter of Ifrah v. Utschig, 98 NY2d 304 [2002]; Matter of Sasso v. Osgood, 86 NY2d 374 [1995]; Miller v. Town of Brookhaven Zoning Bd. of Appeals, 74 AD3d 1343 [2nd Dept., 2010]; Salzano v. Zoning Bd. of Town of Wallkill, 63 AD3d 850 [2nd Dept., 2009]). Pursuant to the statute, the zoning board is also required to consider whether (1) an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) the requested area variance is substantial; (4) the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district and (5) the alleged difficulty was self-created. While the last factor is not dispositive, neither is it irrelevant (Matter of Ifrah v. Utschig, 98 NY2d 304 [2002]; see also, Crilly v. Karl, 67 AD3d 793 [2nd Dept., 2009]; Matter of Millennium Custom Homes, Inc. v. Young, 58 AD3d 740 [2nd Dept., 2009]). A zoning board of appeals is not required to justify its determinations with supporting evidence as to each of the five factors so long as its determination balances the relevant considerations in a way that is rational (see, Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh, 13 NY3d 716 [2010]).

Here, the record establishes that the ZBA properly applied Town Law 267-b (3) in considering the petitioners' application for the subject area variance. Furthermore, its determination denying petitioners' application for the variance was not arbitrary and capricious, was supported by the substantial evidence, and had a rational basis (id.; Muth v. Scheyer, 51 AD3d 799 [2nd Dept., 2008]; Matter of David Park Estates v. Trotta, 283 AD2d 429 [2nd Dept., 2001]; Matter of Budget Estates v. Roth, 203 AD2d 287 [2nd Dept., 1994]).

The ZBA noted that a sign 35% larger than the maximum allowed pursuant to the relevant ordinance was substantial and would not be desirable, that it degrades the visual character of the neighborhood and that the petitioner did not submit any evidence demonstrating that nearby properties have similar signs. In addition, the ZBA concluded that, because the petitioner failed to address the issue, alternative methods to address the sign issue exist and that the alleged difficulty in complying with the ordinance was partially self created.

The ZBA's findings that the proposed change would have an undesirable effect on the neighborhood were thus supported by the evidence in the record (see, Matter of Inlet Homes Corp. v. Zoning Bd. of Appeals of the Town of Hempstead, 2 NY3d 769 [2004]; Matter of Inguant v. Board of Zoning Appeals of the Town of Brookhaven, 304 AD2d 831 [2nd Dept., 2003]; Matter of McNair v. Board of Zoning Appeals of the Town of Hempstead, 285 AD2d 553 [2nd Dept., 2001]). The requested variance is unquestionably substantial (Matter of Inguant v. Board of Zoning Appeals of the Town of Brookhaven, 304 AD2d 831 [2nd Dept., 2003]). The ZBA's further findings that the alleged difficulties were at least partially self-created and the proposed changes would adversely impact the neighborhood were also supported by the evidence in the record (Matter of McNair v. Board of Zoning Appeals of the Town of Hempstead, 285 AD2d 553 [2nd Dept., 2001]; Matter of Ron Rose Group, Inc. v. Baum, 275 AD2d 373 [2nd Dept., 2000]).

Under the circumstances of this case, the ZBA's determination to deny the subject variance was neither illegal, arbitrary nor an abuse of discretion (see, Matter of Picarelli v. Karl, 51 AD3d 1028 [2nd Dept., 2008]; see also, Matter of Biscardi v. Zoning Bd. of Appeals of the Town of Hyde Park, 288 AD2d 215 [2nd Dept., 2001] *app den* 97 NY2d 609 [2002]); Matter of Monte v. Edwards, 258 AD2d 584 [2nd Dept., 1999]; Matter of Seumenicht v. Zoning Bd. of Appeals of City of Rye, 217 AD2d 632 [2nd Dept., 1995]). Although there were some factors weighing in favor of granting the variance, the Supreme Court cannot substitute its judgment for that of the Zoning Board where, as here, there is substantial evidence in the record to support the ZBA's denial of the application (see, Matter of Cowan v. Kern, 41 NY2d 591 [1977]). Based upon the entire record before it and balancing all the factors established, the ZBA could rationally conclude that the detriment posed to the neighborhood outweighed the benefit sought by the petitioners and its determination denying this variance was not arbitrary and capricious (see, Matter of Ifrah v. Utschig, 98 NY2d 304 [2002]).

Accordingly, the petition is denied and the proceeding is dismissed.[1] In light of the decision herein, the petitioner's application for a stay of enforcement of the 12 summonses issued by the Town of Smithtown regarding alleged violations of the Town's zoning ordinances at the subject premises, is denied.

Settle judgment (see, 22 NYCRR §202.48).

So ordered.

Dated: June 23, 2011

William B Rebolini
HON. WILLIAM B. REBOLINI, J.S.C.

___X___ FINAL DISPOSITION_____ NON-FINAL DISPOSITION

[1] The Court notes that the respondents failed to submit an affidavit of service indicating that the memorandum of law included in its submission was served on the petitioner. Therefore, said memorandum was not considered in the determination of this special proceeding.