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

HL Mastic Associations, LLC,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Laws and Rules and for Declaratory Judgment,

-against-

Suffolk County Department of Health Services Division of Environmental Quality Board of Review and James L. Tomarken, as Commissioner of the Suffolk County Department of Health Services,

Respondents.

Motion Sequence No.: 001; MG CDISPO

Motion Date: 2/25/11
Submitted: 8/24/11

Index No.: 00284/2011

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In this Article 78 proceeding, petitioner seeks a judgment annulling and setting aside a determination by the respondent Suffolk County Department of Health Services Division of Environmental Quality Board of Review (Board) and the respondent James L. Tomarken, Commissioner of the Suffolk County Department of Health Services (collectively, the respondents), to deny the variance application and transfer of development rights of the petitioner. The petitioner also seeks judgment directing the respondents to approve the variance to increase the sanitary flow allocated to its property to 10,898 gallons per day, and permitting it to convert a portion of the property to a restaurant upon the condition that the four parcels identified in its application as sending parcels are sterilized against development by dedication to the Town of Brookhaven.

The petitioner is owner of certain real property located in the hamlet of Shirley, Town of Brookhaven, County of Suffolk, which is known as the Southport Shopping Center. On or about February 4, 2010, the petitioner applied to the Board for a variance and transfer of development rights (TDR) in connection with its proposal to convert a 4,200 square foot "dry" retail space into a restaurant. Because the conversion from a "dry" use to a restaurant would increase the sanitary flow output beyond the allowable density for the shopping center, the use of TDRs from four sending parcels was required to mitigate the excess. It is undisputed that each of the four sending parcels are located in the same groundwater management zone as the shopping center, that the shopping center and all four sending parcels are located within the Town of Brookhaven, and that the Town of Brookhaven has certified each of the four sending parcels to be a buildable lot pursuant to the Brookhaven Town Code. In addition, the Town of Brookhaven has indicated it will accept the dedication of the petitioner's four sending parcels. Generally, these facts would ensure that an applicant's request for approval based on TDRs would be granted.

On July 15, 2010, the Board convened a hearing on the petitioner's application for a variance. It is the petitioner's contention that it demonstrated at the hearing, and in its written submissions, that it met all of the criteria established by the Suffolk County Sanitary Code (Sanitary Code) and the TDR Standards promulgated by the Suffolk County Department of Health Services (SCDHS), to entitle it to a variance and to allow the additional sanitary flow density associated with the conversion to a restaurant. On September 13, 2010, the Board issued a written decision denying the variance sought by the petitioner. On September 17, 2010, the respondent James L. Tomarken, Commissioner of the Suffolk County Department of Health Services, approved the Board's denial of the subject variance.

The petitioner commenced the instant Article 78 proceeding challenging the denial of its application for a variance as arbitrary and capricious, against the weight of the evidence, in violation of the standards established by the Sanitary Code and the TDR Standards and without evidentiary support for the determinations made. 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 Education, 34 NY2d 222 [1974]; Matter of Halperin v. City of New Rochelle, 24 AD3d 768 [2nd Dept., 2005], *appeals dismissed* 6 NY3d 890, *lv. denied* 7 NY3d 708 [2006]).

In written recommendations to Commissioner Tomarken dated September 13, 2010, the Board essentially cites three findings in support of its decision to deny the petitioner's variance. The first finding is that the four sending parcels that the petitioner proposes to sterilize by dedication to the Town of Brookhaven are "significantly substandard in area compared to both

Article 6 requirements and town zoning," and are "at varying distances from infrastructure required for their potential development." Article 6 of the Sanitary Code establishes eight ground water management zones in Suffolk County, and allows the transfer of development rights between two parcels, provided that the transfer is in conformance with standards established by the Department. On September 30, 1995, SCDHS issued its "Transfer of Development Rights Standards (Standards)," which permit TDRs between parcels without the need for a variance from its board of review, provided the transfer meets a list of criteria. As the petitioner correctly points out, it appears that the TDRs proposed by the petitioner would generally be acceptable under the list of criteria set forth in the Standards, as well as those in Article 6.

In opposition to this proceeding the respondents submit examples of prior decisions by the Board involving the use of TDRs by applicants for variances. A review of the submitted decisions reveals that the Board has issued half-credit for parcels of 4,000 or 5,000 square feet, some without proof that the parcel is buildable under the applicable town code.[1] In other cases, full credit has been awarded for buildable lots of 6,000 or 10,000 square feet. Here, it undisputed that the sending parcels that the petitioner proposes for TDR credits consist of three buildable parcels of 7,500 square feet and one buildable parcel of 10,000 square feet.

The respondents contend that this disparate treatment is justified on the ground that the proposed sending lots are not in the same groundwater distribution area (GWDA) as the shopping center. The GWDA maps the direction of groundwater flow towards nearby waters including, in this case, rivers. The Board's second finding regarding the petitioner's application is that the shopping center is located in the Forge River GWDA, and that the sending parcels are in the Carman's River GWDA. Based on this finding, the Board rejected the proposed sending parcels, denied any TDR credit to the petitioner, and denied the variance.

The petitioner contends that the Board's use of GWDA as a criterion for its decision is improper and without legal justification, that GWDA is a suggested criterion under a draft plan for water management developed by Suffolk County with input from SCDHS (draft plan) and issued well after the hearing on its application, and that it was not told that GWDA was an issue it had to address in its application.

Generally, the determination of an administrative body is entitled to great deference from the Court (see, Matter of Niagara Falls Power Co. v. Water Power and Control Comm., 267 NY 265 [1935]; County of Nassau v. New York State Pub. Empl. Relations Bd., 151 AD2d 168 [2nd Dept., 1989] *affd* 76 NY2d 579 [1990]; Forest Hills Tenants Assn. v. Joy, 91 AD2d 912 [1st Dept., 1983] *affd* 59 NY2d 1007 [1983]). The presumption is that an administrative agency charged with implementing the policies of a statute has developed an expertise that requires a Court to accept its construction of the statute if not unreasonable (see, Incorporated Vil. of

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[1] Generally, one sanitary flow credit is given for one TDR lot. Each credit increases the sanitary flow allocated to the receiving parcel by 300 gallons per day (300 gpd).

Lynbrook v. New York State Pub. Empl. Relations Bd., 48 NY2d 398 [1979] and its interpretation of its regulations unless "irrational and unreasonable" (see, Marzec v. DeBuono, 95 NY2d 262 [2000]).

Sanitary Code 760-609 (A) provides in pertinent part:

> 1. The determination whether the variance or waiver will be in harmony with the general purpose and intent of this Article shall be made upon findings relating to the following criteria:
>
> > a. Whether the use is in general conformity with this Article;
> >
> > b. Whether the uses of groundwater, surface water, and drinking water supplies will be impaired, taking into account the direction of groundwater flow;

The Board's determination cites, in part, Sanitary Code 760-609 (A) (1) (b) for its determination that the petitioner's application is not in compliance with Article 6. 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 Halperin v. City of New Rochelle, 24 AD3d 768 [2nd Dept., 2005], *appeals dismissed* 6 NY3d 890, *lv. denied* 7 NY3d 708 [2006]). The burden is on the petitioner to show that there is no rational basis for the board's determination (see, Matter of Grossman v. Rankin, 43 NY2d 493 [1977]). A Court may not substitute its judgment for that of the board (see, Matter of Ball v. New York State Dept. of Envtl. Conservation, 35 AD3d 732 [2nd Dept., 2006]). When a board sets forth multiple reasons for its determination, any one of which is supported by a rational basis, the determination will be sustained (Matter of Logiudice v. Southold Town Bd. of Trustees, 50 AD3d 800 [2nd Dept., 2008]). Considering the statutory mandate that the Board consider the direction of groundwater flow in general, the Court finds that the use of additional scientific and investigative information is appropriate, and that the second finding of the Board is not arbitrary and capricious. "[A]n agency has the power and obligation to rectify what it deems to be an erroneous interpretation of the law or an injudicious policy. A shift in agency position to ensure affecting [sic] the statute's purpose serves to indicate heightened agency conscientiousness, not arbitrariness" (Matter of Delese v. Tax Appeals Trib. of State of N.Y., 3 AD3d 612, 615 [3rd Dept., 2004], quoting Matter of AT&T Info. Sys. v. Donohue, 113 AD2d 395, 401-402 [3rd Dept., 1985] [Yesawich, Jr., J., dissenting], *revd on dissenting op of Yesawich, Jr., J.*, 68 NY2d 821 [1986]). However, the propriety of the Board's first finding depends on a critical fact which has not been addressed by the Board in the hearing, or in its written decision, regarding this application.

At the time of the petitioner's application to the Board, the shopping center occupied a parcel of approximately 31 acres in the shape of a reverse "L." The vertical portion of the "L" ran north and south, and the horizontal portion ran east and west. Because the existing

development of the shopping center utilized almost all of the sanitary flow allocated to the parcel, in order to convert the "dry" retail space to a restaurant, which would increase the sanitary flow output, an application to increase the allocation was necessary. The drawings submitted by the petitioner with its application indicate that shopping center's sanitary system outfall # 2 is located on the westerly portion of the horizontal arm of the parcel. The drawings also indicate that 74.2% of the shopping center's sanitary flow was handled by this particular outfall. The petitioner contends that outfall # 2 is in the Carman's River GWDA. In support of this contention, it submits a map showing that a part of the horizontal portion of the premises is within the Carman's River GWDA. The petitioner further contends that, should the Board approve its variance, outfall # 2 would handle 66 % of the shopping center's increased sanitary flow.

The Board's finding that the shopping center "parcel" is within the Forge River GWDA does not address the issues raised by the petitioner. Absent determinations whether the subject sewage treatment outfall is within the Forge River or the Carman's River GWDA, whether the percentage of sanitary flow handled by the subject outfall has any significance, and whether the proposed sending lots would act to mitigate the impact of this project, the Court in not able to determine if the denial of full or partial credit for the proposed TDRs is arbitrary and capricious.

The third finding in the Board's decision of September 13, 2010, cites the petitioner's failure to comply with Sanitary Code 760-609 (A) (1) (d), which requires an application to conform to a comprehensive groundwater management plan. In this case, the Board asserts that the application does not conform to the draft plan dated December 2010. The Court finds that the Board's general requirement that the petitioner's application conform to a plan which was not yet adopted was arbitrary and capricious.

The matter is remitted to the Board for reconsideration of the questions of fact generally noted herein. Thereafter, depending on the Board's findings of fact, following a further hearing if necessary, the Board is directed to consider whether sanitary flow credit, if any, is to be accorded the petitioner's proposed sending parcels.

Settle judgment (see, 22 NYCRR §202.48).

So ordered.

Dated: NOV 09 2011

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

___X___ FINAL DISPOSITION_____ NON-FINAL DISPOSITION