SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI – COUNTY OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

In the Matter of the Application of
600 SOUTH OCEAN REALTY CORP,
Petitioner,

For Judgment pursuant to Article 78,
Civil Practice Law and Rules,

- against -

NICHOLAS FUCILLO, EVA GREGUSKI, CHARLES BURTON, THOMAS FERB, GEORGE HORNFELD, AND BRIAN KEARNS constituting the Board of Zoning Appeals of the Village of Patchogue and **LORICE BELMONTE, JOANNE BRANDI, MELISSA GILLIGAN, KAREN ZORENON, MARY KASSNER, AND CATHY SEFF** constituting the Architectural Review Board of the Village of Patchogue,
Respondents.

INDEX NO: **2011-30684**

MOTION SEQ. NO.: 001 - CASEDISP
ORIG. MOTION DATE: 11/09/11

FINAL SUBMIT DATE: 04/25/12

Upon the following papers numbered 1- 4 read on this Motion:
- Petitioner's Motion (Paper 1);
- Respondents Answer and Return (Papers 2-3);
- Petitioner's Reply Memo of Law (Paper 4);

it is,

ORDERED, that the Petition is hereby granted to the extent set forth herein below.

Petitioner seeks a judgment pursuant to Article 78 of the CPLR annulling and reversing the decision of the Respondents Zoning Board of Appeals of the Village of Patchogue and Architectural Review Board of the Village of Patchogue, which denied Petitioner a demolition permit.

In an apparent attempt to further alleviate the parking issues associated with the Petitioner's restaurant at 600 South Ocean Avenue, Petitioner purchased a parcel located at 508 South Ocean Avenue, in the Village of Patchogue. The premises are fairly close to the location of the restaurant and it is apparent that there was at some point a plan to turn this parcel into a parking lot for employees of Lombardi's on the Bay.

The parcel contains a two story wood frame house that has fallen into a state of severe disrepair. The property is located in the Residential and Professional Office District in the Village, which restricts its use to residential uses and professional office use. The property itself is narrow, with

dimensions of 87' by 327'. In addition to this zoning designation, the property also falls within the designation of the Village's Historic District. Patchogue Village Code § 435-87(E)(1) designates that all locations "within the Village except for property within those areas zoned A Residential" are within the Historic District.

The Petitioner sought to demolish the existing structure on the parcel of land at 508 South Ocean Avenue, but in order to do so, needed to obtain a certificate of appropriateness in accordance with § 435-88(A) of the Village Code, because of its location in the Historic District. In order to apply for the certificate of appropriateness to demolish the structure, Petitioner needed to apply to the Village's Architectural Review Board (ARB) for the certificate.

The first of two hearings presented the only piece of evidence submitted by both sides, a letter from the Village Senior Building Inspector Peter Sarich, which found that the structure in question was a "hazard to the community." The letter also noted that the structure was approximately 75 years old, in addition to various structural failings. Furthermore, Sarich found that there were no remaining architectural distinctions within the building, except for a fireplace mantle. Still further, he wrote that he supported Petitioners request to demolish the structure.

At the January 11 hearing, Hans Henke, the village historian and member of the ARB, noted that the house was in deteriorated state, and further he did not see any historical value to the house. However, during the February 8 hearing Henke suspiciously contradicted his statement from the previous hearing, stating that he thought the house was in repairable shape and saw no reason as to "why this should come down."

Both hearings brought out large opposition from local residents, who wrote and signed a letter declaring their opposition to the demolition of the structure.

At the direction of the ARB by letter dated January 26, 2011, which demanded review of 'proposed construction at the site under review, during the February 8 hearing, Petitioner brought forth a site development plan entitled "Employee Parking Lot." It laid out the property with the structure demolished, and a parking lot containing 54 spaces proposed to replace it.

Following the last hearing on February 8, the ARB denied the application for the certificate of appropriateness stating that:

> Based on the testimony elicited at the hearing, the exhibits presented thereat, and the reasons stated on the record by the Board members, your application for certificate of appropriateness is denied. It is the judgment of the Board that the demolition of the house and the proposed site alterations are not in character with the existing surrounding structures and property. Additionally, the proposed demolition of the residence is not compatible with the historic character of the structure, as well as with the character of nearby properties and will diminish the value of adjacent or nearby property.

Based on this decision, Petitioner decided to appeal the ARB decision to the Zoning Board of Appeal (ZBA), Village Codes § 435-92, requesting that the decision of the ARB be reversed.

The appeal was first heard by the ZBA on July 20, 2011, at a public meeting. At this meeting there arose an issue of whether the ZBA could make judgment based only on the record, or if new evidence could be brought in, characterized as reviewing the case *de novo*. During the hearing, Petitioner brought in John Blaney, a real estate appraiser, licensed in the State of New York, and Al Sutton, an architect. Blaney stated during the hearing that he found that demolition of the property would have no negative impact on the surrounding properties. Sutton further provided his belief that the structure was of little historical significance, mentioning that the only materials worth salvaging could fit in the back of a pick-up truck. He further noted that it would be simpler and more affordable to demolish the house and start from scratch.

Following the statements of Blaney and Sutton, the ZBA allowed the public to address their concerns. Many were from homes neighboring the property in question, fearing the establishment of a parking lot at the premises.

The ZBA determined not to perform the appeal *de novo*, and not to consider the evidence submitted by Petitioner, limiting the appeal to the record from the ARB proceedings. The ZBA did not find that the ARB decision provided any *undue hardship*, and thus upheld it, refusing to provide a certificate of appropriateness to 600 South Ocean Avenue to demolish the structure at 508 South Ocean Avenue.

There are two issues that need to be determined: first, whether the decisions of the ARB and ZBA were arbitrary and capricious, and second, whether the ZBA's refusal to consider evidence not previously presented to the ARB was improper.

The case at hand is similar to ***Wolk v Reisem***, 67 AD2d, 819 (4 Dept 1979), where Respondent, Rochester Preservation Board, appealed a judgment, which annulled the Board's determination denying a certificate of appropriateness for the demolition of a house. The house was similarly designated to be part of a Preservation District. Furthermore, in that case it was found by the Rochester Commissioner of Buildings that the premises were deemed "unsafe and dangerous to public safety, life and property" and demolition was recommended. The court therein ultimately determined that:

> In the face of a clear threat to the public health and safety, the governmental duty to its citizens and civil servants to protect such vital interests must take precedence over the aesthetic and historical concerns expressed by the majority of the Preservation Board in denying petitioner's application (see Rochester Code, s 115-37, subd. I). The threat of imminent danger was fully established in the documents and testimony before the Board, and demolition of the structure should be permitted.

Similarly, presented with the evidence at hand, Sarich, the Senior Building Inspector for the Village of Patchogue, clearly found that the premises were "a hazard to the community," and supported Petitioner's application to demolish the premises. Sarich found that there was no significant architectural distinctions left, noting, "wood floors, doors, and moldings had been replaced with unremarkable substitutes." Furthermore, the exterior was covered in vinyl siding.

Thus, according to the lone piece of evidence brought forth by either side at the ARB hearing, the premises at 508 South Ocean Avenue were both hazardous to the community and devoid of any historical significance.

It has been found by the Court that the ZBA must be judged under the arbitrary and capricious standard within the meaning of CPLR 7803(3). Furthermore, in applying the "arbitrary and capricious" standard, a court inquires whether the determination under review had a rational basis (see, ***Halperin v City of New Rochelle***, 24 AD3d 768 [2 Dept 2005]).

It would appear that both the ARB and ZBA based their decisions against the lone piece of evidence they allowed into the record as a result of pressure from angry residents in the area. The record shows that during both the ARB and ZBA public hearings, there was opposition vocalized by residents of the Village stemming from the fear that, once demolished, Petitioner would construct a parking lot. In addition, there were letters from residents noting their opposition in allowing a certificate of appropriateness for Petitioner. The outrage stemmed from the proposed use after demolition, when in fact the application before the ARB was simply for permission to demolish the existing structure.

The Second Department has found that there must be substantial evidence to deny a variance, and that mere conjecture and speculation are not suitable to determine this (see: ***Frank v Scheyer***, 227 AD2d 558, [2 Dept 1996]). The Court therein found that mere opposition by community residents did not provide adequate "substantial evidence" for the Zoning Board to deny an application. Here too, opposition by Patchogue residents does not provide substantial evidence as to why the certificate of appropriateness for demolition should have been denied by both the ARB and ZBA. Succumbing to community pressure has been found to not be a sufficient reason to deny, without evidence that allowing the variance would adversely impact the neighboring community (see: ***Schumacher v Town of E Hampton New York Zoning Bd of Appeals***, 46 AD3d 691 [2 Dept 2007]).

Petitioner further contends that the ZBA erred in not considering the opinions of two additional experts during the ZBA hearing. The ZBA argued that, under their interpretation of § 435-92 of the Village Code, there was no explicit delegation of the ability to hear new evidence in an appeal. Respondents contend that because of this, the ZBA could only examine the record of the ARB hearings. Respondents rely on § 435-64(B) of the Village Code, which provides for the ZBA to interpret "any word, phrase, provision, requirement or regulation" contain with Chapter 435 of the Village Code.

As adeptly proffered by Petitioner's Counsel, there is nothing in the Village Code which requires the ZBA to consider only the record presented to the body or officer appealed from. In reality, §435-92 of the Village Code provides for the unrestricted right to appeal. It is at the very core of the function of a ZBA to hear facts which are relied upon by an applicant in support of its request for a variance, and refusal hear those facts, including opinions of expert witnesses, serves as grounds for setting aside a zoning board of appeals decision (see: ***Teschner v Town of Pittsford***, 129 NYS2d 803 [1954]).

The Court of Appeals has held that a ZBA performs a quasi-judicial function, and as such, all parties, including applicants and opponents alike, must be given the opportunity to present evidence or facts for ZBA members to consider in rendering a determination (see: ***In the Matter of Frank Cilla, et al v Laura J Mansi, et al, Zoning Board of Appeals of the Town of Huntington***, 2002 NY Slip OP 50208(U) [NY Sup]).

"Zoning board of appeals hearing generally are characterized by more formality than planning board meetings. Such increased formality is appropriate because a zoning board of appeals is a quasi-judicial body, that is, it is charged with the responsibility to hear appeals and certain other matters and to apply the law to the evidence adduced." Village Law 7-712-a Practice Commentaries. Hearings, p. 502.

If the standard applied by the ZBA herein were used for standard area and use variance applications, there would never be an adequate record setting forth substantial evidence upon which a proper decision could be rendered by the ARB, ZBA or the Court in an Article 78 proceeding. Review of the ARB denial is no different than review of the Building Inspectors denial or grant, and the same procedures should have been employed. Failure to do so was clearly arbitrary and capricious, and deprived the members of the ZBA of the ability to make a proper decision.

Furthermore, the Petitioner made an application for a certificate of appropriateness for a permit to demolish a building, the unworthiness of which is undisputed as to actual evidence in the record, and not just the equivocal opinion of the Village Historian, which changes from one meeting to another with absolutely nothing in the record to support his divergence from the concerns and conclusions from the prior meeting of the ARB. Petitioner did not apply for a permit to construct a parking lot, and the site plan that was considered was only submitted at the demand of the ARB, in writing. Still further, Respondents fail to address the fact that some 25 permits for demolition of structures outside the Residence A Zoning District have been granted by Respondent Village without ARB consideration. The Court is inexorably drawn to the conclusion that the decisions herein were undoubtedly arbitrary and capricious, in the most classic sense possible.

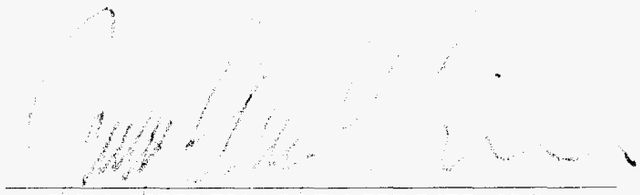
For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the determinations of Respondents ARB and ZBA are hereby annulling, and this matter is hereby remanded to said boards for proper consideration and determination, pursuant to hearings wherein Petitioners are granted their proper opportunity to submit evidence upon which the board members can render a proper decision based upon the evidence, including the first and second inconsistent opinions of the Village Historian, and the undisputed position of the Senior Building inspector; and it is further

ORDERED, that Counsel for the moving party herein is hereby directed to serve a copy of this order, with Notice of Entry, upon Counsel for all parties and upon the Calendar Clerk of this Court, within twenty (20) days of the date is order is entered by the Suffolk County Clerk.

This Court hereby retains jurisdiction of this matter for all purposes.

Dated: **Riverhead, New York**
August 1, 2012



HON. JEFFREY ARLEN SPINNER, JSC

X FINAL DISPOSITION	NON-FINAL DISPOSITION
X SCAN	DO NOT SCAN

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