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SHORT FORM ORDER

INDEX NO. 19803/2012

SUPREME COURT - STATE OF NEW YORK

I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

JACQUELINE CAPUTI,

Petitioner-Plaintiff,

-against-

TOWN OF HUNTINGTON, THE ZONING BOARD OF APPEALS OF THE TOWN OF HUNTINGTON, GEORGE LOUIS FOX, and JOHN CONDON REALTY, INC.,

Respondents-Defendants.

ORIG. RETURN DATE: AUGUST 10, 2012
FINAL SUBMISSION DATE: OCTOBER 4, 2012
MTN. SEQ. #: 005
MOTION: MD

ORIG. RETURN DATE: AUGUST 27, 2012
FINAL SUBMISSION DATE: OCTOBER 4, 2012
MTN. SEQ. #: 006
MOTION: MG

SELF-REPRESENTED PETITIONER-PLAINTIFF:
JACQUELINE CAPUTI, ESQ.
FIVE WHITE DEER COURT
HUNTINGTON, NEW YORK 11743
631-421-2232

ATTORNEY FOR RESPONDENTS-DEFENDANTS TOWN OF HUNTINGTON AND THE ZONING BOARD OF APPEALS OF THE TOWN OF HUNTINGTON:
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HUNTINGTON, NEW YORK 11743
631-673-7555

SELF-REPRESENTED RESPONDENT-DEFENDANT:
GEORGE LOUIS FOX
SEVEN WHITE DEER COURT
HUNTINGTON, NEW YORK 11743

RESPONDENT-DEFENDANT:
JOHN CONDON REALTY, INC.
156 ICELAND DRIVE
HUNTINGTON STATION, NEW YORK 11746

Upon the following papers numbered 1 to 11 read on this petition FOR A JUDGMENT PURSUANT TO CPLR ARTICLE 78 AND MOTION TO DISMISS. Amended Notice of Petition and supporting papers 1-3; Notice of Motion and supporting papers 4-6; Memorandum of Law in Opposition 7; Verified Answer to Amended Petition 8; Record of Proceedings 9; Affirmation 10; Reply Memorandum of Law 11; it is,

ORDERED that this motion (seq. #005) by petitioner-plaintiff, JACQUELINE CAPUTI ("petitioner"), for a judgment:

(1) pursuant to CPLR Article 78, annulling and setting aside the determination of respondent-defendant, THE ZONING BOARD OF APPEALS OF THE TOWN OF HUNTINGTON ("ZBA"), authorizing the issuance by respondent-defendant TOWN OF HUNTINGTON's building department of a building permit and certificate of occupancy to legalize a 55' x 18' greenhouse that was built without a permit;

(2) pursuant to CPLR Article 78, enjoining and restraining respondent-defendant, TOWN OF HUNTINGTON ("Town"), from issuing a building permit and certificate of occupancy legalizing the greenhouse;

(3) pursuant to CPLR 3001, declaring that the determination of the ZBA authorizing issuance by the Town's building department of a building permit and certificate of occupancy for the 55' x 18' greenhouse was arbitrary, capricious, made in violation of lawful procedure, illegal, improper and was affected by an error of law;

(4) pursuant to CPLR Article 78, granting a preliminary and permanent injunction restraining and preventing the Town from issuing a building permit and certificate of occupancy legalizing the 55' x 18' greenhouse; and

(5) awarding petitioner the costs and disbursements of this action,

is hereby **DENIED** in its entirety for the reasons set forth herein; and it is further

ORDERED that this motion (seq. #006) by respondent-defendant, GEORGE LOUIS FOX ("Fox"), for an Order dismissing this hybrid proceeding/action, is hereby **GRANTED**, and this proceeding/action is hereby dismissed.

This is a hybrid special proceeding pursuant to Article 78 and declaratory judgment action pursuant to CPLR 3001, seeking to annul and set aside the determination of the ZBA approving the issuance of a special use permit, and for a judgment declaring that the determination by the ZBA was arbitrary and capricious. Petitioner summarily states that she is aggrieved by the determination of the ZBA, without elaboration.

Fox is the owner of the property commonly known as Seven White Deer Court, Huntington, New York, and petitioner owns the property directly

south of Fox's property at Five White Deer Court, Huntington, New York. Petitioner alleges that Fox's property is zoned R-40 residence district. Petitioner further alleges that Fox erected a 55' x 18' greenhouse on his property without securing the necessary building permit or certificate of occupancy from the Town. As such, the Town issued a Notice of Violation to Fox on or about November 3, 2011. Fox then submitted an application to the Town to legalize the greenhouse. By Zoning Ordinance Letter of Denial dated January 6, 2012, the Town's Division of Building & Housing denied Fox's "letter of intent to legalize a 55' x 18' detached greenhouse built without a permit."

Thereafter, Fox, through respondent-defendant JOHN CONDON REALTY, INC. ("Condon"), submitted an application to the ZBA for a special use permit, pursuant to Section 198-68 (A) (13) of the Huntington Town Code, in order to conform to the current zoning regulations and to maintain the greenhouse. After a public hearing held on May 24, 2012, the ZBA issued a decision of even date granting Fox's application, with certain conditions, to wit: "removal of any unregistered vehicles and/or debris in accord with the requirements of the Town code." The decision was filed on June 15, 2012.

Petitioner has now filed the instant proceeding/action seeking to annul the decision of the ZBA and to enjoin the Town from issuing a building permit and certificate of occupancy legalizing the greenhouse. Petitioner claims that the ZBA's determination was arbitrary and capricious, in that inadequate evidence was presented at the hearing to enable the ZBA to make the findings required under the Town Code for the issuance of a special use permit. Petitioner informs the Court that she and other neighbors appeared at the hearing and testified in opposition to the application. Further, petitioner argues that the ZBA mischaracterized the application, and failed to make all the findings required to grant the relief requested by Fox.

The Court has received an answer, record of proceedings, and memorandum of law in opposition to this petition/complaint from the Town, as well as a motion to dismiss from Fox. The Town argues that the ZBA was required to grant the application based upon the uncontroverted evidence submitted at the public hearing and the relevant code provisions. The Town indicates the evidence established that the noncommercial greenhouse conformed in all respects to the specific conditions for the issuance of a special use permit therefor, and that the only opposition was from community members who were concerned generally with aesthetics, noise and smells. Moreover, Fox argues that the ZBA was within its authority to grant the special use permit; that the general public had an opportunity to submit any opposition at the hearing; and

that the Town and ZBA followed all procedural and substantive requirements prior to the granting of the application.

In a proceeding under CPLR article 78 when reviewing a determination of an administrative tribunal, courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence (*Pell v Board of Education*, 34 NY2d 222 [1974]; *Allen v Bane*, 208 AD2d 721 [1994]). This approach is the same when the issue concerns the exercise of discretion by the administrative tribunal (*Pell v Board of Education*, 34 NY2d 222, *supra*). The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is illegal, arbitrary and capricious, or an abuse of discretion (*Gilman v N.Y. State Div. of Hous. & Cmty. Renewal*, 99 NY2d 144 [2002]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 43 AD3d 1057 [2007]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact (*Pell v Board of Education*, 34 NY2d 222, *supra*). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Pell v Board of Education*, 34 NY2d 222, *supra*). Where a hearing is held, the determination must be supported by substantial evidence (CPLR 7803 [4]). Although scientific or other expert testimony is not required in every case to support a determination with respect to zoning, a tribunal may not base its decision on generalized community objections or pressure (*see Ifrah v Utschig*, 98 NY2d 304 [2002]; *Matter of Grigoraki v Board of Appeals of the Town of Hempstead*, 52 AD3d 832 [2008]).

Moreover, local zoning boards have broad discretion in considering land use applications and the judicial function in reviewing such decisions is a limited one (*Pecoraro v Bd. of Appeals*, 2 NY3d 608 [2004]). Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure (*Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*). A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence (*Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*; *Matter of Hannett v Scheyer*, 37 AD3d 603 [2007]; *Matter of B.Z.V. Enter. Corp. v Srinivasan*, 35 AD3d 732 [2006]). Further, a reviewing court should refrain from substituting its own judgment for the reasoned judgment of the zoning board (*Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*).

With respect to special use permits, Town Law § 274-b is entitled "[a]pproval of special use permits," and subdivision (2) thereof provides authorization for a town board to delegate special use permit review authority to the town planning board or "such other administrative body" that it shall designate to grant special use permits as set forth in such zoning ordinance or local law (Town Law § 274-b [2]).

Under Section 198-68 (A) (13) of the Huntington Town Code, the ZBA may authorize the issuance of a special use permit for noncommercial greenhouses in residence districts, only where they are an accessory to a principal residential use, and provided that:

> (a) No such structure shall be more than fifteen (15) feet in height;
> (b) No greenhouse shall be located within twenty-five (25) feet of any property line; [and]
> (c) No chimney shall, in any case, exceed the height limit for the district as specified in Article IX [of the Town Code]

(Huntington Town Code § 198-68 [A] [13]). In addition, pursuant to Section 198-66 of the Town Code, the ZBA must consider certain factors in connection with an application for a special use permit in order to assure an orderly and harmonious arrangement of land uses in the district and in the community, including, but not limited to, whether the proposed use: (1) will be properly located in regard to transportation, water supply, waste disposal, fire protection and other facilities; (2) will not create undue traffic congestion or traffic hazard; and (3) will not adversely affect the value of property, character of the neighborhood or the pattern of development (Huntington Town Code § 198-66 [A]).

In this matter, the ZBA addressed and discussed the aforementioned factors and considerations at the hearing with respect to the specific requirements for a noncommercial greenhouse, as well as the general requirements for the issuance of a special use permit. As discussed, by decision dated May 24, 2012, the ZBA granted Fox's application to "legalize a 55' x 18' detached greenhouse built without a permit," with certain conditions regarding the removal of unregistered vehicles and/or debris. Although at the hearing the ZBA indicated that this was an application for a special use permit, the ZBA in its written decision recites "applicant is before the Board because the subject property has a greenhouse 48 feet from the property line." Notwithstanding the foregoing, the ZBA found, "after hearing all of the evidence and examining the

exhibits . . . that the structure has existed on the subject property without causing devaluation of surrounding property values or altering the pattern of development of the community," and "no undesirable change will result by a grant of the requested variance." Despite the fact that the ZBA failed to enunciate its reasoning for reaching such a conclusion in its written decision, the Court finds that the ZBA was presented with substantial evidence in the record to support its conclusion to grant the special use permit (*see* CPLR 7803 [4]; *Scibelli v Planning Bd.*, 12 AD3d 450 [2004]). The ZBA was presented with evidence by Fox and Condon that the greenhouse met the three requirements contained in Section 198-68 (A) (13) of the Town Code, and the community opposition to the application did not refute their evidence. As noted, the community members were more concerned with the aesthetics, noise and smells of the greenhouse and of Fox's property in general, not whether the placement and dimensions of the greenhouse complied with the Town Code.

Furthermore, the Court finds that the ZBA imposed reasonable conditions upon the granting of the permit to insure that Fox complied with the Town Code by removing any unregistered vehicles and/or other debris from his property. Additionally, contrary to petitioner's contention, the ZBA limited the grant to one year unless a building permit is issued within that time period. Finally, with respect to the ultimate decision of the ZBA, petitioner is reminded that this Court may not substitute its own judgment for the judgment of the ZBA (*see Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*; *Metro Enviro Transfer, LLC v Vill. of Croton-On-Hudson*, 7 AD3d 625 [2004]).

In view of the foregoing, the instant motion to dismiss is **GRANTED**, the instant petition/complaint is **DENIED**, and this hybrid proceeding/action is hereby dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: March 5, 2013

HON. JOSEPH FARNETI
Acting Justice Supreme Court

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