

**Madonia v Zoning Bd. of Appeals of the Inc. Vil. of
Southampton**

2013 NY Slip Op 31394(U)

June 26, 2013

Sup Ct, Suffolk County

Docket Number: 2009-7122

Judge: Jeffrey Arlen Spinner

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

PRESENT:

HON. JEFFREY ARLEN SPINNER
Acting Justice of the Supreme Court

ANN CAROL MADONIA and
SUSAN MADONIA,

Petitioners-Plaintiffs,

- against -

ZONING BOARD OF APPEALS OF THE
INCORPORATED VILLAGE OF
SOUTHAMPTON, JEM SOUTHAMPTON
REALTY LLC, ARTHUR M KATZ and
JOAN N KATZ,

Respondents-Defendants.

DECISION & ORDER

INDEX NO: 2009-7122

MTN SEQ NO: 001 - CASEDISP
ORIG MTN DATE: 03/18/09

FINAL MTN DATE: 05/22/13

UPON the following papers numbered 1-7 read on this Motion & Petition:

- Petitioners-Plaintiffs' Order to Show Cause & Petition/Complaint (Paper 1);
- Respondents-Defendants JEM & KATZs Opposition & Answer (Paper 2);
- Respondent-Defendant ZBA's Opposition, Answer & Return (Paper 3);
- Petitioner-Plaintiffs' Reply (Paper 4);
- Petitioners-Plaintiffs' Request for Hearing (Paper 5);
- Respondents-Defendants JEM & KATZs Opposition (Paper 6);
- Respondent-Defendant ZBA's Opposition (Paper 7);

it is,

ORDERED, that Petition/Complaint herein is denied to the extent set forth below.

Petitioners move this Court for a judgment, pursuant to CPLR 7803, annulling, vacating, and setting aside the decision of the Zoning Board of Appeals of the Incorporated Village of Southampton denying Petitioners' challenge to the building permit and flood plain development permit issued for Respondents' (JEM/KATZs) property, upon the grounds that said decision was arbitrary and capricious and unsupported by the record. Petitioners also move this Court for a declaratory judgment, pursuant to CPLR 3001 and 3017(b), stating that the ZBA's interpretation of the Village Code setting out the minimum requirements for issuance of a floodplain development permit is unconstitutional, null and void.

Petitioners ANN CAROL MADONIA and SUSAN MADONIA (MADONIAS), are owners of the property located at 99 Meadow Lane in the Village of Southampton.

Respondent ZONING BOARD OF APPEALS OF THE INCORPORATED VILLAGE OF SOUTHAMPTON (ZBA) is an agency of the Village Government, with authority to hear appeals regarding the issuance of building permits and floodplain development permits by the Building Inspector, as well as other matters not relevant to the matter at bar.

Respondent J.E.M. SOUTHAMPTON REALTY, LLC and ARTHUR AND JOAN KATZ (JEM/KATZ) are owners of the subject property.

Subject property, designated as Suffolk County Tax Number 904-26-1-10.1, is located at 81-83 Meadow Lane, adjacent to the east side of MADONIAS' property.

STATEMENT OF FACTS

On December 20, 2007, ZBA granted a wetlands special permit to JEM/KATZ, under Article IIIA of the Southampton Village Zoning Code, for proposed construction on the subject property. During the course of the public hearings on the application for said permit, MADONIAS appeared in opposition to the application, and raised issues with respect to how the proposed construction would affect flooding on their adjacent property. However, MADONIAS failed to submit expert evidence in support of their opposition, despite being invited to do so. The application for the wetlands permit included a drainage plan submitted by JEM/KATZs' expert, which was found to contain extensive provisions to contain runoff.

Said drainage plan was included in the application for a building/floodplain development permit for subject property, which the Building Inspector issued on April 30, 2008. During the application process for the building/flood plain development permit, MADONIAS opposed the application, but did not present any expert evidence to the Building Inspector.

On May 13, 2008, MADONIAS filed an appeal before ZBA, challenging issuance of said building/flood plain development permit, raising issues with respect to the threat of flood damage the proposed development would cause to their property. In the subsequent public hearings, held on June 26 and July 24, of the same year, MADONIAS still failed to present expert evidence. Subsequently, MADONIAS retained new counsel and presented expert evidence during the course of the public hearing process from August 28, 2008 through November 20, 2008. During that period, submissions and legal arguments were made on behalf of both MADONIAS and JEM/KATZs. Among the submissions made by JEM/KATZs was a revised drainage plan, which increased the containment that was previously based on a 2.5 inch storm event to a 5 inch storm event.

Upon the conclusion of the public hearings on December 15, 2008, the Village Environmental Planning Consultant (Charles J. Voorhis of Nelson, Pope and Voorhis) and the Village Engineer (Aldo Andreoli) submitted a written report, recommending rejection of MADONIAS' appeal. Generally, the report found that the area which includes MADONIAS' and JEM/KATZs' properties is subject to flooding, but that the proposed construction meets the base flood elevations, and will not "exacerbate conditions, but will improve conditions." The report also found that MADONIAS

presented "insufficient evidence" that the project would result in physical damage to adjoining properties. Finally, the report recommended that the revised drainage plan submitted by JEM/KATZs be implemented. A written response to the report, dated January 6, 2009, was submitted on behalf of MADONIA. JEM/KATZs did not submit a response to the report.

In their response, MADONIAS challenged the standard used by the report. Chapter 62-14(A)(3) of the Village Code requires the Local Administrator to deny a permit "if the proposed development may result in physical damage to any other property." [emphasis added] The report had concluded that "there is no basis to conclude that development of the JEM/KATZ property would cause physical damage to adjoining properties." [emphasis added] The test, MADONIAS argued, is not that it is "definitive" that there will be physical damage, but rather that a permit should be denied upon showing of the mere possibility of physical damage as a result of a proposed development.

On January 22, 2009, ZBA issued its Decision upholding the building permit/flood plain development permit, and incorporating the revised drainage plan into the proposed construction plan. ZBA rejected MADONIAS' argument that Chapter 62 mandates denial of the permit upon showing of the mere possibility of physical damage as a result of a proposed development. It points out that other sections of the Code provide for measures that "mitigate" or "eliminate" the adverse effects, as well as require flood damage to be "minimized" rather than eliminated. Other provisions refer to a "reasonable" degree of protection from flood damage. The Code also provides for interpretation in a manner which gives meaning in accordance with common usage and which gives the most reasonable application. Based upon these readings, ZBA concluded that the general standard should be interpreted and applied in accordance with a rule of reasonableness, and that mere possibility of physical damage is not grounds for denial of the permit. Rather, there must be at least a reasonable likelihood or expectation of physical damage to other property as a result of the proposed development to warrant a denial. ZBA found that, in this case, the credible evidence does not show such likelihood or expectation, and thus the proposed development, with the revised drainage plans, complies with the standards set forth in Chapter 62-14(A)(3).

MADONIAS filed the present petition/complaint on February 20, 2009. On May 26, 2009, MADONIAS filed a request for a hearing to determine whether the December 15, 2008 report submitted to ZBA by Voorhis and Andreoli was in fact prepared in part by Andreoli, and whether Andreoli reviewed the submissions before adding his name to the report. On June 3, 2009, Andreoli submitted an affidavit, in which he states that the report was drafted by Voorhis and approved by Andreoli in his capacity as Village Engineer, and that he did review the submissions.

DISCUSSION

As this Court has repeatedly and consistently stated in prior decisions, it is well settled law in the State of New York that a Court may not substitute its own judgment for that of the reviewing board (*see: Janiak v Planning Board, Town of Greenville*, 159 AD2d 574 [2 Dept], *appeal denied*, 76 NY2d 707 [1990]; *Mascony Transport and Ferry Service v Richmond*, 71 AD2d 896 [2 Dept 1979], *aff'd*, 49 NY2d 969 [1980]). Therefore, if the decision rendered by the reviewing board is

within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is arbitrary, capricious or unlawful (*see Castle Properties Co v Ackerson*, 163 AD2d 785 [3 Dept 1990]).

The Court agrees with ZBA that, where an agency approves a drainage plan based on uncontradicted expert evidence after providing an opportunity for the complaining party to present expert evidence, as it did during the previous hearing for the wetlands permit, the complaining party cannot reasonably allege that the agency's approval was arbitrary and capricious. Moreover, while MADONIAS later submitted expert evidence during the appeal process concerning the building/flood plain development permit, the Court finds ZBA's interpretation of the general standard as set for in Chapter 62-14(A)(3) of the Southampton Village Code to be reasonable, and neither arbitrary nor capricious, as well as clearly within the legitimate exercise of its duties.

To paraphrase JEM/KATZs' submissions, ZBA's interpretation is entitled to deference, since the only code at issue is the Village Code's flood plain ordinance, and there has been no demonstration of federal or state statutes pre-empting same.

Based on Andreoli's affidavit, there existed no reasonable nor proper need for the hearing requested by MADONIAS, and therefore same was never granted.


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

ORDERED and ADJUDGED, that the above referenced Petition/Complaint is hereby denied in all respects, as there was no case made for reviewing said decision pursuant to CPLR Article 78, nor a justification for declaratory judgment finding ZBA's interpretation unconstitutional, null or void; and it is further

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

This constitutes the Decision and Order of the Court.

Dated: Central Islip, New York
June 26, 2013


HON. JEFFREY ARLEN SPINNER, JSC

✓ FINAL DISPOSITION	NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

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