Matter of Miele v Zoning Bd. of Appeals of the Inc. Vil. of Belle Terre
2014 NY Slip Op 31009(U)
March 27, 2014
Supreme Court, Suffolk County
Docket Number: 18056/2012
Judge: Joseph Farneti
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SHORT FORM ORDER INDEX NO. 18056/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

In the Matter of the Application of

JENNIFER A. MIELE and LAWRENCE E. MIELE,

Petitioners,

-against-

ZONING BOARD OF APPEALS OF THE INCORPORATED VILLAGE OF BELLE TERRE,

Respondent,

For the Relief Pursuant to Article 78 of the New York Civil Practice Law and Rules.

ORIG. RETURN DATE: JULY 6, 2012
FINAL SUBMISSION DATE: SEPTEMBER 26, 2013
MTN. SEQ. #: 001
MOTION: MD CASEDISP

PLTF'S/PET'S ATTORNEY:
THOMAS A. ABBATE, P.C.
100 CROSSWAYS PARK WEST
WOODBURY, NEW YORK 11797
516-496-0700

DEFT'S/RESP ATTORNEY:
EILEEN A. POWERS, ESQ.
456 GRIFFING AVENUE
RIVERHEAD, NEW YORK 11901
631-727-8250

Upon the following papers numbered 1 to 8 read on this petition FOR A JUDGMENT PURSUANT TO ARTICLE 78 OF THE CPLR. Notice of Petition and supporting papers 1-3; Return, Verified Answer and supporting papers 4-6; Respondent's Memorandum of Law 7; Petitioners' Reply Memorandum of Law 8; it is,

ORDERED that this application by petitioners, JENNIFER A. MIELE and LAWRENCE E. MIELE ("petitioners"), for a judgment, pursuant to Article 78 of the CPLR, annulling and setting aside the determination of respondent ZONING BOARD OF APPEALS OF THE INCORPORATED VILLAGE OF BELLE TERRE ("ZBA"), is hereby **DENIED** for the reasons set forth hereinafter. The Court has received an Answer, Return and Memorandum of Law from the ZBA in response to the petition.

Petitioners are the owners of real property commonly known as 6 Cliff Road, Belle Terre, located in the County of Suffolk, State of New York

("Premises"). Petitioners inform the Court that the Premises is a "through lot" having road frontage on both Cliff Road and Buena Visa Road, is located in the Village of Belle Terre's A-1 Zone, and maintains a lot area of approximately 48,381 square feet.

On or about February 15, 2011, petitioners submitted an application to the Village of Belle Terre ("Village") which sought permission to construct a swimming pool with spa, fencing and a shed on the Premises. By Letter of Denial dated February 18, 2011 from the Building Inspector of the Village, the application was denied as it violated certain sections of the Village Code.

Thereafter, by application dated February 22, 2011, petitioners applied to the ZBA for the necessary variances to erect the aforementioned structures. After a public hearing on the application before the ZBA held on March 21, 2011, the ZBA issued a one-page written decision, dated March 23, 2011, granting petitioners' application for variances relative to the pool, spa, fence and shed. In particular, three variances were issued:

(1) relief from Section 140-4 (A) of the Village Code, which requires that a pool be located only in a rear yard;

(2) relief from Section 170-10 (B) of the Village Code, which prohibits any structures from being located in a front yard; and

(3) relief from Section 170-9 (A) of the Village Code, which requires that a front yard setback of 60 feet be maintained.

However, the granting of the application was conditioned on the following stipulations:

(1) Site was to be landscaped as indicated in the site plan presented by petitioners;

(2) Lighting of the 4 trees as described was not allowed; and

(3) Foliage on Buena Vista Road was to be substantial enough to provide privacy to Buena Vista Road.

Petitioners argue that the decision failed to recite any findings of fact; specifically state the relief granted to petitioners; state the specific setback relief

granted to petitioners; or indicate that the approval was based upon a specific site plan.

Subsequent thereto, petitioners were issued a building permit by the Village, and began construction of the structures. Upon the completion thereof, petitioners had an "as-built" survey prepared, which was submitted to the Village for the purpose of the issuance of Certificates of Occupancy. The survey revealed that the shed was located 17.9 feet from the Premises' property line on Buena Vista Road, in violation of the Village Code and not in conformance with the original site plan. As such, the Village refused to issue a Certificate of Occupancy for the shed, and instead directed petitioners to appear again for a hearing before the ZBA. Such hearing was held on May 21, 2012. At the hearing, petitioners' representative informed the ZBA that the location of the shed changed due to "contractor error." Notwithstanding the foregoing, petitioners allege that several residents spoke in favor of their application, and one abutting property owner expressed that he was in favor of the shed/cabana remaining in its current location as a new conforming location would have more of an impact on his property than the current location. Petitioners indicate that the shed/cabana is heavily screened by new vegetation installed by petitioners. Moreover, petitioners allege that no real property abuts the Premises' "*de facto*" rear yard, the frontage on Buena Vista Road.

By unanimous vote, the ZBA denied petitioners' application. Petitioners contend that the ZBA was unsure of the relief granted to petitioners in its 2011 decision, and failed to consider the requisite factors for such an application. By letter dated May 23, 2012, the ZBA denied petitioners' variance application for the existing shed, and directed petitioners to remove, move the location, or modify the size of the shed "in order to comply with the original variance which was granted in March 2011." Petitioners argue, among other things, that the ZBA's decision again failed to recite any findings of fact and failed to address the balancing test for area variances contained in Village Law § 7-712-b (3) (b). As such, petitioners contend that the ZBA's decision was arbitrary and capricious, contrary to law, and against the weight of the evidence before it. Therefore, petitioners seek a judgment of this Court annulling and vacating the denial of the ZBA.

In opposition hereto, the ZBA alleges that as the Premises has frontage on two roads, to wit: Cliff Road and Buena Vista Road, it has two front yards and no rear yard. With respect to "buildings" such as a shed, the ZBA argues that the applicable section of the Village Code requires a front yard setback of 60 feet (Village Code § 170-9 [A]). If petitioners' yard were considered

a rear yard, then the Code mandates a 90-foot setback requirement (Village Code § 170-9 [C]). The ZBA contends that petitioners and their representative have consistently applied the wrong section of the Village Code regarding the shed, i.e., the section requiring merely a 20-foot setback. The ZBA indicates that "structures," such as pools and patios, are not "buildings" under the Code, and therefore they, as opposed to the shed, are subject to the 20-foot setback requirement contained in Village Code § 170-10 (A) for side or rear yards.

Further, the ZBA claims that during the construction phase of petitioners' project, petitioners deviated from the original plans without any approvals therefor by moving the pool five feet further back from the house and closer to Buena Vista Road, by moving the shed/cabana five feet further from the pool, and by increasing the size of the terrace, spa, and shed/cabana. As a result, the Village building inspector determined that instead of being located 28.8 feet from the "front yard" property line along Buena Vista Road pursuant to the approved variance, it was actually located 17.9 from that property line. Therefore, the ZBA argues that the construction "significantly exceeded" the variance granted in March of 2011, and substantially deviated from the 60-foot setback required under the Code for buildings in a front yard. Thus, the ZBA argues that its decision to deny petitioners' application was not arbitrary or capricious, had a rational basis, and was made after careful consideration of all relevant factors.

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*).

Pursuant to Town Law § 267-b (3) (which is identical to Village Law § 7-712-b [3] [b]), when determining whether to grant an area variance, a zoning board of appeals must weigh the benefit of the grant to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted (*see Matter of Ifrah v Utschig*, 98 NY2d 304 [2002]; *Matter of Sasso v Osgood*, 86 NY2d 374, *supra*). The zoning board is also required to consider whether: (1) granting the area variance will produce an undesirable change in the character of the neighborhood or a detriment to nearby properties; (2) the benefit sought by the applicant can be achieved by some method, feasible to the applicant, other than a variance; (3) the requested area variance is substantial; (4) granting the proposed variance would have an adverse effect or impact on physical or environmental conditions in the neighborhood or district; and (5) the alleged difficulty is self-created. While the last factor is not dispositive, it is also not irrelevant (*see Matter of Ifrah v Utschig*, 98 NY2d 304, *supra*; *Matter of Sasso v Osgood*, 86 NY2d 374, *supra*).

Here, the Court finds that the denial by the ZBA had a rational basis and was supported by the evidence presented. After conducting two hearings on the matter in which petitioners appeared along with a representative, the ZBA considered the benefit to petitioners as weighed against the detriment to the health, safety and welfare of the surrounding community. The ZBA also weighed

and applied the five aforementioned factors, in compliance with Village Law § 7-712-b (3) (b) and controlling case law, when reaching its decision on petitioners' application. Although the ZBA's written decisions, dated March 23, 2011 and May 23, 2012, do not contain its findings of fact or determinations regarding the statutory factors, the transcripts of the hearings held before the ZBA do reflect that the ZBA considered and discussed each factor. Moreover, the ZBA has submitted within its Return a document characterized as "May 25, 2012 ZBA Decision Worksheet" in which the ZBA found that: (1) the change applied for will produce an undesirable change in the character of the neighborhood; (2) the requested variance is substantial; (3) the variance would have an adverse effect or impact on physical or environmental conditions in the neighborhood; and (4) the hardship was self-created. The document is signed by the chairman of the ZBA. A reviewing court may look to the administrative agency's formal Return in an article 78 proceeding to ensure that the necessary record support for its decision exists, as well as to permit intelligent judicial review (*see Matter of Frank v Zoning Bd. of Town of Yorktown*, 82 AD3d 764 [2011]; *Matter of Ohrenstein v Zoning Bd. of Appeals of Canaan*, 39 AD3d 1041 [2007]; *Iwan v Zoning Bd. of Appeals*, 252 AD2d 913 [1998]; *Fischer v. Markowitz*, 166 AD2d 444 [1990]). The ZBA found that the "as-built" survey revealed that the construction deviated substantially from petitioners' initial site plan, and as noted herein, this Court may not substitute its own judgment for the reasoned judgment of the ZBA (*see Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*).

In view of the foregoing, the Court finds that the ZBA's denial was supported by the evidence presented and was not arbitrary or capricious. Accordingly, the instant petition is **DENIED** and this special proceeding is hereby dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: March 27, 2014

HON. JOSEPH FARNETI
Acting Justice Supreme Court

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