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

AMVI Realty, LLC,

Petitioner,

-against-

Town of Smithtown, Board of Zoning Appeals, Town of Smithtown Building Department,

Respondents.

Motion Sequence No.: 001; MG; CD
SUBJ

Motion Date: 4/5/13
Submitted: 4/16/14

Index No.: 05442/2013

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In this article 78 proceeding, the petitioner seeks a judgment (I) vacating and annulling the resolution adopted by the respondent Board of Zoning Appeals of the Town of Smithtown (BZA) on January 23, 2013 which denied its application to modify a previously approved variance to permit a 767-square-foot carport with solar panels, and (ii) and directing that the respondent issue a building permit authorizing it to construct a 968-square-foot carport with solar panels.

The petitioner, AMVI Realty, LLC (AMVI), is the owner of the premises located at 88 Terry Road in Smithtown, New York which is the subject of this proceeding. On or about September 15, 2011, the respondent BZA granted variances reducing the front and side yard setbacks, reducing the buffer adjacent to the residential district, and reducing the required parking and truck loading space at the subject premises. On or about December 12, 2012, the petitioner filed an application with the Smithtown building director for a permit to build an accessory structure, a carport with solar panels, over the existing parking at the subject property. On or about December 14, 2012, the building director issued a memorandum to the BZA indicating that the petitioner's building permit could not be issued until the BZA issued its approval in accordance with § 322-81F of the Zoning Code of the Town of Smithtown (Zoning

Code). The memorandum indicated that a variance was required. A public hearing on the application was held on January 22, 2013. By a resolution dated January 23, 2013, the BZA denied the petitioner's application without issuing findings as to the basis of its decision.

Thereafter, the petitioner commenced this proceeding by filing a notice of petition and petition, dated February 22, 2013. By order of the undersigned, dated July 8, 2013, the BZA's determination was vacated and remitted to the BZA for reconsideration and the issuance of specific factual findings. On September 5, 2013, the BZA once again denied the application and issued findings of fact which were filed with the Town Clerk on September 12, 2013. The findings of fact and supplemental affidavits have been filed and the matter is now before the court for consideration of the complete record.

Prior to the public hearing, the BZA received a memorandum from the Department of Environment and Waterways which recommended that if the BZA were to approve the action, it should issue a SEQRA negative declaration. Among the reasons cited was that the "small size and nature of the proposal mitigate against a significant impact on the environment; and [t]he proposal appears to be consistent with the planned use of the subject parcel and compatible with neighboring land uses."

The January 22, 2013 minutes of the hearing reveals that Peter Hans, an employee of the Town's building department, informed that the proposed structure is "completely" compliant with the Town zoning setbacks. He further stated that the newly adopted provision of the Town Code, § 322-81F, required that the applicant must go back before the BZA because, while the proposal is compliant with the ordinance, it is a modification of what the BZA had granted the prior year.

In its findings of September 5, 2013, the respondent BZA set forth the following:

> 2. The site is 23,012 square feet partially developed corner lot on the southeast corner of Terry Road and North Avenue. It is generally rectangular, having 51.36 feet of frontage on Terry Road and 293.67 feet of frontage on North Avenue. A 2 story frame office building with a wood deck and a 1 story addition are located on the north end of the site, set back 44.1 feet from Terry Road. Located directly behind the building is a 10 space parking lot accessed by North Avenue. The southern part of the property is wooded.
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> 3. The site is split-zoned NB (Neighborhood business) and R-10 Residential. The north end of the site fronting on Terry Road is NB, while a small portion of the wooded southern end is zoned R-10. To the southeast are WSI (Wholesale Service Industry) and NB zones. To the Northwest, across North Avenue is NB. To the North, across Terry Avenue, is RM7. To the south is zoned R-10 residence.

> 4. The land use along this part of Terry Road is a mix of commercial and residential uses, including small shopping centers, offices, restaurants, as well as several single-family homes that back up to the road. The land use along North Avenue is exclusively single-family residences except for the parcels that front on Terry Road. To the south of the site are hundreds of single family homes, and across Terry Road to the north are commercial businesses, single family homes and town homes. . .
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> 6. At the request of the current owner, the site was previously granted six variances from the zoning ordinance by the [BZA] on January 10, 2012 (Case #16579). These variances were to reduce the minimum setback from 50 ft. to 0 ft. for a proposed 9' x 12' trellis/breezeway, reduce minimum front parking setback from 6 ft. to 0 ft., reduce required parking from 16 to 10 spaces, reduce truck loading spaces from 1 to 0, reduce front yard setback from 50 ft. to 14 ft. (existing) for a second floor addition, and reduce buffer adjacent to residence district from 10 ft. to 0 ft. [It is noted in respondent's memorandum of law that the site is an office building used by mental health professionals].
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> 7. The application consists of a variance application to waive the requirements in [§] 322-81F of the Zoning Ordinance that requires a site that receives a variance to be developed and maintained in accordance with plans submitted with the application to the [BZA]. The proposed carport did not appear on the plans submitted to the [BZA] . . . and therefore was not considered by the Board in its January 10, 2012 decision.
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> 8. [§] 322-81F of the Zoning Ordinance was added by the Smithtown Town Board on June 26, 2010 in order to ensure that the [BZA] is presented with all improvements that are planned for the particular parcel at the time of their decision, and to ensure that parcels are not later modified in ways that do not conform with the intent of the [BZA] decision.
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> 9. The proposed carport conforms with the Zoning Ordinance with respect to dimensional requirements such as height and setback.

The BZA then reviewed the application pursuant to the standards set forth in Town Law § 267-b(3)(b). A zoning board considering a request for an area variance is required to engage in a balancing test, weighing the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the area variance is granted (Town Law § 267-b [3][b]). The zoning board also is required to consider whether (1) an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created

by the granting of the area variance; (2) the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) the requested area variance is substantial; (4) the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) the alleged difficulty was self-created (*see* ***Matter of Margaritis v Zoning Bd. of Appeals of the Inc. Vil. of Flower Hill***, 32 AD3d 855, 821 NYS2d 611 [2d Dept 2006]).

Upon review, the BZA found that (1) approval would produce an undesirable change in the character of the neighborhood; (2) that the benefit sought can be achieved by some other method; (3) that the requested variance is not substantial; (4) the proposal does not have an adverse impact on the environmental conditions in the neighborhood; and (5) that the applicant's difficultly is self- created.

"A court reviewing a CPLR article 78 petition may not disturb the decision of a municipal body charged with determining land use questions unless that body's decision is arbitrary and capricious, lacks a rational basis, or is an abuse of discretion" (***Matter of Lucas v Bd. of Appeals of Vil. of Mamaroneck***, 109 AD3d 925, 974 NYS2d 464 [2d Dept 2013]; ***Matter of Fuentes v Planning Bd. of Vil. of Woodbury***, 82 AD3d 883, 918 NYS2d 213 [2d Dept 2011]). "Under a zoning ordinance which authorizes interpretation of its requirements by the board of appeals, specific application of a term of the ordinance to a particular property is, therefore, governed by the board's interpretation, unless unreasonable or irrational" (***Matter of Frishman v Schmidt***, 61 NY2d 823, 473 NYS2d 957, [1984]; *see* ***Matter of Conti v Zoning Bd. of Appeals of Vil. of Ardsley***, 53 AD3d 545, 861 NYS2d 140 [2d Dept 2008]).

However, zoning ordinances are in derogation of the common law and, thus, must be strictly construed in favor of the owner whose land is being regulated *(see e.g.* ***Matter of La Russo v Neuringer***, 105 AD3d 743, 962 NYS2d 633 [2d Dept 2013]; ***Matter of Sanantonio v Lustenberger***, 73 AD3d 934, 901 NYS2d 109 [2d Dept 2010]; ***Matter of Mamaroneck Beach & Yacht Club, Inc. v Zoning Bd. of Appeals of Vil. of Mamaroneck***, 53 AD3d 494, 862 NYS2d 81 [2d Dept 2008]). Although a reviewing court will generally grant deference to the interpretation of an ambiguous zoning ordinance by a board of zoning appeals, where, as here, the issue presented is one of pure legal interpretation of the underlying zoning law or ordinance, deference is not required. Any ambiguity must be resolved in favor of the property owner (***Albany Basketball & Sports Corp. v City of Albany***, 116 AD3d 1135, 983 NYS2d 337 [3d Dept 2014]; ***Matter of Subdivisions, Inc. v Town of Sullivan***, 92 AD3d 1184, 1185, 938 NYS2d 682 [3d Dept], *lv denied* 19 NY3d 811, 951 NYS2d 721 [2012]).

It is well settled that "the [z]oning [l]aw is the controlling authority as to what uses ... owners may make of their property in a given district" (***Matter of Goelet v Moss***, 248 App Div 499, 500, 290 NYS 573 [1st Dept 1936], *affd* 273 NY 503, 6 NE2d 425 [1937]). Courts have ruled that the granting or withholding of a building permit is (with a few exceptions not relevant to this matter) not a matter of arbitrary discretion. Where a property owner meets all applicable building code requirements and requires no zoning variances, the proposed development is an "as of right" proposal for which the issuance of a building permit is a ministerial act (***Incorporated Vil. of Atlantic Beach v Gavalas***, 183 AD2d 750, 583 NYS2d 491 [2d Dept 1992]). Where the

building inspector is not authorized to vary or request modifications in the qualifying criteria, as in the instant matter, the issuance of the building permit is ministerial in nature (*see* ***Filmways Communications of Syracuse v Douglas***, 106 AD2d 185, 484 NYS2d 738 [4th Dept] *aff'd* 65 NY2d 878, 493 NYS2d 309 [1985]).

As noted in many cases involving special exceptions, but equally applicable herein, the inclusion of the permitted use in the ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood (*see* ***Tabernacle of Victory Pentecostal Church v Weiss***, 101 AD3d 738, 955 NYS2d 180 [2d Dept 2012]; ***Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead***, 98 NY2d 190, 746 NYS2d 662 [2002]; ***Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston***, 30 NY2d 238, 331 NYS2d 645 [1972]).

Here, the BZA determined that the petitioner's application conforms with the Town Code with respect to dimensional requirements such as height and setback. Since there is no dispute that the carport is an allowed use in the NB zone, the BZA's finding that granting the application would produce an undesirable change in the character of the neighborhood is arbitrary and capricious, and contravenes the enactment of the Zoning Code which was a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood. The BZA also ignored the memorandum from the Department of Environment and Waterways which noted that the proposal appears to be consistent with the planned use of the subject parcel and compatible with neighboring land uses. Likewise, the applicant need not look for an alternative method of obtaining the benefit sought since the BZA found that the petitioner requires no area variances for the carport.

Finally, the petitioner's hardship is not self created. Rather, it was created by the BZA's incorrect interpretation of § 322-81F of the Town Code. As a result, this finding is also arbitrary and capricious.

Section 322-81F of the Town of Smithtown Zoning Code provides that unless modifications of the site plan are required by the building director or the BZA, the site shall be developed and maintained in accordance with the plans submitted with the application to the BZA. Thus, a logical reading of this ordinance is that the site shall be developed and maintained pursuant to the plans submitted to and approved by the BZA. Should any change be made to the approved plans, BZA approval of the change is required. However, the BZA interpreted the section to require that, once a variance is granted, any new application for a building permit must come back to the BZA even, as here, for a use that is permitted under the Zoning Code and requires no area variances, even if it has no relation to the previous application. This interpretation is not rational.

As Town Law § 267–a [4] states, a zoning board of appeals is a body of limited jurisdiction. Where, as here, a zoning ordinance confers no additional authority on a zoning board of appeals, its power is limited to the appellate jurisdiction specifically given to it by Town Law § 267 (2) (***Gaylord Disposal Service, Inc. v Zoning Bd. of Appeals of Town of Kinderhook***, 175 AD2d 543, 572 NYS2d 803, 804 [3d Dept] *lv denied* 78 NY2d 863, 578

NYS2d 877 [1991]; ***Brenner v Sniado***, 156 AD2d 559, 549 NYS2d 68 [2d Dept 1989]). Here, the testimony in the record shows that the building department found that the property owner met all applicable building code requirements and required no zoning variances. As such, the proposed development is an "as of right" proposal for which the building department should have issued a building permit. Instead, based on § 322-81F of the zoning code, the matter was sent directly to the BZA. This, in effect, gave the BZA original, not appellate jurisdiction over this application. This clearly exceeds the powers granted to the BZA by the statute and further establishes that the respondents misinterpreted § 322-81F.

A further issue with the BZA's interpretation is that § 322-81F of the Town Code contains no standards upon which the BZA is to base it determination. The Court of Appeals has held that "there is no constitutional prohibition against the delegation of power, with reasonable safeguards and standards, to an agency or commission to administer the law as enacted by the Legislature" (***Matter of Levine v Whalen***, 39 NY2d 510, 515, 384 NYS2d 721 [1976]). The legislative standard to be provided need not be a "precise and specific formula." Rather, the standards and guidelines shall be so detailed as is reasonably practicable in light of the complexities of the particular area to be regulated, since necessity and practicality fix a point beyond which it is unreasonable and impracticable to compel the Legislature to prescribe detailed rules (***Matter of Levine v Whalen***, 39 NY2d 510, 515, 384 NYS2d 721). "The statute is void only if it specifies no guide or standard at all, but not if there is a comprehensible normative standard capable of interpretation (***Coates v City of Cincinnati***, 402 US 611, 614, 91 SCt 1686, 1688 [1971]). Thus, as stated herein the BZA's attempt to review an application for a permitted use, which requires no variance, using the area variance standards set forth in Town Law 267-b(3)(b), was arbitrary and capricious.

Stated another way, there is yet another error with the respondent BZA's determination. A variance is defined in § 322-1 of the Zoning Code as an "[a]uthorization by the Board of Zoning Appeals, or the Planning Board where authorized pursuant to § 322-19B of this chapter or § 248-31A and B of the Town Code, to utilize land for a use or in a manner otherwise prohibited by this chapter". Here, it has already been established that the application involves a use permitted by the zoning statute. Based on this definition, the BZA is not authorized to grant a variance for a permitted use. Therefore, inversely, the BZA is the not authorized to require a variance for a permitted use and its action herein is in contravention of the Town's zoning code.

Accordingly, the petition is granted, the determination by the respondent BZA dated January 23, 2013 is vacated and annulled, and the matter is remitted to the BZA and the respondent Building Department of the Town of Smithtown for the issuance of the building permit sought by the petitioner.

Dated: August 8, 2014

William B. Rebolini

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