

**Matter of Marrone v Board of Zoning Appeals of the
Town of Brookhaven**

2015 NY Slip Op 30857(U)

May 13, 2015

Supreme Court, Suffolk County

Docket Number: 1713/2013

Judge: Joseph Farneti

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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

HELEN MARRONE,

Petitioner-Plaintiff,

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

-against-

BOARD OF ZONING APPEALS OF THE
 TOWN OF BROOKHAVEN and TOWN OF
 BROOKHAVEN,

Respondents-Defendants.

ORIG. RETURN DATE: FEBRUARY 19, 2013

FINAL SUBMISSION DATE: MAY 23, 2013

MTN. SEQ. #: 001

MOTION: MD

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Upon the following papers numbered 1 to 6 read on this petition _____
FOR A JUDGMENT PURSUANT TO ARTICLE 78 OF THE CPLR

Notice of Petition and supporting papers 1-3; Verified Answer 4; Respondents' Return
5; Reply Affirmation 6; it is,

ORDERED that this motion by petitioner-plaintiff, HELEN MARRONE, for a judgment pursuant to Article 78 of the CPLR: (1) annulling and setting aside that part of the "Findings and Conclusions" of respondent-defendant BOARD OF ZONING APPEALS OF THE TOWN OF BROOKHAVEN made on December 12, 2012 and filed on December 17, 2012, which denied petitioner-plaintiff's application for formal subdivision of two separately held parcels and related area variances; and (2) remanding said application to respondent-defendant BOARD OF ZONING APPEALS OF THE TOWN OF BROOKHAVEN with a direction to grant to the application, is hereby **DENIED** in all respects. The Court has received a Verified Answer and Return in response to the petition from

respondents-defendants BOARD OF ZONING APPEALS OF THE TOWN OF BROOKHAVEN and TOWN OF BROOKHAVEN.

NATURE OF THE CASE

In this hybrid action-proceeding, the petitioner-plaintiff HELEN MARRONE asserts claims: (a) for relief pursuant to Article 78 of the CPLR, *inter alia*, to annul, reverse and set aside the December 12, 2012 determination of respondent-defendant BOARD OF ZONING APPEALS OF THE TOWN OF BROOKHAVEN ("ZBA"), which denied petitioner-plaintiff's application for formal subdivision of two separately held parcels and related area variances; (b) for declaratory judgment inasmuch as the ZBA's denial amounted to a violation of petitioner-plaintiff's rights to equal protection under the law; (c) for related injunctive relief; and (d) remanding said application to the ZBA with a direction to grant the application, upon the grounds that the ZBA's determination was based solely upon an erroneous conclusion as to the character of the neighborhood; that the ZBA's determination was without any other support whatsoever in the record; was made in violation of lawful procedure; was affected by errors of law; was arbitrary and capricious; was an abuse of discretion; and was not supported by substantial evidence.

Petitioner-plaintiff is a resident of the State of Georgia and is the owner in fee simple of two residential parcels of real property collectively known as 4 Woodmere Place, Selden, located in the Town of Brookhaven, County of Suffolk, State of New York, situated on the north side of Woodmere Place, 125' east of Selden Court.

PROCEDURAL HISTORY

A hearing was conducted on two separate dates, to wit: September 19, 2012 and October 17, 2012, wherein the application for subdivision approval was considered, including petitioner-plaintiff's request for seven separate variances. The proposed subdivision would result in parcels designated by petitioner-plaintiff as "Parcel A" and "Parcel B." Parcel B would be a resulting non-conforming parcel upon which a pre-existing single family residence had been erected, and which included two additional sheds. Parcel A would be a

resulting non-conforming parcel upon which a single family residence was proposed within the application. The ZBA unanimously denied the application on December 12, 2012.

Petitioner-plaintiff obtained her interest in the aggregate parcel by deed dated February 17, 1995. No copy of the deed has been provided to the Court on this record. However, petitioner-plaintiff concedes that the entire parcel was obtained within the same deed and that although Parcel A and Parcel B each have separate and distinct tax map designations, there is no assertion of any single and separate ownership as concerns either of the parcels; they comprise a single parcel for this analysis. As a result of these facts, a subdivision application is required and each of the proposed resulting parcels require significant and substantial relaxation of the zoning restrictions for an A1 Residence.

The current zoning for the parcels in question was enacted in 1988, some seven years prior to petitioner-plaintiff's obtainment of the property. The entire parcel as it currently exists is non-conforming. It is not the proposal that renders the premises non-conforming, they are non-conforming in the aggregate as they currently exist as but a single property. In effect, petitioner-plaintiff seeks to transform an existing non-conforming parcel into two non-conforming parcels.

CPLR ARTICLE 78

Petitioner-plaintiff makes legal assertions in the context of both a special proceeding pursuant to Article 78 of the CPLR, and in an action for declaratory relief asserting due process and additional constitutional and statutory violations. The legal standard for overturning the determination of the ZBA requires this Court to find that the action taken was arbitrary and capricious. The petitioner-plaintiff further argues that the ZBA acted without "substantial evidence" in the record. While the arbitrary and capricious argument pursuant to CPLR 7803 (3) is certainly before the Court, the Second Department only requires a CPLR 7803 (4) analysis concerning substantial evidence when a *quasi judicial* evidentiary hearing has been held.

In *Halperin v City of New Rochelle*, 24 AD3d 768, 809 NYS2d 98 (2d Dept 2005), the court held that a "substantial evidence" question arises "only where a quasi-judicial evidentiary hearing has been held." The court noted that public hearings related to zoning issues are informational and not evidentiary or

adversarial (*Id.*). Therefore, those determinations are reviewed under the “arbitrary and capricious” standard rather than the “substantial evidence” standard (*Id.*). Further, “the determination of a land use agency must be confirmed if it was rational and not arbitrary and capricious” (*Id.* [internal quotations omitted]; accord *Herman v Inc. Vil. of Tivoli*, 45 AD3d 767, 846 NYS2d 316 [2d Dept 2007]; *Rendely v Town of Huntington*, 44 AD3d 864, 843 NYS2d 668 [2d Dept 2007]). The Second Department adheres to this standard at present and the analysis as prescribed is controlling (see *Matter of Pine v Westchester County Health Care Corp.*, 2015 NY Slip Op 02974 [April 8, 2015]).

PETITIONER-PLAINTIFF’S APPLICATION TO THE ZBA

Petitioner-plaintiff sought the relaxation of the zoning requirements as to Parcel A as follows: 75% relaxation of area; 71% relaxation of frontage; 60% relaxation minimum side yard; 73% relaxation total side yard. As to Parcel B, as follows: 66% relaxation of area; 61% relaxation of frontage; 32% relaxation minimum side yard. The Court finds that each of these seven variance requests is significant and substantial. The subdivision sought by petitioner-plaintiff is not a vested property right or interest. This determination is within the discretion of the ZBA. There is certainly a rational basis for this determination and, given the magnitude of each of the variances, the determination is neither arbitrary nor capricious. The proper balancing test required pursuant to Town Law § 267-b was undertaken by the ZBA and it reached its conclusions in the exercise of its discretion.

NO VESTED PROPERTY RIGHT

In *Crowley v Courville*, 76 F 3d 47, 52 (1996), the Second Circuit Court of Appeals held:

In order to establish a constitutionally cognizable property interest, a litigant must demonstrate “a ‘legitimate claim of entitlement’ to the benefit in question.” *Zahra*, 48 F.3d at 680 (quoting *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 915 (2d Cir.), *cert. denied*, 493 U.S. 893, 107 L.

Ed. 2d 191, 110 S. Ct. 240 (1989), and *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58 (2d Cir. 1985)).

Here, the property in question was not held as a single and separate parcel. In addition, the parcel without the proposed subdivision is already non-conforming, and any attempt to increase the degree to which the parcels are non-conforming is without legal support (*see Rembar v Board of Appeals*, 148 AD2d 619 [2d Dept 1989]).

In light of the foregoing, it is,

ORDERED, that the CPLR Article 78 petition is hereby **DISMISSED**; and it is further

ORDERED, that the **FIRST** and **SECOND** causes of action are hereby **DISMISSED**.

The foregoing constitutes the decision and Order of the Court.

Dated: May 13, 2015



HON. JOSEPH FARNETI
Acting Justice Supreme Court

 X FINAL DISPOSITION NON-FINAL DISPOSITION