Matter of Harn Food, LLC v DeChance
2016 NY Slip Op 30173(U)
January 25, 2016
Supreme Court, Suffolk County
Docket Number: 8624/15
Judge: Thomas F. Whelan
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[* 1]

SHORT FORM ORDER

INDEX No. 8624/15

COPY

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 6/18/15
SUBMIT DATE 1/8/16
Mot. Seq. # 001 - Petition Denied
Submit Judgment on Notice
CDISP Y X N ___

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In the Matter of the application of
HARN FOOD, LLC,

Petitioner,

For an Order pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

PAUL M. DeCHANCE, Chairman, KERI PERAGINE, Vice-Chairman, JAMES WISDOM, KEVIN McCARRICK, GEORGE PRIOS, HOWARD BERGSON and RONALD LINDSAY constituting the Zoning Board of Appeals of the Town of Brookhaven, and the ZONING BOARD OF APPEALS of the Town of Brookhaven, and the TOWN OF BROOKHAVEN,

Respondents.

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Upon the following papers numbered 1 to 10 read on this Article 78 Petition ________________; Notice of Petition and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ________; Answering papers 5-6 ; Replying papers 7-8 ; Other 9-10 (Respondents' Return) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this Article 78 Petition (#001) is denied and the petition is dismissed.

Petitioner's property consists of two adjoining undeveloped and substandard lots which have been held in common ownership for over 67 years. Petitioner argues that it is entitled to single and separate dispensations from the current Brookhaven Town Code dimensional requirements, by claiming that the

common law doctrine of back-to-back splits is a doctrine of constructive single and separate ownership. Despite occasional mention of that common law doctrine in Appellate Division determinations, pronouncements from the Court of Appeals have cast serious doubt on the continued viability of such a doctrine. Moreover, a close examination of the relevant provisions of the Brookhaven Town Code reveals the demise of that doctrine within the confines of that town.

Prior to 1996, Appellate courts held that "where a lot has been held in single and separate ownership since a date prior to the enactment of a zoning ordinance which renders it substandard, the owner is entitled to an area variance as of right" (***Matter of Ewers v Zoning Bd. of Appeals of Town of Brookhaven***, 165 AD2d 873, 874, 560 NYS2d 344 [2d Dept 1990]). An exception to the single and separate ownership doctrine is the merger doctrine, "whereby adjoining substandard parcels owned by the same owner would merge by operation of law to form a standard parcel, thus negating the need for an area variance" (***Ramundo v Pleasant Valley Zoning Bd. of Appeals***, 41 AD3d 855, 857, 839 NYS2d 189 [2d Dept 2007]). As a corollary to that single separate doctrine, petitioners have customarily argued that a common law doctrine of "back-to-back" splits exist whereby two distinct lots are joined at the rear, but have common ownership and frontage on separate streets, the lots could be divided as of right (*see* ***Matter of Morin v Zoning Bd. of Vil. of Irvington***, 163 AD2d 389, 558 NYS2d 117 [2d Dept 1990]).

However, the Court of Appeals in ***Matter of Khan v Zoning Bd. of Appeals of Vil. of Irvington***, 87 NY2d 344, 639 NYS2d 302 (1996) held that "there is no common-law 'single and separate ownership' exemption from minimum area requirements, and that such an exemption only applied if the municipality enacted a local law or ordinance providing for such an exemption" (***Ramundo v Pleasant Valley Zoning Bd. of Appeals***, 41 AD3d at 857). "[W]here the municipality has not created an exemption as a matter of legislative grace, the property owner can ordinarily utilize the local provisions for obtaining a variance" (***Matter of Khan v Zoning Bd. of Appeals of Vil. of Irvington***, 87 NY2d at 350; *see also* ***Matter of Bialla v Zoning Bd. of Appeals of Vil. of Northport***, 271 AD2d 685, 706 NYS2d 473 [2d Dept 2000]).

Some municipalities have refused to incorporate a single and separate exemption from new zoning requirements into their legislative scheme, thereby precluding any "as of right" claim (*see* ***Matter of Rivero v Voelker***, 38 AD3d 784, 832 NYS2d 616 [2d Dept 2007]; ***Matter of Bialla v Zoning Bd. of Appeals of Vil. of Northport***, 271 AD2d at 687). Most municipalities refuse to provide blanket single and separate dispensations excusing all area deficiencies (*see* ***Matter of Sakrel, Ltd. v Roth***, 176 AD2d 732, 574 NYS2d 972 [2d Dept 1991] [minimum frontal width and area; other variances needed]; ***Matter of Sakrel, Ltd. v Roth***, 182 AD2d 763, 582 NYS2d 492 [2d Dept 1992] [*id.*]; ***Matter of Woodmaster Homes, Ltd. v Scheyer***, 171 AD2d 666, 567 NYS2d 148 [2d Dept 1991] [plot held in single and separate ownership may qualify for only one variance as of right]; ***Matter of Koster Keunen, Inc. v Scheyer***, 156 AD2d 563, 549 NYS2d 72 [2d Dept 1989] [*id.*]).

Here, Brookhaven Town Code §85-1B (172) defines "singly and separately owned lot" and requires the lot to be "separated from any adjoining tracts of land continuously."

The Brookhaven Town Code offers an interpretation of that provision at §85-2C(1):

> Whenever a single lot which has been excepted from the area, width and yard requirements of a particular district by reason of such lot being in single and separate ownership on a certain date is joined by common ownership to an abutting lot, the greater area, width and yard requirements for the particular district shall apply to the increased size lot.

Additionally, the Brookhaven Town Code details Nonconforming Uses at §85-883 and, in particular, at §85-883D(2):

> Separate ownership. A single-family dwelling may be erected on any lot 60 feet or more in width, within a zoning district where otherwise permitted, which was separately owned at the time of any amendment thereto heretofore adopted, and which has not come into common ownership with adjoining property, and which conforms to the minimum dimensional requirements set forth herein below at Subsection D(3)(a) and the area density requirements.

Finally, it is legislatively established as the policy of the Town of Brookhaven, at §85-883D(4) to encourage the merger of "adjacent single and separate parcels to create larger parcels which more closely conform to the zoning requirements."

Therefore, the code provisions specifically provide that minimum lot width "on lots at least 60 feet in width" (§85-883D[3][b]) with a minimum area "of 6,000 square feet" (§85-883D[3][b][1]) are subject to exemptions only if (1) based upon single and separate ownership which has not come into common ownership with adjoining property and (2) where the remaining dimensional requirements comply with those set forth in §85-883D(3)(a). Those dimensional requirements are not subject to any legislatively crafted exemptions.

In this case, the single and separate ownership exemption found in the Brookhaven Town Code is inapplicable. The Code limits the exemption by its terms only where a lot's ownership was different from that of any adjoining tracts of land or property. A merger is created when a lot is joined by common ownership to an abutting lot. It is the policy of the Town to encourage mergers of nonconforming lots. Once merged, the parcel is subject to the greater area, width and yard requirements for the particular district.

Here, the parcels have been held in common ownership for over 67 years. Moreover, this is not the first time that such a claim of right to divide a parcel, as argued herein, has been rejected by a Court (*see* ***Matter of Romeo v Trotta***, Index No. 21243-01, Sup. Court Suffolk County, February 25, 2002 [Pitts, J.S.C.]).

While the Brookhaven Town Code makes provisions for interior (flag) lots (*see* §85-883D[3)][c]) and corner lots (*see* §85-883D[3)][d]), no provision is made for "back to back" split parcels.

Accordingly, petitioner is not entitled to relief as of right upon the "back-to-back" split or the single and separate ownership doctrine. There can be no doubt, as found by the Zoning Board, that the parcels in

question merged by reason of common ownership (*see* ***Matter of Weisman v Zoning Bd. of Appeals of Vil. of Kensington***, 260 AD2d 487, 688 NYS2d 215 [2d Dept 1999]; ***Matter of McGlasson Realty, Inc. v Town of Patterson Bd. of Appeals***, 234 AD2d 462, 651 NYS2d 131 [2d Dept 1996]; ***Matter of Vollet v Schoepflin***, 28 AD2d 706, 280 NYS2d 950 [2d Dept 1967]).

After the holding by the Court of Appeals in ***Matter of Khan***, *supra*, and upon a review of the applicable provisions of the Brookhaven Town Code, the common law "back to back" split doctrine has given away to the Town's policy of merger. A review of the record establishes that petitioner never had an absolute right to build two single-family homes on this parcel without variances. That request is denied.

Even if this Court where to consider the common law rule that "back to back" split parcels may be deemed not to have merged where the applicant has established that during the period of common ownership the parcels were never used in conjunction with one another and neither parcel materially enhanced the value or utility of the other, here, the record before the zoning board is devoid of such evidence. The petitioner failed to meet its burden to establish that the two parcels did not merge and that they retained their single and separate status (*see* ***Matter of Sakrel, Ltd. v Roth***, 176 AD2d at 734; *see also* ***Matter of Patrick v Zoning Bd. of Appeals of Vil. of Russell Gardens***, 130 AD3d 741, 15 NYS3d 50 [2d Dept 2015]; *see eg.* ***Matter of Martino v DeChance***, 2009 WL 4099417, Sup. Court Suffolk County, October 23, 2009 [Cohalan, J.S.C.]; *see generally* 1 N.Y. Zoning Law & Prac. § 7:41. Substandard lots ["If the owner of [a substandard] lot owns another lot adjacent to it, he/she is not entitled to an exception. Nor does it entitle the owner to a variance for other nonconformities. Rather the owner must combine the two lots to form one that will meet the frontage and area requirements of the ordinance"]; *cf* ***Matter of Matherson v Scheyer***, 20 AD3d 425, 799 NYS2d 86 [2d Dept 2005]).

Here, the fact that the subject properties merged is shown by petitioner's application before the Zoning Board , which states that it is seeking to subdivide the parcels. The same is set forth in the notice of proposed application for variance forwarded to surrounding property owners. The Part 1 Full Environmental Assessment Form details the proposed two lot land division for one single family dwelling on each lot and the location within the Critical Environmental Area. Petitioner can now not claim that the parcels were not merged.

The Zoning Board's determination was set forth in a well-reasoned decision dated April 8, 2015. The Board relied upon the testimony of its Land Planner, Christopher Wrede and Anthony Graves, the Chief Environmental Analyst of the Division of Environmental Protection, who both issued reports to the Board.. The application required 12 separate variances. The record demonstrates that the Board has refused to grant similar variance requests since the upzoning created by the establishment of the A-2 Residential District in 1994. The Board relied in particular on an application in 2007, which was denied and withdrawn to permit just one dwelling, instead of two. The variances sought by petitioner were substantial deviations from the Code requirements and the Board adopted the finding of the Land Planner that the proposed land division plan did not appear to conform to the surrounding development pattern. Testimony was also offered as to the location of the parcel within a Critical Environmental Area and the proposals contravention of same. Additionally, the numerous variances needed are set forth under the heading "Variances Requested," in the

application. The transcript of the hearing reveals the concern of the Board members in maintaining the character of the community since the 1994 upzoning and their consistent position, as a zoning board, since that time.

With regard to the Zoning Board's denial of the request for variances, it is hornbook law that in determining whether to grant an area variance, Town Law §267-b(3) is controlling (*see* ***Matter of Affordable Homes of Long Is., LLC v Monteverde***, 128 AD3d 1060, 10 NYS2d 283 [2d Dept 2015]; ***Fortunato v Town of Hempstead Bd. of Appeals***, – AD3d –, 21 NYS3d 322 [2d Dept 2015]).

Although petitioner argues that there are factors weighing in favor of granting the variances, a court cannot substitute its judgment for that of the Board where, as here, there is substantial evidence in the record to support the Board's determination.

Courts have repeatedly upheld administrative board determinations that have denied area variances in connection with applications for the subdivision of property into two nonconforming lots (*see* ***Matter of Gebbie v Mammia***, 13 NY3d 728, 885 NYS2d 450 [2009]; ***Matter of Zanieski v Zoning Bd. Of Appeals of Town of Riverhead***, 64 AD3d 720, 883 NYS2d 279 [2d Dept 2009]; ***Matter of Picarelli v Karl***, 51 AD3d 1028, 858 NYS2d 389 [2d Dept 2008]; ***Matter of Kearney v Kita***, 62 AD3d 1000, 879 NYS2d 584 [2d Dept 2009]).

Here, the denial of variances pursuant to Town Law §267-b(3) has a rational basis in the record, and is not illegal, arbitrary, an abuse of discretion, or the product of generalized community opposition. The relief requested in this special proceeding is denied and the petition is dismissed, in its entirety. This constitutes the decision of the Court.

Submit Judgment on notice.

DATED: 1/25/16

THOMAS F. WHELAN, J.S.C.