Desimone v Town Bd. of the Town of Islip
2016 NY Slip Op 30189(U)
January 15, 2016
Supreme Court, Suffolk County
Docket Number: 11513/15
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 11513/15

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 8/7/15
SUBMIT DATE: 11/6/15
Mot. Seq. # 001 - Pet. decided
PRELIMINARY CONF. 2/26/16
CDISP: No

MARIA DESIMONE and PHILIP DESIMONE,

Petitioners,

-against-

TOWN BOARD OF THE TOWN OF ISLIP, consisting of ANGIE M. CARPENTER, ANTHONY M. SENFT, JR., JOHN C. COCHRANE, JR., STEVEN J. FLOTTERON and TRISH BERGIN WIECHBRODT,

Respondents.

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Attys. For Defendants
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Upon the following papers numbered 1 to 12 read on this Article 78 petition by ; Notice of Petition and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers ; Opposing papers 4-6 ; Reply apers 7-8 ; Other 9-10 (Return); 11-12 (Verified Answer) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the petition (#001) served and filed in this Article 78 proceeding for a judgment reversing and annulling the May 28, 2015 determination of the respondent, Town Board of the Town of Islip, which denied the petitioners' application for a removal of a restrictive covenant requiring owner occupation of the two family residence owned by petitioner, Maria Desimone, is considered under CPLR Article 78 and is granted only to the extent that the petition is hereby converted into a complaint pursuant to CPLR 103[c] for relief pursuant to CPLR 3001 declaring that the respondent Board's determination not to repeal the 1981 owner/occupancy restrictive covenant imposed upon the premises at the time of a zone change is invalid and erroneous for want of substantial relationship to promoting the public health, safety, morals or general welfare; and it is further

ORDERED that a preliminary conference shall be held in this action on **February 26, 2016** at 9:30 a.m. in the courtroom of the undersigned located in the Annex Building of the Supreme Court located at One Court Street, Riverhead, New York 11901, at which counsel are directed to appear.

The premises at issue in this proceeding are located at 350-352 Woodhollow Road, Great River, New York and are improved with a two family dwelling constructed after a conditional change in the zoning classification was granted by the respondent Town Board in May of 1981. This zone change removed the Business 1/Residence AAA classification and imposed the Residence CAA classification which allows the premises to be used as a two family residence. Three conditions were imposed upon the zone change granted by the Town Board in 1981 which were memorialized in a recorded Declaration of Covenants and Restrictions dated September 23, 1981executed by the then owner of the premises (*see* Exhibit B attached to the petition). Of the three conditions imposed, one mandated that the two family dwelling to be constructed on the premises be owner occupied. In or about 1983, the residence was constructed and a certificate of occupancy for use as a two family dwelling issued in November of 1983. The premises were thereafter used for that purpose in accordance with the above described condition.

Petitioner, Maria Desimone, who resides with her co-petitioner in West Babylon, purchased the premises in November of 2012 from the owner/occupant. On January 30, 2013, petitioner, Maria Desimone, obtained a two year rental permit from the Town of Islip for the premises which were therein described as "2 Units in a 2 Family Dwelling". In December of 2014, the petitioner applied for renewal of the permit and was thereafter advised that the same could not issue since the premises were not owner occupied.

By application jointly addressed to the Town of Islip's Town and Planning Boards filed in February of 2015, the petitioner sought to modify the covenants imposed by the Declaration of September 23, 1981 so to eliminate the requirement that the premises be owner occupied. The matter was preliminarily reviewed by the planning department personnel and a hearing before the planning board was held on April 9, 2015. In a memo dated April 23, 2015, the planning board recommended that the application be approved subject to the petitioners' adoption of newly proposed covenants and restrictions drafted by planning department personnel which would be substituted for those imposed in 1981 by the Town board, and to which, the petitioners agreed to in writing on April 15, 2015 and April 22, 2015. These new covenants and restrictions imposed obligations upon the owner to keep the property in a clean and well managed condition, including the maintenance of plantings and other landscape features, all of which were subject to oversight by the Planning Board.

On May 28, 2015, the Town Board conducted a public hearing on the petitioners' application. Thereat, the petitioners' counsel appeared and explained the nature of the application and the restrictions imposed upon the prior zone change, the use of the premises and the character of the neighborhood, after which, the Commissioner of Planning and Development for the Town of Islip was called to comment. Commissioner Zaploski averred that the owner occupancy requirement of

the type imposed in 1981 on the subject premises had essentially been abandoned by the Town and was being replaced with new covenants and restrictions which the planning department proposed and drafted during their review of the petitioner's application. The Commissioner explained that the 1981 covenants and restrictions were aimed at up-keep and property maintenance which the newly proposed covenants and restrictions would assure. The Commissioner went on to state that there were no discernable adverse environmental impacts from the proposed changes and that the County of Suffolk had no interest in the proposal and he concluded his testimony with a recommendation that the Town Board approve the project subject to the new covenants and restrictions to which the petitioners had agreed. In response to questions from an abstaining board member, the Commissioner noted that there are only a handful of two family residences in Great River and most, if not all, are pre-existing, non-conforming uses that are not subject to owner occupancy requirements. He further indicated that the parking provided on the subject premises was adequate.

Several objectors to the proposal expressed their personal reasons for advocating for a denial of the application. Most of the expressed concerns were premised upon fears that the condition of the subject property would deteriorate and become a blight in the neighborhood if it were not owner occupied. One neighbor stated that he observed that the exterior condition of the premises, particularly, the landscaping, had declined in the last couple of years which he attributed to the lack of an owner occupant. Other objections came in the form of an e-mail and other writings that were put into the record by the abstaining town council member, respondent Anthony Senft, Jr.

Following the recusal of council member Anthony Senft, Jr., who resides in close proximity to the subject premises, the respondent Town Board voted on the record to close the hearing and to deny the application. An untitled, unsigned writing filed June 4, 2015, expanded the May 28, 2015 determination of the respondent Town Board to deny the petitioners' application. Said writing contained various recital paragraphs regarding, among other things, that the application would directly contravene the intent of the Town Board in imposing the 1981 covenants and restrictions which purpose were to ensure proper management and maintenance of the premises and to prevent situations likely to occur in cases of absentee landlords, and that there was a lack of proof to support the application on the part of the petitioners. Only one finding is included in the recital paragraphs, namely, that "the Board finds that the covenants and restrictions on the property are appropriate and reasonable as currently existing and help promote the health, safety and welfare of the surrounding community" (*see* Exhibit A of the respondent's uncertified return of proceedings).

The petitioners then commenced this proceeding for a judgment pursuant to CPLR Article 78 annulling and reversing the denial of their application to remove the owner/occupancy requirement imposed by the Town Board on the subject premises in 1981. They characterize the proceeding as one for relief under "Town Law 267-c, which authorizes a party to bring an Article 78 proceeding to review a final determination of a Town Board" (*see* ¶ 4 of the petition). The petitioners challenge the respondent's determination to deny the repeal of the owner/occupancy restrictive covenant as arbitrary, capricious and irrational due to a total lack of support in the record. They further challenge

the respondent's determination as lacking a substantial relationship to the public, health, safety, welfare or morals (*see* ¶ 39 of the petition).

The respondent opposes the petition in an answer in which it asserts, among other defenses, that the petition fails to state a cause of action. The respondent further submits an uncertified return of the proceedings before it and the planning board together with opposing papers prepared by its counsel to which, an affidavit by the Planning Commissioner Zaplosky is attached. Therein, the Commissioner essentially disavows his prior statements recommending approval of the application subject to the new covenants and restrictions drafted by planning department personnel that were put into the record at the public hearing conducted on May 28, 2015 by the respondent Town Board. The Commissioner goes on to state legal conclusions regarding the reasonableness and rationality of the determination of the Town Board to deny the petitioner's application.

For the reasons stated below, the petition is converted into a complaint for relief under CPLR 3001, and a summary determination of the claims set forth in the petition is denied as unavailable as the within proceeding is now plenary rather than summary in nature.

The power to zone "is not a general police power, but a power to regulate land use" (***Sunrise Check Cashing & Payroll Servs., Inc. v Town of Hempstead***, 20 NY3d 481, 485, 964 NYS2d 64 [2013]). "It is a 'fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it'" (***Blue Is. Dev., LLC v Town of Hempstead***, 131 AD3d 497, 15 NYS3d 807 [2d dept 2015], *quoting* ***BLF Assoc., LLC v Town of Hempstead***, 59 AD3d 51, 55, 870 NYS2d 422 [2d Dept 2008]), as a municipality does not have the power to regulate the manner of ownership of a legal estate and may not dictate how property may be owned (*see* ***FGZ & L Prop. Corp. v City of Rye***, 109 AD2d 814, 486 NYS2d 333 [2d Dept 1985], *aff'd.* 66 NY2d 1, 495 NYS2d 321 [1985]). While it is proper for zoning officials to impose appropriate conditions and safeguards in conjunction with a change in zone or a grant of a variance or special permit, such conditions and safeguards must be reasonable and relate only to the real estate involved without regard to the person who owns or occupies it (*see* ***Matter of Dexter v Town Bd. of Town of Gates***, 36 NY2d 102, 105, 365 NYS2d 506 [1975]). A zoning ordinance will thus be struck down if it bears no substantial relation to the police power objective of promoting the public health, safety, morals or general welfare (*see* ***Nicholson v Incorporated Vil. of Garden City***, 112 AD3d 893, 894, 978 NYS2d 288 [2d Dept 2013]; *see also* ***Trustees of Union Coll. in Town of Schenectady in State of N.Y. v Members of Schenectady City Council***, 91 NY2d 161, 165, 667 NYS2d 978 [1977]).

"'[R]estrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy'" (***Blue Is. Dev., LLC v Town of Hempstead***, 131 AD3d 497, *supra, quoting* ***Chambers v Old Stone Hill Rd. Assoc.***, 303 AD2d 536, 537, 757 NYS2d 70 [2d Dept 2003], *affd.* 1 NY3d 424, 774 NYS2d 866 [2004]). The purchase of property with knowledge of a restriction does not bar the purchaser from testing the validity of the zoning ordinance because the zoning ordinance in the very nature of things has reference to land

rather than to owner (*see* ***Blue Is. Dev., LLC v Town of Hempstead***, 131 AD3d 497, *supra; see also* ***BLF Assoc., LLC v Town of Hempstead***, 59 AD3d 55 at 56, *supra*, *quoting* ***Vernon Park Realty, Inc. v City of Mount Vernon***, 307 NY 493, 500, 121 NE2d 517 [1954]).

Challenges to the validity of a "legislative act" are not subject to review in an Article 78 proceeding (*see* ***New York City Health and Hosp. Corp. v McBarnette***, 84 NY2d 194, 616 NYS2d 1 [1984]) and that the power to zone by amendment or otherwise is legislative in nature (*see* ***Neddo v Schrade***, 270 NY 97, 200 NE 657 [1936]; ***Wolf v Town/Village of Harrison***, 30 AD3d 432, 816 NYS2d 186 [2d Dept 2006]). Where the wisdom or merit of a challenged zoning enactment is questioned, the determination of its enactors is entitled to great deference as it is afforded a presumption of validity and constitutionality (*see* ***Robert E. Kurzius, Inc. v Incorporated Vil. of Upper Brookville***, 51 NY2d 338, 434 NYS2d 180 [1980]; ***Town of Huntington v Park Shore Country Day Camp of Dix Hills, Inc.***, 47 NY2d 61, 416 NYS2d 774 [1979]).

Here, the petitioners seek relief from one of three restrictive covenants which were imposed as conditions upon a change in the zoning classification of the subject premises in 1981. The subject condition required that the newly permitted two family residence be owner occupied. While at least one appellate case authority has held that a determination to deny the repeal of a restrictive covenant is actionable in an Article 78 proceeding and measurable under the arbitrary, capricious and irrational standard of review applicable to mandamus to review proceedings (*see* ***Mallins v Foley***, 74 AD3d 1070, 903 NYS2d 492 [2d Dept 2010]), other appellate case authorities have held otherwise finding that a Town board's determination to deny a request to annul or repeal a restrictive covenant was legislative in nature and thus subject to challenge in a declaratory action where the standard of review was whether the denial of such application had a substantial relationship to public health, safety, welfare and morals (*see* ***Blue Is. Dev., LLC v Town of Hempstead***, 131 AD3d 497, *supra*; *see also* ***Wolf vTown Board of Islip***, 133 AD2d 636, 519 NYS2d 744 [2d Dept 1987]; ***Kasper v Town of Brookhaven***, 122 AD2d 200, 504 NYS2d 736 [2d Dept 1986]).

Upon a reading of the petition in its entirety, the court finds that the petition states a legally cognizable claim to annul, repeal or modify by deletion the owner occupancy condition imposed upon the 1981 rezoning of the subject premises, as the petitioner has alleged that the owner/occupancy restrictive covenant imposed is invalid and should be repealed because it bears no substantial relationship to the public, health, safety, welfare and morals (*see* ¶¶ 39, 42-44 of the petition). The petition is thus converted into a complaint for declaratory relief (*see* ***Blue Is. Dev., LLC v Town of Hempstead***, 131 AD3d 497, *supra*; ***Wolf vTown Board of Islip***, 133 AD2d 636, *supra*; *cf.*, ***Rodriguez v McClosky***, 156 AD2d 369, 548 NYS2d 323 [2d Dept 1989]). Since jurisdiction has been obtained over all respondents and there are no issues as to any statute of limitations bar, the court hereby converts the petition, pursuant to CPLR 103[c], into a complaint for a judgment declaring the invalidity of respondent's determination to deny a repeal of the 1981restrictive covenant imposed upon the subject premises pursuant to CPLR 3001 (*see* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 7B, CPLR C7801:5).

In view of the foregoing, the instant action is now plenary in nature and not subject to a summary determination of the type contemplated by CPLR 7801, 7803 and 7804. The court shall thus conduct a preliminary conference on **February 26, 2016**, at 9:30 a.m. in the court room of the undersigned, at which, counsel for the respective parties shall appear ready to confer with the court as to all matters.

DATED: 1/15/16

THOMAS F. WHELAN, J.S.C.