

**Matter of Woodhull Landing Realty Corp. v
DeChance**

2016 NY Slip Op 32137(U)

August 4, 2016

Supreme Court, Suffolk County

Docket Number: 3140-2014

Judge: Peter H. Mayer

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COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 3-26-14
ADJ. DATE 4-29-14
Mot. Seq. # 001 - MG

-----X	
In the Matter of the Application of	: Richard I. Scheyer, Esq.
	: Attorney for Petitioner
	: 110 Lake Avenue South, Suite 46
WOODHULL LANDING REALTY CORP.,	: Nesconset, New York 11787
	:
Petitioner,	: Annette Eaderesto
	: Brookhaven Town Attorney
For an Order Pursuant to Article 78 of the Civil	: 1 Independence Hill
Practice Law and Rules,	: Farmingville, New York 11738
	:
- 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.	:
-----X	

Upon the reading and filing of the following papers in this matter: (1) Notice of Petition, dated February 12, 2014, and supporting papers; (2) Verified Answer and Return, dated August 15, 2014, and supporting papers; (3) Reply Affidavit by the petitioner, dated September 5, 2014, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

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ORDERED that the Article 78 petition (seq. #001) by petitioner, Woodhull Landing Realty Corp. (“petitioner” or “Woodhull”), which seeks an order, *inter alia*, setting aside as arbitrary and capricious the Decision by the respondent Zoning Board of Appeals (“ZBA”) denying petitioner’s application and granting the petitioner a rehearing, is granted to the extent set forth herein; and it is further

ORDERED that this matter is remanded to the ZBA for a hearing to determine whether or not Woodhull is entitled to the relief requested in the subject application; and it is further

ORDERED that counsel for the petitioner shall promptly serve a copy of this Order upon counsel for the ZBA, and shall promptly thereafter file the affidavit of such service with the Suffolk County Clerk.

The subject of this Article 78 petition is the petitioner’s property located on the Northwest corner of Lower Rocky Point Road and Woodhull Landing Road, Miller Place, New York. The property was purchased by the petitioner from non-party Gust Politis in October 2012. On the property are three residential structures, each built by Mr. Politis’s father, Manuel Politis. One building is a one-family residential structure built sometime in 1939. Another is a legal two-family residence for which a Certificate of Occupancy was granted by the Town Brookhaven (the “Town”) on April 21, 1960. The third structure is a three-family residence, which has existed on the Town’s tax rolls since 1958.

In 1995, Gust Politis, the son of Manuel Politis and then-owner of the property, filed an application with the Town for approval of an addition to the one-family residence, which had been added to the structure by Manuel Politis in 1950. A hearing in connection with that application was held on June 28, 1995. The minutes of that hearing indicate that each of the three structures was erected prior to 1959. Apparently, the section of the Town Code requiring Certificates of Occupancy did not take effect until 1959, after the structures were built. Although a Certificate of Occupancy had already been issued for the two-family dwelling in 1960, the hearing minutes indicate that Mr. Politis applied for a Certificate of Occupancy for all three structures. At the conclusion of the hearing, the ZBA Chairman concluded that since the two-family and three-family structures were not built prior to 1937, they were illegal structures. On that basis, Mr. Politis’s 1995 application was denied.

On October 1, 2012, Woodhull purchased the property from Mr. Politis. Thereafter, Robert Thomas, Woodhull’s President, hired John Weis to obtain Certificates of existing use for the one-family and the three-family structures. According to his affidavit in support of the petition, Mr. Weis had previously been employed by the Town as a Zoning Inspector from 1988 to 2012. By correspondence to the ZBA dated January 2, 2014, Mr. Weis applied for a hearing regarding the previously held hearing of June 28, 1995 (the “new” or “2014 application”). In his correspondence, Mr. Weis noted the various changes in the current 2014 application as compared to the 1995 application. In this regard, the new application was for a Certificate of Existing Use for the one-family and three-family dwellings. Also, unlike the 1995 application, the two-family dwelling was not a part of the 2014 application, since a Certificate of Occupancy had been issued in 1960 and no variance was necessary. Mr. Weis further noted that the addition to the single-family dwelling was also deleted and not part of the 2014 application. Mr. Weis also concluded that the 1995 application had been denied in error because of the ZBA’s improper use in this case of the 1937 Code, instead of using the 1959 Code.

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In response to Woodhull's 2014 application, the ZBA issued a written Decision, dated January 10, 2014. Although Woodhull was the applicant, the Decision listed Gust Politis as the applicant. According to the Decision, the ZBA considered the new application to be one for permission to re-apply, and found that "while characterized differently, the [2014] request to re-open . . . seeks the same relief previously denied to the applicant." Accordingly, the request for a rehearing was summarily denied. While this "Gust Politis Decision" indicates that a public hearing was held on January 8, 2014 regarding the 1995 application and related June 28, 1995 hearing, the pleadings and exhibits are devoid of any notice of the purported January 8, 2014 public hearing, and devoid of any minutes of such hearing.

The ZBA also issued a second Decision dated January 10, 2014, which correctly lists Woodhull as the applicant. As with the "Gust Politis Decision," this second Decision indicates that "a public hearing [had been] [h]eld [on] January 8, 2014." Also as with the "Gust Politis Decision," the pleadings and exhibits are devoid of any notice of the purported public hearing and devoid of any minutes of such hearing. In this "Woodhull Decision," the Woodhull application was postponed for hearing on February 5, 2014. Thereafter, a February 21, 2014 ZBA Decision was issued by the ZBA. As with the ZBA's other Decisions, this Decision also indicates that a public hearing was held, this time on February 19, 2014, regarding the January 8, 2014 postponement. The minutes of the February 19, 2014 session indicate that the prior application was denied for seeking essentially the same relief. On that basis, the ZBA summarily dismissed Woodhull's application. Although minutes of a February 19, 2014 ZBA session are annexed to the Respondents' Return, the pleadings and exhibits are, once again, devoid of any notice of the purported February 19, 2014 public hearing.

In its petition, Woodhull contends that the ZBA failed to give notice of the hearings purportedly held on January 8, 2014 and February 19, 2014. With regard to proper notice of a ZBA hearing, Town Law §267-a(7) states that "[t]he board of appeals shall fix a reasonable time for the hearing of the appeal or other matter referred to it and give *public notice of such hearing by publication in a paper of general circulation in the town at least five days prior to the date thereof*. . . . Upon the hearing, any party may appear in person, or by agent or attorney" (emphasis supplied). When a rehearing is to be held by a zoning board of appeals, Town Law §267-a(12) mandates, in pertinent part, that "[s]uch *rehearing is subject to the same notice provisions as an original hearing*" (emphasis supplied). Since there is no proof of compliance with the notice requirements of Town Law §267-a(7) and §267-a(12), the Court concludes that the ZBA failed to establish proper notice of the January 8, 2014 and February 19, 2014 purported hearings.

Woodhull also argues that the ZBA's refusal to afford Woodhull a hearing on its application was arbitrary and capricious and that this matter, therefore, should be remanded for the ZBA to consider Woodhull's application after a properly noticed hearing. Pursuant to Town Law §267-b(3)(b), in making its determination with regard to a requested area variance, a zoning board of appeals must consider "the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant." As further set forth in that statute, the board must also consider: "(1) whether 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) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the

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neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance” (Town Law §267-b[3][b]).

A local zoning board has broad discretion in considering variance applications, and judicial review is limited to ascertaining whether the action taken by the zoning board was illegal, arbitrary and capricious, or an abuse of discretion (see *Matter of Ifrah v Utschig*, 98 NY2d 304, 746 NYS2d 667 [2002]; *Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 259 [1995]; *Lee v Zoning Bd. of Appeals of Town of Putnam Valley*, 1 AD3d 600, 768 NYS2d 26 [2d Dept 2003]). A zoning board's interpretation of its zoning ordinance is entitled to great deference, and will not be overturned by a court, unless it is unreasonable or irrational (see *Matter of Watkins v Town of N.E. Zoning Bd. of Appeals*, 136 AD3d 836, 24 NYS3d 521 [2d Dept 2016]; *Matter of Green 2009, Inc. v Weiss*, 114 AD3d 788, 980 NYS2d 510 [2d Dept 2014]; *Matter of Mejias v Town of Shelter Is. Zoning Bd. of Appeals*, 298 AD2d 458, 751 NYS2d 409 [2d Dept 2002]; *Matter of Sposato v Zoning Bd. of Appeals of Vil. of Pelham*, 287 AD2d 639, 732 NYS2d 19 [2d Dept 2001]).

The determination to rehear an application is also within the discretion of a zoning board, and a zoning board may refuse to rehear an application in the absence of new facts or a change of circumstances (see *Matter of Moore v Town of Islip Zoning Bd. of Appeals*, 28 AD3d 772, 813 NYS2d 542 [2d Dept 2006]; *Matter of Lee v Zoning Bd. of Appeals of Town of Putnam Valley*, 1 AD3d 600, 768 NYS2d 26 [2d Dept 2003]; *Matter of Falco v Town of Islip Zoning Bd. of Appeals*, 283 AD2d 576, 725 NYS2d 221 [2d Dept 2001]). This is so even when the second application is brought by a different applicant (see *Matter of Pettit v Board of Appeals of Town of Islip*, 160 AD2d 1006, 554 NYS2d 723 [2d Dept 1990]). However, a zoning board may not refuse to consider an application with respect to which there has been a substantial change of circumstances since the prior denial (see *Matter of Moore v Town of Islip Zoning Bd. of Appeals*, 28 AD3d 772, 813 NYS2d 542 [2d Dept 2006]; *Matter of Siciliano v Scheyer*, 131 AD2d 679, 516 NYS2d 758 [2d Dept 1987]).

As evidenced by the ZBA's January 10, 2014 “Gust Politis” Decision, Mr. Politis is listed as the applicant, despite Mr. Politis having sold the property to Woodhull more than a year before. In addition to listing the wrong applicant, without explanation the ZBA concluded in its Decision that the application “[sought] the same relief previously denied to the applicant.” The Court finds that the 2014 application is factually distinguishable from the 1995 application, that there had been a substantial change of circumstances since the ZBA's prior denial in 1995, and that the relief sought in each was substantially different. First, although Mr. Politis was the applicant and property owner when the 1995 application was submitted, Woodhull was the owner at the time of the 2014 application. Second, while Mr. Politis's 1995 application sought Certificates of Occupancy for all three structures, Woodhull's 2014 application was for a Certificate of Existing Use (not a Certificate of Occupancy) for the one-family and three-family dwellings (not for all three structures). Third, unlike the 1995 application, the two-family dwelling was not a part of the 2014 application, since a Certificate of Occupancy was issued in 1960 and no variance was necessary. Fourth, in the 2014 application, the addition to the single-family dwelling was deleted.

The Court finds that the foregoing constitute substantial changes in circumstances and factual distinctions between the 2014 application and the 1995 application. Lastly, in his affidavit in support of the

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petition Mr. Weis, as former Town Zoning Inspector, concludes that the 1995 application was denied in error because of the ZBA's improper use of the 1937 Code, instead of the 1959 Code. The respondents fail to submit competent evidence to refute these conclusions.

With regard to the respondents' assertion that the ZBA's 2014 denial should have res judicata effect, The doctrine of res judicata is inapplicable where the circumstances giving rise to a board's determination of a prior application are factually distinguishable from the later application (see *Matter of Hunt v Bd. of Zoning Appeals of Inc. Village of Malverne*, 27 AD3d 464, 812 NYS2d 581 [2d Dept 2006]; *Matter of Riina v Baum*, 300 AD2d 665, 754 NYS2d 644 [2d Dept 2002]; *Matter of Josato v Wright*, 288 AD2d 384, 733 NYS2d 214 [2d Dept 2001]; *Matter of Peccoraro v Humenik*, 258 AD2d 465, 684 NYS2d 588 [2d Dept 1999]).

Based upon the foregoing, the Court finds that the ZBA's denial of Woodhull's 2014 application was arbitrary and capricious, and that Woodhull is entitled to a properly noticed hearing and determination of its 2014 application. Therefore, the matter is remanded to the ZBA for a hearing to determine whether or not Woodhull is entitled to the relief requested in the subject application (see *Matter of Moore v Town of Islip Zoning Bd. of Appeals*, 28 AD3d 772, 813 NYS2d 542 [2d Dept 2006]; *Matter of Siciliano v Scheyer*, 131 AD2d 679, 516 NYS2d 758 [2d Dept 1987]).

This constitutes the Order and Judgment of the Court.

Dated: August 4, 2016


PETER H. MAYER, J.S.C.

FINAL DISPOSITION

NON FINAL DISPOSITION