

**Matter of Waterways Dev. Corp. v Town of
Brookhaven Planning Bd.**

2019 NY Slip Op 33291(U)

November 4, 2019

Supreme Court, Suffolk County

Docket Number: 0771/2018

Judge: William G. Ford

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SHORT FORM ORDER

INDEX NO.: 0771/2018

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY**

PRESENT:

**HON. WILLIAM G. FORD
JUSTICE of the SUPREME COURT**

**Motion Submit Date: 07/11/19
Mot SCH: 08/07/19
Mot Seq #: 001 - MD**

_____x

**In the Matter of the Application of
WATERWAYS DEVELOPMENT CORP.,**

Petitioner,

**For a Judgment Pursuant to Article 78 of the
Civil Practice Law & Rules**

-against-

**THE TOWN OF BROOKHAVEN PLANNING
BOARD & THE TOWN OF BROOKHAVEN,**

Respondents.

_____x

**PETITIONER'S COUNSEL:
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Read on the instant special proceeding commenced by petitioner under CPLR Article 78, the Court considered the following papers: Petitioner's Notice of Petition, Verified Petition, Memorandum of Law in Support, Affidavits and other supporting papers; Respondent's Verified Answer with Objections in Point of Law; Certified Administrative Return with Exhibits, Affirmation & Memorandum of Law in Opposition and other opposing papers; Petitioner's Reply Affidavit & Affirmation & other supporting papers; and upon due deliberation and full consideration of the same; it is

ORDERED that the Verified Petition pursuant to CPLR Article 78 seeking an order vacating, annulling or otherwise setting aside respondent's determination reversing and rescinding a prior approval of petitioner's request for additional time to obtain a building permit connected with site plan amendment and modification is **denied** as follows; and it is further

ORDERED that petitioner's counsel is hereby directed to serve a copy of this decision and order with notice of entry via certified first-class mail, return receipt requested on respondent's counsel; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be

required.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

Petitioner Waterways Development Corporation commenced this special proceeding pursuant to CPLR Article 78 seeking to challenge an administrative determination of respondent Brookhaven Town's decision to overrule its Planning Board's permitting petitioner an extension on its deadline to obtain a building permit in support of site plan amendment, modification and review pertaining to its real property located in Center Moriches, Suffolk County.

For the sake of brevity, only the salient facts as pertinent to the particular matter before this Court are set forth below. Otherwise the Court assumes the parties familiarity with long litigation history and background previously set forth by the Supreme Court and the Appellate Division as summarized by this Court in short-form decisions and orders of this Court dated May 29, 2019 and October 29, 2019, in respondent's related declaratory judgment action commenced in the matter *Town of Brookhaven v. Waterways Development Corporation*, Index No. 623794/2017.

Petitioner as noted above owns real property which consists of a zoned planned retirement community in Center Moriches which has long been the subject of litigation between the parties, most recently resulting in a determination by the Supreme Court, Appellate Division, Second Department in 2015 that petitioner has vested rights to build, and as relevant here, conclude construction of the final phase of its property from an approval of its site plan rendered by the Brookhaven Town Planning Board in 1987.

Presently construction on defendant's zoned planned retirement condominium community's final phase has stalled due to complications arising from resolution of prior litigation and community complaints and dissatisfaction with the site's condition. As relevant here, petitioner prepared and file an amended site plan with respondents with the purpose and desire to prepare to finalize construction on the final phase of its "midrise" condominium community as a result of resolution of prior litigation. As part of the review of that plan, respondents' advised petitioner to revise the plans to include 3 preexisting construction and storage trailers/containers on the premises since as early as 2001 when petitioner acquired title over the subject property from its predecessor in interest.

For reasons unrelated to the present phase of litigation between the parties, petitioner came before the Town after the resolution of the prior litigations seeking site plan amendment, modification and approval of the 1987 site plan the Appellate Division decreed petitioner had vested rights to build on. Specifically, due to a settlement agreement with the homeowner's association of the condo community relating to construction of tennis courts, petitioner sought to amend the site plan to reflect the addition of those amenities, as well as to modify the plan to include the preexisting construction storage trailers and containers on premises. In response to this effort, by decision dated October 25, 2016, the Planning Board determined that in order to permit defendant to resume construction to complete the final phase, petitioner had to obtain a valid building permit. Thereafter, 2 public hearings were held in connection with petitioner's request to amend the site plan on July 11, 2016 and August 1, 2016. Present at those meetings s were representatives from the Town Law Department, defendant's counsel and principal, and residents of the retirement community, some of which formed the community's civic

association¹. The presence of the community members was notable because dating back to sometime in or around November 2015, they had made numerous and vociferous complaints that defendant's trailers and storage containers were nonconforming and non-code compliant structures, presented as an eyesore, an attractive nuisance, had been previously vandalized or were otherwise public safety and health hazards.

On October 17, 2016 the Planning Board then decided by unanimous vote to conditionally approve the petitioner's amended site plan, as relevant here, concerning the trailers and containers. Following that vote, the Planning Board issued "Findings and Conclusions" dated October 25, 2016 explaining that the approval was conditioned on petitioner's addressing the residents' aesthetics complaints, i.e. installing "skirting" around the trailers and containers and/or repair their doors, painted their exterior surfaces. Further, the Board required petitioner's agreement to remove those structures within 2 years, unless further extension was granted by the Board. By that determination, the Board further determined that the site plan, as amended, would expire within 3 years, unless further extension issued.

Thereafter, the Planning Board extended petitioner's deadlines to remove the trailers or obtain permits by decision dated March 17, 2017 which pushed petitioner's deadline to apply for a permit to November 1, 2017. In December 2016, petitioner applied seeking a further 6-month extension to apply for a building permit, arguing that the Planning Board's earlier conditions concerning the trailers and containers had been satisfied. With this interpretation of the situation, petitioner believed it had until effectively October 26, 2018 to either remove the trailers and storage containers, or file for a building permit with the Town. Further, petitioner was of the belief its amended site plan was ripe until October 25, 2019 under its original 2-year building permit. All through petitioner explained that it had delayed applying for the building permit in part because its original project architect had passed away.

On January 8, 2018, petitioner and its counsel appeared before the Planning Board with a further request for an extension, which was approved for an additional 6 months. However on January 22, 2018, at the insistence of the Town's Attorney, petitioner's extension request was recalled and placed back on Planning Board's meeting agenda. The Town Attorney's Office then opined that the Planning Board's previous extensions were null and void or illegal to the extent that the Board permitted petitioner to maintain the storage trailers and containers, not included in the original 1987 site plan, without possessing a valid building permit. In this regard, the Town Attorney advised that it relied upon a plain reading of the town zoning code.

Relying on the advice of its counsel, the Planning Board then reversed its prior decision and denied petitioner any further extensions. The Town Building Department then conducted a search of its records on file with the Town Clerk and determined that from November 3, 2017 until December 4, 2017, no new building permit application had been filed by the petitioner. The Planning Department then conducted a similar search gleaned the same results. As a result, in December 2017, premised on the previously received resident complaints, the Town ticketed petitioner and commenced a code enforcement prosecution in the Suffolk County District Court on allegations of violations of Brookhaven Town Administrative Code §§ 85-158(A) & 85-12.

¹ The Waterways Civics Association previously appeared before this Court in connection with the Town's prior declaratory judgment action moving for permissive intervention there. That application was denied by short-form decision and order dated May 29, 2019.

The merits of that proceeding were coextensive and intertwined with the substance of the Town's subsequent declaratory judgment action previously before this Court.

SUMMARY OF THE PARTIES' CONTENTIONS & ARGUMENTS

This proceeding followed with petitioner essentially asserting that the Town rescinded prior grants of extensions of time for petitioner to file for a building permit in bad faith. Petitioner stresses that the alleged offending structures have been continuously on premises from 2001 to the present time according to a mutual agreement or understanding it terms a "standstill" agreement between it and the Town while the prior litigation worked its way throughout the motion and appellate courts. Thus, petitioner argues the Town's overruling its planning board extension is arbitrary and capricious and thus seeking an order of this Court reversing that refusal and a remand back to the Planning Board for further proceedings in contemplation of review of petitioner's building permit.

Additionally, petitioner also argues that it should be permitted to proceed with construction with something less than a full building permit, which would entail a more onerous and exacting standard than a foundational requirement², which petitioner claims would be more than sufficient to allow for completion of its project. Petitioner states that the Town has on at least one other occasion permitted a similarly situated builder to proceed with construction with a foundational permit, instead of a full building permit. Lastly, petitioner contends that the Town's Code is insufficiently clear or vague as regards what permits are required to legalize the trailers and containers, and thus this should militate in petitioner's favor against the Town.

Petitioner claims this matter is ripe for determination because the Planning Board's reversal of the extension is a final administrative decision which inflicted actual injury on the petitioner. It argues that as a matter of law, the Planning Board lacks the authority to interpret the Town's zoning code and thus its determination could not be administratively exhausted with a further appeal to the Town Zoning Board of Appeals.

At bottom, petitioner believes that respondents' adverse determination was founded upon concession to irrational and generalized community opposition and thus is not backed by substantial evidence and should be overturned. Further, petitioner disputes the Town Attorney's authority to recall a matter before the Planning Board's public meetings' agenda and to administratively overrule its decision as occurred here concerning interpretation of the Town Code provisions concerning permitting and extensions. Here, the Petition charges that determination as irrational or legally unsupportable. Petitioner relies in part on administrative *res judicata* arguing that the Planning Board's determination is unsupported by substantial evidence or is irrational to the extent it deviates from past practice without sufficient explanation.

Lastly, petitioner asserts that in the alternative, even if the Planning Board was the appropriate decisionmaker imbued with authority to conclusively interpret and determine manners of the Town's zoning code, it did so erroneously when it determined that the

² Petitioner contends that in connection with the subject premises and the anticipated completion of construction that the Town has already issued a valid foundational permit, or that documentation supporting such permitting is already on file with the Town.

construction storage trailers and containers were non-code compliant. Petitioner argues that the zoning code must be interpreted to apply to structures utilized as temporary construction site trailers or offices, which it urges was not the case here.

For their part, respondents answered the Petition with objections in point of law and served and filed an administrative return. By their answer, respondents interpose objections in point of law contending that petitioner failed to exhaust administrative remedies by not seeking a timely appeal of the subject adverse determination before the Town Zoning Board of Appeals; mootness; and on the merits arguing that the determination under review was discretionary in nature and thus not proper for mandamus and/or was rational and supported by substantial evidence. Respondents dispute that a “standstill” agreement had ever been reached. Nevertheless, respondents note that to date petitioner has yet to file for a building permit. Further, the Town contends it cannot be compelled to violate its zoning code and permit construction to resume or to amend a site plan without a full building permit.

STANDARDS OF REVIEW

General Article 78 Standard Concerning Site Plan Review

At the outset, generally speaking the law of land use and zoning within the Article 78 realm provides that courts are minded that “the determination of a municipal land use agency must be confirmed if it was rational and not arbitrary and capricious” (*Home Depot, U.S.A. v Town Bd. of Town of Hempstead*, 63 AD3d 938, 938, 881 NYS2d 160, 162 [2d Dept 2009]). Thus, a local planning board has broad discretion in reaching its determination on applications such as the petitioner's, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion. A planning board's determination “should be sustained upon judicial review if it was not illegal, has a rational basis, and is not arbitrary and capricious” (*Ramapo Pinnacle Properties, LLC v Vil. of Airmont Planning Bd.*, 145 AD3d 729, 730, 45 NYS3d 105, 107 [2d Dept 2016]). If the challenge action taken is without foundation in fact or not justified it is arbitrary and capricious (*see Pell v Bd. of Educ.*, 34 NY2d 222, 231 [1974]; *Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; *Matter of Wooley v N.Y. State Dep't of Corr. Servs.*, 15 NY3d 275, 280 [2010]; *Ward v City of Long Beach*, 20 NY3d 1042, 1043 [2013]).

The motion court is therefore cautioned that its review on a land use special proceeding challenging the local planning board's adverse determination is constrained to consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination” (*In-Towne Shopping Centers, Co. v Planning Bd. of Town of Brookhaven*, 73 AD3d 925, 926, 901 NYS2d 331, 332 [2d Dept 2010]; *see also Hejna v Planning Bd. of Vil. of Amityville*, 105 AD3d 846, 846, 961 NYS2d 801, 802 [2d Dept 2013][local planning board has broad discretion in deciding applications for site-plan approvals, and judicial review is limited to determining whether the board's action was illegal, arbitrary and capricious, or an abuse of discretion]).

Our courts define rational as having “some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition” (*JSB Enterprises, LLC v Wright*, 81 AD3d 955, 956, 917 NYS2d 302, 303 [2d Dept 2011]). Courts consider “substantial evidence” only to determine whether the record contains sufficient evidence to

support the rationality of the determination being questioned (*Harn Food, LLC v DeChance*, 2018 WL 1309927, at *1 [2d Dept Mar. 14, 2018]).

Mandamus to Compel

A proceeding pursuant to CPLR article 78 in the nature of mandamus is an appropriate vehicle by which “to compel acts that officials are duty-bound to perform, regardless of whether they may exercise their discretion in doing so.” “A subordinate body can be directed to act, but not how to act, in a matter as to which it has the right to exercise its judgment” (*Jurnove v Lawrence*, 38 AD3d 895, 896, 832 NYS2d 655, 657 [2d Dept 2007]). “Mandamus ... is an extraordinary remedy that, by definition, is available only in limited circumstances”. “[T]he remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion” (*Willows Condominium Ass'n v Town of Greenburgh*, 153 AD3d 535, 536, 60 NYS3d 233, 235 [2d Dept 2017]). It is also only available where the petitioner demonstrates a clear legal right to the relief sought (*Glyka Trans, LLC v City of New York*, 161 AD3d 735, 739, 76 NYS3d 585, 590 [2d Dept 2018]). Moreover, the act sought to be compelled must be based upon a “specific statutory authority mandating performance in a specified manner” (*Highland Hall Apartments, LLC v New York State Div. of Hous. and Community Renewal*, 66 AD3d 678, 682, 888 NYS2d 67, 71 [2d Dept 2009]).

The difference between ministerial or discretionary acts is described thusly: “discretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result’ ” (*Katz v Town of Clarkstown*, 120 AD3d 632, 634, 990 NYS2d 880, 881-82 [2d Dept 2014]; *Haddock v City of New York*, 75 NY2d 478, 484 [1990]; *Idlewild 94-100 Clark, LLC v City of New York*, 27 Misc3d 1006, 1022, 898 NYS2d 808, 821 [Sup Ct, Kings Co. 2010][holding that where the law requires an entity or officer to do a specified act, in a specified way, upon a conceded state of facts, without regard to its or his or her own judgment as to the propriety of the act, the duty is ministerial in character]).

Ripeness

To determine whether a matter is ripe for judicial review, it is necessary ‘first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied’ ”(*E. End Resources, LLC v Town of Southold Planning Bd.*, 135 AD3d 899, 900, 26 NYS3d 79, 82 [2d Dept 2016]). Specifically, the court must determine whether an agency has arrived at a definitive position on the issue that inflicts an actual concrete injury and whether the resolution of the dispute requires any fact-finding, for “[e]ven if an administrative action is final, however, it will still be ‘inappropriate’ for judicial review and, hence, unripe, if the determination of the legal controversy involves the resolution of factual issues” (*Town of Riverhead v Cent. Pine Barrens Joint Planning and Policy Com'n*, 71 AD3d 679, 681, 896 NYS2d 382, 384 [2d Dept 2010]).

Stated conversely, the agency’s administrative determination is nonfinal and not concrete “if the injury is not actual or concrete if the injury purportedly inflicted by the agency could be prevented, significantly ameliorated, or rendered moot by further administrative action or by

steps available to the complaining party” (*Ranco Sand and Stone Corp. v Vecchio*, 124 AD3d 73, 81, 998 NYS2d 68, 74–75 [2d Dept 2014], *aff’d*, 27 NY3d 92, 49 NE3d 1165 [2016]). “If the anticipated harm is insignificant, remote or contingent the controversy is not ripe” “A fortiori, the controversy cannot be ripe if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.” Well settled law has previously determined that “mere participation in an ongoing administrative process is not, in and of itself, an actual concrete injury” (*Equine Facility, LLC v Pavacic*, 155 AD3d 1033, 1035, 66 NYS3d 521, 523 [2d Dept 2017]).

The courts have determined that two requirements exist for the purposes of “fixing the time when agency action is deemed final and binding. ‘First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party’ ” (*Kaneev v City of New York Envtl. Control Bd.*, 149 AD3d 742, 744, 52 NYS3d 107, 110 [2d Dept 2017]).

DISCUSSION

The Planning Board’s Authority to Determine

The authority to approve or deny applications for site development plans is generally vested in local planning boards” (Town Law § 274–a[2][a]). Under Town Law § 274–a(4) a planning board, where otherwise authorized by ordinance or local law, “shall have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to a proposed site plan” (*Rock of Salvation Church v Vil. of Sleepy Hollow Planning Bd.*, 166 AD3d 985, 986, 89 NYS3d 208, 209 [2d Dept 2018]).

The authority to approve or deny applications for site development plans is generally vested in local planning boards (see Town Law § 274–a[2][a]). “Site plans shall show the arrangement, layout and design of the proposed use of the land on said plan. The ordinance or local law shall specify the land uses that require site plan approval and the elements to be included on plans submitted for approval. The required site plan elements which are included in the zoning ordinance or local law may include, where appropriate, those related to parking, means of access, screening, signs, landscaping, architectural features, location and dimensions of buildings, adjacent land uses and physical features meant to protect adjacent land uses as well as any additional elements specified by the town board in such zoning ordinance or local law” (*Valentine v McLaughlin*, 87 AD3d 1155, 1157, 930 NYS2d 51, 53 [2d Dept 2011]; *accord Greencove Assoc., LLC v Town Bd. of Town of N. Hempstead*, 87 AD3d 1066, 929 NYS2d 325, 327 [2d Dept 2011]).

However, it remains true that a planning board's decision must be based on an “objective factual basis” and not “subjective considerations such as general community opposition” (*Schwartz v LaRocca*, 167 AD3d 906, 908, 90 NYS3d 246, 248 [2d Dept 2018]; *accord Luburic v Zoning Bd. of Appeals of Vil. of Irvington*, 106 AD3d 824, 825, 966 NYS2d 440, 442 [2d Dept 2013]; *Cacsire v City of White Plains Zoning Bd. of Appeals*, 87 AD3d 1135, 1137, 930 NYS2d 54, 57 [2d Dept 2011]).

The Town's Zoning Code

At the center of the parties' dispute is the Town's Zoning Code, Brookhaven Town Administrative Code § 85-889 entitled "Construction site trailers or mobile structures" concerning the alleged offending structures on premises and the need for petitioner to acquire a building permit to maintain their presence which provides as follows in pertinent part:

(A) Intent. The Town Board of the Town of Brookhaven hereby finds and determines that the use of temporary mobile structures or trailers may be appropriate for large-scale development projects, when located on the approved development site, for use exclusively as a field office(s), subject to reasonable regulation calculated to ensure the health, safety and welfare of neighboring residents and the public at large

(B) Mobile structures or trailers shall be permitted in all zoning districts for temporary use as an on-site field office(s), subject to the following requirements:

- (1) Said mobile structure or trailer shall be located on the same site which is the subject of the approved final development plan;
- (2) **a valid building or foundation permit has been issued;**
- (3) appropriate sanitary, water supply and electrical service shall be installed as evidenced by approval and/or permit of the Suffolk County Department of Health Services, the Chief Building Inspector, and an authorized electrical inspection company, respectively.

(C) Construction site trailers shall be subject to site plan review and approval of the Planning Board, which shall make its determination based on the following considerations:

...

- (2) the extent of intrusion upon neighboring properties
- (3) such other factors as the Board shall deem relevant

(D) Upon the Planning Board's final site plan approval, a permit therefor shall be issued by the Chief Building Inspector for a period not exceeding two years, unless otherwise extended by the Board.

Appearing in respondents' administrative return first is the Planning Board's chair letter dated January 30, 2018 advising petitioner that, in consultation with the Town's Attorney, that its further extension to obtain a building permit had been denied without there being a valid building permit previously issued at the time of the extension request's consideration in reliance on an interpretation of Brookhaven Town Code § 85-889(D). Put differently, respondents' position is that under the Town Code, the Planning Board was constrained to deny any and all further requests for extension by petitioner, including requests to maintain or permit the allegedly non-code compliant structures (trailers and containers), unless and until it received a valid building permit, regardless of a valid amended site plan. Further extensions would be conditioned upon approval of a building permit.

Reconciling the parties' rivaling contentions with precedent, the Court commences its analysis concluding that petitioner's challenge is ripe and thus respondents' objection in point of law contending that the Petition is unripe for petitioner's failure to exhaust administrative remedies is thus hereby **denied and dismissed** as lacking merit. Respondents contend that the Planning Board lacks the authority conferred upon the Town Zoning Board of Appeals to be the final administrative arbiter and interpreter of matters of local zoning under the town zoning code (*see* Brookhaven Town Administrative Code § 85-30 providing that the town zoning code exists to assist and enable ZBA members to determine and interpret zoning matters). The Planning Board within its discretion made a determination to grant petitioner's request for further extension of its deadline to apply for a building permit in connection with its application to amend its site plan to *inter alia* include the storage trailers and containers. Armed with that extension, petitioner had an expectation that it had additional time to obtain the building permit, irrespective of whether it had adequate grounds to explain delays, beyond the entire scope and extent of the parties' longstanding history of protracted litigation. Shortly thereafter, the Town's Attorney intervened and advised the Planning Board that its action was illegal under the zoning code. The Planning Board itself as a matter of law is not the appropriate actor to determine the legality of a zoning action. Thus, ordinarily petitioner's avenue of recourse would be to appeal to the ZBA. However, here the Planning Board did not act to grant or deny site plan review or a permit. Rather, they granted and then summarily rescinded an extension of time, a precondition, to permit grant and site plan approval. Thus, this Court agrees with petitioner that requiring it to further appeal to the ZBA would be superfluous and would not be appropriate where the sole issue boils down to whether the Board appropriately exercised its discretion to abide its counsel's advice to deny the extension request. Therefore, this Court will not summarily dismiss the Petition and will consider its merits.

Proceeding to the Petition's merits, next comes petitioner's assertion that the zoning code does not apply to bar the presence of the trailers or containers. In order to determine whether mandamus lies to compel respondents grant of petitioner's extension request or for an order compelling respondents' approval of the requested amended site plan, this Court first must determine whether respondents' interpretation of the zoning code at issue was reasonable.

Zoning law is settled that because "[z]oning ordinances are in derogation of the common law and, thus, must be strictly construed in favor of the owner whose land is being regulated" (*Lucas v Bd. of Appeals of Vil. of Mamaroneck*, 109 AD3d 925, 929, 974 NYS2d 464, 468 [2d Dept 2013]; *cited with approval by Waterways Dev. Corp. v Town of Brookhaven Zoning Bd. of Appeals*, 126 AD3d 708, 712, 5 NYS3d 450, 454 [2d Dept 2015][acknowledging that any such ambiguities in a local zoning code "must be resolved in favor of the property owner"]; *leave to appeal denied* 25 NY3d 909 [2015]). A plain reading of the zoning code provision at issue finds no internal conflict or tension that petitioner suggests. Instead, as an initial matter, the Court notes that § 85-889(B) provides that all "[m]obile structures or trailers shall be permitted in all zoning districts for temporary use as an on-site field office." The administrative record here however makes clear that petitioner's alleged offending structures were for the storage of construction materials and for a construction field office. A perusal of the code's definitions section, § 85-1 reveals that neither material term is separately defined, thus their ordinary meaning and usage is thus presumed.

Now, the record is clear that for all intents and purposes that petitioner's structure has been present on premises from 1999 to 2002 while construction was active, and from 2002 to

2016 during the pendency of litigation. The latter period seems to support petitioner's suggestion that an informal agreement or understanding existed between the parties concerning petitioner's maintenance of the structures while the construction site lay dormant. Whether that was the case or not, the status quo now is that residents made complaints and the Town respondents took actions responsive to these complaints, including code enforcement proceedings in District Court. The remaining provisions of the zoning code make explicitly clear that construction sales offices may be legally present on a construction site, provided a foundational or building permit has already been issued. Applied here, it is clear that petitioner does not possess a valid building permit, nor has he indicated that a foundation permit has been obtained. Thus, petitioner sought the extension which had been granted on at least one occasion prior to this dispute arising.

To this Court's mind, all of the above militates towards a finding that petitioner has failed to sustain his heavy burden of establishing entitlement to mandamus to compel. The plain language of the Town's zoning code clearly shows that petitioner neither satisfies the requirement of possessing a valid building permit at the time it tried to maintain the storage trailers and construction containers. Moreover, petitioner expressly conceded that the structures were not being used or maintained in a manner falling expressly within permitted uses by the zoning code. Therefore, the Planning Board's reliance on its counsel's insistence that it adhere to the express letter of the law does not present as unreasonable, irrational, or arbitrary. While it is true that the Board is not the ZBA, its determination to rescind prior approval of an extension of time to file for and obtain a building permit, does not rise to the level of zoning code interpretation akin to site plan review or permit denial/grant on the facts presented.

Lastly, petitioner has failed to support its contention that the Board's determination was based solely on generalized community opposition and thus irrational. While the administrative record indicates that several community residents and members of the local civics association voiced opposition to petitioner's application, the record at the same time shows that the Board was reflective of petitioner's vested rights to build on the 1987 site plan. The primary motivating factor behind the Board's reversal on petitioner's extension was its counsel's advice to adhere to zoning code's plain provisions. Reliance on the advice of counsel under the parties' scenario presented fails to meet the irrational, arbitrary, and capricious standard petitioner must meet to sustain its Petition. The Court thus finds that, where as here, the Planning Board reasonably exercised its inherent authority to impose follow the zoning code and impose reasonable regulations and conditions on petitioner's request for site plan review.

CONCLUSION

In accord with all of the above, the Verified Petition seeking an order vacating, annulling, or setting aside respondents' determination reversing a prior approval of petitioner's building permit application extension request is **denied** as that determination was not arbitrary, capricious, or unsupported by substantial evidence as previously explained. Accordingly the Petition is **denied**, and this proceeding is **dismissed**.

Any other particular argument or contention made by the parties not explicitly referenced or addressed herein above has been determined to be meritless by the Court and is thus presumed denied.

The foregoing constitutes the decision and order of this Court.

Respondents by counsel are therefore **directed** to settle judgment on notice denying the Verified Petition and dismissing this proceeding consistent with the provisions of the within decision and order of this Court.

Dated: November 4, 2019
Riverhead, New York



WILLIAM G. FORD, J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION