

Grand Leopard Muriel the First, LLC v Zoning Bd. of Appeals

2020 NY Slip Op 31942(U)

May 19, 2020

Supreme Court, Suffolk County

Docket Number: 5066-2018

Judge: William G. Ford

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SHORT FORM ORDER

INDEX NO.: 5066-2018

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

PRESENT:

HON. WILLIAM G. FORD
JUSTICE of the SUPREME COURT

GRAND LEOPARD MURIEL THE FIRST,
LLC,

Petitioner,

-against-

ZONING BOARD OF APPEALS of the
TOWN OF EAST HAMPTON and FLOKEN
INC.,

Respondents.

For a judgment pursuant to C.P.L.R. Article 78.

Motion Date:
Motion Adjourn Date:
Motion Seq #: 001- MD CASE DISP

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Read upon the petitioner's special proceeding commenced under Article 78, the Court considered the following: Notice of Article 78 Petition, with Verified Petition by petitioner, Grand Leopard Muriel the First, LLC ("petitioner"), each dated September 21, 2018, and supporting papers; Verified Answer by Respondent, Zoning Board of Appeals of the Town of East Hampton ("Board"), dated November 28, 2018, with Administrative Return and supporting papers; Verified Answer by Floken Inc. ("Floken"), dated December 5, 2018, and supporting papers; Memorandum of Law in Support of Verified Petition by petitioner, dated February 25, 2019, and supporting papers; Memorandum of Law in Opposition and Response by Floken, dated May 16, 2019, and supporting papers; Memorandum of Law in Opposition to Petition by the Board, dated June 19, 2019, and supporting papers; Reply Memorandum of Law in Further Support of Verified Petition by petitioner, dated September 25, 2019, and supporting papers; and upon full consideration of the foregoing; it is

ORDERED that, for the reasons set forth herein, the Article 78 petition (seq. #001) by petitioner, Grand Leopard Muriel the First, LLC, is hereby **denied** in its entirety and the petition is **dismissed**; and it is further

ORDERED that counsel for respondent, Zoning Board of Appeals of the Town of East Hampton, shall forthwith serve a copy of this Decision and Order upon all counsel via facsimile transmission and certified mail (return receipt requested), and shall promptly thereafter file the affidavit of such service with the Suffolk County Clerk; and it is further

ORDERED that, if applicable, within 30 days of the entry of this Decision and Order, that respondents' 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 AND PROCEDURAL POSTURE

In this Article 78 proceeding, the petitioner, Grand Leopard Muriel The First, LLC ("petitioner"), seeks to annul and reverse the August 21, 2018 determination ("Decision") of the respondent Town of East Hampton Zoning Board of Appeals ("Board"). The Decision denied petitioner's application to rescind Building Permit #64322, which was issued to respondent, Floken, Inc. ("Floken"), on May 1, 2017 by the Town's Principal Building Inspector, Ann Glennon. Petitioner alleges that the Board's Decision was arbitrary, capricious or irrational and, therefore, must be annulled and reversed.

The Building Permit issued to Floken was for construction of a new two-story, single-family five-bedroom residence on property owned by Floken, located at 17 Association Road, Wainscott, New York ("Subject Property"). Petitioner, an alleged aggrieved neighbor, is the owner of 15 Association Road, which is immediately adjacent to Floken's Subject Property. By application dated June 28, 2017 and filed with the Board on June 29, 2017 ("Appeal"), the petitioner appealed the Building Inspector's issuance of the Building Permit to Floken. Paragraph 7 of the Appeal notes that such appeal concerns a Harbor Protection Overlay District. Similarly, paragraph 10 indicates that the Appeal is made because of the presence of Wetlands and Fresh or Tidal Waters. The appeal further states:

This appeal is taken from the determination of the building inspector dated May 1, 2017 concerning including but not limited to Sections 255-4-20(A) [Wetlands], 255-4-30(B) [Sewage Disposal Devices] & 255-3-75(C) [Existing Sanitary Septic Systems] of the Town Code. . . .

The Applicant hereby appeals the following with respect to the Premises located at 17 Association Road, Wainscott . . . pursuant to § 267-a (5)(b) [time to appeal] of the New York State Town Law and § 255-8-35(A) [Time to Take Appeal] of the East Hampton Code: Building Permit 64322, dated May 1, 2017. The issuance of the building permit is illegal, arbitrary, and capricious or an abuse of discretion in that the owner failed to seek and obtain

all necessary approvals prior to the issuance of the building permit, among other things. The appeal is timely in all respects . . .

After the petitioner filed its Appeal, petitioner's counsel sent letters, dated July 28, 2017 and August 17, 2017, to the Building Inspector alleging that certain violations of wetland setbacks existed with regard to Floken's location of the project's sanitary system. Both letters requested either revocation of the Building Permit or issuance of a Stop Work Order. Thereafter, Floken amended the project plans by moving the sanitary system to a different location. By letter to the Building Inspector, dated September 18, 2017, petitioner's counsel alleged that the project's sanitary system was located too close to petitioner's existing well. The letter also questioned, for the first time, the project's Gross Floor Area and petitioner's counsel again requested revocation of the Building Permit or issuance of a Stop Work Order.

In another letter from petitioner's counsel to the Building Inspector, dated September 21, 2017, counsel stated that he had contacted the Suffolk County Department of Health Services (SCDHS) regarding the placement of Floken's leaching field, and that SCDHS would be rescinding the Permit "until [Floken] demonstrate[s] compliance with the required setbacks." As a result, the Building Inspector issued a September 22, 2017 Stop Work Order for the Floken project, which would remain in effect "until Board of Health approval is reinstated" for the septic system (emphasis added). The Stop Work Order specified that "[FLOKEN] MAY RESUME WORK ON THE FOLLOWING CONDITIONS: By conforming to the provisions of the New York State Building Code [and] By conforming to the provisions of Section 255 of the East Hampton Town Zoning Board" (emphases in original). After the Stop Work Order was issued, petitioner's counsel sent an October 27, 2017 letter to the Building Inspector regarding the placement of the project's septic system and inquiring about the project's Gross Floor Area calculations. The letter concluded with the request that either the Building Permit be revoked or that the Inspector "continue the Stop Work Order issued on September 22, 2017 until all of the above issues are properly addressed" (emphasis added).

More than two months after the Stop Work Order was issued, the Building Inspector determined that Floken had complied with the necessary requirements. Therefore, the Inspector issued a written determination, dated December 5, 2017, rescinding the Stop Work Order. The rescission of the Stop Work Order was based upon inspection of the lot and a review of the documents presented by Floken's engineer, including SCDHS's amendments pursuant to revised plans of October 27, 2017. No separate appeal was filed by petitioner after the Building Inspector rescinded the Stop Work Order on December 5, 2017.

Public Hearings were held on February 6, 2018 and March 30, 2018 in connection with the petitioner's Appeal. At the February Hearing, the petitioner's counsel acknowledged that there were no longer any issues related to the placement of the sanitary system or the need for a Natural Resource Special Permit based upon wetland setbacks; however, petitioner's counsel alleged that there may be Gross Floor Area violations. Floken's counsel objected to the introduction of Gross Floor Area as a basis for the Appeal, since no such issue was raised by

petitioner in its original Appeal application. Floken's counsel also raised issues of the Appeal's timeliness and the Board's jurisdiction to hear the Appeal. Given these issues, the Board scheduled a second Hearing for March 30, 2018 and gave the parties time to submit briefs addressing these issues prior to the Hearing.

Petitioner and Floken submitted briefs arguing their respective positions and another Public Hearing was held, as scheduled, on March 30, 2018. At the Hearing, the Board heard arguments from petitioner's counsel and Floken's counsel. At the conclusion of the Hearing, the Board kept the record open to allow petitioner's counsel to submit a reply brief to the points set forth in Floken's brief, and in response to points raised during the Hearing. The Board also reserved its right to obtain information from the Building Inspector.

On or about May 16, 2018, the Board sent a letter to the Building Inspector requesting the history of the Building Permit, any Stop Work Orders, and an analysis of how Gross Floor Area was calculated. In response, the Building Inspector provided a written memorandum, dated June 19, 2018, with attachments, which explained, among other things, that before the Building Permit was issued to Floken, there was a review process of the parcel size, clearing, wetlands, building coverage, lot coverage and Gross Floor Area, as well as the regulations pertaining to the project. The Building Inspector also gave a detailed explanation of the review process undertaken on the issuance of the permits, the questions related to placement of the sanitary system, and the need for a Natural Resource Special Permit. The Inspector further addressed the issuance of the Stop Work Order on the basis of proximity of the project's sanitary system to the neighbor's well, and provided an explanation as to how that issue was resolved. Included in her memorandum, the Building Inspector submitted all of the documents in her file, which were also made available to the petitioner and Floken.

On August 21, 2018, the Board issued its written Decision. In relevant part, the Board found that the Building Inspector's issues relating to the initial Appeal were resolved prior to the first public Hearing, and that the Gross Floor Area was reviewed by the Building Inspector and was deemed correct. In addition, the Board noted that the issue related to Gross Floor Area was first raised by the petitioner in October 2017 and that the Stop Work Order, issued in September 2017, was rescinded December 5, 2017, thereby triggering the commencement of a new statutory appeal period. The Board determined that the issues raised in the Appeal were addressed and resolved prior to the Hearings and the concerns regarding Gross Floor Area were resolved as part of the Stop Work Order. It is from that August 21, 2018 Decision that the petitioner filed this Article 78 proceeding.

STANDARD OF REVIEW

In a proceeding pursuant to CPLR Article 78 to review a determination of a zoning board of appeals, the board's interpretation of its own zoning ordinance must be afforded great deference, and judicial review is generally limited to ascertaining whether the board's action was illegal, arbitrary and capricious, or an abuse of discretion (*see Credit v Southold Town Zoning*

Board of Appeals, 179 AD3d 1058, 117 NYS3d 675 [2d Dept 2020]; *Rada Corp. v Gluckman*, 171 AD3d 1189, 99 NYS3d 342 [2d Dept 2019]; *Matter of Bartolacci v Village of Tarrytown Zoning Bd. of Appeals*, 144 AD3d 903, 41 NYS3d 116 [2d Dept 2016]). In general, the petitioner has the burden of proving the allegations of his or her petition in a proceeding commenced pursuant to CPLR Article 78 (see *Stanton v Town of Islip Dept. of Planning and Development*, 37 AD3d 473, 829 NYS2d 596 [2d Dept 2007]; *Poster v Strough*, 299 AD2d 127, 752 NYS2d 326 [2d Dept 2002]).

A determination of a zoning board will be sustained if it has a rational basis and is not arbitrary and capricious (see CPLR §7803[1], [3]; *Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 259 [1995]; *Matter of Nowak v Town of Southampton*, 174 AD3d 901, 106 NYS3d 372 [2d Dept 2019]; *Matter of 278, LLC v Zoning Bd. of Appeals of the Town of E. Hampton*, 159 AD3d 891, 73 NYS3d 614 [2d Dept 2018]; *Matter of Conway v Van Loan*, 152 AD3d 768, 58 NYS3d 598 [2d Dept 2017]; *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 809 NYS2d 98 [2d Dept 2005]). A zoning board's determination is rational if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition (see *Matter of JSB Enterprises, LLC v Wright*, 81 AD3d 955, 917 NYS2d 302 [2d Dept 2011]; *Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 886 NYS2d 442 [2d Dept 2009]; *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 809 NYS2d 98 [2d Dept 2005]).

Where a rational basis for the board's determination exists, a court may not substitute its own judgment for that of the board, even if a contrary determination is supported by the record (see *Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 746 NYS2d 662 [2002]; *Matter of Route 17K Real Estate, LLC v Zoning Board of Appeals of Town of Newburgh*, 168 AD3d 1065, 93 NYS3d 107 [2d Dept 2019]; *Matter of 278, LLC v Zoning Bd. of Appeals of the Town of E. Hampton*, 159 AD3d 891, 73 NYS3d 614 [2d Dept 2018]; *Matter of Conway v Van Loan*, 152 AD3d 768, 58 NYS3d 598 [2d Dept 2017]; *Matter of Roberts v Wright*, 70 AD3d 1041, 896 NYS2d 124 [2d Dept 2010]).

Regarding time within which to file an appeal of an administrative decision, Town Law §267-a (5)(b) states, in relevant part, that such appeal "shall be taken within sixty days after the filing of any order, requirement, decision, interpretation or determination of the administrative official, by filing with such administrative official and with the board of appeals a notice of appeal, specifying the grounds thereof and the relief sought" (emphasis added). Pursuant to East Hampton Town Code ("Town Code") §255-8-35A, an appeal of a Building Inspector's interpretation of a zoning provision, or any other order, requirement, decision or determination made by the Building Inspector, must be made in writing to the Board of Appeals "within 60 days after the filing of the Building Inspector's written interpretation, order, requirement, decision or determination." Town Code § 255-8-40 mandates that "applications to the Board of Appeals shall be made in writing only, on the forms prescribed by the Board for the same, and shall set forth fully the facts and circumstances involved in the application. Every such application shall refer to the specific provision(s) of this chapter involved . . . (emphasis added).

DISCUSSION

On its face, the Appeal filed by the petitioner was timely; however, contrary to petitioner's contention, the Appeal was limited to issues and alleged violations of the Town Code Sections identified within the Appeal application itself. In this regard, petitioner's Appeal was limited to alleged violations of Town Code § 255-4-20(A) [Wetlands], § 255-4-30(B) [Sewage Disposal Devices] & § 255-3-75(C) [Existing Sanitary Septic Systems]. While the petitioner argues that the "included but not limited to" language in the Appeal application effectively expanded the scope of the Appeal, such argument is contrary to the specificity required by the plain language of the Town Law and the Town Code. For example, Town Law §267-a(5)(b) mandates that with the filing of an appeal, the petitioner must file with the Board a notice of appeal, *specifying the grounds* for the appeal. Likewise, Town Code § 255-8-40 mandates that issues for Appeal must be made *on the forms prescribed by the Board*, and that every Appeal application must refer to the *specific provisions* alleged to have been violated.

Here, the specific issues and alleged violations identified in the petitioner's June 29, 2017 application for Appeal were resolved prior to the February 6, 2018 Public Hearing. Petitioner's counsel acknowledged this fact on the record during such Hearing. Although petitioner's counsel raised the issue of alleged Gross Floor Area violations after filing the June 29, 2017 Appeal, no such claim or related Code Section violations were included in petitioner's Appeal application. Furthermore, after the Appeal was filed, petitioner never raised any alleged Gross Floor Area violations on the appeal form required by Town Code §255-8-40.

Nevertheless, the Building Inspector's September 22, 2017 Stop Work Order was issued as a result of petitioner's counsel's various letters concerning Floken's alleged septic system and Gross Floor Area violations. After the Building Inspector determined that Floken had conformed to the applicable State and Town Code provisions, the Inspector issued her written determination of December 5, 2017, which rescinded the Stop Work Order. Therefore, Floken was permitted to resume work on the project.

In its August 22, 2018 Decision, the Board found that "the appeal of the Building Permit was limited to those issues put forth in the application, to wit: those issues all related to the siting of the septic system. Once those issues were resolved by [Floken] and the Stop Order lifted, we believe the appeal became moot." The Board also found that the Building Inspector's lifting of the Stop Work Order "was a new determination by the Building Inspector and should [petitioner] have disagreed that the property was not, at that time, in full compliance with the Town Code, the action lifting the stop work order should have been appealed in a timely manner."

Based upon the record, the Court finds that the Board's August 21, 2018 Decision has a rational basis and is not arbitrary and capricious, and that it has an objective factual basis (*see* CPLR §7803[1], [3]; *Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 259 [1995]; *Matter of Nowak v Town of Southampton*, 174 AD3d 901, 106 NYS3d 372 [2d Dept 2019]; *Matter of 278, LLC v Zoning Bd. of Appeals of the Town of E. Hampton*, 159 AD3d 891, 73 NYS3d 614

[2d Dept 2018]; *Matter of JSB Enterprises, LLC v Wright*, 81 AD3d 955, 917 NYS2d 302 [2d Dept 2011]).

Notwithstanding petitioner’s arguments to the contrary, the issues presented by a Building Inspector’s issuance and rescission of Stop Work Orders constitute separate appealable acts of the administrative agency, which requires an appeal to be filed within 60 days thereafter (*see* Town Law §267-a (5)(b); Town Code §255-8-35A; *Matter of Aliano v Oliva*, 72 AD3d 944, 899 NYS2d 330 [2d Dept 2010]). The petitioner’s failure to exhaust its administrative remedies with respect to the Building Inspector’s December 5, 2017 rescission of the Stop Work Order extinguished its right to judicial review of that determination (*see* CPLR 7801 *Village of Westhampton Beach v Cayea*, 83 AD3d 692, 919 NYS2d 913 [2d Dept 2011]; *Matter of Aliano v Oliva*, 72 AD3d 944, 899 NYS2d 330 [2d Dept 2010]).

CONCLUSION

As set forth herein, petitioner has not established that the Board’s August 21, 2018 Decision should be set aside as illegal, arbitrary and capricious, or an abuse of discretion (*see* *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234 [2004]; *Rada Corp. v Gluckman*, 171 AD3d 1189, 99 NYS3d 342 [2d Dept 2019]; *Hitner v Planning Board of the Town of Patterson*, 168 AD3d 939, 90 NYS3d 898 [2d Dept 2019]). Accordingly, upon review of the administrative record and the parties’ submissions in this proceeding, the Court finds that the actions of the Board were not illegal, nor arbitrary and capricious, nor an abuse of discretion, and that the Board’s August 21, 2018 Decision has a rational and sound basis in reason with regard to the facts presented (*see* *Credit v Southold Town Zoning Board of Appeals*, 179 AD3d 1058, 117 NYS3d 675 [2d Dept 2020]; *Rada Corp. v Gluckman*, 171 AD3d 1189, 99 NYS3d 342 [2d Dept 2019]). All other arguments are without merit.

Based upon the foregoing, the Verified Petition is **denied**, and the petition is **dismissed**.

Respondent Town is hereby **directed** to settle judgment on notice in a manner consistent with the provisions of this Decision and Order.

This constitutes the Decision and Order of this Court.

Dated: May 19, 2020
Riverhead, New York



WILLIAM G. FORD, J.S.C.

 X FINAL DISPOSITION

____ NON-FINAL DISPOSITION