

Matter of S&L Birchwood, LLC v Modelewski

2020 NY Slip Op 32100(U)

May 28, 2020

Supreme Court, Suffolk County

Docket Number: 28502/2012

Judge: Martha L. Luft

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This opinion is uncorrected and not selected for official publication.

Short Form Order

Index No. 28502/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

ORIGINAL

PRESENT:

Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION and JUDGMENT
CASEDISP

_____ x
In the Matter of the Application of
S&L BIRCHWOOD, LLC,

Mot. Seq. No.: 002 - MD
Orig. Return Date: 11/09/2012
Mot. Submit Date: 10/29/2019

Petitioner,

PETITIONER'S ATTORNEY

For a Judgment Under Article 78 of the New
York State Civil Practice Law and Rules

Brett Zinner, Esq.
Rosenberg, Fortuna & Laitman, LLP
666 Old Country Road, Suite 810
Garden City, NY 11530

-against-

RESPONDENTS' ATTORNEY

CHRISTOPHER MODELEWSKI, SCOTT
M. FRAYLER, CAROL GAUGHRAN,
JEFFREY N. NANNES, ED PEREZ,
JAMES ROGERS, ROBERT F. SLING,
Constituting the ZONING BOARD OF
APPEALS OF THE TOWN OF
HUNTINGTON,

Nicholas R. Ciappetta
Huntington Town Attorney
Huntington Town Attorney's Office
Town Hall
100 Main Street
Huntington, NY 11743
By: John C. Bennett
Special Assistant Town Attorney

Respondents.
_____ x

Upon the notice of motion to vacate determination, the affirmation in support thereof dated August 30, 2019, with annexed exhibits and memorandum of law; the affirmation in opposition thereto, dated September 25, 2019, with annexed exhibit and memorandum of law; the reply affirmation in further support of the motion dated October 24, 2019, with annexed exhibits; and upon all prior proceedings in this matter, it is hereby

ADJUDGED that the petition is dismissed.

This article 78 proceeding, seeking to have the court set aside a decision of the Zoning Board of Appeals of the Town of Huntington ("ZBA") denying the petitioner's application and direct that the ZBA grant such application, has taken a torturous path over an unduly lengthy period of years. The ZBA decision at issue is dated August 16, 2012 and was filed the following day ("ZBA Decision"). The article 78 proceeding seeking

review thereof was filed on September 14, 2012. Rather than answer the petition, the respondents moved to dismiss the petition as moot, based upon an amendment to the Town Code and a subsequent application to the ZBA for, essentially, the same relief. That motion was denied by order dated March 19, 2014 (Tarantino, J), upon a finding that the record before the court at that time was "insufficient to warrant dismissal on that ground," while contemplating a possible return to the issue upon further submissions post-answer. Respondents then filed their answer on October 29, 2014.

What followed were years of attempts to settle the matter, during which the parties, on consent, requested numerous adjournments. Finally, after a number of occasions of purportedly being very close to resolving the matter, the parties stipulated to a discontinuation of the proceeding, without prejudice to its being restored to the court's calendar upon petitioner's request. The parties requested that the stipulation be "so-ordered" by the court, which occurred on February 15, 2018. By order dated May 2, 2019, the court granted petitioner's request to restore the matter to its calendar, as had been stipulated.

Again, attempts to resolve the matter were made, and again they were unsuccessful. Rather than rest on the pleadings previously filed in this proceeding, the petitioner filed what is denominated as a "notice of motion to vacate determination." The respondents served opposition papers to the motion, to which the petitioner duly replied. Although the notice of motion does not cite to any particular provision of article 78 of the CPLR that contemplates a motion such as this, given the peculiar history of this matter, and the fact that both parties had the opportunity to make submissions on the motion, the court has taken into consideration the papers submitted on the motion, in addition to the original pleadings specified by article 78.

The facts are essentially undisputed and are as follows. The property at issue is located in the R-10 Residence Zoning District of the Town of Huntington, and is the site of a nursing home facility named Apex Rehabilitation and Care Centers. The nursing home was conditionally permitted in 1957 for a nine-bed facility. Over the years, increases in bed capacity were granted by the ZBA, including in 1979 when special permits were granted to expand to a 200-bed capacity. The application that resulted in the ZBA Decision sought a further expansion to 240 beds, as well as certain expansion of services and upgrade of facilities.

Before addressing the merits of the application, the ZBA examined the relevant Town Code provisions in order to identify the standards that were to be utilized in evaluating such application. The ZBA Decision reflects the statutory conundrum in which

the board found itself. The provision of the zoning code that had previously governed the petitioner's special permit applications over the years had been amended by the Huntington Town Board in 2008. The new provision, §198-20.1 established a Residential Health Services District which is a floating zone, meaning it is not tied to a particular location, but could be located anywhere within the Town. If petitioner wished for the property to be re-zoned as falling within that new district, it would have to apply to the Town Board. Relying on Town Law §267-b (2), the ZBA identified its only authority in this scenario as considering the application as a request for a use variance.

However, the ZBA Decision goes on to note that the proof presented by the petitioner was not the sort required for a use variance, and that the petitioner was relying on a provision in the amended portion of the zoning code that specified that the ZBA has "continuing jurisdiction over expansions, alterations or modifications to properties where special use permits have previously been granted by the Board." Town Code §198-109(I). The ZBA Decision noted that the problem with applying that provision to the petitioner's application was that the code provision containing the standards that had previously been utilized in this context had been repealed and had not been replaced. It concluded that "[i]f the Town Board had intended for nursing home uses such as applicant's to continue with the right to seek expansion, then it could have provided for that authority with a specification of the standards to apply."

Thus, the only jurisdictional authority the ZBA could rely on was that set forth in the code with regard to special use permits generally. The code provision governing such authority requires that the ZBA apply the "more restrictive standards" in a case where there is a "conflict between the special requirements and other regulations." Town Code §198-110 (A). Under such analysis, the regulations of the R-10 zone were more restrictive, and, thus, were those that the ZBA concluded it must apply, resulting in the nursing home use being non-conforming. As the proof presented was not applicable to a use variance, the application was denied.

In a proceeding pursuant to CPLR article 78 to review a determination of a zoning board of appeals, the board's interpretation of its zoning ordinance is entitled to great deference (*Matter of Brancato v Zoning Bd. of Appeals of City of Yonkers, N.Y.*, 30 AD3d 515, 817 NYS2d 361 [2d Dept. 2006]), and judicial review is limited to ascertaining whether the action taken by the board is illegal, arbitrary and capricious, or an abuse of discretion (*Waterways Dev. Corp. v Town of Brookhaven Zoning Bd. of Appeals*, 126 AD3d 708, 5 NYS3d 450 [2d Dept. 2015]; *Matter of Ifrah v Utschig*, 98 NY2d 304, 746 NYS2d 667 [2002]). In applying the "arbitrary and capricious" standard, a court looks only to whether the determination lacks a rational basis, *i.e.*, whether it was without sound basis in reason and without regard to the facts (*Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 809 NYS2d 98 [2d Dept. 2005], *appeals dismissed* 6

NY3d 890, 817 NYS2d 624, *lv denied* 7 NY3d 708, 822 NYS2d 482 [2006]). Deference is not required, however, where the question is one of pure legal interpretation of statutory terms. (*New York Botanical Garden v Bd. Of Standards & Appeals of City of New York*, 91 NY2d 413, 419, 671 NYS2d 423, 425 (1998). The burden is on the petitioner to show that there is no rational basis for the board's determination (*Matter of Grossman v Rankin*, 43 NY2d 493, 402 NYS2d 373 [1977]).

The court finds that the analysis that formed the basis of the ZBA Decision was rational and complied with well-established principles of statutory construction. Where previously there had been standards specified in the zoning code, the recent amendment had repealed such provision, without specifying a substitute. The importance of such standards, indeed, their necessity, in the context of special permit determinations cannot be gainsaid, as they lie at the heart of such determinations. (*Tandem Holding Corp. V Bd. of Zoning Appeals of Town of Hempstead*, 43 NY2d 801, 402 NYS2d 388 [1977] [compliance with stated standards in ordinance must be shown before any exception can be secured]; *Metro Enviro Transfer, LLC v Village of Croton-On-Hudson*, 7AD3d 625, 627, 777 NYS2d 170, 171 [2d Dept. 2004, *aff'd* 5 NY3d 236, 800 NYS2d 535 [2005]; *See Cliff Equities, LLC v Bd. of Zoning Appeals of Inc. Village of Sea Cliff*, 106 AD3d 923, 965 NYS2d 173 [2d Dept. 2013]). The ZBA Decision did not assert or find that the nursing home use was, *per se*, a nonconforming use. Rather it found that, under the amended code, it did not have the proper tools by which to evaluate the application which was for an expansion or modification of the existing special permit, and, thus, in the nature of an area variance.

Petitioner has failed to show that such analysis was irrational. To assert that the ZBA should have guessed that the requirements would be identical to the previous ones or, indeed, made any assumptions as to what they would be, ignores the fact that a ZBA is a creature of statute, which only has that authority accorded it, either by the Town Law or by the relevant zoning ordinance. The ZBA cannot usurp the legislative role of the Town Board. (*Levitt v Incorporated Village of Sands Point*, 6 NY2d 269, 189 NYS2d 212 [1959]; *Levy v Bd. of Standards & Appeals of City of New York*, 267 NY347 [1935]).

Moreover, even if the court had found that the ZBA's analysis was affected by an error of law, the appropriate remedy would have been remittal, not a direction that the application be granted, as requested by petitioner. A determination of the merits of the application was not reached in the ZBA Decision, and such determination was not a ministerial matter, subject to a direction from this court as to its contents. Such a request is in the form of mandamus, which will lie only to compel a governmental body or officer to perform a duty, not to direct them how to perform such duty. (*Willows Condominium Ass'n v Town of Greenburgh*, 153 AD3d 535, 60 NYS3d 233 [2d Dept. 2017]).

S & L Birchwood, LLC v. Christopher Modelwski, et al.
Index No. 28502/2012

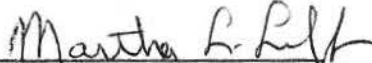
LUFT, J.
Page 5

In fact, in the recent submissions to the court, petitioner annexes, as an exhibit, a decision of the ZBA dated April 25, 2013, issued upon a subsequent application by the petitioner for "substantially the same relief." In that decision the ZBA recites that, in the interim, the Town Board amended the zoning code to specify the standards to be applied to applications for expansion, such as that of the petitioner, in §198-20.1. The decision notes that "[a]s a result of this code amendment, the Board can now proceed to the merits of this application, applying area variance standards to dimensional deviations from the code standards contained in §198-20.1." Thus, even if the court had not found that the ZBA Decision was rational, this proceeding, by petitioner's own submission, would now be moot.

Based upon the foregoing, the petition is dismissed.

ENTER

Dated: May 28, 2020
Riverhead, NY


The Hon. Martha L. Luft, AJSC

Final Disposition

Non-Final Disposition