Mount Bldrs., LLC v Perlmutter
2020 NY Slip Op 33835(U)
November 18, 2020
Supreme Court, New York County
Docket Number: 154078/2020
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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MOUNT BUILDERS, LLC,

Plaintiff,

- v -

MARGERY PERLMUTTER, SHAMPA CHANDA, DARA OTTLEY-BROWN, NASR SHETA, SALVATORE SCIBETTA

Defendant.

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INDEX NO. 154078/2020

MOTION DATE 12/20/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 8, 11, 12, 13, 14, 15, 16, 22, 23

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the application, pursuant to CPLR Article 78, of petitioner Mount Builders, LLC (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondents shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

In this Article 78 proceeding, petitioner Mount Builders, LLC (Mount Builders) seeks an order to vacate a resolution of the respondent Board of Standards and Appeals of the City of New York (BSA) as arbitrary and capricious (motion sequence number 001). For the following reasons, the petition is denied and dismissed.

FACTS

Mount Builders is a New York-licensed, limited liability real estate development corporation that owns a vacant, 15.5 acre parcel of land located at Block 3019, Lot 120, in the County of Richmond, City and State of New York (the property). *See* verified petition, ¶ 7. Mount Builders asserts that the property is located in an R3-2 (residential) zoning district, which permits residential development as-of-right without any special zoning variances or City Planning Commission approval. *Id.*, ¶¶ 9-10. Mount Builders proposes to develop the property to build 169 residential one-family houses with adjacent parking spaces. *Id.*, ¶ 1. Only six of those units would face on existing, mapped City streets, however. *Id.*, ¶¶ 10-11. Mount Builders' development plan proposes the construction of an access road leading onto three new private interior roads onto which the remaining 163 units would face. *Id.*

In prosecuting its development plan, Mount Builders submitted a total of 163 "new building" residential construction applications to the New York City Department of Buildings (DOB) in four batches between 2016 and 2019. *See* verified answer, ¶ 83, n 3. The DOB issued four batches of decisions denying those applications, each of which contained the following determination:

> "The street giving access to proposed building is not duly placed on the official map of the City of New York therefore:
> "A) No Certificate of Occupancy (C of O) can be issued pursuant to Article 3, Section 36 of General City Law (GCL).

> "B) Proposed construction does not have at least 8% of the total perimeter of building(s) fronting directly upon a legally mapped street or frontage space contrary to section 502.1 of the 2014 NYC Building Code."

Id., ¶ 84; exhibit appendix 1.

Mount Builders subsequently submitted 163 denial appeal applications to the BSA, each of which sought an order directing the DOB to waive enforcement of GCL § 36 (2) in connection with Mount Builders' development project. *See* verified answer., ¶¶ 83, 85; exhibit appendix 1 (administrative record). The BSA sought additional submissions from Mount Builders to support its' appeal applications, and later conducted public hearings in which the New York City Department of Transportation (DOT), the New York City Department of Environmental Protection (DEP), the Fire Department of the City of New York (FDNY), Staten Island Community Board 1, the Borough President of Staten Island and members of the New York State Legislature and the New York City Council all participated. *Id*., ¶¶ 87-98; exhibits appendix 1, appendix 2. The BSA finally conducted hearings on November 19, 2019, and February 25, 2020 at which Mount Builders addressed the issues that had arisen at the public hearings, and also presented its own arguments in support of its appeals of the DOB's denials. *Id*., ¶¶ 99-102; exhibit appendix 2. At the conclusion of the final hearing, the BSA approved a resolution denying Mount Builders' appeal and upholding the 163 underlying DOB decisions. *Id*. The BSA issued its resolution in a written decision dated April 20, 2020 (the BSA decision). *See* verified petition, exhibit A. The portion of the BSA decision now being challenged is the finding that Mount Builders had failed to establish the waiver requirements set forth in GCL § 36 (2) of "practical difficulty or unnecessary hardship" that would justify constructing the three new unmapped interior streets. *Id*. Since the BSA decision is too long to reproduce in its entirety, the court will quote from it selectively below.

Mount Builders commenced this Article 78 proceeding to challenge the BSA's decision on June 8, 2020. *See* verified petition. The BSA filed its answer on September 23, 2020. *See* verified answer. The matter is now fully submitted (motion sequence number 001).

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County,* 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). A determination is only deemed arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts." *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, if there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232.

The BSA asserts that its decision should be sustained because there was a rational basis in the administrative record to uphold its denial of Mount Builders' GCL § 36 (2) waiver applications. *See* respondent's mem of law at 17-21. The BSA particularly argues that the evidence supported its determination that Mount Builders failed to establish either "practical difficulty or unnecessary hardship" or the absence of need to connect its 163 planned buildings to existing mapped streets, pursuant to GCL § 36 (2). *Id.* at 12-16. As a matter of law, the BSA is correct in asserting that GCL § 36 (2) waiver applications may not be granted absent proof of

those circumstances. *See e.g. Matter of Brock Props. v Bockman*, 166 AD2d 525 (2d Dept 1990). Mount Builders nevertheless raises three arguments that the BSA's April 20, 2020 decision was an arbitrary and capricious ruling.

First, Mount Builders asserts that "the BSA ignored the plain language of GCL § 36." *See* petitioner's mem of law at 10-15. The pertinent portion of that statute provides as follows:

> ". . . *No [C of O] shall be issued in [New York City] for any building unless a street or highway giving access to such structure has been duly placed on the official map or plan, which street or highway, and any other mapped street or highway abutting such building or structure shall have been suitably improved to the satisfaction of the [DOT] . . .. Where the enforcement of the provisions of this section would entail practical difficulty or unnecessary hardship, and where the circumstances of the case do not require the structure to be related to existing or proposed streets or highways*, the applicant for such a [C of O] may appeal from the decision of the [DOB] to the [BSA] or other similar board of such city having power to make variances or exceptions in zoning regulations, and the same provisions are hereby applied to such appeals and to such board as are provided in cases of appeals on zoning regulations. . . ."

GCL § 36 (2) (emphasis added). Mount Builders argues that "the plain language GCL § 36 . . . requires a property owner to demonstrate either 'practical difficulty or unnecessary hardship' with the mapped street frontage requirement, [but] not both," and that the BSA arbitrarily and capriciously based its decision solely on the latter factor [i.e., unnecessary hardship] while ignoring Mount Builders' evidence of "practical difficulty." *See* petitioner's mem of law at 13. The BSA responds that Mount Builders' argument fails because the three cases which it cited are either inapposite or contradict Mount Builders' argument. *See* respondent's mem of law at 17-21. The BSA appears to be correct. *Matter of Brancato v Zoning Bd. of Appeals of City of Yonkers, N.Y.* (30 AD3d 515 [2d Dept 2006]) involved the application of a different statute - GCL § 36 (1) rather than GCL § 36 (2) - and is therefore inapposite. Similarly, *Matter of Panetta v City of Rye* (105 AD3d 748 [2d Dept 2013]) was decided pursuant to a 1968 resolution of the City of Rye Planning Commission rather than GCL § 36 (2), and is therefore also inapposite. *Matter of Brock Props. v Bockman* was decided pursuant to GCL § 36 (2), however

it upheld the BSA's denial of a GCL § 36 (2) waiver application. 166 AD2d at 526. In *Brock*, the Appellate Division, Second Department, found that it was not arbitrary and capricious for the BSA to consider the issue of whether the plaintiff-property owner could use "alternative access routes" to connect its property to existing, mapped city streets rather build a new access road. 166 AD2d at 526. The court noted that the FDNY objected to the design of the proposed access road, and also that the plaintiff held title to adjacent property which it could have used for an "alternative access route." 166 AD2d at 526. The court concluded that the owner's mere denial that any viable "alternative access routes" existed did not constitute proof of "practical difficulty or unnecessary hardship" under GCL § 36 (2). 166 AD2d at 526. However, none of these cases held that allegations of "practical difficulty" without proof of "unnecessary hardship" are sufficient to justify a GCL § 36 (2) waiver request. The court rejects Mount Builders' argument as an unsupported "red herring" that was mainly derived from mis-quoted precedents that interpreted inapplicable statutes. This does not end the inquiry, however.

As was just noted, the Second Department's ruling in *Matter of Brock Props. v Bockman* focused on (1) the FDNY's objection to a developer's proposed access road, and (2) the developer's failure to demonstrate to the BSA that no "alternative access route" existed. 166 AD2d at 526. The BSA notes that its April 20, 2020 decision found that both of those factors exist in this case as well. *See* respondent's mem of law at 19. The evidence bears out the BSA's assertion. The BSA's decision plainly stated that "[t]he [FDNY], by letters dated September 10, 2019, and November 15, 2019, states that it objects to this [waiver] application because the proposed development 'places undue hardship on the department in the event of emergency conditions,'" and that the FDNY "concurs with the [DOT] 'that the streets [must] be mapped and the site plans conform to DOT standards for new roads.'" *See* verified petition, exhibit A. The

decision also found that Mount Builders "failed to explore whether access to each of the buildings on the site, whatever their number and configuration, could be achieved from existing mapped streets, or whether access to such buildings could be accomplished by obtaining street mapping approval from the Department of City Planning and City Planning Commission." *Id.* It concluded that Mount Builders' "decision to pursue an exception [i.e., waiver] with this application does not reflect the presence of 'practical difficulty or unnecessary hardship.'" *Id.* The court finds that there was evidence in the administrative record to support these two findings in the form of the many submissions by the DOT and FDNY. *See* verified answer, exhibits appendix 1, appendix 2. The court also finds that the BSA was permitted to look beyond Mount Builders' development plan and consider whether a smaller development and/or alternative access routes were more appropriate than simply voting "yes" or "no" on Mount Builders' waiver request. *Matter of Brock Props. v Bockman*, 166 AD2d at 525. Finally, the court agrees that these findings provide a rational basis for the BSA's determination that Mount Builders failed to demonstrate "practical difficulty or unnecessary hardship" in its GCL § 36 (2) waiver application.[1] Accordingly, the court concludes that the BSA's April 20, 2020 decision was not an arbitrary and capricious ruling. However, this does not end the inquiry either, since Mount Builders raises several ancillary reply arguments that the court must also address.

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[1] The court noted earlier that GCL § 36 (2) also permits waivers to the mapped street requirement "where the circumstances of the case do not require the structure to be related to existing or proposed streets or highways." The BSA asserted that that portion of the statute is inapplicable to the facts of this case, however, since it was intended to apply only to "incidental" buildings such as garages, storage sheds or farm buildings which do not have the same need for access to mapped streets because they do not implicate the same public safety considerations as dwellings. *See* respondent's mem of law at 14-16. Its April 20, 2020 decision contains this finding. *See* verified petition, exhibit A. Mount Builders did not challenge it in either its moving or reply papers. Therefore, the court concludes that it need not address that portion of GCL § 36 (2).

First, Mount Builders asserts that it made a late response to the FDNY's November 15, 2019 letter in a letter of its own dated February 5, 2020 that purportedly included documents and plans which conclusively demonstrated that Mount Builders' had redesigned the proposed access road into the property to address the FDNY's misgivings. *See* petitioner's reply mem at 6-7. However, at the final hearing before the BSA on February 25, 2020, Mount Builders' counsel admitted that the FDNY had not approved those plans. *See* verified answer, exhibit appendix 2. Therefore, the court rejects Mount Builders' argument because it misstates the facts. Mount Builders' allegation that the BSA improperly closed the proceedings before the FDNY could do so is unsupported speculation.

Mount Builders next asserts that "the BSA misapplied GCL §36 as a review of density and bulk and not street safety." *See* petitioner's reply mem at 7-9. However, the BSA's decision plainly recites that:

> ". . . the applicant [i.e., Mount Builders] states that a development complying with both General City Law § 36 (2) and with applicable bulk regulations, which would permit as-of-right development of multiple dwellings, would be out of character with the surrounding area; would result in more, but smaller, dwelling units; require six, instead of two, curb cuts; and would represent a loss of return to the developer."

See verified petition, exhibit A. Thus, it was actually *Mount Builders* which sought to raise the issue of "density and bulk." The BSA did not discuss that issue anywhere in its decision apart from the foregoing mention, and nothing in the decision indicates that the BSA based its GCL §36 (2) review on considerations of "density and bulk." Therefore, it is clear that Mount Builders' argument again misstates the facts, and the court rejects it for that reason.

Finally, Mount Builders asserts that "the BSA's assessment of the history and necessity of street mapping actions is erroneous." *See* petitioner's reply mem at 9-10. A careful reading of this argument discloses that Mount Builders is actually attempting to re-assert a "profitability" argument that the BSA considered and rejected at the February 25, 2020 hearing (i.e., that a

development plan involving 163 units fronting on unmapped private streets would be more profitable than a smaller development fronting on existing mapped City streets). *See* verified answer, exhibit appendix 2. However, Mount Builders has never cited any legal support for its position that the BSA is ministerially obliged to grant GCL §36 (2) waiver applications in order to maximize developers' potential profits. It is not. GCL §36 (2) directs the BSA to enforce the mapped street frontage requirement in all cases. Lower potential profits to a developer is not a form of "practical difficulty or unnecessary hardship" that justifies a waiver. In the related context of challenges to zoning determinations, the Court of Appeals has long held that "there is no constitutional requirement that the highest and best use or the greatest income obtainable be allowed," and that "[a] zoning classification will be held confiscatory only . . . if no reasonable return can be obtained from the property as zoned." *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 504 (1983), citing *Dauernheim, Inc. v Town Bd.*, 33 NY2d 468, 472 (1974); *see also Matter of Carriage Works Enters. v Siegel*, 118 AD2d 568, 570 (2d Dept 1986) ("It has been stated that 'zoning . . . may legally leave in its wake scars of lost profits to landowners as well as restricted uses causing inconvenience and disappointments but that is the exact meaning of zoning' . . . [t]he courts should not be placed in the position of having to guarantee the investments of careless land buyers" [citations omitted]); *Matter of Power House Home Rd. Corp. v Board of Zoning Appeals of Town of Hempstead*, 171 AD2d 796, 797 (2d Dept 1991) ("the public benefit to be gained by the strict enforcement of the zoning restriction . . ., outweighs any private detriment which might be suffered by the petitioner"). In any case, the court rejects Mount Builders' "profitability" argument because no precedent supports it. At this point in the decision, the court reiterates its finding that Mount Builders first "arbitrary and capricious" argument is meritless.

Mount Builders' second "arbitrary and capricious" argument asserts that "the BSA denial was impermissibly based on political pressure." *See* petitioner's mem of law at 15-19. Mount Builders cites several unrelated decisions which recognize the proposition that "zoning board decisions cannot be based on generalized political and community opposition." *Id*. at 18. The BSA responds that those decisions are inapposite since they were all based on GCL § 36 (1) rather than GCL § 36 (2). *See* respondent's mem of law at 17-21, 24-27. The court's own research indicates that the proposition which Mount Builders cited was derived from older Court of Appeals precedent holding that "[a]lthough scientific or other expert testimony is not required in every case to support a zoning board's determination, the board may not base its decision on generalized community objections." *Matter of Ifrah v Utschig*, 98 NY2d 304, 308 (2002), citing *Matter of Twin County Recycling Corp. v Yevoli*, 90 NY2d 1000 (1997). At least one trial court decision has applied the "generalized community objection" rule when reviewing a BSA decision. *See Matter of 25-50 FLB LLC v Srinivasan*, 32 Misc 3d 1237(A), 2011 NY Slip Op 51615(U) (Sup Ct, Queens County 2011), affd 116AD3d 1056 (2d Dept 2014).[2] However, the court finds that the "generalized community objection" rule does not support Mount Builders' argument because it does not apply to the facts of this case. The administrative record before the BSA was replete with "scientific and expert testimony" from the DOB, the DOT, the DEP, the FDNY and the BSA itself.[3] *See* verified answer, exhibits appendix1, appendix 2. This flatly

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[2] The Appellate Division, First Department, also applied the "generalized community objections" rule to overturn a BSA decision in its holding in *Matter of Homes for Homeless, Inc. v Board of Stds. & Appeals of City of N.Y.* (24 AD3d 340 [1st Dept 2005]), which the Court of Appeals later reversed, finding that the BSA's decision was rationally based (7 NY3d 822 [2006]) .

[3] The administrative record shows that several members of the BSA inspected the premises themselves before conducting the final hearings on Mount Builders' appeal. *See* verified answer, exhibit appendix 2.

contradicts Mount Builders' contention that the BSA based its decision solely on "generalized community objections." It plainly did not. Therefore, the court rejects Mount Builders' "political pressure" argument.[4]

Finally, Mount Builders asserts that "the BSA arbitrarily and capriciously ignored its own prior precedent." *See* petitioner's mem of law at 20-23. New York law considers an administrative agency's determination to be arbitrary and capricious "when it 'neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts.'" *Matter of 20 Fifth Ave., LLC v New York State Div. of Hous. & Community Renewal*, 109 AD3d 159, 163 (1st Dept 2013), quoting *Matter of Lantry v State of New York*, 6 NY3d 49, 58 (2005). Here, Mount Builders has produced copies of eight BSA decisions that allegedly demonstrate a traditional BSA policy which granted "hundreds of GCL § 36 [waiver] applications based on the application of the 'practical difficulty' standard." *See* petitioner's mem of law at 20; verified petition, exhibits B, C. Mount Builders also cites the unpublished 2001 2004 decision by this court (Lehner, J.) in *Matter of Enopac Holding LLC v New York City Bd. of Stds. & Appeals* (5 Misc 3d 1013[A], 2004 NY Slip Op 51358[U] [Sup Ct, NY County 2004) to support its assertions that GCL § 36 (2) waiver applications have a "presumption of approval," and that the BSA's role in reviewing such applications is "almost ministerial [in] nature." *Id.*, at 20-21.

The BSA responds that Mount Builders' allegations are disingenuous and lack merit. *See* respondent's mem of law at 10-11. It avers that it has recently "modified" its' approach to GCL § 36 (2) waiver reviews, but asserts that the law grants it the right to do so, and notes that it

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[4] Mount Builders reply papers sought to re-assert this argument in the context of "the BSA's admitted change in interpretation of GCL § 36." *See* petitioner's reply mem at 10-11. However, for the reasons discussed above, that argument is of no moment in either context.

explained its reasoning fully in the April 20, 2020 decision. *Id.* The BSA then cites the Court of Appeals' holding in *Matter of Cowan v Kern* (41 NY2d 591 [1977]) that "[e]xercise of discretion in favor of one confers no right upon another to demand the same decision . . . [u]nlimited discretion vested in an administrative board by ordinance is not narrowed through its exercise . . . [t]he (board) may refuse to duplicate previous error; it may change its views as to what is for the best interests of the (town); it may give weight to slight differences which are not easily discernible." 41 NY2d at 595, quoting *Matter of Larkin Co. v Schwab*, 242 NY 330, 336-337 (1926). Mount Builders' reply papers do not address these points, but instead seek to assert its rejected "political pressure" argument to delegitimize the BSA's "modified approach." *See* petitioner's reply mem at 10-11. The court again rejects that argument,[5] and after careful consideration, finds for the BSA.

The portion of the BSA decision that Mount Builders objects to found as follows:

> "This provision [i.e., GCL § 36 (2)] vests the [BSA] with the authority, under certain circumstances, to 'make any reasonable exception' to the requirement that 'any building' issued a certificate of occupancy have 'access' to 'a street or highway . . . duly placed on the official map or plan.'
>
> "The [BSA] had taken an expansive view of this authority, making exceptions for developments of all sizes, which permitted the buildings on them to be accessed by unmapped streets, while imposing few if any safeguards as conditions of the [BSA's] grants. In the cases where such safeguards were imposed, they relied on the representation of the developers that a Homeowners Association Agreement ("HOA") would oblige homeowners to maintain the private streets and enforce no-parking regulations on narrow unmapped private streets to allow emergency vehicle access.
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> "In recent years, however, the [BSA] conducted site visits to developments constructed pursuant to waivers of [GCL] § 36 (2) and heard considerable testimony that these safeguards have proven inadequate. The Office of the Staten Island Borough President submitted an extensive amount of testimony highlighting the issues concomitant with these developments, as a myriad of such exist within its borough. Over the last several years, the [BSA] has learned that problems arise because builders frequently abscond after sellout of the development to new homeowners. Homeowners are not properly notified of their obligations under the HOA or aware that their properties are subject to the [BSA's] restrictions. Homeowners associations have gone unfounded

[5] *See* n 4 *supra*.

> and unfunded. Ownership of the private roadways has gone unrecorded and chain of title has been lost. Access easements have never been granted. Parking restrictions have gone unenforced. Snow has gone unplowed. Trash has gone uncollected. Fire hydrants have gone uninspected. Damaged roadways have gone unrepaired, sidewalks unbuilt, and street lighting never installed. Emergency vehicles have been delayed by inconsistent house numbering, non-continuous and, sometimes, unidentified streets, and double- or triple-parking blocking access. And homeowners and neighborhoods have been left with infrastructure in a state of disrepair, and unplanned, unmapped roads that do not relate to or tie in to existing roadway networks.
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> "The [BSA] has thus revisited its approach towards and analyses of requests for such exceptions to the [GCL], recognizing and refusing to duplicate what is now seen as a previous error, with an eye toward limiting the granting of such 'reasonable exceptions' only in rare circumstances. The [BSA's] authority to modify its approach and, hence, no longer adhere to precedent is permitted where its reasons for doing so are clearly stated. *Matter of Cowan v Kern*, 41 NY2d 591, 595 (1977) ('The [board] may refuse to duplicate previous error; it may change its views as to what is for the best interests of the [town] . . .. More importantly, the board, after [ ] reflection, could find that previous awards had been a mistake that should not be again repeated. Certainly, the board was not bound to perpetuate earlier error.')
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> "Consequently, the [BSA] has over the last several years required applicants to affirmatively demonstrate that it can meet the findings set forth in GCL § 36 (2): that both enforcing the mapped street access requirement 'would entail practical difficulty or unnecessary hardship' and that 'the circumstances of the case do not require the structure to be related to existing or proposed streets or highways.' GCL § 36 (2).
>
> "Having witnessed the failure of safeguards at other sites, the [BSA] also now takes a critical eye when exercising its discretion and when assessing the credibility of applicants' assurances that certain safeguards and conditions could - and would - be implemented. These assurances often turn on promises that large numbers of future unidentified and unknown third parties not currently appearing before the [BSA] would coordinate amongst themselves in the applicant's absence and would take certain steps to maintain the unmapped streets. However, these same sorts of unfulfilled promises have resulted in the current state of disrepair and mismanagement of unmapped streets, and the [BSA] does not generally find them sufficient - especially where entire unplanned neighborhoods are proposed, as in this case."

See verified petition, exhibit A. Although the BSA's discussion was lengthy, the court finds that its decision was actually quite straightforward. The BSA admitted that it had formerly taken an "expansive view" of its authority to grant GCL § 36 (2) waiver applications. It stated that it justified that view, in part, by relying on developers' representations that homeowners' associations would safeguard the street access protections required by GCL § 36 by maintaining the unmapped interior streets in their developments themselves. The BSA then stated that it

changed its view, however, because it had reviewed numerous instances where homeowners' associations had failed – for a variety of reasons - to provide sufficient maintenance to safeguard the statutory standards. The BSA concluded that it has consequently adopted a stricter approach to GCL § 36 (2) waiver applications. In the court's view, the BSA's explanation is both reasonable and entitled to deference. As the Second Department recently observed:

> "'A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious.' Where 'a zoning board is [considering] an application that is substantially similar to a prior application that had been previously determined, the zoning board is required to provide a rational explanation for reaching a different result.' 'Where, however, a zoning board provides a rational explanation for reaching a different result on similar facts, the determination will not be viewed as either arbitrary or capricious.' The zoning board 'may refuse to duplicate previous error; it may change its views as to what is for the best interests of the [Town]; [or] it may give weight to slight differences which are not easily discernable.'"

Matter of Monte Carlo 1, LLC v Weiss, 142 AD3d 1173, 1175-1176 (2d Dept 2016) (internal citations omitted). Here, as previously noted, Mount Builders has identified instances where the BSA granted similar GCL § 36 (2) waiver applications to the ones that it seeks, however Mount Builders does not address the reasons that the BSA asserted in the April 20, 2020 decision for changing its approach to such applications in this case. Therefore, the court finds that the holdings of *Matter of Cowan v Kern* and its progeny defeat Mount Builders' "inconsistent with precedent" argument. The court concludes that Mount Builders has failed to demonstrate that the BSA's April 20, 2020 decision was an arbitrary and capricious ruling. It was not.

Accordingly, the court finds that Mount Builders' Article 78 petition should be denied as meritless, and that this proceeding should be dismissed.

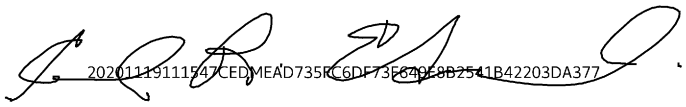
CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the application, pursuant to CPLR Article 78, of petitioner Mount Builders, LLC (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondents shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.



11/18/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	[x]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
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APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
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