Matter of Denisov v Dechance
2021 NY Slip Op 32074(U)
August 10, 2021
Supreme Court, Suffolk County
Docket Number: 606066/21
Judge: Carmen Victoria St. George
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

-- x

In the Matter of the Application of DIMITRI DENISOV, DONNA FALLON and ANTOINETTE TODARO,

Petitioners,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

PAUL M. DECHANCE, Individually, VINCENT PASCALE, Chairman, STEVEN WILUTIS, Vice-Chairman, PATRICIA KELLY, PETER ZARCONE, KAREN DUNNE, RIGHARD SMITH and JOHN ROSE, constituting the Planning Board of the Town of Brookhaven, and the PLANNING BOARD of the Town of Brookhaven, and the TOWN OF BROOKHAVEN,

Respondents.

-- x

Index No.
606066/21

Motion Seq:
001 Mot D

Decision/Order

The following electronically-filed papers were read upon this motion:

Notice of Motion/Order to Show Cause...........	1-12
Answering Papers...	13-34
Reply..	35-42

Petitioners seek an Order annulling the respondent Planning Board's approval of respondent Paul M. Dechance's application for relief from a covenant dated October 31, 1984 (recorded on November 28, 1984), declaring the covenant in full force and effect, and declaring that Dechance's property cannot be subdivided without approval of every lot owner in the Sunset Bluffs subdivision. Respondents oppose the requested relief.

This is a hybrid proceeding. This application is made pursuant to Article 78 of the CPLR; therefore, the requests for declaratory judgment are not herein considered. The sole determination to be made by this Court at this juncture is whether to annul the Planning Board's determination issued on March 16, 2021. The statutory framework applicable to Article 78 causes of action cannot be applied to causes of action seeking a declaratory judgment, especially where, as here, the respondents do not make argument concerning the declaratory judgment sought, but contend that this Court's review is limited to assessing whether the Board's decision was arbitrary or capricious, or without rational basis. In reply, the petitioners contend that the Board's determination should be annulled, and that the declaratory judgment action severed for further proceedings therein (*see* ***Matter of East West Bank v. L&L Associates Holding Corp.***, 144 AD3d 1030 [2d Dept 2016]).

Petitioners assert that "[t]he decision by the Planning Board was arbitrary and capricious in light of the fact that it failed to establish that there had been a change of circumstances which would allow for the relief of covenant that it granted and failed to take into account that, without the consent of the common grantees of the Covenant, no subdivision relief could be granted." As noted, respondents assert that, where a board's determination is neither arbitrary nor capricious, a court may not substitute its judgment therefore, and where substantial evidence exists, a court may not substitute its own judgment for that of the board, even if such a contrary determination is supported by the record. Accordingly, the questions raised for determination fall under CPLR §§ 7803 (3) and (4).

This Court recognizes that a local planning board has broad discretion in reaching a determination on applications, and judicial review of any planning board determination is limited to whether the board's action was illegal, arbitrary, or an abuse of discretion (***Matter of Kearney v. Kita***, 62 AD3d 1000, 1001 [2d Dept 2009]). When a judicial review for substantial evidence, courts consider only whether the record contains sufficient evidence to support the rationality of the board's determination (***Id.***; *see also* ***Matter of Fildon LLC v. Planning Board of the Inc. Village of Hempstead***, 164 AD3d 501 [2d Dept 2018]; ***Matter of In-Towne Shopping Centers v. Planning Board of the Town of Brookhaven***, 73 AD3d 925 [2d Dept 2010]).

In this case, the hearing was commenced on December 7, 2020 and continued on January 25, 2021. It is undisputed that the real property at issue is part of a development in the Town of Brookhaven known as Sunset Bluffs. Sunset Bluffs was subdivided in 1984 pursuant to an application by Sylvan Estates, Inc. Sylvan Estates sought to subdivide the property into twenty-nine (29) residential lots. Ultimately, in July 1984, the planning board approved the subdivision application for twenty-eight (28) lots contingent on Sylvan Estates filing covenants and restrictions, namely that "[n]o lot shall be subdivided or its lot lines changed in any manner at any future date unless authorized by the Brookhaven Town Planning Board." Each of the lots in the development is a single lot with one single family residence located thereon. Dechance's lot is denoted as lot No. 28, and is approximately 1.67 acres in size, improved by a single family residence. There is no dispute that Dechance purchased the property with awareness of the subject covenants. Dechance ultimately desires to subdivide his lot and build another residence thereon. It is also undisputed that there is subject to drainage easement.

The memorandum of law submitted in support of Dechance's application to the Town planning board advanced the argument that the covenant and restriction should be "cancelled of record because of changed circumstances within the town including increased demand for housing and advances in the technology of soil compaction" (Memorandum, Point I, p. 2). Dechance also argued that the covenant and restriction is not enforceable under RPAPL § 1951, and that the planning board is within its rights to declare that the covenant's intention is not clear or reasonable, and that the covenant is offensive to public policy because it is of no actual and substantial benefit to the Town.

Presently, respondents maintain that RPAPL § 1951 and a sufficient showing of changed circumstance is inapplicable to the instant matter "since the Application did not seek to repeal the Covenant, but to act pursuant to the language of the Covenant." This contention is belied by the memorandum of law submitted in support of the application before the planning board that sought cancellation of the covenant, and it is also in contrast to the purpose of the application stated on December 7, 2020, which was for "relief of covenant."

In fact, at the December 7, 2020 proceedings on the application, a planning board member asked Dechance's representative,[1] "what, if anything, is the change in circumstances or hardship that brings this proceeding before us?"

"[A] planning board may reconsider a determination if there has been a material change of circumstances since its initial approval of the plat or new evidence is presented" (***1066 Land Corp. v. Planning Board of the Town of Austerlitz***, 218 AD2d 887, 887 [3d Dept 1995]; *see also* ***Matter of Lynn v. Planning Board of the Town of East Hampton***, 89 AD3d 1028 [2d Dept 2011]).

When that member of the planning board made the inquiry as to the change in circumstance or hardship, Dechance's representative, an expediter, responded that the "change in circumstance predominately is that the owner has one of the largest parcels in the subdivision. He does have a – the ability and the amount of property in order to have a conforming lot that conforms with the surrounding area, as well as an adult child who offer an ability to stay on Long Island and build a home for." When asked how that is a change in circumstance, Dechance's representative answered that it is a change in personal circumstances, "not a change in circumstances of the surrounding area, other than the fact that much of Long Island has been—is being built up that there are many more applications of this nature as of late. . ." The Chairman of the planning board stated to Dechance's representative that, "[t]here were some questions that you weren't prepared for and I think the board's going to have additional information required on this application," and Dechance's representative acknowledged that, "this is a jumping off point and based on the circumstances obviously there is additional information that needs to be gathered and brought forward." The proceeding was adjourned to January 25, 2021. Accordingly, it is reasonable to conclude that the respondents were aware that

[1] It was disclosed at this session that applicant Dechance is an employee of the Town of Brookhaven and serves on the Town's Zoning Board of Appeals.

they had not sufficiently demonstrated the required change in circumstances necessary for the planning board to reconsider its 1984 determination set forth in the subject covenant.

On January 25, 2021, Dechance was represented by counsel, who framed the application as one for "a relief of covenant." In support of the application for relief of covenant, Dechance presented, *inter alia*, the memorandum of law discussed herein above, the testimony and written report of John J. Breslin, Jr., the principal of a real estate appraisal company, and the sworn written report of William Stone, a construction contractor. The petitioners, who object to the application, were represented by counsel as well at the January 25, 2021 proceeding before the planning board.

At the continued application hearing, Dechance's counsel maintained that "there is a need to create housing in the Town." Petitioners' representative raised the argument that there was no showing of a change in circumstances within the physical character of the community warranting reconsideration of the 1984 covenant at issue, but "[h]is changes in circumstances refer to a pandemic and refer to economic changes that have occurred in the economy" that may make it more profitable to subdivide a parcel of property. Petitioners pointed out that all of the other homeowners in the subdivision have adhered to the covenant in issue and they enjoy the benefits thereof.

Thereafter, Mr. Breslin testified that, in 1984, "the economics didn't allow the filling in of this lot to make any economic sense. Today, however, it's different circumstance. This is a very nice neighborhood. It's worth it to do that." He further testified that "the idea of filling this lot to the extent that you can develop, will also help stabilize the hill for the homes that are on the street to the north." Mr. Breslin's written report likewise discusses the economics of filling in the lot for purposes of development, that the covenant is "standard boiler plate covenant that exists in all sub-divisions," and that the "clear intent of that covenant was not specifically directed at this lot or any other lot in the sub-divisions." Breslin further wrote that, "[i]n 1984, the level of engineering that is done with sub-divisions and steep slopes was not done for the most part, steep slope ordinances did not exist. It would be in my opinion that this lot was not developed for very practical reasons in 1984," and that, the "then developer did not want to spend the money [;] it would not have been worth it. Land was readily available and the cost to do that rendered it not feasible. Today, it is a different story with the scarcity of land especially in a desirable community such as this." Notably, Mr. Breslin acknowledged in his written submission that he is not an engineer, and he offers that "common sense dictates that filling the hole will stabilize the hill." In fact, applicant Dechance did not submit any engineering report concerning the advisability of "filling the hole."

Dechance's other submission, the sworn statement of Mr. Stone, similarly states that the depression in the land could be "infilled" and "would need to be compacted properly and certified as capable of bearing the load of, in this case, haunch footings, a basement floor and walls and the typical structural members and equipment expected in any single family home." He further states that "soil compaction [has] improved" since 1984 and this fact makes it much more feasible to build the subject home, than it would have been at that time, when the subdivision map was filed. According to Mr. Stone, "it could make perfect economic sense to build and

develop on this land." Mr. Stone acknowledges in his sworn statement that he does not have a curriculum vitae, and that he had not visited the property in question; rather, he stated that he reviewed a series of photographs provided to him by counsel for the applicant.

The public hearing was closed on January 25, 2021, and on March 8, 2021, the planning board issued its written findings and conclusions approving the application. The section entitled relief requested states, "Relief of covenant," which is what counsel for Dechance requested in the memorandum of law submitted in support of the application; however, also listed under this section is "Planning Board authority to subdivide the subject property." The latter was not the relief requested by Dechance. Further muddying the board's findings and conclusions is its attempt to clarify the relief sought. In Paragraph Third it is written that,

> "[t]he Board finds that it must clarify the relief sought pursuant to this application and pursuant to the Board's limited authority in hearing this application. The application here, for relief of covenant, seeks the Board's permission to subdivide the subject property. Approval to subdivide the property permits the applicant to make a subsequent and separate application for land division approval and variance relief from the Board of Zoning Appeals. The Board does not have the authority to approve the applicant's land division proposal. The application does not request that the Board repeal the language set forth in the covenant."

As noted herein, cancellation of record of the covenant and restriction is precisely what was requested by the applicant Dechance; therefore, the board's characterization of the application is seemingly at odds with the application, and/or misapprehended the application.

The Board further found that the applicant need not show sufficient "changed circumstances" to obtain the relief of the covenant, and that "such standard is inapplicable to the application herein" because "the application before the Board is not to repeal the covenant, but to act pursuant to the covenant language. The relief requested is permission from the Planning Board to seek land division and variance relief from the Board of Zoning Appeals. Therefore, evidence of 'changed circumstances' is not necessary" (Paragraph Eighth, emphasis in original).

Paragraph Eleventh's finding sets forth that the "applicant is acting pursuant to and in compliance with the covenant restrictions in question. If the neighboring property owners have any rights herein, it is to seek enforcement of the covenant. Enforcement of the covenant leads to the applicant's current application before the Planning Board, *seeking permission to subdivide the subject property*" (emphasis added). The board's conclusion is that the "applicant's request for relief of the covenant for authorization to subdivide the subject property is approved, subject to the conditions of Planning staff dated December 2, 2020." Notably, the planning board acknowledged in the beginning of its written findings and conclusions that it does not have authority to approve division of the land, but that only the Zoning Board of Appeals, of which Dechance is a member, has such authority. Accordingly, the board's own written findings and conclusions appear internally inconsistent and display a kaleidoscopic and confused understanding of Dechance's application, thereby rendering the planning board's determination arbitrary and capricious by making it unclear what relief, if any, was actually granted.

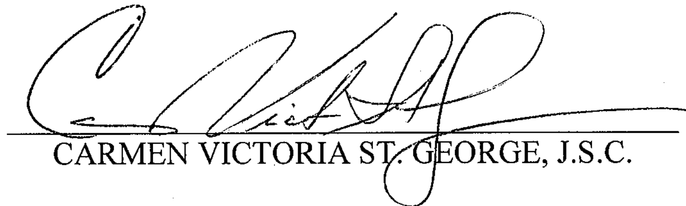
Moreover, the findings and conclusions reference in Paragraph Twelfth that the subject property "maintains a portion of a drainage easement on the northwest corner of the property," and that "[t]he subject property, though maintaining steep slopes, is not utilized for recharge purposes. The applicant's expert testified that filling in the subject property could provide a benefit to adjacent properties by reducing and eliminating the existing slopes. Furthermore, Planning staff, and environmental review, did not note any concerns regarding drainage. Therefore, the Board finds that the record does not support the conclusion that the subdivision and development of the subject property will have a negative effect on the existing drainage conditions in the area."

Neither Mr. Breslin nor Mr. Stone are engineers or experts in soil compaction as acknowledged in their respective statements, thereby further leading to the conclusion that the planning board's determination is not supported by substantial evidence. Moreover, in further support of the instant petition, petitioners have submitted a Town of Brookhaven SEQR Notice of Determination dated April 24, 1984 concerning the subdivision that reduced development of 29 lots to 28 by eliminating Lot 29 and making it part of lots 11 and 12 (the Dechance property) because of a "substantial change in the drainage patterns in an area of steep slopes and erodible soils possibly resulting in erosion problems," thereby requiring the "high slope area adjacent to Gully Landing Road to remain in its natural state." This submission is apparently in contradiction to Messrs. Breslin's and Stone's assertions that the subject lot was not subdivided in 1984 because it was not economically feasible, and also in in contravention to Dechance's counsel's representation at the January 25, 2021 proceeding that he "dug deeper. . .to see if there was anything in the minutes in 1984, circa '84 or '85 which would give a clear indication of what the board members had in the mind when they had drafted the covenant and whether it did pertain in particular to the subject lot, my client's property. I found nothing."

Accordingly, the petition is granted to the extent that the planning board's determination dated March 8, 2021 is hereby annulled. The declaratory judgment causes of action are severed.

The foregoing constitutes the Decision and Order of this Court.

Dated: August 10, 2021
Riverhead, NY



CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]