

Demirjian v Planning Bd. of the Town/Vil. of Harrison
2021 NY Slip Op 32731(U)
December 9, 2021
Supreme Court, Westchester County
Docket Number: Index No. 57252/2021
Judge: David S. Zuckerman
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DISPO Seq 1 and 2 Motions and Case

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
TEDDY A. DEMIRJIAN and ROZITA DEMIRJIAN,

DECISION/ORDER

Petitioner,

-against -

THE PLANNING BOARD OF THE TOWN/VILLAGE OF HARRISON and GRASSO BROTHERS GENERAL CONTRACTING, INC.

Index No.
57252/2021

Motion Date:
6/9/2021

Respondents.

-----X
ZUCKERMAN, J.

The following papers numbered 1 through and including 56 in NYSCEF were considered in connection with the instant Petition seeking, *inter alia*, to vacate, annul, and invalidate the April 27, 2021 approval by Respondent Planning Board of the Town/Village of Harrison of a steep slope application for 27 Century Ridge Road, to require said Board to rescind the steep slope approval, to enjoin implementation of any plan set forth in the steep slope approval, and to prevent Respondent Grasso Brothers General contracting, Inc., from conducting any work within the wetland buffer or on the steep slope based on the steep slope approval. Petitioners argue that they are entitled to this relief because Respondent Planning

Board of the Town/Village of Harrison issued the steep slope approval without first obtaining and considering a complete steep slope application and/or wetlands application.

The instant CPLR Article 78 action was commenced by Petitioners Teddy A. Demirjian and Rozita Demirjian (hereinafter "Petitioners") seeking to restrain and enjoin steep slope work sought to be performed at 27 Century Ridge Road, in the Town/Village of Harrison (hereinafter, "the subject premises"), in a wetlands buffer zone directly adjacent to Petitioner's premises, located at 33 Century Ridge Road (hereinafter "Petitioners' premises"). George Grasso and Respondent Grasso Brothers General Contracting, Inc. (hereinafter, "the applicant" or "Respondent Grasso") own the subject premises. The approved steep slope project (hereinafter, "the project") involves placement of a new driveway, cutting of trees, and associated excavation on a designated steep slope (hereinafter, "the project location"). Petitioners allege that Respondent Planning Board of the Town/Village of Harrison (hereinafter "the Board") erred when it approved the steep slope application. More specifically, Petitioners allege that the Board's approval of the steep slope permit was made after submission of an incomplete application and without a freshwater wetlands application - in violation of the Harrison Town Code.

FACTS

Petitioners have resided at 33 Century Ridge Road in the Town/Village of Harrison for an extended number of years. Petitioners' premises partly consists of freshwater wetlands--it contains a pond which is supplied by water from a stream. The fresh water thereafter flows from the pond onto other properties. The subject premises is south of and elevated above Petitioners' premises on a designated "steep slope." The steep slope is within 100 feet of the wetlands area. Numerous trees on both premises mitigate the flow of groundwater from the steep slope down to the wetlands below (located on Petitioners' premises).

The subject premises is not improved by a house - the previously erected house was demolished in 2016. The subject premises is improved by an existing driveway, still partially present, on the other (north) side of the premises, outside of the 100-foot wetlands buffer. A second partial driveway, the subject of the current application process, was installed adjacent to Petitioners' premises on the steep slope¹. Respondent Grasso seeks to improve this driveway by expanding it, requiring excavation and tree cutting.

¹Petitioners assert that the prior work was done without Town approval.

Respondent Grasso filed a steep slope application seeking permission to extend the driveway as well as the above-referenced excavation and tree cutting. The application, and the minutes of the Board's relevant discussion, contain what appear to be inaccuracies. They include statements regarding the absence of a wetlands buffer zone (or the true location of that buffer zone) between Petitioners' premises and the subject premises as well as denials that water flows down the steep slope onto Petitioners' premises. Petitioners assert that these statements caused the Board to waive the Town Code requirement that the applicant apply for a freshwater wetlands permit relating to the proposed work. Petitioners argue that such waiver is a direct violation of the Town Code, requiring the court to grant the relief sought. Further, while the Town Code also requires consideration of alternatives for planned work, here, only one alternate location on the subject premises (where a driveway might otherwise be placed) was considered; i.e., placing the driveway along the southern portion of 27 Century Ridge Road. That alternative was dismissed by Respondent Grosso as not feasible. Petitioners allege that it never was a truly feasible alternative. Notably, the Board considered the application even though it was incomplete (i.e., when filed, the application form was not completely filled out and it lacked a freshwater wetlands application). Nonetheless, on April 27, 2021, the Board approved the steep slope application.

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CONTENTIONS OF THE PARTIES

Petitioners seek vacatur of the approved steep slope application or a temporary restraining order and preliminary injunction to prevent what they allege to be irreversible damage to their premises (namely the wetlands thereon) due to the Board's improperly approving the project. Petitioners allege that the project will take place in a designated wetlands buffer that includes and adjoins Petitioners' premises (and the wetlands thereon). They assert that the approval violated Town Code §149-6 in that Respondent Grasso did not file a freshwater wetlands permit application. Petitioners further argue that the steep slope application otherwise violated the Town Code because it was not fully completed when filed. Nor were "all" alternatives examined for the project as required by Town Code §199-6E. Additionally, Petitioners assert that the project violates Town Code §199-6E because it threatens to cause a nuisance due to flooding from the removal of trees. Finally, Petitioners allege that representatives of Respondent Grasso made false and misleading statements in furtherance of the application including, *inter alia*, denying the presence of wetlands near the site and falsely representing that storm water does not flow down the steep slope from the subject premises onto Petitioners' premises. In sum, Petitioners argue that, because the project impacts both a steep slope and wetlands,

it requires proper Town Code applications which were not done and, in their absence, The Board's approval must be vacated, annulled, and cancelled.

Respondents argue that the Board properly considered the steep slope application and, for several valid reasons, rejected the alternative driveway site as impractical. The Board concedes the presence of freshwater wetlands on Petitioners' premises within the buffer zone (i.e. less than 100 feet distant). Nonetheless, the Board asserts that no wetlands approval process was required, arguing that it was "unnecessary." Respondent Grasso argues that the Board had discretion to dispense with a hearing on the freshwater wetlands issue and that, even if remitted for consideration, the result would not change. Instead, it would cost Respondent Grasso additional time and financial loss.

DISCUSSION

It is well settled that a court reviewing an Article 78 proceeding may not substitute its judgment for that of the board which issued the final determination unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious. *See Matter of Pell v Board of Education of Union Free School District No. 7 of Towns of Scarsdale &*

Mamaroneck, Westchester County, 34 NY2d 222, 230 (1974); see also *Save America's Clocks, Inc. v City of New York*, 33 NY3d 198 (2019); *Matter of Trump on the Ocean, LLC v Cortes-Vasquez*, 76 AD3d 1080, 1083 (2d Dept 2010); CPLR 7803(3). A local board's determination must be upheld if it is rational and supported by substantial evidence, even if the reviewing court might have decided the matter differently based on the same record. (*Nabe v Sosis*, 175 AD3d 500 (2nd Dept, 2019); see also *Matter of Trump, supra*; *Matter of P.M.S. Assets v Zoning Board of Appeals of Village of Pleasantville*, 98 NY2d 683, 685 (2002); *Matter of Toys "R" Us v Silva*, 89 NY2d 411, 423 (1996).

With respect to local zoning decisions, it is also well settled that:

[t]he responsibility for making zoning decisions has been committed primarily to quasi-legislative, quasi-administrative boards, composed of representatives from the local community. Local officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community. Absent arbitrariness, it is for locally selected and locally responsible officials to determine where the public interest in zoning lies [and] where there is a rational basis for the local decision, that decision should be sustained. It matters not whether, in close cases, a court would have, or should have, decided the matter differently.

(*Matter of Cowan v Kern*, 41 NY2d 591, 599 [1977]; see also *Youngwirth v Town of Ramapo Town Board*, 155 AD3d 755, 159 [2nd Dept 2017]).

In *District Council 37, AFSCME v City of New York*, 22 AD3d 279 (1st Dept 2005), the court held that

Under CPLR article 78, judicial review of an administrative determination is limited to the evaluation of whether the determination is consistent with lawful procedures, whether it is arbitrary or capricious, and whether it is a reasonable exercise of the agency's discretion (*See Matter of Pell, supra*, 230). When an administrative agency is charged with implementing and enforcing the provisions of a particular statute, the courts will generally defer to the agency's expertise and judgment regarding that statute. So long as the Public Employment Relations Board's interpretation is "legally permissible and so long as there is no breach of constitutional rights and protections, the courts have no power to substitute another interpretation" (*Matter of Village of Lynbrook v New York State Public Employment Relations Board*, 48 NY2d 398, 404 [1979]).

Moreover, when the language of a law is specific, all that is required of the agency to effect its mandate is to implement the statute in conformity with its purpose and directive. *Sabol v Perales*, 82 NY2d 685 (1983--published regulations); *O'Neil v Metropolitan Transit Authority*, 143 AD2d 739, 740 (2nd Dept 1988), *ap dism* 74 NY2d 909 (1989); *Occidental Chemical Corporation v NYS Environmental Facilities Corporation*, 113 AD2d 4 (3rd Dept 1985), *lv den* 67 NY2d 604 (1986)).

Petitioners argue, and Respondents concede, that no freshwater wetlands permit was applied for or granted herein. Harrison Town Code §149-6A provides

Any person proposing to conduct or cause to be conducted a regulated activity requiring a permit under this chapter upon any freshwater wetland or adjacent area shall file an application for a permit with the Clerk of the Town of Harrison.

(emphasis added).

Respondent Grasso asserts that the Board has discretion to waive a hearing on any freshwater wetlands application. Petitioners correctly argue that Town Code §149-6A requires a wetlands application in the instant matter. The Court of Appeals has held that, in all statutory construction, the word "shall" has its usual meaning. Thus, in *Matter of DeVira v Elia*, 32 NY3d 423, 435 (2018), the Court explained: "[i]n other words, the use of 'shall' . . . makes what follows mandatory." See also *McCormick v Axelrod*, 59 NY2d 568, 572 (1983) ("the Legislature . . . added the word 'shall' . . . [giving rise to] a mandatory interpretation."

Further, there can there be little doubt that the approved activities involving this wetlands area are "regulated activities." Harrison Town Code §149-4 defines "Regulated Activities" as including

[a]ny form of draining, dredging, excavation or removal of soil, ...from any freshwater wetland, either directly or indirectly; erecting any structure or roads; ... that portion of any subdivision of land that involves any land in any freshwater wetland or adjacent area; and any other activity which substantially impairs any of the several functions served by freshwater wetlands or the benefits derived therefrom, which are set forth in § 149-3." (emphases added).

As noted above, the project involves, at a minimum, excavation, soil removal, and erecting a road on the subject premises. Consequently, a wetlands application and permit are required for the project.

While it is true that, pursuant to Town Code §149-6E(2), a hearing is discretionary, Town Code §149-6A mandates issuance of a freshwater wetlands permit. Further, Town Code §149-6E(1) requires a public hearing 30-60 days after receipt of a completed application. Although Town Code §149-6E(2) grants the Board discretion to dispense with a hearing, that follows only after submission of a completed application. Pursuant to Town Code §149-6A, the steep slope application herein required (*i.e.*, was incomplete without) a freshwater wetlands permit. Consequently, there was no completed steep slope application.

In sum, Respondent Grasso was required to file a freshwater wetlands permit application preparatory to the steep slope application. Respondents concede that this was not done. The Board asserts that it was "unnecessary" and, thus, waived it. The Town code mandates otherwise.

Absent the required freshwater wetlands permit, the Board was not authorized to consider, much less grant, the steep slope

application. Thus, the court must find that the Board's grant of the application was arbitrary and capricious, an abuse of discretion, and not legally permissible. Therefore, the permit must be annulled and the matter remitted to the Board for proper consideration of a freshwater wetlands application, if any. Thereafter, if appropriate, the Board may consider a new steep slope permit. The remainder of Petitioners' motion is denied, with leave to renew upon such time, if any, that a freshwater wetlands permit application is completed and a new steep slope application for 27 Century Ridge Road, Harrison, is thereafter approved.

Based upon the foregoing papers, it is hereby

ORDERED, that the Petition seeking to annul and invalidate the April 27, 2021 approval by Respondent Planning Board of the Town/Village of Harrison of a steep slope application for 27 Century Ridge Road is hereby granted, and the same is annulled; and it is further

ORDERED, that Petitioners' motion is in all other respects denied, with leave to renew upon such time, if any, that a freshwater wetlands permit application is completed and a new steep slope application for 27 Century Ridge Road, Harrison is thereafter approved.

The foregoing constitutes the Opinion, Decision & Order of the Court.

Dated: White Plains, New York
December 9, 2021



HON. DAVID S. ZUCKERMAN, A.J.S.C.

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