Feinberg-Smith Assoc., Inc. v Town of Vestal Zoning Bd. of Appeals
2017 NY Slip Op 31695(U)
August 15, 2017
Supreme Court, Broome County
Docket Number: CA2017000913
Judge: Eugene D. Faughnan
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At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 20th day of June, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

FEINBERG-SMITH ASSOCIATES, INC. dba
HAYES STUDENT LIVING COMMUNITY,

Petitioner,

vs.

TOWN OF VESTAL ZONING BOARD OF
APPEALS and TOWN OF VESTAL,

Respondents.

DECISION AND ORDER

Index No. CA2017000913
RJI No. 2017-0546-M

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

Petitioner, Feinberg Smith Associates d/b/a Hayes Student Living Community ("Feinberg"), commenced this Article 78 proceeding seeking: 1) a Judgment that the determination of the Town of Vestal Zoning Board of Appeals ("Vestal ZBA") denying Feinberg's variance requests, was illegal, arbitrary, capricious and without substantial evidence; 2) an Order granting Feinberg's variance requests; 3) an Order directing the production of records pursuant to Feinberg's Freedom of Information Request, and 4) an Order directing the Town of Vestal Board ("Town") and Vestal ZBA to appear for depositions concerning alleged communications and/or pressure placed on the Vestal ZBA to deny Feinberg's variance requests. The parties appeared before the Court for oral argument on June 20, 2017. At that time, Petitioner advised the Court that the Town had recently provided documents pursuant to the Freedom of Information Request, and accordingly, that aspect of the Article 78 proceeding was resolved. Therefore, the Court deems that part of the Petition withdrawn. The Court also determined from the Bench that the Petition, as it pertains to the Town, should be dismissed. That decision was incorporated into an Order signed on July 5, 2017. The Court reserved decision on the remainder of the arguments. After due deliberation, the Court renders this Decision and Order.

Background facts

In 2015-2016, Feinberg explored the possibility of adding new buildings to an existing student housing development it operates near the Binghamton University campus, known as Hayes Student Living Community ("Hayes")[1]. In 1986, there was a 10 year lease between the University and Hayes to house up to 400 students in the buildings. The University itself dealt with any issues or concerns with the Town directly at that point, although there apparently was

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[1]There are two properties involved in this proposed project. One on Country Club Road, consisting of 3 buildings, 95 units and 130 residents; the other on Plaza Drive, consisting of 5 buildings, 90 units and 92 residents.

no formal variance issued. At the expiration of that lease, Petitioner began to "self-operate" the student housing, utilizing one and two bedroom apartments, targeting "the serious student." Having operated it successfully for the past 20 years, Feinberg began exploring the possibility of expanding Hayes, to add more residential units using the same one and two bedroom model. Specifically, Feinberg proposed to construct additional buildings at the two properties, adding 220-240 apartments and 340 residents (for a total of 409 apartments and 562 residents upon completion). In order to accomplish that, Feinberg sought to obtain variances to reduce the lot size requirement for two and three story multi family residences, reduce the minimum living space requirement per family from 750 square feet to 475 square feet, reduce the number and size of parking spaces, and increase the building height maximums.[2] Feinberg highlights that the goal was to have fewer residents, and less population density, than permitted under the existing laws. Feinberg preferred to have one and two bedroom units, instead of four or five bedroom units.

Feinberg submitted its request for variances to the Vestal ZBA in late August, 2016. (See Record in accordance with CPLR §7804(e), R-1). The variance requests were addressed by the Vestal ZBA on three hearing dates- November 10, 2016, December 15, 2016 and February 9, 2017. The first meeting consisted of Petitioner's Power Point presentation about the proposed project, and public comments. The record shows that the Board received over 80 emails or letters in opposition to the requested variances. At the second meeting, Petitioner responded to the public comments, and made another Power Point presentation. After deliberation and discussion at the December 15, 2016 meeting, the Vestal ZBA made a SEQR determination of no adverse impacts, and scheduled another hearing on the matter. By the time of the next hearing, according to Feinberg, the public, and members of the Town Board, placed influence on the Vestal ZBA to oppose the proposal. The Vestal ZBA denied the variance requests at the February 9, 2017 meeting, and subsequently issued a written Decision dated March 22, 2017, summarizing its findings and conclusions. Feinberg then commenced this Article 78 proceeding on April 21, 2017, challenging the denial.

Feinberg alleges that at the conclusion of the December 15, 2016 meeting, the Vestal

[2]At the ZBA meeting, Feinberg withdrew its variance requests for height of buildings, and for smaller parking spaces, leaving just the remaining items for variance consideration.

ZBA informed Petitioner there would be another meeting in February, 2017, and there would be a question and answer process by which the Vestal ZBA could understand the details and support for the requested variances. In this way, according to Petitioner, the Vestal ZBA could publicly conduct a detailed inquiry into the variance requests, and make an informed decision. Feinberg points to the fact that additional public comments were allowed up to January 5, 2017, and therefore, those comments, and Feingberg's responses, would have had to have been contemplated for discussion at the next meeting in February.

However, Feinberg asserts that instead, at the beginning of the February 9, 2017 meeting, the Vestal ZBA stated that they were going to vote on the variances that night, and there was little substantive discussion at the February meeting. Feinberg contends that "between December 15, 2016 and February 9, 2017, it is believed that the Town of Vestal Town Board or certain members of the Town Board placed undue and improper influence on the [Vestal ZBA] with respect to Petitioner's proposed project and variance requests." (Article 78 Petition at ¶20). That would also suggest that certain non-public meetings or discussions occurred. Further, the written Decision filed on March 22, 2017 is challenged by Feinberg as an after the fact effort to justify the Vestal ZBA's determination, and went beyond the actual discussions at the meeting, further evidencing that private discussions occurred between the Vestal ZBA members between February 9, 2017 and March 22, 2017.

The Vestal ZBA argues that its determination has a rational basis and that it properly considered the statutory factors as required. The Vestal ZBA believes that the denial of the variances was proper because the variances would have a deleterious impact on the character of the neighborhood and the properties bordering the project, and the requested variances were too substantial. It further argues that the decision was not based solely on community opposition to the project.

Discussion

"Local zoning boards have broad discretion in considering applications for area variances and the judicial function in reviewing such decisions is a limited one. Courts may set aside a

zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure." *Pecoraro v. Bd. of Appeals of Town of Hempstead*, 2 NY3d 608, 613 (2004) *citing Matter of Ifrah v. Utschig*, 98 N.Y.2d 304, 308 (2002) (other citations omitted); *Matter of Braunstein v. Board of Zoning Appeals of the Town of Copake*, 100 AD3d 1091 (3rd Dept. 2012) Thus, the basis for review of a zoning board's determination is whether it has a rational basis and is supported by substantial evidence. *Pecoraro* at 613. A determination is rational "if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition." *Matter of Halperin v. City of New Rochelle*, 24 AD3d 768, 772 (2nd Dept. 2005); *see Matter of Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh,* 68 AD3d 62 (2nd Dept. 2009). Whether the reviewing court would have made the same decision as the zoning board, or "might have decided the application differently is of no moment." *Braunstein* at 1093. The court's role is to review zoning decisions, not to make them. *See Pecoraro, supra.*

In making a determination as to whether to grant an area variance, Town Law §267-b(3) provides that:

> a zoning board of appeals must weigh the benefit of the grant to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted (*see Matter of Ifrah v Utschig*, 98 N.Y.2d 304, 307, 774 N.E.2d 732, 746 N.Y.S.2d 667 [2002]; *Matter of Sasso v Osgood*, 86 N.Y.2d 374, 382, 384, 657 N.E.2d 254, 633 N.Y.S.2d 259 [1995]). The zoning board is also required to consider whether (1) granting the area variance will produce an undesirable change in the character of the neighborhood or a detriment to nearby properties; (2) the benefit sought by the applicant can be achieved by some method, feasible to the applicant, other than a variance; (3) the requested area variance is substantial; (4) granting the proposed variance would have an adverse effect or impact on physical or environmental conditions in the neighborhood or district; and (5) the alleged difficulty is self-created.

Pecoraro, supra at 612-613; *see also Braunstein, supra.*

"The statute envisions that courts will engage in a balancing test of the enumerated

factors.... A ZBA is not required to justify its determinations with supporting evidence as to each of the five factors, so long as its determinations balance the relevant considerations in a way that is rational ...." *Matter of Caspian* at 73 (citations omitted); *See also Matter of Patrick v. Zoning Bd. of Appeals of Vil of Russell Gardens*, 130 AD3d 741, 741-742 (2nd Dept. 2015) (citations omitted).

Feinberg argues that the Vestal ZBA did not perform the required balancing test, and instead was influenced by community pressure. The Vestal ZBA argues that it properly considered, but did not bow, to those concerns and comments. In the present case, there was a considerable amount of public comment with respect to the proposal. The Vestal ZBA received numerous emails and letters in opposition to the proposed variances, as well as some in support of the application, even before the application was considered at a board meeting on November 10, 2016. (R-5). At the conclusion of the November 10, 2016 meeting, the Vestal ZBA advised that it would permit additional submissions with respect to the application. Those additional written submissions are also part of the record . (R-5).

Petitioner's variance requests were addressed by the Vestal ZBA at three meetings. At the November, 2016 meeting, Petitioner played its own Power Point presentation with respect to the expansion project on the 2 properties. (R-3). The detailed summary highlighted the history of this student housing development, provided photos of the existing site, contained sketches and descriptions of the proposed project, and discussed the several variances being requested, and Petitioner's justification for each of the variances: 1) With respect to the minimum lot area, it was noted that the Village Code calls for 3,000 square feet for 2 and 3 story multifamily dwellings. Based on the area involved in this project, the Code would allow the construction of 150 dwelling units, which could house 5 occupants per unit for a total of 750 occupants. Petitioner's project was seeking only 562 occupants, but more units because they would be one and two bedrooms apartments; 2) Regarding the minimum living area, the presentation showed that the minimum allowed living space under the Code is 750 square feet, and Petitioner was seeking a variance to 474 square feet for the one bedroom apartments. While 5 occupants in 750 square feet suggests 150 square feet per person, the 474 square feet for one person is much more per person; 3) The Code requires 2 parking spaces per each dwelling unit, which would be 818

for this proposed 409 dwelling units. Petitioner sought a variance to require only 309 parking spaces, noting that historically, only 35%-43% of the residents use the parking, opting instead to walk to campus.[3] At the conclusion of the Power Point presentation, the Vestal ZBA also allowed public comment on the proposal. Thereafter, another meeting was scheduled for December 15, 2016.

At the December, 2016 meeting, Petitioner presented additional details and explanations regarding its variance requests. At the end of that presentation, the Vestal ZBA deliberated on the SEQR related issues, including change in intensity of use of land, impairing the character or quality of the existing community, and adverse change in existing level of traffic or affect infrastructure for mass transit, biking or walkway. As to those three items, the Board concluded that a moderate to large impact may occur. Ultimately, however, the Board issued a negative declaration.

On February 9, 2017, the Board met for a third time on these variance requests. The Board noted it was not a public hearing, in that public comments would not be permitted, but the Board would be discussing the application, and then voting. The Chairman noted the five factors the Board must consider under Town Law regarding the requests for variances.

The Board then voted on the three variances. With respect to the request to maximum number of dwelling units allowed on this size parcel, the Board discussion included comments that this project was quite substantial, comparing how many units were going to be added, with how many there are now. The Board voted to deny that variance request.

The Board then considered the variance request with respect to the minimum living area. It was observed that the reduction in size was almost one-third of the Code requirement (from the current 750 square feet down to 474 square feet-which is actually more than a one-third reduction). The Board voted to deny that variance request.

The Board also reviewed and voted on the minimum number of parking spaces requirement. Again, noting it to be a very substantial variance request, the Board denied the variance request.

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[3]The presentation also included details about the other variance requests that were subsequently withdrawn, and accordingly, the Court will not discuss those further.

Recognizing that a zoning board's decision need only be rational based on substantial evidence, the Court cannot say that the Vestal ZBA's determination was arbitrary or an abuse of discretion. The Board has provided adequate explanation for its decision.

The Vestal ZBA highlights there will be a change in the character of the neighborhood if the variance is granted. This project would add more than 220 dwelling units to the existing 185, an increase of about 120%. The occupancy would add approximately 340 people to the current number of about 220, or an increase of 150%. More buildings would be added to the site, and the buffer area between the development, and surrounding homes, would be significantly decreased. The wooded area would be reduced by approximately 50%. Local residents expressed their concerns about the decreased buffer area, and increased pedestrian traffic, in an area that does not have sidewalks. Reliance on specific testimony of neighbors is an appropriate consideration. *See Caspian, supra*. The Board also point out that these elements were clearly considered and discussed at the December meeting when the SEQR was prepared. Although the Board granted a negative declaration in December, 2016, it did find that there would be a moderate to large impact in the following areas: 1) change in the use or intensity of use of the land, 2) it would impair the character or quality of the existing community, and 3) adverse change in the existing level of traffic or affect mass transit, biking or walkway. The Board concluded that those findings did not preclude a negative declaration of the SEQR form, but they certainly could have rationally reached a different conclusion on the ultimate granting of the variances.

Based on the discussion and percentage observed in the preceding paragraph, this project would also be fairly characterized as substantial, based on the amount of additional area covered, population density and decrease in the buffer zone. Variances can be substantial based on the extent to which they deviate from the Code, and also based on the cumulative effect. *Matter of Millennium Custom Homes, Inc, v. Young*, 58 AD3d 740 (2nd Dept. 2009). The larger the amount of the deviation from the Code, the more substantial the impact is. *See National Merritt, Inc. v. Weist*, 41 NY2d 438 (1977). It was not irrational for the Board to conclude that these variances are substantial, and for that factor to weigh against the granting of the variances.

There are also alternatives to the variance requests. As Petitioner has pointed out, it

could actually house over 700 people with a project that would be compliant with the Code, if it were to build 5 bedroom units. Petitioner urged the Board that the current proposal was an even better alternative, because of it would not be as much of an increase in population. Be that as it may, it does evidence an available alternative to the proposed project, and variance requests. The Board recognized, considered, discussed, and weighed that factor. Additionally, the denial of the variance requests does not render this property unusable to the Petitioner. He has been, and can continue, using it as he has.

The Board proceedings reveal that the Petitioner, Board, and public all addressed the various aspects of this project, and the variance requests. The Board's actions reflect an involved discourse with both the Petitioner and the public about the project, and the Board was provided with very detailed plans and explanations from the Petitioner. In fact, the Board contends that, for that very reason, it did not need to have any further explanation from the Petitioner at the February meeting. It already had enough information on the project, and variance requests.

The Court cannot say that the Vestal ZBA overlooked any of the relevant factors or that its determination lacks a rational basis. The ZBA balanced and weighed the statutory factors over the course of its 3 meetings on the matter, and its findings were based on objective evidence in the record. Although the determination was not as Petitioner had hoped, and although Petitioner advanced many arguments that could have supported the variances, there is also ample evidence to support the Vestal ZBA's ultimate denial of the variance requests, and the determination was not arbitrary or an abuse of discretion.

Open meetings/ additional discovery

Petitioner also contends that there may have been some undue influence exerted over the ZBA between the second and third meetings. Petitioner contends that the ZBA seemed to change course, and therefore, it may be due to external pressures. Petitioner seeks to explore that possibility by obtaining depositions from members of the Town Board and Vestal ZBA.

In an Article 78 proceeding, "a petitioner is not entitled to discovery as of right, but must seek leave of court pursuant to CPLR 408...(and) discovery is granted only where it is

demonstrated that there is a need for such relief." *Matter of Lally v. Johnson City Cent. Sch. Dist.*, 105 AD3d 1129, 1132 (3rd Dept. 2013), *quoting Matter of Town of Pleasant Valley. v. New York State Bd. of Real Prop. Servs.*, 253 AD2d 8, 15 (2nd Dept 1999). Discovery tends to prolong a case, and is inconsistent with the summary nature of a special proceeding, and accordingly discovery is granted only where it is demonstrated that there is need for such relief. *Matter of Town of Pleasant Val, supra.*

Here, Petitioner asserts that there may have been pressure exerted on the Vestal ZBA between the December, 2016 and February, 2017 meetings. To support that contention, Petitioner states that the Vestal ZBA attorney was removed during that time-frame, and that the Board's determination in February, 2017 of significant impacts on the neighborhood, is in contrast to its December, 2016 SEQR negative declaration. However, Petitioner only offers conjectures and supposition, and the Court finds they are not reasonably calculated to lead to evidence material and necessary to this case. Therefore, the Court finds that the Petitioner has failed to provide a satisfactory basis to grant discovery in this matter, and that request is DENIED.

CONCLUSION

Based upon the foregoing discussion, Petitioner's Article 78 proceeding is denied and the application is DISMISSED.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: August 15, 2017
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice

The following papers were received and reviewed by the Court in connection with this motion:

1) Notice of Petition, dated and filed April 21, 2017, with Petition dated April 19, 2017 and attached Exhibits;
2) Notice of Cross-Motion from Town of Vestal filed June 12, 2017, with Affirmation of David S. Berger, Esq., dated June 8, 2017 and unsworn Affidavit of Emil Bielecki, dated June 7, 2017, with attached Exhibits, and Memorandum of Law;
3) Affidavit of Mark S. Johnson, sworn to on June 13, 2017 on behalf of Vestal ZBA in opposition to the Petition, and Memorandum of Law, dated June 13, 2017
4) Reply Affidavit of Alan J. Pope, Esq., sworn to on June 16, 2017;
5) The Vestal ZBA also provided Chambers with the Record in accordance with CPLR §7804(e), including CDs of the hearings held over 3 different dates. The Court will transmit the Record to the County Clerk to be filed.