Matter of Sullivan v Board of Appeals of the Town of Hempstead
2018 NY Slip Op 33441(U)
December 10, 2018
Supreme Court, Nassau County
Docket Number: 609514/18
Judge: Denise L. Sher

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

In the Matter of the Application of
KENNETH SULLIVAN,

Petitioner,

Index No.: 609514/18
Motion Seq. No.: 01
Motion Date: 08/16/18
XXX

For a Judgment Pursuant to Article 78 of the
Civil Practice Laws and Rules,

- against -

BOARD OF APPEALS OF THE TOWN OF
HEMPSTEAD,

Respondent.

The following papers have been read on this application:

	Papers Numbered
Notice of Verified Petition, Verified Petition and Exhibit	**1**
Verified Answer, Objections in Point of Law and Return and Exhibits	**2**
Affirmation in Reply	**3**

Upon the foregoing papers, it is ordered that the application is decided as follows:

Petitioner moves, pursuant to CPLR Article 78, for an order annulling certain conditions imposed in a decision, dated June 18, 2018, issued by respondent, with respect to property located at 1541 Bellmore Road, Bellmore, New York, Town of Hempstead, County of Nassau. Respondent opposes the application.

Counsel for petitioner submits, in pertinent part, that "[p]etitioner is the fee simple owner of the subject property located at 1541 Bellmore Road, Bellmore, New York. The subject

property is currently improved with a two-family dwelling. On April 25, 1956, under case number 482/1956, the previous owners of the Subject Property filed an application to convert the dwelling from a one-family dwelling to a two-family dwelling. The application was granted for a five (5) year period, running through 1961. The then-property owner was to file for a renewal every five (5) years thereafter. The permit was continuously renewed every five years thereafter until the renewal expired on May 9, 1996. At which time, the then-owner did not re-file for the permit. In 2017, the Petitioner herein, filed a new application to maintain the previously granted two-family dwelling and the matter came before the Board on May 23, 2018. In its June 18, 2018 Decision, the Board unanimously granted the Petitioner's application, but imposed the following conditions: a. one of the two dwelling units must be owner occupied no later than June 13, 2020; b. upon the sale or transfer of the parcel by the applicant it shall at all times be required to have one dwelling unit be owner occupied; c. in the event of a violation, the Board reserved the right to amend or revoke any or all of the grants; and d. a Declaration of restrictive (*sic*) Covenants embodying these conditions must be submitted to the Board for recording in the Nassau County Clerk's office." *See* Petitioner's Verified Petition Exhibit A.

Counsel for petitioner further asserts that, "[a]t the hearing held before the Board on May 23, 2018, Petitioner demonstrated, *inter alia*, that Petitioner's application would not cause harm to the nature and character of the surrounding neighborhood and that the benefit to Petitioner in granting the variance outweighed any detriment to the nearby area. Petitioner's application was tantamount to an application to correct an oversight wherein Petitioner's predecessor-in-interest had neglected to file the paperwork necessary to secure the renewal of the variance upon its expiration in 1996. The Board's imposition of conditions in the Decision,

requiring that one of the units in the Subject Property be 'owner occupied', is illegal and unenforceable, as the Board does not have the power to impose conditions that seek to control what persons reside on a given property nor to prevent a fee owner from renting all or part of his property for a legal use. As such, the conditions set forth in the Decision requiring that one of the units on the Subject Property be occupied by the owner of the Subject Property constitute an error of law and should be annulled accordingly." *See id.*

In opposition to the application, counsel for respondent submits, in pertinent part, that, "[p]etitioner made (*sic*) application to the Town of Hempstead Building Department to maintain an existing two-family residence at 1541 Bellmore Road (the 'Subject Property'), within the Town of Hempstead on August 2, 2017 (the 'Building Permit Application').... The Building Permit Application was denied on September 12, 2017, after thorough review by Town Plan Examiners resulting in correspondence confirming same (the 'Denial Letter').... Mr. Sullivan was subsequently notified of receipt of the Building Permit Application and Denial Letter by the Board of Appeals on September 14, 2017.... On January 16, 2018, Mr. Sullivan applied to the Board of Appeals for relief from the Town's Building Zoning Ordinance ('BZO') section 63 and seeking a use variance to maintain a two-family dwelling in Residence B District (the 'Application').... By resolution, the Board of Appeals determined the Application to be Type II under the New York State Environmental Quality Review Act on March 7, 2018.... The Nassau County Planning Commission approved the Board of Appeals to take such action as the Board of Appeals deems appropriate by notice dated March 14, 2018.... The Application was scheduled to be heard by the Board of Appeals on April 18, 2018. On April 2, 2018, Petitioner filed a duly executed Affidavit of Service Notice with the Board of Appeals attesting to the fact that all property owners within a 100 foot radius of the Subject Property were served notice of the public

hearing scheduled for April 18, 2018.... On April 18, 2018, the Board of Appeals granted an adjournment of the public hearing of the Application until May 23, 2018, as a result of Petitioner's failure to appear before the Board of Appeals.... On May 23, 2018, the Board of Appeals held an additional public hearing, at which time the Board of Appeals placed the Application on the Board of Appeals' decision calendar.... During said meeting, the Board of Appeals made reference to a previous use variance approval and renewals granted for the Subject Property.... By Resolution dated June 13, 2018, the Board of Appeals unanimously granted the Petitioner's Application subject to certain conditions to be met by the Petitioner (the 'Decision').... Notice of the Board of Appeals' Decision was provided to Petitioner on June 18, 2018.... At a duly noticed hearing of the Board of Appeals, held on October 17, 2018, the Board of Appeals adopted a resolution enumerating findings of fact with regards to the Decision (the 'Findings of Fact')." *See* Respondent's Verified Answer Exhibits A-M.

Counsel for respondent further asserts, in pertinent part, that, "[i]n 1956, the Board of Appeals granted a use variance to maintain a two-family dwelling structure on the Subject Property.... In 1983, as a condition of granting the subsequent renewals of the 1956 variance, the Board of Appeals included the additional requirement that one of the units on the Subject Property be owner occupied.... The owner of the Subject Property then permitted the 1956 variance to lapse, due to failure to renew upon its 1996 date of expiration.... At the hearing, Petitioner's Counsel expressly admits to the fact that the owner occupancy requirement had been imposed as a condition on the previous use variance.... In the interest of elucidating the reasoning behind its Decision, the Board of Appeals issued Findings of Fact.... The Findings of Fact expressed the Board of Appeals' desire to preserve the conditions previously imposed upon the granting of the substantially same variance at the same property.... The Board of Appeals further expressed its desire to address the Petitioner's hardship, while 'preserving the residential

character, standard of well-maintained properties, and welfare of the community.'" *See* Respondent's Verified Answer Exhibits I, J and M.

Counsel for respondent argues that, "[p]etitioner's allegation that the Board of Appeals' 'imposition of conditions in the Decision, requiring that one of the units in the Subject Property be 'owner occupied', is illegal and unenforceable," since the Board of Appeals 'does not have the power to impose conditions' of this nature, is patently incorrect.... New York Town Law ('Town Law') espouses the standard for use variances and expressly states the authority of the board of appeals to impose 'such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property', as long as the conditions are 'consistent with the spirit and intent of the zoning ordinance' and 'imposed for the purpose of minimizing any adverse impact' on the 'neighborhood or community.' [citations omitted]. The granting of a use variance condition upon owner occupancy has been upheld by courts, as reasonably related to the purposes underlying zoning codes. [citations omitted]. Therefore, Petitioner' argument is simply without merit.... The Board of Appeals does, in fact, have the power to impose the condition of owner occupancy, as such a condition is rationally related to the legitimate zoning goal of protecting the overall ethos and character of the substantially single-family zoning district in which the Subject Property is located within. [citations omitted]. Thus, the Board of Appeals' decision to impose owner occupancy as a condition of granting the variance is legal and enforceable. Accordingly, Petitioner has failed to state a legally cognizable cause of action, and the Verified Petition should be dismissed. [citations omitted]."

Counsel for respondent further contends that, "[t]here is a complete lack of any facts alleged, which indicate the violation of any rule of law by the Board of Trustees, or any specific statutory law(s) or jurisprudence cited to support Petitioner's assertions. The assertions contained in the Verified Petition are entirely vague and conclusory. [citations omitted]. As such, the

Verified Petition should be dismissed."

Counsel for respondent adds that, "[t]hough it is respectfully submitted that the Court's inquiry should end here, as the Petitioner has failed to cite 'cognizable legal theory' or allege factual allegations to establish a cause of action, the Respondent can demonstrate that the owner-occupancy condition contained within its Decision was rational and based on facts and the records before the Board of Appeals.... In the instant case, both the determination of the Board of Appeals to grant the use variance and re-impose the restrictive conditions in previously granted use variances are rational.... It is readily clear that the Board of Appeals' decision to impose the owner occupancy condition was based on the understanding that such restriction (*sic*) have been previously imposed under the identical use variance, which expired in 1996.... The knowledge that the Subject Property was previously granted a use variance to maintain a two-family structure upon the requirement that one of the dwellings in such structure be owner occupied adequately supports the Board of Appeals' altogether reasonable decision to impose the same requirement upon the Petitioner's subsequent application to maintain the same two-family structure on the Subject Property... The Board of Appeals determined the variance, curtailed by the imposed conditions, to be the minimum variance needed to alleviate Petitioner's hardship, while also minimizing any adverse impact on the community and, in doing so, embraced the ethos of Town Law § 267-b.... As such, there can be no question as to whether the Board of Appeals acted reasonably or rationally upon substantial evidence."

"Local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion." *Matter of Ifrah v. Utschig*, 98 N.Y.2d 304, 746 N.Y.S.2d 667 (2002). *See also Matter of Towers v. Weiss*, 131 A.D.3d 621, 14 N.Y.S.3d 918 (2d Dept. 2015); *Matter of Borrok v. Town of Southampton*, 130 A.D.3d 1024, 14 N.Y.S.3d 471 (2d Dept. 2015).

"'In a proceeding pursuant to CPLR article 78 to review a determination of a zoning board of appeals, judicial review is limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion.'" *Matter of Greentree Country Club, Inc. v. City of New Rochelle*, 119 A.D.3d 570, 989 N.Y.S.2d 108 (2d Dept. 2014) *quoting Matter of Arceri v. Town of Islip Zoning Bd. of Appeals*, 16 A.D.3d 411, 791 N.Y.S.2d 149 (2d Dept. 2005). *See also* CPLR § 7803(3). Accordingly, "[a] zoning board's determination should be sustained on judicial review if it has a rational basis and is supported by evidence in the record." *Matter of Towers v. Weiss*, *supra* at 622. *See also Matter of Patrick v. Zoning Bd. of Appeals of Vil. of Russell Gardens*, 130 A.D.3d 741, 15 N.Y.S.3d 50 (2d Dept. 2015); *Matter of Traendly v. Zoning Bd. of Appeals of Town of Southold*, 127 A.D.3d 1218, 7 N.Y.S.3d 544 (2d Dept. 2015). "'It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them.'" *Matter of Pecoraro v. Board of Appeals of Town of Hempstead*, 2 N.Y.3d 608, 781 N.Y.S.2d 234 (2004) *quoting Matter of Cowan v. Kern*, 41 N.Y.2d 591, 394 N.Y.S.2d 579 (1977).

"In determining whether to grant an application for an area variance, a zoning board is required to engage in a balancing test, weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the variance is granted." *Fortunato v. Town of Hempstead Bd. of Appeals*, 134 A.D.3d 825, 21 N.Y.S.3d 322 (2d Dept. 2015) *citing* Town Law § 267-b (3)(b). "In applying that balancing test, the zoning board must consider whether (1) an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance, (2) the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance, (3) the requested area variance is substantial,

(4) the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district if it is granted, and (5) the alleged difficulty was self-created." *Matter of Moore v. Town of Islip Zoning Bd. of Appeals*, 70 A.D.3d 950, 895 N.Y.S.2d 188 (2d Dept. 2010) *citing* Town Law § § 267-b (3)(b). "The zoning board, in applying the balancing test, is not required to justify its determination with supporting evidence for each of the five statutory factors, as long as its determination balancing the relevant considerations is rational." *Matter of Patrick v. Zoning Bd. of Appeals of Vil. of Russell Gardens*, *supra* at 741-742 *citing Matter of Traendly v. Zoning Bd. of Appeals of Town of Southold*, *supra* at 1218-1219; *Matter of Merlotto v. Town of Patterson Zoning Bd. of Appeals*, 43 A.D.3d 926, 841 N.Y.S.2d 650 (2d Dept. 2007).

"A zoning board may impose conditions in conjunction with granting a variance, as long as the conditions are reasonable and relate only to the real estate involved, *without regard to the person who owns or occupies it* (emphasis added)." *Finger v. Levenson*, 163 A.D.2d 477, 558 N.Y.S.2d 163 (2d Dept 1990); *BLF Associates, LLC v. Town of Hempstead*, 59 A.D.3d 51, 870 N.Y.S.2d 422 (2d Dept. 2008).

In the instant matter, the Court finds that the conditions imposed by respondent with respect to granting petitioner's variance application - particularly the condition that one of the two-dwelling units shall be owner occupied no later than June 13, 2020 - are conditions that relate to the person who owns and occupies the subject premises and not the real estate itself. Conditions which relate not to the real estate involved, but to the person who owns or occupies the subject real estate, are invalid. *See St. Onge v. Donovan*, 71 N.Y.2d 507, 527 N.Y.S.2d 721 (1988).

Accordingly, based upon the arguments and applicable case law presented to the Court in the instant motion papers, petitioner's application, pursuant to CPLR Article 78,for an order annulling certain conditions imposed in a decision, dated June 18, 2018, issued by respondent, with respect to property located at 1541 Bellmore Road, Bellmore, New York, Town of Hempstead, County of Nassau, is hereby **GRANTED**. And it is further

ORDERED that the four (4) enumerated conditions imposed in respondent's June 18, 2018 Decision, which require that one of the units on the property located at 1541 Bellmore Road, Bellmore, New York, be occupied by the owner of the subject property, are hereby **annulled**.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

XXX

ENTERED

DEC 11 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
December 10, 2018