Tortora v Board of Zoning Appeals of the Town of Brookhaven
2018 NY Slip Op 33454(U)
December 21, 2018
Supreme Court, Suffolk County
Docket Number: 17-2605
Judge: William J. Condon
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SHORT FORM ORDER

INDEX No. 17-2605

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 41 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM J. CONDON
Justice Supreme Court

MOTION DATE 7-11-17
ADJ. DATE 5-3-18
Mot. Seq. # 001 - MD

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ROBERT TORTORA,

Plaintiff,

- against -

BOARD OF ZONING APPEALS OF THE TOWN OF BROOKHAVEN, PAUL M. DECHANCE, JAMES WISDOM, HOWARD BERGSON, RONALD LINDSEY, WAYNE ROGERS, RICK CUNHA, and CHARLES LAZAROU, COLLECTIVELY COMPRISING BOARD OF ZONING APPEALS OF TOWN OF BROOKHAVEN,

Defendants.

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Upon the following papers numbered 1 to ____ read on this motion____: Notice of Motion/ Order to Show Cause and supporting papers __; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers ____; Other ____; it is,

ORDERED, that Petitioners' application to this Court for an Order making a determination that Respondent acted in a manner which contradicted current law and was arbitrary and capricious in its ruling and further remanding the matter to hearing before Respondent is denied.

Petitioner, Robert Tortora, brings this petition pursuant to CPLR Art. 78 by order to show cause against Respondent, the Board of Zoning Appeals of the Town of Brookhaven, seeking relief in the form of mandamus directing Respondent to consider Petitioner's application for a dune walk over for their property at 4 Ocean Walk in the hamlet of Fire Island Pines, Town of Brookhaven. Respondent denied the application. The instant proceeding arises out of an attempt by Petitioner to build a dune walkover for the subject premises at 4 Ocean Walk in The Fire Island Pines, Town of Brookhaven, County of Suffolk, State of New York.

As a result of the 2012 Superstorm Sandy, the United States Army Corp of Engineers ("USACE"), initiated a project which involved restoration of the beach and creation of a dune through Fire Island communities. In order to accomplish this plan, an easement area for construction was established which required the taking of property and the moving of structures in the easement area in order to build the seventy-seven foot wide dune. Cost sharing agreements were made among Suffolk County ("County"), the New York State Department of Environmental Conservation ("DEC") and the USACE for building the dune, replenishment of the beach and the cost of relocating structures. Owners were compensated for any property taken under eminent domain proceedings in order to build the dune. Federal funds were to be used to compensate homeowners for condemnation of property. The relocation of existing structures were designed to minimize the loss to homeowners so as to minimize the amount the Federal Government would have to spend in condemnation. Property owners were to follow a two-step applicationprocess for approval to relocate, raise and rebuild structures taken under eminent domain. Property owners needed to apply for a Coastal Erosion Hazard Permit ("CEHP") and a building permit from the Town of Brookhaven. If either permit was denied, the property owner was to appeal to the Board of Zoning Appeals.

Petitioner applied for a Coastal Erosion Hazard Permit with the DEC asking to build a dune walkover. The DEC denied the application as the proposed walkover violated the rear yard setback requirement and the lot coverage was increased to 57.7%, substantially over the 35% limit. Petitioner applied to the BZA for a variance of the rear yard setback restriction and relief from the 35% lot coverage restriction. Petitioner had previously sought a variance for the lot coverage requirement in 2011. The BZA granted in part and denied in part Petitioners 2011 application, requiring several structures that were built without permits be removed, at the time reducing the total lot coverage from 60.8% to 57.3%. The BZA further concluded at the time that Petitioner could feasibly reduce the total lot coverage to 45% lot occupancy by the removal of non-conforming accessory structures. Petitioner commenced an Article 78 proceeding on May 18, 2011 challenging the decision to reduce the lot coverage to 45%. The Article 78 Petition

(Tortora I) was denied by the Honorable Justice LaSalle of the Supreme Court, Suffolk County. When the current application for a dune walkover was presented to the BZA, they denied the application "in accordance with Findings and Conclusions of this Board dated May 18, 2011." The BZA has determined that the lot coverage variance of 45% established in 2011 should be binding on the Petitioner.

Under Town Law §267-b, a five-factor balancing test is required when considering an area variance. Factors to be considered are whether an undesirable change to the neighborhood would be produced, could the benefit sought be achieved by some other method, was the variance substantial, would there be an adverse effect on physical or environmental conditions and was the difficulty self-created. The difficulty was not self-created, as the changes requested were precipitated by Superstorm Sandy, a natural event. In applying the remaining four factors, the BZA found the variance requested was substantial. The permit application as submitted was for a proposed lot coverage of 57.7% where the limit under federal and state regulation is 35%. There has been no evidence presented that indicates the dune walkover is a preexisting structure to mitigate the substantial nature of the relief requested. The Fire Island Pines Property Owners Association (the "Association"), while not specifically opposing application of the Petitioner, has expressed general opposition to dune walkovers based upon the undesirable changes in neighborhood character created by the construction of such. Where dune walkovers had existed, the Association has supported efforts to replace them, regardless of the effect on lot coverage. However, the Association has expressed reservations about the adverse impact on the environmental conditions and the aesthetics of the beachscape from the construction of dune walkovers where they did not previously exist, as in Petitioners case. The benefits sought by the dune walkover can be achieved by other means. Petitioner maintains access to the beach by the public walkways, therefore the dune walkover is not required.

Petitioner has argued the County approved the construction of the dune walkover for Petitioner and the prior approval of dune walkovers to other property owners demands the approval of Petitioners application by the BZA. The County interest in approving the dune walkovers has little to do with any of the five factors in Town Law, but is driven by an economic analysis aimed at reducing the cost of condemnation. The County made it clear that the approval of walkovers was intended to increase the value of the properties so that the government takes less value from property owners thereby reducing the cost of taking the property to the government. The design submitted sought to minimize the amount the County would have to pay in taxpayer funds in order to compensate property owners and if dune walkovers were not provided there would be a greater expense to the County in compensating property owners. The County further deferred to the BZA on the question of any undesirable change in the neighborhood as a result of the dune walkovers and concedes the walkover is not the onlymethod to achieve beach access. While the

Town has approved dune walkovers in other cases, those cases are to be distinguished from Petitioners. The BZA approved dune walkovers where such walkovers pre-existed and where a lot variance was not required. The only application where an increase in lot coverage was granted resulted in a coverage of 36.1%, a variance of 1.1%, far less than the variance proposed by Petitioner.

The decision of Tortora I is binding on Petitioner, and therefore this petition should be denied as the BZA's denial of the lot coverage variance sought was proper and must be upheld. Petitioner is precluded by principle of res judicata from arguing that a refusal to permit lot coverage in excess of 45% is arbitrary and capricious or an error of law, as the issue was already settled in Tortora I. Res judicata applies to quasi-judicial determinations of zoning board appeals. See ***Matter of Timm v. Van Buskirk***, 17 A.D.3d 686, 686 (2d Dep't 2005). Therefore, a second application for identical relief by the same person or a person in privity with the first applicant would be barred by res judicata. See ***Jensen v. Zoning Bd. of Appeals of Vil. of Old Westbury,*** 130 A.D.2d 549, 559 (2d Dep't 1987), lv denied 70 N.Y.2d 611 (1987). Absent new facts which could materially change aspects of the request, the zoning board, pursuant to Town Law, can refuse to rehear the application. See ***Matter of ELN Realty Corp. v. Zoning Bd. of Appeals of Town of Greenburgh***, 261 A.D.2d 619, 620 (2d Dep't 1999). While Petitioners can argue the current application is different as it is based on the construction of a dune walkover rather than relocation of wooden steps and a fence as well as other issues, the material facts have not changed. Petitioners application remains in excess of the 35% lot coverage limit, as well as the 45% variance established under Tortora I. Petitioner has further failed to remove accessory structures that contribute to the substantial lot overage of 57.7% called for in Petitioners current application. Petitioner has not presented a basis on which to permit, let alone require, the BZAto reconsider their application and therefore, based on res judicata, the decision in Tortora I is binding.

In a proceeding pursuant to CPLR Article 78, it is the role of the Court to review whether a determination by a municipal body or agency was made in violation of lawful procedure, was effected by an error of law, or was arbitrary and capricious. It is further settled law that in a proceeding seeking judicial review of administrative action that the Court cannot substitute its judgement for that of the agency responsible for making the determination but must ascertain only whether there is a rational basis for the decision or whether it was arbitrary or capricious (***Flacke v Onondonga Landfill Sys, Inc***. 69 NY2d 355 (1987)). The Court must ascertain only whether there is a rational basis for the decision or whether the administrative agency was arbitrary and capricious. Under this standard, a determination should not be altered unless the record shows the agency's action was arbitrary, unreasonable, irrational or indicative of bad faith (***Halperin v City of New Rochelle***, 24 AD3d 768 (2nd Dept 2005) *citing* ***Matter of Pell v Bd. of***

Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cty., 34 NY2d 222(1974)). The Court finds there is a rational basis and substantial evidence to support the BZA decision to deny Petitioner application for a dune walkover. This Court does not find the BZA decision to be arbitrary and capricious. The BZA was thorough in its review of Petitioner's application for a dune walkover and considered all aspects of the proposal. Petitioner argues the BZA was arbitrary and capricious in its denial of the proposed walkover as it had granted similar walkovers to other homeowners. However, these applications are distinguished from Petitioners as each of those applications were a request to replace a pre-existing walkover or where the granting of a walkover would not significantly increase the lot occupancy. Petitioner is requesting to build a dune walkover where a stairway to the beach once existed. Petitioner has presented no evidence that a dune walkover existed prior to their application and the addition of a walkover results in a lot coverage substantially over the 35% limit established by the federal and state governments. The substantial overage of lot coverage is further supported by the findings of the Fire Island Nation Seashore Superintendent. Petitioner maintains USACE, the County and DEC have approved and support the building ofthe dune walkover. However, the County and DEC concede a monetary interest in approving the dune walkover for Petitioner, as the building of the walkover will reduce the total compensation to be made to Petitioner for condemnation of property. While there is no proposed alternative to the dune walkover, Petitioner maintains the benefit of beach access through the public walkway. While this will result in additional cost to the County, it does not justify the granting of the application.

The foregoing constitutes the decision and Order of the Court.

Dated: 12/21/18

Hon. William J. Condon
Justice Supreme Court

_X___ FINAL DISPOSITION _____ NON-FINAL DISPOSITION