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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 21

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In the Matter of the Application of

WATERWAYS DEVELOPMENT CORP.,

Petitioner,

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

- against -

TOWN OF BROOKHAVEN ZONING BOARD OF APPEALS and THE TOWN OF BROOKHAVEN,

Respondents.

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By: Spinner, J.S.C.
Dated: DEC 03 2012

Index No. 09-41985
Mot. Seq. # 001 - MG; CDISPSUBJ

Return Date: 11-19-09
Adjourn Date: 7-12-12

COPY

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This hybrid Article 78 proceeding and action for declaratory relief seeks a judgment annulling and setting aside a determination of respondents/defendants Town of Brookhaven Board of Zoning Appeals and Town of Brookhaven denying the applications of petitioner/plaintiff Waterways Development Corp. for a building permit and for height variances, and declaring that a height variance granted to petitioner's predecessor-in-interest is valid and in full force. For the reasons set forth herein, the petition/complaint is granted to the extent set forth herein, and is otherwise denied.

In 1987, the Planning Board of respondent/defendant Town of Brookhaven approved a site plan submitted by Bay Pointe Associates to construct a retirement community on an undeveloped peninsula located south of Montauk Highway, between the Forge River and Ely Creek, in Moriches, New York. The project, spread over two parcels of land totaling approximately 100 acres, planned for the construction of 515 residential units housed in one, two and three-story buildings distributed over approximately 88 acres. Three years earlier, respondent/defendant Town of Brookhaven Board of Zoning Appeals granted Bay Pointe Associates' application for a height variance of three stories instead of the two and one-half stories permitted by the Town Code, thereby enabling the developer to build the three three-story buildings, referred to as "mid-rises," contemplated for the development. It also granted Bay Pointe Associates a variance from the requirement of second floor elevator service. At the time such variances were issued, the Code of the Town of Brookhaven provided that a variance would lapse if a building permit was not issued and construction was not started within one year of the granting of such variance.

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As relevant to the instant controversy, in 1985, Bay Pointe Associates filed an application to extend to six years the duration of the height variance previously granted to it on the ground that, due to the size of the project, construction of the mid-rises, which were designed to measure 35 feet in height, would not commence within one year. When the Zoning Board granted the application to the extent that it extended the height variance for another one-year period, Bay Pointe Associates filed an application for a rehearing on the matter. At a rehearing conducted on January 8, 1986, counsel for Bay Pointe Associates stated that his client was requesting a longer duration for the height variance, because the development was being built in phases, with construction of some buildings slated to begin that year and construction of other buildings slated to begin in a year or two. On January 9, 1986, the Zoning Board granted the application for an extension, stating that "due to the magnitude of the project," the height variance was "approved for life of job."

After obtaining the necessary site plan approval, Bay Pointe Associates began construction of the retirement community. By 1995, approximately 225 residential units had been built, along with a sewage treatment facility, roads, curbs and other infrastructure improvements for the community. Meanwhile, an involuntary bankruptcy petition filed against Bay Pointe Associates in 1993 was converted to a voluntary bankruptcy petition under Chapter 7 of the Bankruptcy Code, and in 1995 the Chapter 7 trustee conveyed the remaining undeveloped parcels of the subject property to Post Village, Inc. A state court action commenced by Post Village in 1996 to extinguish a covenant running with the subject property regarding the construction of a ramp and the dredging of the Forge River was settled, and the stipulation of settlement was so-ordered by this Court (Stark, J.) on February 20, 1997. It is noted that as part of that settlement, Bay Pointe Associates paid the Town $40,000 for it to construct a launching site on an alternate site of the Forge River. Similarly, claims raised by Post Village against the Town in a bankruptcy court proceeding regarding certain covenants on the subject property were settled, and on February 21, 1997 the bankruptcy court judge so-ordered the stipulation of settlement. The written settlements in both the state court and the bankruptcy court (Duberstein, J.) contain a provision stating that the Town "acknowledges that the site plan of the property as originally approved by the Planning Board of the Town of Brookhaven and as subsequently revised and approved is still valid, in effect and is binding" on both the Town and Post Village. Further, the stipulation of settlement for the state court action states that Post Village "may commence and/or continue construction on the property pursuant to the aforementioned site plan without any further Town of Brookhaven zoning or planning board approvals." The stipulation of settlement for the bankruptcy court proceeding contains the same acknowledgment by the Town concerning Post Village's right to commence or continue construction on the property, except that it states no further approval from the Town Planning Board is required.

Sometime later in 1997, petitioner/plaintiff Waterways Development Corp. (hereinafter Waterways) acquired title to the undeveloped land from Post Village. From 1998 to 2001, the Town issued building permits to Waterways for construction of more than 100 residential units on the subject property. It also built additional roadways, installed sewer connections, and performed other site improvements at the development. However, in March 2001, the Building Department denied Waterways' applications for permits to construct the three mid-rise buildings. Waterways, then, allegedly met with Town officials and proposed revising their plans in an effort to allay the concerns of area residents opposed to the project. Despite an alleged agreement between Waterways and the Town Supervisor, the Town refused an application to transfer development rights to a different parcel of land in the Town owned by Waterways. Consequently, Waterways brought an action in 2003 for a judgment declaring, among other things, that the

height variance for the mid-rise buildings was valid for the life of the project, and that it could proceed with the construction of such buildings without further approval from the Town. By order dated November 12, 2004, this Court (Cohalan, J.) granted a motion by the Town seeking dismissal of the complaint pursuant to CPLR 3211 (a)(7) for failure to state a cause of action, finding that there had been no adjudication by the Town as to the validity of the height variance granted in 1986, as Waterways had not applied for a building permit to construct the 145 residential units planned for the three-story mid-rise buildings, and that Waterways had not exhausted its administrative remedies. The Appellate Division, Second Department, by order issued April 11, 2006, affirmed this Court's November 2004 order.

In 2006 another declaratory judgment action was brought by Waterways seeking, inter alia, a judgment that the height variance issued by the Zoning Board in 1986 still is valid and that it could complete the development of the project without the need for further Town approval. By order dated March 18, 2008, Justice Cohalan dismissed the 2006 declaratory judgment action, determining that it was not ripe for judicial review, because Waterways had withdrawn its appeal of the Town's 2001denial of its applications for building permits. The arguments raised by the parties in the 2003 and 2006 actions and the bases for the courts' determinations will not be repeated herein, as the parties' familiarity with the same is assumed.

Following this Court's March 2008 order, Waterways again filed applications with the Town Building Department seeking permission to construct the three-story buildings for which site plan approval had been granted back in 1987. Containing a total of 145 residential units, the three buildings would constitute the last phase of construction for the community, which currently has 346 residential units located in one-story and two-story buildings. Waterways' applications for building permits, however, were denied on the ground that Town Code § 85-101(A) limits the maximum height for structures to 35 feet or two and one-half stories. After the Building Department denied its applications, Waterways filed four applications with the Zoning Board, one challenging the Building Department's determination that variances were required, because the proposed buildings would violate the maximum permitted height for structures, and the other three requesting height variances for the buildings. Public hearings on Waterways' applications were conducted by the Zoning Board over various days in April, May, June and July of 2009. According to counsel for respondents/defendants, "[h]undreds of residents from the Waterways community, the Peconic Baykeeper, and representatives and members of local civic groups" attended the public hearing to voice their opposition to the project, complaining, among other things, about the proposed mid-rises "lack of conformity with the community" and the impact such development would have on the environment, traffic, public safety and "visual aesthetics." Area residents also allegedly expressed concerns about the "overall potential negative impact on the Waterways development" if the last planned phase of construction in the community is permitted.

By decision dated September 16, 2009, the Zoning Board denied Waterways' application challenging the Building Inspector's determination that height variances were required for the mid-rises, finding that the height variance granted to Bay Pointe Associates in 1986 had expired. In its decision, the Zoning Board refers to changes in the Town Code enacted after 1986, including the Town's adoption of the Wetlands and Waterways Law (Code of the Town of Brookhaven § 81-1 *et seq*) and the Stormwater Management and Erosion Control Law (Code of the Town of Brookhaven § 86-1 *et seq*), and community objections to the proposed development, as well as to the bankruptcy of the original developer and past litigation involving the project. It also refers to findings by the Town's Department of Planning,

Environment and Land Management, Division of Environmental Protection, that if the Zoning Board determines the mid-rise buildings may be constructed "as of right," a Wetlands and Waterways permit will be needed, and that, if the "as of right" claim is rejected, Waterways will be required to submit a new site plan and the project will not be in compliance with buffer requirements for the wetlands overlay district or zoning requirements for planned retirement communities. The Zoning Board concludes that "under these circumstances it would be improper to ignore the intervening changes in the law over the course of nearly 25 years, particularly when these laws are designed to protect the health, safety and welfare of the community," and that it would be "unreasonable to conclude that our prior members would ignore these developments in order to allow an unfinished project . . . to be built under the laws in effect in 1986." It further concludes that, even if the height variance "survived the 15 year hiatus, bankruptcy, abandonment and multiple transfers of ownership," it still would be void under Town Code § 85-30 (B).

The Zoning Board also denied the three applications filed by Waterways for height variances. However, rather than engaging in the " balancing test" set forth in Town Law § 267-b (3)(b) when reaching its determination on Waterways' requests for height variances, the Zoning Board denied such applications as premature. More particularly, the decision states that "[s]ince it appears that applicant must obtain a new wetlands permit, at a minimum, and possibly site plan approval, we determine that it would be improper for us to render a determination on the underlying variance request[s] until applicant has made all other necessary applications and a SEQRA review has been conducted pursuant to the applicable regulations."

Subsequently, Waterways commenced this hybrid Article 78 proceeding and action for declaratory relief against the Zoning Board and the Town. As to the request for relief under Article 78, Waterways seeks a judgment annulling and reversing the September 16, 2009 determinations of the Zoning Board regarding the validity of the 1986 variance and its applications for a height variance for the mid-rise buildings. Waterways asserts that the Zoning Board acted in an arbitrary and capricious manner when it determined that the 1986 variance had expired, arguing that the Town granted the variance "for the life of the project," which remains incomplete due to the Town's own actions, and that it has a vested right to construct the three mid-rise buildings. Alternatively, it asserts that the Town acted improperly and unlawfully in denying the applications for a height variance as premature, rather than engaging in the balancing test mandated by Town Law § 267-b. Waterways further argues that the Town should be compelled to grant its applications for a variance of the two and one-half story restriction, since the same relief was granted to Bay Pointe Associates in 1984, and that its submissions at the hearing were sufficient to meet the burden of proof for the requested variance.

The court's role in reviewing an administrative decision is not to decide whether the agency's determination was correct or to substitute its judgment for that of the agency, but to ascertain whether there was a rational basis for the determination (*see* ***Matter of Sasso v Osgood***, 86 NY2d 374, 633 NYS2d 239 [1995]; ***Matter of Chemical Specialties Mfrs. Assn. v Jorling***, 85 NY2d 382, 626 NYS2d 1 [1995]; ***Matter of Warder v Board of Regents of Univ. of State of N.Y.***, 53 NY2d 186, 440 NYS2d 875 [1981]). In the context of an Article 78 proceeding brought to review an administrative determination of a quasi-legislative, quasi-administrative body like a zoning board, a court may annul the determination only if it was arbitrary and capricious, affected by an error of law, or lacked a rational basis (*see* ***Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.***, 77 NY2d 753, 570 NYS2d 474 [1991]; ***Matter of Cowan v Kern***, 41 NY2d 591, 394 NYS2d 579 [1977]; ***Matter of Pell v Board of Educ.***, 34 NY2d 222, 356 NYS2d 833 [1974]; ***Matter of Halperin v City of New Rochelle***, 24 AD3d 768, 809 NYS2d 98 [2d

Dept 2005]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (***Matter of Pell v Board of Educ.***, 34 NY2d 222, 231, 356 NYS2d 833), and a "decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious" (***Matter of Charles A. Field Delivery Serv.***, 66 NY2d 516, 517, 498 NYS2d 111 [1985]; *see* ***Matter of Menachem Realty Inc. v Srinivasan***, 60 AD3d 854, 875 NYS2d 237 [2d Dept 2009]; ***Matter of Lucas v Board of Appeals of Vil. of Mamaroneck***, 57 AD3d 784, 870 NYS2d 78 [2d Dept 2008]). Further, it is fundamental that when reviewing a determination that an administrative agency alone is authorized to make, the court must judge the propriety of such determination on the grounds invoked by the agency; if the reasons relied on by the agency do not support the determination, the administrative order must be overturned (***Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.***, 77 NY2d 753, 758, 570 NYS2d 474; *see* ***Matter of National Fuel Distrib. Corp. v Public Serv. Commn. of the State of N.Y.***, 16 NY3d 360, 922 NYS2d 224 [2011]; ***Matter of Filipowski v Zoning Bd. of Appeals of Vil. of Greenwood Lake***, 77 AD3d 831, 909 NYS2d 530 [2d Dept 2010]; ***Matter of Stone Landing Corp. v Board of Appeals of Vil. of Amityville***, 5 AD3d 496, 773 NYS2d 103 [2d Dept 2004]).

A zoning board's interpretation of the local zoning ordinances is entitled to great deference (*see* ***Matter of Toys "R" Us v Silva***, 89 NY2d 411, 654 NYS2d 100 [1996]; ***Matter of Brancato v Zoning Bd. of Appeals of City of Yonkers, N.Y.***, 30 AD3d 515, 817 NYS2d 361 [2d Dept 2006]; ***Matter of Ferraris v Zoning Bd. of Appeals of Vil. of Southampton***, 7 AD3d 710, 776 NYS2d 820 [2d Dept 2004]). Nevertheless, a court may set aside a zoning board determination if the records reveals that the board acted illegally or arbitrarily, or abused its discretion, or simply succumbed to generalized community pressure (*see* ***Matter of Pecorano v Board of Appeals of Town of Hempstead***, 2 NY3d 608, 781 NYS2d 234 [2004]; ***Matter of Cacsire v City of White Plains Zoning Bd. of Appeals***, 87 AD3d 1135, 930 NYS2d 54 [2d Dept 2011]). "In applying the arbitrary and capricious standard, a court inquires whether the determination under review had a rational basis . . . [A] determination will not be deemed rational if it rests entirely on subjective considerations, such as general community opposition, and lacks an objective factual basis" (***Matter of Kabro Assoc., LLC v Town of Islip Zoning Bd. of Appeals***, 95 AD3d 1118, 1119, 944 NYS2d 277 [2d Dept 2012]; *see* ***Matter of Ifrah v Utschig***, 98 NY2d 304, 746 NYS2d 667 [2002]; ***Matter of White Castle Sys., Inc. v Board of Zoning Appeals of Town of Hempstead***, 93 AD3d 731, 940 NYS2d 159 [2d Dept 2012]; ***Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh***, 68 AD3d 62, 886 NYS2d 442 [2d Dept 2009]).

As discussed above, following a rehearing on an application filed by Bay Pointe Associates in 1985 to extend the duration of a previously-granted height variance, the Zoning Board, informed of the developer's plans to construct the retirement community in various phases over a number of years, granted such application, stating that such variance was "approved for life of job." Subsequently, as part of its settlement of claims brought against it by Waterways' predecessor-in-interest, Post Village, the Town affirmed the validity of the site plan approval and the right to proceed with construction of the community without further approval from the planning board or the zoning board in the so-ordered stipulations of settlement.

The Court finds the Zoning Board's determination that the 1986 height variance "expired" is irrational, as it is based largely upon the Board's own conclusions as to what Board members sitting at the time of Bay Pointe Associates' 1985 application to extend the duration of the variance believed about the

length of the project and as to how they would consider the application if they currently were sitting on the Board (*see* ***Matter of Trump on the Ocean, LLC v Cortes-Vasquez***, 76 AD3d 1080, 908 NYS2d 694 [2d Dept 2010]; *see also* ***Matter of Rendely v Town of Huntington***, 44 AD3d 864, 843 NYS2d 668 [2d Dept 2007]; ***Matter of Kelly v Zoning Bd. of Appeals of Town of Harrison***, 224 AD2d 424, 638 NYS2d 101 [2d Dept 1996]). More specifically, the Zoning Board's determination regarding the 1986 variance is premised on conjecture and speculation that prior Zoning Board members "anticipated that the 'job' would be completed within a period of three to six years, that it would be "unreasonable to conclude that our prior members would ignore [changes in the Town Code adopted after the issuance of the variance] in order to allow an unfinished project, which spanned the course of nearly 25 years, to be built under the laws in effect in 1986." Significantly, a zoning board has the authority to extend the term of any area variance it previously granted to an applicant (*see* ***Matter of New York Life Ins. Co. v Galvin***, 35 NY2d 52, 358 NYS2d 724 [1974]; ***Matter of Halperin v Board of Appeals on Zoning of City of New Rochelle***, 24 AD3d 767, 809 NYS2d 112 [2d Dept 2005]). Although a review of the record indicates there has been increased local opposition to the project since it was proposed by Bay Pointe Associates in the mid 1980s, including from homeowners currently living in the retirement community, there is no rational basis for the Zoning Board's position that, despite the explicit language of the Zoning Board's 1986 decision approving the height variance for the "life of job," the current members of the Board can simply disregard such language and require Waterways to begin the development process anew for the last phase of the project. "Zoning decisions must be made 'in accordance with a comprehensive plan,' rather than in response to the 'whims of either an articulate minority or even majority of the community'" (***Matter of St. Onge v Donovan***, 71 NY2d 507, 518, 527 NYS2d 721 [1988]). While Town officials now may disagree with the actions of their predecessors, decisions to zone the parcel for a planned retirement community and to grant approval of the plans for the development of such land with one, two and three-story buildings were made by Town officials during the 1980s, and the zoning power may not be used arbitrarily to infringe on property rights (*see* ***Matter of St. Onge v Donovan***, 71 NY2d 507, 518, 527 NYS2d 721).

The determination by the Zoning Board with respect to the validity of the 1986 variance also is arbitrary, as it is based on conclusory findings that the stipulations entered into by the Town in 1997 need not be considered as part of the instant application, because the Zoning Board "was not a party to [those] proceedings," and that the project had been abandoned by the "original property owner." "It is basic that a variance runs with the land and, 'absent a specific time limitation, it continues until properly revoked'" (***Matter of St. Onge v Donovan***, 71 NY2d 507, 520, 527 NYS2d 721, *quoting* 2 Anderson, New York Zoning Law and Practice § 23.53 [3d ed.]; *see* ***Matter of Holthaus v Zoning Bd. of Appeals of Town of Kent***, 209 AD2d 698, 619 NYS2d 160 [2d Dept 1994]). Further, the Town's finding that, under Town Code § 85-30, the 1986 height variance became null and void as of August 31, 2005 was improper. Pursuant to Town Code § 85-30 (B), "[a]ll prior unexpired and valid special permits, variances or land division grants with no date of expiration shall be and become null and void and of no further force and effect, one year from August 31, 2004." The Court agrees with Waterways' argument that the particular variance granted to Bay Pointe Associates in 1986, which is limited by its express terms to the "life" of the development of the retirement community "job," is not within the scope of Town Code § 85-30. It is noted that in view of its repeated refusals since 2001 to grant Waterways' applications for permits to build the three planned high-rises, the Town's claim that the 1986 height variance was rendered null and void by a local ordinance, which was passed and became effective during litigation seeking to enforce such variance, is disingenuous at best.

Accordingly, the petition/complaint is granted to the extent that the September 16, 2009 determination of the Zoning Board as to the application challenging the determination of the Building Inspector that Waterways must obtain a height variance for the three proposed mid-rises is annulled and the matter is remitted back to the Town for the issuance of building permits for such buildings. The Court declares that the height variance issued January 9, 1986 is valid and in full force.

Submit judgment annulling the September 16, 2009 determination of the Zoning Board.

J.S.C.

HON. JEFFREY ARLEN SPINNER