Matter of Smith v Board of Zoning Appeals of Town of Islip
2014 NY Slip Op 31604(U)
June 18, 2014
Supreme Court, Suffolk County
Docket Number: 13-27589
Judge: Daniel Martin

[* 1]

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 9

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In the Matter of the Application of

THE ESTATE OF ROBERT W. SMITH BY WAYNE W. SMITH, EXECUTOR,

Petitioner-Plaintiff,

for a Judgment pursuant to Article 78 of the Civil Practice Law and Rules

- against -

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

Respondents.

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By: Martin, A.J.S.C.
Dated: June 18, 2014

Index No. 13-27589
Mot. Seq. # 001 - MD

Return Date: 10-30-13
Adjourned: 12-17-13

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In this hybrid Article 78 proceeding and action for declaratory judgment, petitioner/plaintiff (hereinafter "petitioner") seeks a judgment annulling and setting aside the determination of the Zoning Board of Appeals of the Town of Islip ("ZBA"), dated September 16, 2013, which denied the petitioner's application for variances, and directing the approval of the application in its entirety. Petitioner further seeks a judgment pursuant to CPLR 3001 declaring that the denial of petitioner's application deprived petitioner of vested property rights, without due process of law, and without just compensation in violation of the Federal and New York State constitutions and a further declaration that Chapter 68 of the Code of the Town of Islip is unconstitutional and void as a matter of law for prohibiting development of the subject premises without due process of law.

Petitioner is the owner of real property in the Town of Islip known as 60 West Drive, Ronkonkoma, New York (the "subject premises"). The subject property, located in a Residence "B" zoning district, is currently vacant and unimproved, the prior dwelling on the property having been destroyed by a fire in 2010. The Town Code of the Town of Islip requires that property in a Residence "B" district have a lot width of 75 feet and a lot area of 7,500 square feet. The subject property measures 40 feet by 100 feet, resulting in a lot size of 4,000 square feet and, thus, does not meet the minimal lot area requirements of the Residence "B" zone. Petitioner applied to the ZBA to construct a single family dwelling on the subject property with the lot having a width of 40 feet instead of the required 75 feet and a lot area of 4,000 square feet instead of the required 7,500 square feet. In addition, petitioner sought area variances to reduce the required side yards from 14 feet to 7 feet, for total side yards of 14 feet instead of the required 28 feet and for a floor area ratio ("FAR") of 28.6% instead of the permitted 25%.

The subject property was previously before the ZBA in 1997, ZBA Application #323-97, at which time it was determined that the previous dwelling on the substandard lot constituted a legal nonconforming use. However, thereafter the dwelling suffered extensive damage in a fire and was demolished after it was determined that 85% of the dwelling was damaged.

Section 68-15 (c) of the Town Code of the Town of Islip states:

> No building which has been damaged by fire or other causes to the extent of more than 50% of physical structure, as determined by the Commissioner of Planning and Development, or his designee, exclusive of foundations, shall be repaired, rebuilt or used except in conformity with the provisions of this ordinance.

As a result, the property lost its nonconforming use and any new structure on the subject property is required to be built in conformity with the Town Code.

A hearing on petitioner's application was held on April 30, 2013. The prior grant of nonconforming status was noted. Petitioner's counsel argued that the petitioner's situation was not self-created because the prior nonconforming house was destroyed by a fire. He further stated that within 200 feet of the subject property, three of thirteen properties have similar dimensions to the subject property. However, within 500 feet of the subject property, only 3 to 4 percent of the properties have dimensions similar to the subject property. It was also noted in the record that the ZBA had previously, in 2000, denied an application in the same area to build a one-story dwelling on a lot having a width of 41.98 feet and a lot area of 3,735 square feet. A representative of the Planning Department testified in opposition to the application, based upon a finding that the application was not in keeping with the character of the neighborhood. Neighboring homeowners also spoke in opposition to the application, with the requested side yards being the main focus of their complaints. The public hearing was adjourned, on consent, until July 9, 2013 to allow the applicant to meet with the Planning Department and neighbors and to modify the proposal to make it more acceptable. At the second hearing, two additional neighbors spoke in opposition to the application. No change was made to the application and after the hearing, the ZBA reserved decision. In opposition to the application, the Planning Department forwarded to the ZBA a memorandum, dated September 9, 2013, wherein it asserted that: the proposal would have an adverse impact on the neighborhood; the lot was significantly substandard; granting the

application would undermine the neighbors' lawful expectation that the nonconforming use would one day be phased out of existence; the requested area variances were substantial, not in keeping with the nature and character of the neighborhood and self-created; and the applicant had alternative courses of action under the code.

On September 10, 2013 the ZBA rendered a decision and issued written findings denying the application.

It is noted at the outset that the affidavit of Jason Majestic, submitted with the petition herein, is not admissible and will not be considered, since it was not submitted during the application process or at either of the public hearings and, thus, was not part of the record before the respondent ZBA (***Kaufman v Inc. Vil. of Kings Point***, 52 AD3d 604, 607 [2d Dept 2008]; ***Merlotto v Town of Patterson Zoning Bd***, 43 AD3d 926, 841 NYS2d 641 [2d Dept 2007]; ***Manzi Homes v Trotta***, 286 AD2d 737, 730 NYS2d 451 [2d Dept 2001]).

A local zoning board has broad discretion in considering applications for area variances and interpretations of local zoning codes (*see* ***Matter of Pecorano v Board of Appeals of Town of Hempstead***, 2 NY3d 608, 781 NYS2d 234 [2004]; ***Matter of Cowan v Kern***, 41 NY2d 591, 394 NYS2d 579 [1977]; ***Matter of Marino v Town of Smithtown***, 61 AD3d 761, 877 NYS2d 183 [2d Dept 2009]), and its interpretation of the local zoning ordinances is entitled to great deference (*see* ***Matter of Toys "R" Us v Silva***, 89 NY2d 411, 418-419, 654 NYS2d 100 [1996]; ***Matter of Gjerlow v Graap***, 43 AD3d 1165, 842 NYS2d 580 [2d Dept 2007]; ***Matter of Brancato v Zoning Bd. of Appeals of City of Yonkers, N.Y.***, 30 AD3d 515, 817 NYS2d 361 [2d Dept 2006]). A court, however, may set aside a zoning board's determination if the record reveals that the board acted illegally or arbitrarily, abused its discretion, or succumbed to generalized community pressure (*see* ***Matter of Pecorano v Board of Appeals of Town of Hempstead***, 2 NY3d 608, 781 NYS2d 234; ***Matter of Cacsire v City of White Plains Zoning Bd. of Appeals***, 87 AD3d 1135, 930 NYS2d 54 [2d Dept], *lv denied* 18 NY3d 802, 938 NYS2d 859 [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]; ***Matter of Cacsire v City of White Plains Zoning Bd. of Appeals***, 87 AD3d 1135, 930 NYS2d 54 [2d Dept 2011].

The burden is on the petitioner to show that there is no rational basis for the board's determination (***Matter of Grossman v Rankin***, 43 NY2d 493, 402 NYS2d 373 [1977]). A court may not substitute its judgment for that of the board (***Matter of Ball v New York State Dept. of Envtl. Conservation***, 35 AD3d 732, 826 NYS2d 698 [2006]; ***Smith v Board of Appeals of the Town of Islip***, 202 AD2d 674, 675, 609 NYS2d 912 [2d Dept 1994]). Nor may the court weigh the evidence or reject the choice made by the zoning board where the evidence is conflicting and room for choice exists (***Calvi v Zoning Bd. of Appeals of City of Yonkers***, 238 AD2d 417, 656 NYS2d 313 [2d Dept 1997]; *see* ***Toys R Us v Silva***, 89 NY2d 411, 654 NYS2d 100 [1996]).

Pursuant to Town Law § 267-b (3) (b), a zoning board considering a request for an area variance must engage in a balancing test, weighing the benefit to the applicant if the variance is granted against the detriment to the health, safety and welfare of the surrounding neighborhood or community (*see* ***Matter of Pinnetti v Zoning Bd. of Appeals of Vil. of Mt. Kisco***, 101 AD3d 1124, 956 NYS2d 565 [2d Dept 2012]; ***Matter of Jonas v Stackler***, 95 AD3d 1325, 945 NYS2d 405 [2d Dept 2012], *lv denied* 20 NY3d 852, 957 NYS2d 689[2012]; *see also* ***Matter of Pecorano v Board of Appeals of Town of Hempstead***, 2 NY3d 608, 781 NYS2d 234). A zoning board also must consider whether the granting of an area variance will produce an undesirable change in the character of the neighborhood or a detriment to neighboring properties; whether the benefit sought by the applicant can be achieved by some other feasible method, rather than a variance; whether the requested variance is substantial; whether granting the variance will have an adverse impact on the physical or environmental conditions in the neighborhood; and whether the alleged difficulty is self-created (Town Law § 267-b(3)(b); *see* ***Matter of Pinnetti v Zoning Bd. of Appeals of Vil. of Mt. Kisco***, *supra*; ***Matter of Alfano v Zoning Bd. of Appeals of Vil. of Farmingdale***, 74 AD3d 961, 902 NYS2d 662; *see also* ***Matter of Danieri v Zoning Bd. of Appeals of Town of Southold***, 98 AD3d 508, 949 NYS2d 180 [2d Dept], *lv denied* 20 NY3d 852, 2012 NY Slip Op 91377 [2012]). However, a zoning board is not required to justify its determinations with evidence as to each of the five statutory factors, as long as its determinations "balance the relevant considerations in a way that is rational" (***Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh***, 68 AD3d 62, 73, 886 NYS2d 442; *see* ***Matter of Merlotto v Town of Patterson Zoning Bd. of Appeals***, 43 AD3d 926, 841 NYS2d 650 [2d Dept 2007]).

Based upon the record and pursuant to the foregoing requirements, the ZBA issued findings determining that the vast majority of the properties in the subject neighborhood conform with the dimensional requirements of the Town Code. The relief sought would be inconsistent with the prevailing conditions in the neighborhood, and approval would create an unwarranted precedent for future development and undermine the Town Code by encouraging further divergences. The ZBA concluded that the proposed development would not be in keeping with the nature and character of the area. The ZBA also found that: the benefit sought could be achieved by an alternative, feasible method, perhaps by purchasing land from the adjoining properties, which were oversized; the requested variances were substantial, with the lot area being a 46% variance from the requirements of the Residence "B" zoning district and the side yards being a 50% variance; the requested variance is self-created; and that approval would have an adverse impact on the neighborhood.

After conducting two hearings on the matter in which petitioner's representative appeared, the ZBA considered the benefit to petitioners as weighed against the detriment to the health, safety and welfare of the surrounding community. The ZBA also weighed and applied the five aforementioned factors, in compliance with Town§ 267-b (3) (b) and controlling case law, when reaching its decision on petitioner's application and issued findings explaining the basis for its decision. The Court, therefore, finds that the ZBA's denial was supported by evidence in the record and was not arbitrary or capricious. Accordingly, the instant petition, to the extent it seeks relief pursuant to Article 78, is denied

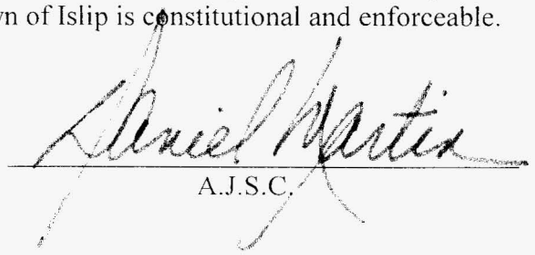
That portion of this action/proceeding which seeks a judgment pursuant to CPLR 3001 declaring that the denial of petitioner's application deprived petitioner of vested property rights, without due process of law and without just compensation is denied. Denial of a permit, even an arbitrary denial

redressable by a CPLR article 78 or other state law proceeding, is not tantamount to a constitutional violation under 42 USC § 1983; significantly more is required (***Bower Assoc. v Town of Pleasant Valley.***, 2 NY3d 617, 627, 781 NYS2d 240, [2004]). To establish its substantive due process claim, petitioner was required to prove that, without legal justification, it was deprived of a vested property interest, consisting of "more than a mere expectation or hope" of obtaining a permit or a variance (***Town of Orangetown v Magee***, 88 NY2d 41, 52, 643 NYS2d 21,[1996]; *see* ***Kreamer v Town of Oxford***, 91 AD3d 1157, 938 NYS2d 220 [3d Dept 2012]). Petitioner has failed to establish that it had any vested property right. The prior nonconforming use was lost when the dwelling on the property was destroyed in a fire and any new structure on the subject property was required to be built in conformity with the Town Code. Otherwise, petitioner was required to seek variances in order to obtain a building permit. As petitioner's variance application was properly denied, petitioner failed to establish it was denied due process.

Petitioner's request for a judgment pursuant to CPLR 3001 declaring that Chapter 68 of the Code of the Town of Islip is unconstitutional and void as a matter of law for prohibiting development of the subject premises must also be denied. When an interpretation involves a determination regarding a nonconforming use, an owner who challenges the zoning board faces a "burden of persuasion [that] is high because of the law's traditional aversion to nonconforming uses" (***Matter of Pelham Esplanade v Board of Trustees of Vil. of Pelham Manor***, 77 NY2d 66, 70, 563 NYS2d 759 [1990]; *see also* ***Scal Realty Corp. v DeSalvo***, 234 AD2d 550, 651 NYS2d 581 [2d Dept 1996]). Nonconforming uses are generally viewed "as detrimental to a zoning scheme, and the overriding public policy of zoning ... is aimed at their reasonable restriction and eventual elimination" (***Matter of Toys "R" Us v Silva***, 89 NY2d 411, 417, 654 NYS2d 100 [1996]; *see* ***Verstandig's Florist v Board of Appeals of Town of Bethlehem***, 229 AD2d 851, 852, 645 NYS2d 635 [3d Dept 1996]). Furthermore, zoning ordinances are "invested with an exceedingly strong presumption of constitutionality" (***Town of Huntington v Park Shore Country Day Camp***, 47 NY2d 61, 65, 416 NYS2d 774 [1979]; *see also* ***McGowan v Cohalan***, 41 NY2d 434, 436, 393 NYS2d 376 [1977]). A landowner who challenges the constitutionality of a zoning ordinance as applied to a particular parcel of property bears a heavy burden of demonstrating beyond a reasonable doubt, with "dollars and cents" proof, that under no use permitted by the ordinance, would the property be capable of producing a reasonable return (***Kransteuber v Scheyer***, 80 NY2d 783, 587 NYS2d 272 [1992]; ***de St. Aubin v Flacke***, 68 NY2d 66, 77, 505 NYS2d 859 [1986]; *see also* ***Linzenberg v Town of Ramapo***, 1 AD3d 321, 766 NYS2d 217 [2d Dept 2003]). The record herein is bereft of any "dollars and cents" proof that under no use permitted by the ordinance, would the property be capable of producing a reasonable return and, therefore, there is no legal basis for the relief sought by the petitioner.

Accordingly, the defendants is entitled to entry of judgment declaring that the denial of petitioner's application did not deprive petitioner of vested property rights without due process of law and further that Chapter 68 of the Code of the Town of Islip is constitutional and enforceable.

Settle judgment.



A.J.S.C.