Drummond v Town of Ithaca Zoning Bd. of Appeals
2017 NY Slip Op 30471(U)
March 14, 2017
Supreme Court, Tompkins County
Docket Number: EF2016-0216
Judge: Eugene D. Faughnan

At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 6TH day of February, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

WILLIAM DRUMMOND, MAYA DEVI DRUMMOND and RASHMI DRUMMOND

Petitioners,

-vs-

TOWN OF ITHACA ZONING BOARD OF APPEALS and BRUCE BATES in his capacity as CODE ENFORCEMENT OFFICER OF THE TOWN OF ITHACA

Respondents.

DECISION AND ORDER

Index No. EF2016-0216
RJI No. 2016-0624-M

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court in a combined proceeding, pursuant to CPLR Article 78 and an action for declaratory judgment, filed by William Drummond, *et al* ("Petitioners") on December 21, 2016 and an Order to Show Cause signed by this Court dated January 4, 2017. Petitioners seek to annul the determination of the Town of Ithaca Zoning Board of Appeals, *et al* ("Respondents"), arguing that said determination was arbitrary and capricious and that the zoning ordinance upon which it was based, as applied to Petitioners, is in violation of Article 1, Section 6 of the New York State Constitution. The parties appeared at argument on the Petition on February 6, 2017.

In 2015, Petitioners purchased a single family residence at 104 Pineview Terrace in the Town of Ithaca. The property is zoned for Medium Density Residential ("MDR"). Under the relevant town ordinances, a single family residence may be occupied by only one family, plus no more than one border, roomer, lodger or other occupant. Pursuant to Article III, §270-5, a family is defined as, *inter alia*, "[two] or more persons occupying a single dwelling unit, related by blood, marriage or legal adoption, living and cooking together as a single housekeeping unit..." However, "a group of unrelated persons numbering more than two shall be considered a family upon a determination by the Zoning Board of Appeals that the group is a functional equivalent of a family" pursuant to criteria set forth in that section. Specifically, the Zoning Board of Appeals ("ZBA") must consider whether:

> (1) The group is one which in theory, size, appearance and structure resembles a traditional family unit.
> (2) The group is one which will live and cook together as a single housekeeping unit.
> (3) The group is of a permanent nature and is neither merely a framework for transient or seasonal (including as "seasonal" a period of an academic year or less) living, nor merely an association or relationship which is transient or seasonal in

nature. In making this finding, the Zoning Board of Appeals may consider, among other factors, the following:

(a) Whether expenses for preparing of food, rent or ownership costs, utilities, and other household expenses are shared and whether the preparation, storage and consumption of food is shared.
(b) Whether or not different members of the household have the same address for the purposes of:
[1]Voter registration.
[2]Driver's license.
[3]Motor vehicle registration.
[4]Summer or other residences.
[5]Filing of taxes.

(c)Whether or not furniture and appliances are owned in common by all members of the household.
(d)Whether or not any children are enrolled in local schools.
(e)Whether or not householders are employed in the local area.
(f)Whether or not the group has been living together as a unit for an extended period of time, whether in the current dwelling unit or other dwelling units.
(g)Any other factor reasonably related to whether or not the group of persons is the functional equivalent of a traditional family.

Chapter 270 Article III §270-5 Town of Ithaca Code.

Petitioner Maya Devi Drummond ("Drummond") is a student at Ithaca College. Drummond has lived with five other fellow students at the subject property since the fall of 2016. On September 26, 2016, Petitioners submitted an Application for Special Approval to the ZBA seeking a

determination that Drummond and her housemates were the functional equivalent of a family.

On November 21, 2016, the ZBA held a properly noticed public hearing regarding Drummond's application. Drummond submitted evidence in the form of Petitioner William Drummond's remarks to the ZBA. William Drummond had made a prior written submission to the ZBA that is part of the certified record. This included a Walmart receipt representing communal purchasing of household items. Public comment from neighbors was also received by the ZBA.

Following the public hearing, the ZBA unanimously denied the application. In doing so, the ZBA found that the housemates did not resemble a traditional family in theory, size, appearance and structure. Specifically, the ZBA noted that all of the residents of the property were of roughly the same age and did not support each other; presumably financially. They acknowledged that although the residents had previously lived together, this was in the context of college dormitories or college apartments. Although the ZBA accepted that the residents provide each other with emotional support, they concluded that this does not distinguish this group from any group of co-tenants. Similarly, although Petitioners allege that the housemates eat meals together, this likewise did not distinguish this group from other co-tenants. There was no evidence submitted documenting the sharing of household bills. The ZBA further found that there was a lack of submitted evidence to support the non-transient nature of the group such as voter registrations, drivers licenses, vehicle registrations or income tax returns noting the subject property as resident's address. The ZBA also noted that the property is rented furnished and all major appliances are provided by Petitioners.

Arbitrary and Capricious

Generally, "[a ZBA's] interpretation of the home occupation provisions of [its] zoning ordinance must be upheld if it is neither irrational nor unreasonable." *Matter of Criscione v. City of Albany Bd. of Zoning Appeals*, 185 AD2d 420, 420 (3rd Dept. 1992); *see Matter of Baker v. Polsinelli*, 177 AD2d 844, 846 (3rd Dept. 1991), *lv denied* 80 NY2d 752 (1992); *Matter of Criscione v. Wallace*, 145 AD2d 697, 698 (1988), *Matter of Aboud v. Wallace*, 94 AD2d 874, 875 (3rd Dept.

1983); *see also Matter of Mack v. Board of Appeals, Town of Homer*, 25 AD3d 977, 980 (2006). A court's review of a ZBA's determination "is limited to an examination of whether it has a rational basis and is supported by substantial evidence." *Matter of Sullivan v. City of Albany Bd. of Zoning Appeals*, 20 AD3d 665, 666 (3rd Dept. 2005), *lv denied* 6 NY3d 701 (2005).

Having reviewed the certified record of the submissions, the minutes of the public hearing, and the ZBA's written decision, the Court cannot conclude that the ZBA's decision is irrational or unreasonable. The ZBA addressed each of the criteria listed in §270-5 of the Town Code and concluded that the housemates did not operate as the functional equivalent of a family. The findings regarding the criteria are based upon the evidence and testimony received, and are based upon substantial evidence. Beyond the allegation that the housemates rely on each other for emotional support and that they eat meals together, the housemates appear to meet few, if any of the criteria. In fact, it appears that there is substantial evidence that the group is transient in nature in that, at oral argument, Petitioners concede that most of the residents will be leaving the subject property at the end of the school term in May, 2017.

Therefore, the Court concludes that the ZBA's decision was not arbitrary or capricious, but was rational and supported by substantial evidence.

Declaratory Judgment

Petitioners also challenge the Town Ordinance §270-5 as applied to Petitioners, alleging that the ordinance requires "functionally equivalent" families to apply for special approval and pay a substantial fee[1] while related individuals do not. Respondents argue that no special permit is required, but rather upon an allegation that a group is in violation of the ordinance, the group is permitted to submit evidence to the ZBA that the group is the functional equivalent of a family based upon specific criteria in the ordinance.

[1]Petitioners acknowledged at oral argument that no fee was required for a determination by the ZBA as to whether a group of more than two unrelated individuals constituted the functional equivalent of a family.

Generally, "zoning ordinances are presumed to be constitutional and the challenger bears the burden of proving unconstitutionality beyond a reasonable doubt." *Matter of Morrissey v. Apostol*, 75 AD3d 993, 995 (3rd Dept. 2010). "Moreover, a zoning ordinance is valid if (1) it is enacted to further a legitimate governmental purpose and (2) there is a reasonable relation between the goal of the ordinance and the means employed to achieve that goal." *Id.* at 995.

In the present matter, Petitioners erroneously alleged unrelated groups were required to pay a fee and obtain a permit not required of groups related by marriage, adoption or blood. As noted above, the ZBA charges no fee and does not require a special permit, but rather, allows unrelated groups to submit evidence that they are the functional equivalent of a family under the applicable ordinance. The Court finds that the Petitioners have failed to set forth any basis to rebut the presumptive constitutionality of the subject ordinance.

The Petitioners' reliance on *Children's Village v. Holbrook, infra* is misplaced. The Petitioners in *Children's Village* challenged the *facial* validity of a zoning ordinance; a challenge not raised in the present petition. More importantly, the zoning ordinance challenged in *Children's Village* restricted the size of a functionally equivalent family and required a special permit, while not similarly limiting the size of a family of individuals related by blood or requiring a special permit. It was this disparate treatment that violated of Article 1 §6 of the New York State Constitution. In contrast, the subject ordinance herein does not limit "functional families" in size or composition, or require a special permit, but rather, defines broad criteria for determining whether a group is the functional equivalent of a family.

The Court concludes that the provision in the Town of Ithaca Code which permits unrelated individuals to offer proof that they are the functional equivalent of a family, is constitutional under Article 1 §6 of the New York State Constitution.

For the reasons set forth herein, Petitioners' application pursuant to CPLR Article 78 seeking to annul the Town of Ithaca ZBA determination and seeking declaratory judgment that the subject ordinance is unconstitutional as applied is **DENIED,** and the matter is **DISMISSED.** The Order

to Show Cause signed January 4, 2017 is **VACATED**.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: March 9, 2017
Ithaca, 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) Order to Show Cause signed on January 4, 2017

2) Verified Petition, sworn to on December 26, 2017, with Exhibits; affidavit of Maya Drummond, sworn to on December 26, 2017, with Exhibit; and Memorandum of Law dated December 21, 2016

3) Respondents' Verified Answer, sworn to on January 30, 2017; and Respondents' Memorandum of Law dated January 30, 2017

4) Record for an Article 78 proceeding to review a decision of the Town of Ithaca Zoning Board of Appeals, dated January 30, 2017