

Baychester Retail III LLC v Perlmutter
2019 NY Slip Op 30528(U)
February 26, 2019
Supreme Court, New York County
Docket Number: 156584/2018
Judge: Arthur F. Engoron
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

-----X

INDEX NO. 156584/2018

BAYCHESTER RETAIL III LLC,

MOTION DATE 07/16/2018

Petitioner,

MOTION SEQ. NO. 001

- v -

MARGERY PERLMUTTER, SHAMPA CHANDA, DARA OTTLEY-BROWN, NASR SHETA, THE BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK,

DECISION AND ORDER

Respondents.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to ANNUL AND VACATE (ARTICLE 78).

Upon the foregoing documents, the petition is denied.

Background

Petitioner (hereinafter, "Baychester") is the owner and operator of a 20,500-square-foot lot located at 2001 Bartow Avenue in the Bronx, on a block bounded by Bartow Avenue to the south, Asch Loop/Alcott Place to the east, Aldrich Street to the north, and Baychester Avenue to the west (hereinafter, "the Site.") Respondents are the Board of Standards and Appeals of the City of New York, as well as the commissioners thereof (hereinafter, "BSA.") Baychester plans to develop the Site for commercial purposes and seeks permits for 54 separate advertising signs at the Site, 27 signs facing north and 27 facing south.

The Site is located within a C7 zoning district. C7 zoning districts are an extreme rarity in New York City; they are generally exempt from most of the size, height, and illumination provisions applicable to other zoning districts (in fact, Baychester asserts there is only one other C7 zoning district in all of New York City, located at Coney Island). However, because this particular C7 zoning district is located 322 feet from an arterial highway (the New England Thruway), it is subject to the requirement that such signs "shall be located at a distance of at least as many linear feet therefrom as there are square feet of surface area on the face of such sign." Zoning Resolution § 32-662. Consequently, the surface area of any sign proposed for the Site cannot exceed 322 square feet. Baychester necessarily concedes that if its signs are not found to be 54 discreet and separate signs, then its proposal far exceeds the allotted signage permitted in proximity to an arterial highway

Baychester first attempted to obtain permits in 2013, when it initially sought a determination from the Department of Buildings ("DOB") that its proposed signage be considered 54 discrete

signs, for zoning purposes, rather than two signs (one consisting of 27 LED panels facing north, a second consisting of 27 LED panels facing south). DOB denied Baychester's application, finding that the proposal did not consist of 54 individual signs, but of two large signs. Baychester appealed the decision to BSA, which affirmed DOB's decision, finding that all of the LED panels on each side of the proposed grid (together with the writings and pictorial elements), constitute a single sign "because they are affixed to a single structure." BSA further stated that "all of the Commissioners agree that the [proposal] is a clear hazard to motorists on the New England Thruway (an arterial highway)." BSA's May 3, 2016 Resolution, page 8. Baychester then commenced a CPLR Article 78 proceeding challenging BSA's denial. The Hon. Carol R. Edmead denied Baychester's petition, finding that BSA's determination was rational and supported by substantial evidence. Baychester appealed to the First Department, which upheld Judge Edmead. On October 18, 2018, the Court of Appeals denied Baychester's motion for leave to appeal.

During the appeals process, Baychester submitted a new proposal to DOB, modifying its previous proposal to the extent that each of the 54 proposed signs would be supported by its own individual structure, or armature. However, one large monopole would still be supporting all of the armatures. Baychester asserted that its modified proposal resolved the "single sign structure" problem identified by BSA in its previous denial, and that the modified proposal was consistent with similar proposals that DOB had approved in the past. DOB denied petitioner's modified proposal, finding that although the proposed grid was different in that individual screens would be held up by individual structures, all of the individual structures would be held up by a single monopole holding up the entire grid. DOB thus concluded that the modified proposal was still two large, single signs, each of which would exceed the allotted square footage permitted, based on its proximity to an arterial highway.

Baychester appealed the denial of its modified proposal to BSA. Over a period of 10 months in 2017 and 2018, BSA held five separate public hearings on Baychester's appeal. Prior to BSA rendering its final determination, Baychester commenced another Article 78 proceeding in which it sought to prohibit BSA from retroactively reversing or modifying the position it previously took during Baychester's first appeal. The Hon. Shlomo Hagler denied the petition and dismissed the proceeding, finding that Baychester's challenge was not ripe for judicial review, given that BSA had not yet rendered its final determination on Baychester's modified proposal. On February 27, 2018, BSA upheld DOB's final determination denying Baychester's modified proposal, holding that the proposed installation, comprised of 27 LED panels on each side placed on structural frames that all connect to a single monopole, would be a single sign on each side. BSA further compared Baychester's initial proposal with its modified proposal and found that the manner by which the LED video screens are attached is ultimately a "distinction without a difference." BSA's February 27, 2018 Resolution, pg. 5, annexed to its opposition as Exhibit A.

Baychester then commenced its third Article 78 proceeding, the instant one, seeking to annul BSA's February 27, 2018 Resolution.

Discussion

It is well-settled that local zoning boards are entitled to broad discretion and that the judicial function in reviewing their decisions is limited to determining whether the board's actions were

illegal, arbitrary or an abuse of discretion. Ifrac v Utschig, 98 NY2d 304, 308 (2002); Pecoraro v Bd. of Appeals of Town of Hempstead, 2 NY3d 608, 613 (2004).

Baychester argues that BSA's determination was not only arbitrary, it exceeded BSA's jurisdiction and further violated the doctrines of judicial estoppel, collateral estoppel, and res judicata. For the reasons set forth herein, this Court disagrees.

Baychester asserts that the language in BSA's first resolution, dated May 3, 2016, denying Baychester's initial permit request, concentrated on a "single structure" analysis as the reason for its denial. Baychester also asserts that the modifications it made to its proposal remedied the "single structure" problem by designing a separate armature for each sign such that they can no longer be characterized as a single structure. Baychester further asserts BSA's February 27, 2018 resolution is so drastically different from its May 3, 2016 resolution that it violates the New York City Charter, § 666(8) which states, in pertinent part, that the "[b]oard shall have power... [t]o review... any rule, regulation, amendment or repeal thereof, and any order, requirement, decision or determination from which an appeal may be taken to the board... ; but no such review shall prejudice the rights of any person who has in good faith acted thereon before it is reversed or modified."

This Court does not find the differences between the May 3, 2016 resolution and the February 27, 2018 resolution to be the "drastic change in the applicable standard" that Baychester contends it to be. BSA does state in its May 3, 2016 resolution that "the majority of the Board also concludes that the advertising panels are a single sign, and not multiple signs, because they are affixed to a single structure." BSA's May 3, 2016 Resolution, page 10. However, such language is only one sentence in a comprehensive, 11-page resolution in which BSA discussed the intent and reasoning behind its decision, including its concern that the proposed signs would create a visibility hazard, presumably by distracting drivers on the nearby arterial highway. BSA's attempt to characterize the May 3, 2016 resolution as entirely reliant on a "single structure" theory is meritless.

Moreover, BSA foreshadowed subsequent events in its May 3, 2016 resolution, stating that:

WHEREAS, a minority of the Commissioners articulated their concern that a relatively insignificant structural reconfiguration of the [proposal] (in which each advertising panel would be mounted to an individual structure, rather than a shared structural grid) would render it multiple signs, and not a single sign, and suggested that the Appellant's ability to circumvent the Board's determination herein merely by reconfiguring the [proposal] undermines the validity of such determination; the Board, however, cannot reach a determination as to any signage assembly other than that which is the subject of this appeal;

Id. at 11. Accordingly, Baychester's claims that it relied on the May 3, 2016 resolution in modifying its proposal and could not possibly have anticipated its modified proposal being denied is unpersuasive. Moreover, this Court agrees with BSA that Baychester's modified

proposal is a “distinction without a difference.” That a separate armature would exist for each LED panel would not change the fact that each and every armature would supported by one large monopole, giving the impression that each LED screen is in fact one small part of a large single sign. Regardless, the obvious intent of the regulations imposed on locations in proximity to arterial highways is to prevent large signage areas from distracting drivers; whether or not each LED sign has a separate armature installed behind it is irrelevant to this goal.

As this Court (as stated herein) does not find BSA’s February 27, 2018 resolution to be a reversal or modification of the May 3, 2016 resolution, Baychester’s arguments premised on jurisdiction, res judicata and collateral estoppel are unavailing. In any event, the First Department made clear in the first Baychester appeal that “[i]nsofar as DOB’s determination is inconsistent with any of its past decisions, the doctrine of judicial estoppel does not avail.” Baychester Retail III v Perlmutter, 161 AD3d 678, 679 (1st Dep’t 2018).

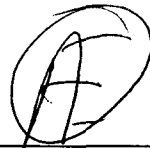
Finally, BSA’s February 27, 2018 resolution is not arbitrary and capricious. See Cowan v Kern, 41 NY2d 591, 599 (1977) (holding “[w]here there is a rational basis for the local decision, that decision should be sustained. It matters not whether, in close cases, a court would have, or should have, decided the matter differently”).

This Court has considered Baychester’s other arguments and finds them to be unavailing.

Conclusion

For the reasons set forth herein, Baychester’s petition is denied and dismissed, and the clerk is hereby directed to enter judgment accordingly.

2/26/2019
DATE


ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE