Matter of Magid Setauket Assoc., LLC v Town of Brookhaven Bd. of Zoning Appeals
2019 NY Slip Op 33659(U)
December 16, 2019
Supreme Court, Suffolk County
Docket Number: 3716/2018
Judge: Joseph Farneti
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

ORIGINAL

SHORT FORM ORDER

INDEX NO. 3716/2018

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

In the Matter of the Application of

MAGID SETAUKET ASSOCIATES, LLC, and METRO NY DEALER STATIONS, LLC,

Petitioners,

for a Judgment Pursuant to Article 78 of the CPLR, and for such other, further and additional relief,

-against-

THE TOWN OF BROOKHAVEN BOARD OF ZONING APPEALS, as comprised by PAUL DeCHANCE, Chairman, JAMES WISDOM, Deputy Chairman, HOWARD M. BERGSON, RONALD J. LINDSAY, WAYNE T. ROGERS, RICK CUNHA, CHARLES LAZAROU, THE TOWN OF BROOKHAVEN TOWN CLERK, and THE TOWN OF BROOKHAVEN, NEW YORK,

Respondents.

ORIG. RETURN DATE: AUGUST 3, 2018
FINAL SUBMISSION DATE: JANUARY 17, 2019
MTN. SEQ. #: 001
MOTION: MD

ORIG. RETURN DATE: NOVEMBER 28, 2018
FINAL SUBMISSION DATE: JANUARY 17, 2019
MTN. SEQ. #: 002
MOTION: WDN

PETITIONERS' ATTORNEY:
BROWN & ALTMAN, LLP
538 BROAD HOLLOW ROAD - SUITE 301-W
MELVILLE, NEW YORK 11747
516-222-0222

RESPONDENTS' ATTORNEY:
ANNETTE EADERESTO
BROOKHAVEN TOWN ATTORNEY
BY: JOHN W. DOYLE, ESQ.
ASSISTANT TOWN ATTORNEY
ONE INDEPENDENCE HILL
FARMINGVILLE, NEW YORK 11738
631-451-6500

Upon the following papers numbered 1 to 11 read on this petition FOR A JUDGMENT PURSUANT TO ARTICLE 78 OF THE CPLR AND MOTION TO STRIKE. Notice of Petition and supporting papers 1-3; Petitioners' Memorandum of Law 4; Verified Answer With Objections in Point of Law 5; Respondents' Return 6; Notice of Motion and supporting papers 7-9; Affirmation in Opposition 10; Supplement to Petitioners' Memorandum of Law 11; it is,

ORDERED that this petition (seq. #001) by MAGID SETAUKET ASSOCIATES, LLC ("Magid") and METRO NY DEALER STATIONS, LLC ("Metro") (collectively "petitioners") for an Order and Judgment: (1) annulling, vacating and setting aside the written summary of respondent THE TOWN OF BROOKHAVEN BOARD OF ZONING APPEALS' ("BZA") determination, filed on June 11, 2018, and the full written decision of the BZA, dated June 12, 2018, denying petitioners' application for a gas station canopy and for certain area variance relief, as more fully described in the petition; (2) directing the BZA to immediately forthwith issue a written determination granting the zoning relief sought by petitioners in the petition; and (3) directing respondent THE TOWN OF BROOKHAVEN, NEW YORK ("Town") to immediately process petitioners' applications for all such other and further required zoning approvals and/or permits, as required by law, on the grounds that the BZA's written determination is arbitrary, capricious, an abuse of the BZA's discretion and is not predicated on substantial evidence contained in the written record before the Court, is hereby **DENIED** for the reasons set forth hereinafter. In opposition to the petition, respondents have submitted a Verified Answer With Objections in Point of Law and a Return; and it is further

ORDERED that this motion (seq. #002) by petitioners for an Order striking out the BZA's Findings and Conclusions dated October 3, 2018 ("Findings"), annexed to the Return of respondents, upon the ground that the Findings are not part of the record, to amend the Return including the record of the proceeding compiled by respondents to include the BZA's "unsubstantiated" Findings and documents submitted to the Town in support of the variance application, has been withdrawn by correspondence from counsel for petitioners dated January 15, 2019.

This special proceeding, commenced on July 11, 2018 by notice of petition and petition, seeks an Order of this Court annulling a decision of the BZA that denied petitioners' application for area variance relief to construct a gasoline fueling station canopy at the property located at 195 Route 25A, Setauket, New York ("Property"). Magid is the fee owner of the Property, which is located in the Transition Zone of the Old Setauket Historic District, in a J-5 Business district, and Metro operates a Shell gas station located thereupon. Metro sought to make certain improvements to the "aging and outdated" gas station, including installing a canopy that would protect patrons from the weather while they are at the fuel pumps filling their vehicles. The cost of the improvements allegedly totaled approximately $500,000. Petitioners required a front yard area setback variance from the Town to construct such canopy, and submitted a Variance Application to the BZA on or about January 18, 2018. Petitioners inform the Court that the

Three Village Civic Association as well as other community members and elected officials opposed petitioners' application. Petitioners further inform the Court that they redesigned the proposed canopy three times to address the objectors' concerns. The last proposal requested a setback of 15.5 feet, or a 69% relaxation, where 50 feet is required under the Code (*see* Brookhaven Town Code § 85-466 [C] [1]). Public Hearings were held before the BZA on March 28, 2018 and April 18, 2018. On June 6, 2018, the BZA denied petitioners' application on the record, on June 11, 2018, the BZA filed a written summary of the record decision with the Town Clerk, and on June 12, 2018, the BZA issued a formal written denial. On October 3, 2018, the BZA issued its written Findings.

Petitioners allege that the determination of the BZA was not supported by substantial evidence contained in the record before it, and was arbitrary, capricious and an abuse of the BZA's authority and discretion. Specifically, petitioners argue, among other things, that: (1) the BZA disregarded precedent when it allegedly issued on July 12, 2017 a zero foot setback for a canopy to be installed at a gas station on Route 25A in Rocky Point, and on December 17, 2014, a 17 foot setback for a canopy to be installed at a gas station located at 482 Sills Road, Yaphank; (2) as the Property is located in the Old Setauket Historic District Transition Zone, it requires a more relaxed level of scrutiny than if it was located in the Historic District; (3) petitioners obtained a recommendation for approval from the Town Historic District Advisory Committee on or about November 20, 2017; and (4) fuel canopies are not prohibited by the Brookhaven Town Code. Further, petitioners contend that the BZA failed to give the reasons for its determination, as both the summary and the written decision only contain one word: "denied." However, as discussed, after petitioners commenced the instant proceeding the BZA issued its written Findings wherein it discussed in detail the reasons for the denial of the front yard area setback variance required for the canopy.

In opposition, respondents argue that after hearings held on March 28, 2018 and April 18, 2018, the BZA properly issued a denial of the application for the front yard setback. The BZA found that the approximate 70% relaxation of the Code was substantial; that the proposal was not consistent with the area located in the Historic District Transition Zone which has unique historic physical characteristics; no other examples cited by petitioners were located in a Historic District Transition Zone; that such a grant in this case would be precedent-setting in this historic area in Old Setauket where President George Washington once visited in 1790; that this hardship was self-created, as the gas station has been in operation since 1973 without a canopy; and there could be a potentially more feasible alternative, i.e., an even smaller canopy.

Judicial review under CPLR article 78 of the determination at issue here is limited to whether it was illegal, arbitrary, capricious, or an abuse of discretion (*see* CPLR 7803 [3]; *Matter of Gebbie v Mammina*, 13 NY3d 728 [2009]; *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608 [2004]; *Matter of Genser v Board of Zoning & Appeals of Town of N. Hempstead*, 65 AD3d 1144 [2009]). The challenged determination must be upheld if it has a rational basis and is not arbitrary or capricious (*see Matter of Mallins v Foley*, 74 AD3d 1070 [2010]; *Matter of Genser*, 65 AD3d 1144). "When an administrative determination is made and person acting has not acted in excess of his jurisdiction, in violation of lawful procedure, arbitrarily, or in abuse of his discretionary power, including discretion as to the penalty imposed, the courts have no alternative but to confirm his determination" (*Pell v Board of Education*, 34 NY2d 222, 356 [1974]).

Where a hearing is held, the determination must be supported by substantial evidence (CPLR 7803 [4]). However, in *Halperin v City of New Rochelle*, 24 AD3d 768 (2005), the Second Department held that a "substantial evidence" question arises "only where a quasi-judicial evidentiary hearing has been held." The court noted that public hearings related to zoning issues are informational and not evidentiary or adversarial (*id.*). Therefore, those determinations are reviewed under the "arbitrary and capricious" standard rather than the "substantial evidence" standard (*id.*). Further, "the determination of a land use agency must be confirmed if it was rational and not arbitrary and capricious" (*id.* [internal quotations omitted]; *accord Herman v Inc. Vil. of Tivoli*, 45 AD3d 767 [2007]; *Rendely v Town of Huntington*, 44 AD3d 864 [2007]). The Second Department adheres to this standard at present and the analysis as prescribed is controlling (*see Matter of Pine v Westchester County Health Care Corp.*, 127 AD3d 868 [2015]).

Moreover, local zoning boards have broad discretion in considering land use applications and the judicial function in reviewing such decisions is a limited one (*Pecoraro*, 2 NY3d 608). Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure (*id.*). Further, a reviewing court should refrain from substituting its own judgment for the reasoned judgment of the zoning board (*id.*). While a zoning board may not merely succumb to generalized community pressure (*see Pecoraro*, 2 NY3d 608), a zoning board may consider community testimony, among other factors, and may require that issues raised by such testimony be addressed by the applicant (*see Ifrah v Utschig*, 98 NY2d 304

[2002]; *Michelson v Warshavsky*, 236 AD2d 406 [1997]; *Matter of AHU Realty Corp. v Goodwin*, 81 AD2d 637 [1981]).

Pursuant to Town Law § 267-b (3), when determining whether to grant an area variance, a zoning board of appeals must weigh the benefit of the grant to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted (*see Ifrah*, 98 NY2d 304; *Sasso v Osgood*, 86 NY2d 374 [1995]). The zoning board is also required to consider whether: (1) granting the area variance will produce an undesirable change in the character of the neighborhood or a detriment to nearby properties; (2) the benefit sought by the applicant can be achieved by some method, feasible to the applicant, other than a variance; (3) the requested area variance is substantial; (4) granting the proposed variance would have an adverse effect or impact on physical or environmental conditions in the neighborhood or district; and (5) the alleged difficulty is self-created. While the last factor is not dispositive, it is also not irrelevant (*see Ifrah*, 98 NY2d 304; *Sasso*, 86 NY2d 374).

Here, the Court finds that the denial by the BZA had a rational basis, and was not arbitrary or capricious. After conducting hearings on the matter on March 21, 2018 and April 18, 2018, in which petitioners appeared along with counsel, the BZA considered the benefit to petitioners as weighed against the detriment to the welfare of the surrounding community. According to the Brookhaven Town Code, an Historic District Transitional Area is defined as "an area extending for a distance of 500 feet from and contiguous to the perimeter boundary of an historic district. The purpose of such transitional area shall be to control the effect of potentially adverse environmental, visual and developmental influences on an historic district" (Brookhaven Town Code § 85-1 [B]). In accordance with the foregoing, the BZA found that the canopy would have an adverse visual and developmental impact on, and was inconsistent with, the historic character of the surrounding district. Further, the BZA found that the requested relief would result in an undesirable change to the unique historic plan of the community.

The BZA also weighed and applied the five aforementioned factors, in compliance with Town Law § 267-b (3) and controlling case law, when reaching its decision on petitioners' application. Although the BZA's written decisions dated June 11, 2018 and June 12, 2018, do not contain its findings of fact or determinations regarding the statutory factors, the transcripts of the hearings held before the BZA do reflect that the BZA considered such matters. Moreover, the BZA has submitted the Findings in which the BZA found that: (1) the change applied for will produce an undesirable change in the character of the

historic neighborhood; (2) the requested variance is substantial; (3) the variance would have an adverse effect or impact on physical or environmental conditions in the historic neighborhood; and (4) the hardship was self-created. The document is signed by the chairman of the BZA. A reviewing court may look to the administrative agency's formal Return in an article 78 proceeding to ensure that the necessary record support for its decision exists, as well as to permit intelligent judicial review (*see Matter of Frank v Zoning Bd. of Town of Yorktown*, 82 AD3d 764 [2011]; *Matter of Ohrenstein v Zoning Bd. of Appeals of Canaan*, 39 AD3d 1041 [2007]; *Iwan v Zoning Bd. of Appeals*, 252 AD2d 913 [1998]; *Fischer v. Markowitz*, 166 AD2d 444 [1990]). The Court notes that petitioner filed, but then withdrew, a motion to strike from the record the BZA's Findings of October 3, 2018. Instead, petitioners' have submitted a Supplemental Memorandum of Law which responds to the Findings.

Although petitioners cite other allegedly similar properties that were granted variances, the fact that similar applications were granted to other properties in the vicinity does not suffice to establish that the BZA's action was arbitrary, as a zoning board "may refuse to duplicate previous error; . . . change its views as to what is for the best interests of the [Town]; [or] . . . give weight to slight differences which are not easily discernible" (*Matter of Cowan v Kern*, 41 NY2d 591, 595 [1977]; *see Ifrah*, 98 NY2d 304; *Josato, Inc. v Wright*, 35 AD3d 470 [2006]; *Matter of Spandorf v Board of Appeals of Vil. of E. Hills*, 167 AD2d 546 [1990]). Furthermore, the allegedly comparable properties cited by petitioners are not close in proximity to the Property, and none are located within a Historic District Transition Zone.

For the foregoing reasons, this petition to annul the determination of the BZA to deny petitioners' application for a front yard area variance is **DENIED**, and this special proceeding is hereby dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: December 16, 2019

HON. JOSEPH FARNETI
Acting Justice Supreme Court

__X__ FINAL DISPOSITION **____ NON-FINAL DISPOSITION**