Ind No. 06374-2007

SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 12 - SUFFOLK COUNTY

MOT. SEQ: 001-MD

PRESENT:

Hon. MARTIN J. KERINS
J.S.C.

In the Matter of the Application of GERRY FERRARA, Petitioner(s), For a Judgment under Article 78 of the Civil Practice Law and Rules, - against - **BOARD OF ARCHITECTURAL REVIEW and HISTORIC PRESERVATION OF THE VILLAGE OF SOUTHAMPTON, and individually,** Respondent(s).	**JOHN J. BENNETT, ESQ.** Bennett & Read Attorneys for Petitioner 212 Windmill Lane Southampton, New York 11968 **ELBERT W. ROBINSON, JR. ESQ.** Robinson & Robinson, P.C. Attorneys for Respondents 61 Main Street Southampton, New York 11968

Upon the following papers numbered 1 to 49 read on this petition pursuant to Article 78 ; Notice of Petition/ Order to Show Cause and supporting papers 1-40 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 41-46 ; Replying Affidavits and supporting papers 47-49 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that after hearing counsel for the parties and after consideration of the papers filed in support and in opposition thereto, this application (seq 001) by Gerry Ferrara, pursuant to Article 78, annulling and reversing the decision of the respondent Board of Architectural Review and Historic Preservation of the Village of Southampton (hereafter Board), dated January 8, 2007 and compelling the Board to grant petitioner architectural review approval for petitioner's application for a single family swelling is granted.

On July 26, 2006, the Petitioner applied to respondent Board to build a single family residence on a parcel of property located at 50 Post Avenue in the Village of Southampton, NY. The property consists of 26,293.22 square feet and is located in the R-12.5 residential zoning district within the Village. This zoning requires a minimum lot size of !2,500 square feet.

Petitioner initially submitted a design for a proposed dwelling of 5087 sq. ft. with 2 ½ stories. At this preliminary stage, on January 9, 2006, petitioner was advised by the Board to remove a handrail, to lower the chimney, and to screen the three garage doors from the street. It is undisputed that petitioner complied with the request. Respondent does not dispute that no Board member objected to the size of the proposed dwelling. Thereafter, there were approximately nine hearings on this application from August 14, 2006 until December 11, 2006.

After the meeting of January 9, 2006, petitioner spent over $200,000.00 in architectural and landscape architectural designs. He also hired an environmental consultant. Thereafter, on July 25, 2006, petitioner submitted revised building plans to the building department incorporating the Board's comments of January 9, 2006. On July 26, 2006, petitioner applied for a building permit to demolish the old house and build a new one.

At a public hearing held on August 14, 2006, all petitioner's experts appeared. Petitioner presented a 3-D scale model of the proposed house including landscaping. His environmental consultant addressed the neighborhood character. Petitioner also presented aerial photographs and a neighborhood analysis. This consultant testified that the house would conform to the gross floor area (GFA) ratio and lot coverage under the recently enacted zoning laws. At this meeting six area residents appeared to voice objection to the size of the house. In response, to the concerns of the objectors, petitioner revised his building permit application. He removed an exterior garage door from the rear and he removed driveway access along the side and rear of the house. His architect re-labeled the area above the garage from "attic" to "storage, unfinished and unheated".

At the August 28, 2006 hearing, four neighbors, immediately adjacent to petitioner's property, sent letters of support to the Board as did three other neighbors. There were also neighbors who appeared to voice opposition to the application. Again, the issue raised involved the size of the house as opposed to its architecture or aesthetics.

At that meeting, a Board member asked the Board's attorney if they had the authority to reduce the size of the house. In response, counsel for the Board said that their authority comes from the change in the code as to the "character of the neighborhood". Counsel used the term "massing" as giving authority to the Board to reduce the size. He also admitted that, "... the designers of the code could be more specific but they are not...", and later he noted, "... it's not as definitive as it could be".

Counsel for petitioner reminded the Board at this meeting that they did not have the authority to deal with site plans since the proposed house conformed to the zoning code. The Board Chairman

then closed the public hearing allowing written comments through September 11, 2006. However, on that date, neighbors again appeared to voice their objections.

The Building Inspector sent a letter to the Board on September 20, 2006, interpreting gross floor area (GFA) in the village code. As a result, petitioner eliminated the second floor ceiling above the garage. This change satisfied the Building Inspector.

On September 25, 2006, the Board again announced that the hearing was closed and no further testimony would be accepted. A decision on the application would be rendered on October 23, 2006. However, inexplicably, the Board advised that it was considering re-opening the public hearing. This involved whether 695 sq. ft. of interior space should be labeled "storage" as opposed to attic.

On October 23, 2006, the Board re-opened the hearing solely for discussion of the 695 sq. ft. in issue. Petitioner objected on the ground that no changes to the exterior of the house had been proposed since the closing of the hearing. Only an interior modification had been made at the request of the Building Inspector. Petitioner's counsel and architect both objected to reopening the hearing to discuss an interior modification. While Village of Southampton Code §116-33, gives the Architectural Board jurisdiction to review the exterior of a proposed structure, it does not give them the authority to review floor plans.

Petitioner's counsel and architect also provided the Board with the architectural definition of "massing" from several sources. They also noted that the Zoning Code of the Village of Southampton does not contain a definition of either "mass" or "massing".

Thereafter, a third re-design of the house was presented to the Board on November 27, 2006. This further reduced the overall area of the house by about 20%. The gables were also reduced from three to two and the garage was reduced from three to two. Counsel for petitioner also reminded the Board that one of its members had described the house in August 2006, as a fine example of Southampton architecture and a magnificent example of material and style.

On December 11, 2006, the Board closed the hearing. It rendered its decision denying the application on January 8, 2007.

In opposition to the Petition respondent asserts at times that mass and size are synonymous. At other times he argues that the Board denied the application based uon the architectural definition of mass and not on the basis of its size.

Administrative agencies are accorded broad discretion in considering applications for variances and judicial review of their determinations is limited to whether the action taken was illegal, arbitrary and capricious, or an abuse of discretion (*see* CPLR 7803 [3]; ***Matter of Pell v Board of Educ.,*** 34 NY2d 222; ***Matter of Doerrbecker v Saunders,*** 229 AD2d 490). Thus, a

determination of an administrative agency with respect to applications for variances should be sustained upon judicial review if it has a rational basis (*see* ***Matter of Ifrah v Utschig,*** 98 NY2d 304, 308; Matter of Lyons v Whitehead, 2 AD3d 638).

It is also well settled that zoning codes, being in derogation of the common law, must be strictly construed against the enacting municipality and in favor of the property owner (*see* ***FGL & L Prop. Corp. v City of Rye,*** 66 NY2d 111; ***Matter of Allen v Adami,*** 39 N.Y.2d 275; ***Baker v. Town of Islip Zoning Bd. of Appeals,*** 20 AD3d 522***; Matter of Geisinsky v Village of Kings Point,*** 226 AD2d 340). Although an administrative agency's interpretation of a regulation is entitled to deference, its interpretation is "not entitled to unquestioning judicial deference, since the ultimate responsibility of interpreting the law is with the court (***Matter of Tartan Oil Corp. v Bohrer,*** 249 AD2d 481; see ***Matter of Tallini v Rose,*** 208 AD2d 546). A zoning code must be construed according to the words used in their ordinary meaning (*see* ***Matter of Chrysler Realty Corp. v Orneck,*** 196 AD2d 631) and may not be extended by implication (see ***Matter of KMO-361 Realty Assocs. v Davies,*** 204 A.D.2d 547); ***Gillen v Zoning Bd. of Appeals of Town of Cortlandt,*** 144 A.D.2d 433). Where the interpretation of a zoning code is irrational or unreasonable, the administrative agency's determination will be annulled (*see* ***Baker v. Town of Islip Zoning Bd. of Appeals,*** 20 A.D.3d 522).

Here, Respondent Board went beyond the scope of its authority in denying the application. Clearly, the Board here succumbed to community pressure when it denied petitioner's application and its decision was arbitrary and capricious.

Petitioner correctly notes that the Village Code §116-33 provides for the duties of the Board of Architectural Review and Historic Preservation. It charges the Board to exercise sound judgment and to reject plans which, in its opinion, are not of harmonious character which include among other items such things as style, materials, mass, line and placement upon the property.

The code does not provide a definition of mass. Petitioner's architect continually stressed to the Board that in architectural terms, mass did not mean size. Further, petitioner presented the Board with what that word meant. However, the record here is replete with instances where the members confused the terms. This resulted in the members defining the term themselves although none of the members is an architect. Even the Village Attorney at the hearing of August 28, 2006, was confused about the meaning of "mass". His response to a Board member's question conveyed the false impression that the Board possessed the authority to reduce the size of a structure. The record here is clear. The Board denied petitioner's application because of its size and after community pressure. Of course, the size of the structure was not a factor mentioned in the enabling statute. As petitioner notes regulating the size of the dwelling is the duty of the Building Department pursuant to the Zoning Code.

In its decision the Board states that the area of the dwelling as initially presented exceeded the permissible GFA. Similarly, counsel for Respondent makes the same assertion in their

opposition.

Contrary to these assertions no such evidence was presented at the numerous hearings. Moreover, respondent's belated attempt to produce other evidence in their opposition to this petition, has not been considered by the Court.

Of the objectors who appeared at the hearing, none made a comment about the design of the house. All related to the size. Clearly, the attitude of the Board changed as the objectors became more vocal in their opposition. However, no evidence was presented that the structure would have a negative visual impact on the area. Its determination regarding the aesthetics of the house is inconsistent with its prior statements and was arbitrary and capricious and, therefore, must be vacated and annulled.

Dated: November 21, 2007
RIVERHEAD, NY

Martin J. Kerins, J. S. C.

FINAL DISPOSITION ✓ NON-FINAL DISPOSITION_____