Index No: 6058/17

SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY

PRESENT:
HON. JOSEPH C. PASTORESSA
JUSTICE OF THE SUPREME COURT

Mot Seq: #001-MOT D; CDISPSJ
002-MD

In the Matter of LYNN S. MANGER, AS TRUSTEE OF THE WILLIAM M. MANGER TRUST, TOP O'DUNE LLC and PAMELA MICHAELCHECK,

Petitioner(s),

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

BOARD OF ARCHITECTURAL REVIEW AND HISTORIC PRESERVATION OF THE VILLAGE OF SOUTHAMPTON, JONATHAN FOSTER, AS SR. BUILDING INSPECTOR OF THE VILLAGE OF SOUTHAMPTON, SH 24 LLC AND SH 28 LLC,

Respondent(s),

ATTYS FOR PETITIONER(S):
RICHARD G. HANDLER
50 BROADWAY
PO BOX 427
AMITYVILLE, NY 11701

JEFFREY L. BRAGMAN
15 RAILROAD AVENUE, SUITE ONE
EAST HAMPTON, NY 11937

ATTYS FOR RESPONDENT(S):
BENNETT & READ
212 WINDMILL LANE
SOUTHAMPTON, NY 11968

ROBINSON & ROBINSON
61 MAIN STREET
SOUTHAMPTON, NY 11968

The respondents SH 24 LLC and SH 28 LLC are the owners of two parcels of real property located in the Village of Southampton. The property is located within the Village's R-120 zoning district and the Southampton Village Historic District. The two lots are contiguous and the respondents applied to the respondent Board of Architectural Review and Historic Preservation of the Village of Southampton (hereinafter the Board) for a certificate of appropriateness to construct a single family dwelling and accessory structures on each parcel. The Village Code requires a certificate of appropriateness for any alteration or construction on property within a historic district (*see* Village Code § 65-4). The Board is required to consider certain criteria, including whether new construction is compatible with the character of nearby properties (*see* Village Code § 65-5[B][3]). Among the factors the Board shall consider in applying compatibility is the "scale of proposed. . .new construction in relation to the property itself, surrounding properties and the neighborhood" (Village Code § 65-5[C][2]). The petitioners, who are adjoining property owners, objected to the proposal on the grounds that, among other things, the main dwelling was too large. Following numerous public hearings, the Board approved the application by a 3 to 2 vote. The majority of the Board concluded that the proposal complied with the code but specifically noted that it had no authority to reduce the size of a dwelling. The petitioners then commenced this proceeding, pursuant to CPLR article 78, to annul the determination.

Initially, the respondents contend that the petitioners lack standing because they failed to allege any injury in fact. However, the petitioners allege that they are owners of real property that is contiguous to the subject property, that they were required to receive notice of the administrative hearing and that they were within the zone of interest to be protected by the historic district. Thus, the petitioners sufficiently demonstrated that they had standing to maintain this proceeding (*see* ***Matter of Sun-Brite Car Wash v Board of Zoning & Appeals***, 69 NY2d 406; ***Matter of East Hampton Indoor Tennis Club v Zoning Board of Appeals***, 83 AD3d 935).

In a proceeding to review a determination of an administrative agency, the standard of judicial review is whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion (*see* ***Matter of Wilson v New York City Dept of Housing Preservation and Dev.***, 145 AD3d 905; ***Matter of Gottlieb v City of New York***, 129 AD3d 724). This standard is applicable to a determination of a historic review board (*see* ***Matter of Teachers Ins. & Annuity Assn v City of New York***, 82 NY2d 35, 41; ***Matter of L.S.O.F. CYNWYD v Town of N. Hempstead***, 298 AD2d 520). Where interpretation of statutory terms is involved, a court is not required to defer to an agency where the question is one of pure legal interpretation (*see* ***Matter of Teachers Ins. & Annuity Assn v City of New York***, *supra* at 42).

Here, the petitioners contend that the Board failed to follow the criteria in the Village Code and incorrectly applied the law with respect to consideration of the size of the proposed dwelling. The record demonstrates that there was substantial argument at the hearing regarding size and the Board Chairman eventually stopped any further discussion on the issue stating that the Board lacked jurisdiction regarding the size of the house. In its decision, the Board engaged in a lengthy discussion regarding this issue and claimed that there is a conflict between the zoning code and the historic code. The Board concluded that it could not demand a reduction of the size of a dwelling as long as it complied with the formula in the zoning code for maximum gross floor area.

The Board and the respondents rely upon a decision of this Court (Kerins, J.) in ***Ferrara v Board of Architectural Review*** (2007 WL 4846177). In that case, the court annulled a determination of the Board which denied an application because of its size and community pressure. The Board has apparently concluded that, based on the ***Ferrara*** decision, it is unable to consider the size of a structure. However, ***Ferrara*** is not so broad and does not preclude the Board from considering size at all. Rather, it merely holds that the Board cannot reject an application solely because of its size. Moreover, the property in ***Ferrara*** was not in a historic district as that review was based on Village Code § 116-33, which does not include the same language or criteria as a historic district. In this case, the Board is specifically authorized to consider the "scale of proposed. . .new construction in relation to the property itself, surrounding properties and the neighborhood" (Village Code § 65-5[C][2]). The respondents contend that scale is not the same as size or square footage but scale necessarily requires a consideration of the size of a structure in relation to other things. Thus, the Board may consider the size of the proposed dwelling as it relates to the property itself, surrounding properties and the neighborhood.

The Board and the respondents also contend that there is a conflict with the zoning code and the Board cannot require a property owner to reduce the size of a dwelling. However, the Board can reject an application if it finds that the scale of the construction is not compatible with the property or neighborhood. An historic preservation board is charged with the responsibility of denying a certificate of appropriateness in the reasonable exercise of its powers if the proposal fails to meet the standards of the preservation law, permitted uses of the zoning laws notwithstanding (*see* ***Academy***

Mews v Kane, 143 AD2d 960; ***Matter of Zartman v Reisem***, 59 AD2d 237). The property is subject not only to the zoning ordinance but the additional requirements of the historic district which a local legislature may require (*see* ***Academy Mews v Kane***, *supra;* ***Matter of Zartman v Reisem***, *supra*). Thus, there is no conflict as the historic district constitutes an additional regulatory requirement beyond the zoning laws that is applicable to all property owners within the district. The Board may consider the size or scale of the proposed dwelling as it relates to the property itself, surrounding properties and the neighborhood and may reject an application if it finds that the scale of the construction is not compatible with the property or neighborhood. Any such determination may not be arbitrary and must be supported by sufficient evidence.

In this case, the decision indicates that two members of the Board voted against the proposal based upon concerns over the scale and size of the building. The majority concluded that the proposal complied with the standards of the code but apparently believed that they did not have the authority to consider size and did not specifically address the code criteria. Thus, it appears that the majority did not apply the correct standard and the determination was affected by an error of law (*see* ***Matter of Save America's Clocks Inc v City of New York***, 157 AD3d 133). Under these circumstances, a new hearing and determination is warranted.

Accordingly, the petition is granted, the determination is annulled and matter is remitted to the Board for a new hearing and determination. In view of this determination, the motion by the petitioners for a preliminary injunction is denied as moot.

Settle judgment.

DATED: October 30, 2018

HON. JOSEPH C. PASTORESSA, J.S.C.

H:Article78.Manger v Bd of Arch Review