SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
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In the Matter of the Application of

BMG MONROE I, LLC,

Petitioner, Index No. 70181/2018

-against-

VILLAGE ON MONROE ZONING BOARD OF APPEALS, PAUL S. BAUM, in his official capacity as Chairman and Member of the Village of Monroe Zoning Board of Appeals, R. DANIEL MARGOTTA, JERRY MARTUSCHELLI, RICHARD MCCARTHY, and HOWARD ZUCKERMAN, in their official capacities as Members of the Village of Monroe Zoning Board of Appeals, and JAMES COCKS, in his official capacity as Building Inspector of the Village of Monroe,

Respondents.
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Minihan, J.

Petitioner commenced this proceeding for an order and judgment setting aside as arbitrary and capricious, and contrary to law, the November 13, 2018 determination of respondent Village of Monroe Zoning Board of Appeals (hereinafter ZBA) affirming a determination of the respondent Building Inspector denying its applications for building permits for two parcels of property in the Village of Monroe, compelling the respondent Building Inspector to grant the subject building permits, and awarding attorneys' fees, costs, and disbursements pursuant to Village Law § 7-712-c(2). Respondents opposed the petition arguing that the ZBA's determination was rational and fully supported by the record. The court agrees with respondents and, thus, denies the petition and dismisses the proceeding.

Factual & Procedural History

This proceeding involves petitioner's building permit applications to construct duplex homes, specifically Lots 45 and 46, in the Village of Monroe, as part of the Smith Farm residential cluster subdivision[1]. The Smith Farm project required, in pertinent part, land use approval by the Village's Planning Board. By resolution dated August 10, 2015, the Village's

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[1]The underlying facts of this proceeding are set forth at length in this court's prior order dated March 28, 2019, denying respondents' motion to change venue.

Planning Board granted "cluster subdivision approval, conditional final conditional use approval, [and] conditional final site plan approval." The Planning Board's approval was explicitly conditioned upon, in pertinent part, "full compliance with all SEQR[A] Findings and mitigation measures identified therein." The Village's approval resolution listed certain SEQRA Findings and mitigation measures, including, in pertinent part, mitigation measures as to rear elevation, roof pitch, and siding material. Petitioner revised its site plan in accordance with the Planning Boards' approval resolution. In October 2015, petitioner submitted a revised final site plan to the Planning Board. The Planning Board signed the revised final site plan and it was filed.

On or about October 31, 2017, petitioner submitted building permit applications to respondent Village Building Inspector to construct Smith Farm duplex homes at 1 Van Arsdale Road and 3 Van Arsdale Road, Lots 45 and 46. On December 26, 2017, the Building Inspector denied the building permits for noncompliance with the Planning Board's SEQRA Findings. By letter dated February 1, 2018, petitioner submitted revised building permit applications. On or about February 5, 2018, the Building Inspector again denied the applications, citing noncompliance with the SEQRA Findings. On or about March 29, 2018, petitioner appealed the Building Inspector's February 5, 2018 denial to the ZBA. Having resolved certain issues, the appeal was limited to three issues: rear elevation; roof pitch; and siding material. By letter dated April 2, 2018, petitioner asked the ZBA to stay consideration of the appeal to permit the parties to pursue settlement discussions.

On or about April 26, 2018, petitioner submitted revised building permit applications. On or about May 7, 2018, the Building Inspector denied petitioner's applications for failure to comply with the Planning Board's approval resolution and the SEQRA Findings in terms of: rear elevation; roof pitch; and siding material. Specifically, the Building Inspector found, in pertinent part, as follows:

> **1.** Rear elevation on building plan does not comply with the Final Resolution of Approval dated 8/10/15 nor with the Typical Rear Elevation Drawing listed in the SEQRA findings statement... The rear elevation drawings approved in the SEQRA findings statement show the two duplex units clearly dissimilar in appearance and depicting two separate and distinct units as well as show an offset between the two units. The rear elevation sheets of the building plans you have submitted for both lots are a mirror image of each other, are inherently similar, and do not indicate any offset between the units.
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> 2. The roof pitch of the main roof line submitted on the building plans varies between 12 on 12 to 3 on 12. This does not comply with the Final Resolution of Approval dated 8/10/15 nor with the SEQRA findings statement... which specifically states that main rooflines shall be steeply sloping with 12 on 12 pitch or greater.
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> 3. Proposed vinyl siding material does not comply with the Final Resolution of Approval dated 8/10/15 nor with the SEQRA findings statement... [which] specifically lists the materials for siding to consist of shingles, shiplap, stucco, stone or brick.

On or about May 18, 2018, petitioner amended its ZBA appeal to address only those three issues: rear elevation; roof pitch; and siding material. A public hearing commenced on June 12, 2018, and closed on October 9, 2018. On November 13, 2018, the ZBA affirmed the Building Inspector's denial of the building permit applications on the same three grounds: (1) rear elevation; (2) roof pitch and (3) siding material.

Present Proceeding

On November 29, 2018, petitioner commenced this article 78 proceeding to challenge the ZBA's November 13, 2018 determination, to compel the Building Inspector to issue the subject building permits, and for an award of costs, disbursements and attorney's fees pursuant to Village Law § 7-712-c(2). At its December 11, 2018 meeting, the ZBA adopted written findings as to its November 13, 2018 determination. The written findings read, in pertinent part, as follows:

> The Board found that the rear elevation proposed does not comply with either the Planning Board's Resolution or the SEQRA Findings Statement, as they must be dissimilar in appearance, depict two separate and distinct units and show an off-set between the two units. What is proposed are units similar in appearance, with no offset, not making it very clear that a duplex is proposed. The Board compared the Plans and Typical Rear Elevation Drawing, last revised July 28, 2014 (Exhibit D) with the Plans last revised April 26, 2018 (Exhibit C) and found that the two units on Exhibit C are mirror images of each other and are not offset from each other, which is contrary to the Planning Board's Resolution and the SEQRA Findings Statement, which specifically incorporated the Typical Rear Elevation Drawing. ...
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> Concerning the proposed construction materials, ... the SEQRA Findings Statement and Planning Board Resolution referenced very specific siding materials: "shingles, stucco, stone, shiplap and brick." ... [I]f the Applicant desires construction material other than the specified siding ... it must return to the Planning Board for an amended approval. ...
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> The Board next considered whether the proposed roof pitch complied with the Planning Board's Resolution and SEQRA Findings Statement. The Board heard arguments from the Applicant and Building Inspector as to what constitutes a "main roof line." ... The Board discussed how the application (Exhibit A) depicts all of the rooflines as 6' on 12' pitch, and not the 12' on 12' pitch as approved. After amending the plans on April 26, 2018 the roof lines varied between 12' on 12' to 3' on 12'. The Applicant argued that because 80% of the proposed roofline is now 12' on 12', it did comply with the Planning Board's approval. The Building Inspector and the attorney for the Village Planning Board asserted that although there is no definition for "main roof line," in the industry, and based upon discussions with builders, the entirety of the roof is the 'main roof line.' Again, the Board discussed how because portions of the main roofline are proposed to be on a 3' on 12' pitch it was not in accord with the Planning Board approval of a pitch of 12' on 12' or greater. The Board also found that the proposed deviation will definitely have an impact on the visual impacts of the project, which does not meet the intent of the Planning Board.

On December 20, 2018, petitioner filed an amended petition raising eight claims. The first five claims challenged the ZBA's determination as arbitrary and capricious, and sought to compel the Building Examiner to issue the subject permits, arguing that (1) the ZBA did not find that the proposed rear elevation, roof pitch, or siding materials in the subject applications would cause adverse visual impacts; (2) the subject applications contained small deviations from the typical rear elevation drawings set forth in the SEQRA Findings but nonetheless provided for a varied streetscape in accordance with the Planning Board's approval resolution; (3) the Planning Board's approval resolution and the SEQRA Findings did not require that the rear elevation of every single home be different; (4) the Planning Board's approval resolution and the SEQRA Findings did not require that the entire roofline be 12' on 12' pitch, and the proposed plans showed a main roofline of 12' on 12' pitch, with "minor sections of the roof at different pitches;" (5) the visual mitigation measures within the SEQRA Findings were intended to ensure that the Smith Farm homes fit within the Village's architectural atmosphere and vinyl siding met that goal. In the remaining three claims, the amended verified petition alleged that (1) the ZBA's December 11, 2018 written findings amounted to *post hoc* rationalization of the ZBA's November 13, 2018, determination and, thus, should not be considered by the court; (2) the ZBA failed to timely file its written decision pursuant to Village Law § 7-712-a(9); and (3) pursuant to Village Law § 7-712-c(2) petitioner is entitled to costs, disbursements and attorney's fees because respondents acted with gross negligence, in bad faith, and/or with malice, in that the denial of the building permits was motivated by anti-Hasidic animus.

By order dated March 28, 2019, this court, in pertinent part, denied respondents' motion to change venue and directed respondents to answer the amended petition. Respondents appealed. Petitioner moved to dismiss the appeal on the basis that no appeal lies from an order in an article 78 proceeding. Respondents cross-moved for leave to appeal. By order dated July 17, 2019, the Appellate Division, Second Department, granted the motion to dismiss, denied the cross-motion, and dismissed the appeal.

Respondents answered the amended petition, denying its material allegations and raising objections. In a memorandum of law, respondents argued, in pertinent part, that claims one through five, challenging the ZBA's determination as arbitrary and capricious, were unsupported by the record and that, rather, the ZBA's determination to affirm the Building Inspector's denial of the building permits was rational because the subject applications did not conform with the Planning Board's approval resolution and the related SEQRA Findings, specifically with respect to rear elevation, roof pitch, and siding material. To show that the failure to conform to the Planning Board's resolution approval constituted a proper basis for the Building Inspector to deny the permits, respondents cited to Section 200-68 of the Village of Monroe Code, which provides, "No building permit shall be issued for any building where the site plan of such building is subject to approval by the Planning Board, except in conformity with the plans approved by said Board." Respondents reasoned that it was the ZBA's role to determine whether the building plans complied with the Planning Board's resolution approval and not to re-evaluate the conditions within that resolution, nor the intent behind them. Petitioner's recourse, respondents argued, was to apply to the Planning Board for an amended resolution of approval.

As for the claims seeking to compel the Building Examiner to issue the subject permits, respondents argued that mandamus does not lie against an administrative officer to compel him *how* to perform a legal duty. As for the sixth claim, respondents argued that the ZBA's December 11, 2018 written findings did not amount to *post hoc* rationalization and that, rather, the ZBA merely reduced to writing its grounds for denying petitioner's appeal, as per the discussions and findings at prior meetings. Moreover, respondents pointed out that at the ZBA's November 13, 2018, meeting petitioner's counsel agreed to give the ZBA until December 11, 2018 to approve its written decision. To refute the seventh claim, which alleged that the ZBA failed to file its decision within five days as required by Village Law § 7-712-a(9), respondents pointed out that the ZBA filed its December 11, 2018 written decision that same day. Respondents also argued that, regardless, a failure to timely file under Village Law § 7-712-a(9) did not mandate annulment of the determination. Finally, respondents argued that petitioner's claim for an award of costs and attorney's fees under Village Law § 7-712-c(2) failed because petitioner could not show that the ZBA acted with "gross negligence", "bad faith" or "malice", as required under that statute.

In reply, petitioner argued that the ZBA's affirmance of the Building Inspector's denial of the permits was based on the ZBA's misinterpretation of the visual mitigation measures in the Planning Board's approval resolution and the SEQRA Findings and that, in fact, the subject permit applications complied with the requirements set forth in the approval resolution and SEQRA Findings Statement.

Analysis

The court denies the amended petition for failure to demonstrate that the actions of the ZBA in affirming the determination of the Building Examiner to deny the subject building permits was illegal, arbitrary or capricious, or an abuse of discretion. "Judicial review of a determination by a zoning board is generally limited to reviewing whether the action taken by the zoning board was illegal, arbitrary and capricious, or an abuse of discretion" (*Matter of Voutsinas v Schenone*, 166 AD3d 634, 636 [2d Dept 2018]). "A determination is arbitrary if it is made 'without sound basis in reason... without regard to the facts'" (*Matter of Trump on the Ocean, LLC v Cortes-Vasquez*, 76 AD3d 1080, 1083 [2010], quoting *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Here, the ZBA's determination to affirm the Building Examiner's denial of the building permits was rational and supported by the record. Thus, the court denies the petition insofar as it seeks to annul the ZBA's determination as arbitrary and capricious. Moreover, finding that petitioner failed to show that the ZBA's action was illegal or an abuse of discretion, the court declines to annul the ZBA's determination on those grounds.

The court also denies the petition insofar as it seeks mandamus relief, to compel the Building Examiner to issue the subject building permits. Administrative acts which are purely ministerial in nature may be overruled and contrary action compelled by mandamus, where such conduct has been arbitrary and capricious, and the petitioner is enforcing a clear legal right

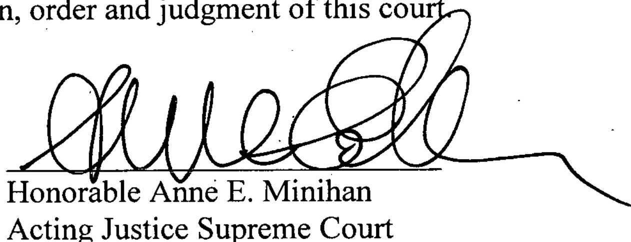
(*Gimprich v Board of Educ.*, 306 NY 401, 407 [1954]). However, mandamus will not be awarded to compel discretionary acts with respect to which the administrative officer may exercise judgment or discretion (*see Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018]; *Gimprich v Board of Educ.*, 306 NY at 406). Here, petitioner failed to show arbitrary and capricious conduct by the ZBA and, in any event, the Building Examiner's determination necessarily involved the exercise of discretion. Accordingly, mandamus relief, compelling the Building Examiner to issue the subject permits, is not appropriate.

The claim as to Village Law § 7-712-a(9) is without merit as it is undisputed that the ZBA filed and issued its written findings on the same day. Moreover, even assuming, *arguendo*, a failure to timely file under Village Law § 7-712-a(9), annulment of the ZBA's determination would not be an appropriate remedy under these circumstances. Finally, the court finds unconvincing the claim as to Village Law § 7-712-c(2) since petitioner failed to show that the ZBA acted with "gross negligence", "bad faith" or "malice", as is required under that statute for an award of costs.

Based on the foregoing, it is ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

The foregoing constitutes the decision, order and judgment of this court.

Dated: White Plains, New York
October 9, 2019



Honorable Anne E. Minihan
Acting Justice Supreme Court