

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-----X
In the Matter of the Application of
AVC PROPERTIES LLC,

Petitioner,

For Judgment Pursuant to Article 78 of the CPLR,

-against-

THE VILLAGE OF MAMARONECK ZONING BOARD
OF APPEALS (COMPRISED OF BARRY WEPRIN,
DAVID NEUFELD, KELLY WENSTRUP, ROBIN
KRAMER, MEG YERGIN), DAN GRAY, JOCELYN
DONAT, ANTHONY LIVIDINI, KAREN COLANERI,
BRIAN GELLMAN AND STACEY GELLMAN,Respondents.
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Minihan, J.

In this consolidated Article 78 proceeding¹, petitioner, AVC Properties, LLC, filed two

¹After a hearing held on September 6, 2018 before this court, petitioner's application to stay the revocation of the certificates of occupancy was denied however the respondents were enjoined from evicting the families occupying 1017 and 1019 Grove Street. By stipulation dated November 30, 2018, the parties agreed to consolidate the proceedings and the respondents

petitions. By the first petition (Index No. 59146/2018), petitioner seeks a judgment setting aside the resolution dated May 10, 2018 issued by the Village of Mamaroneck Zoning Board of Appeals ("ZBA") requiring it to obtain approvals from the Village of Mamaroneck Planning Board and Village of Mamaroneck Architectural Review Board ("ARB") for modifications to the single family homes constructed in a 3-lot subdivision located on Grove Street in the Village of Mamaroneck. By the second petition (Index No. 62807/2018), petitioner seeks a judgment setting aside the ZBA's resolution dated July 19, 2018 (adopting the conclusions and findings of the May 10, 2018 resolution) directing petitioner, in pertinent part, to comply with the Planning Board's final plat approval, or seek amendment thereto, and to obtain approval from the ARB for the proposed changes, and seeking an award of attorneys' fees, costs and disbursements.

NYSCEF documents 1-107 (Index #62807/18) and NYSCEF documents 1-127 (Index # 59146/18) were read on this consolidated proceeding.

Factual & Procedural Background

Petitioner constructed three single family residences located at 1017, 1019 and 1021 Grove Street in the Village of Mamaroneck pursuant to a subdivision application granted by the Planning Board on May 27, 2015 which permitted, among other things, division of the property into 3 lots (1021 Grove Street [Lot 1], 1019 Grove Street [Lot 2] and 1017 Grove Street [Lot 3]). The properties of respondents Donat, Lividini and Colaneri are adjacent to the lot lines of the subdivided properties. On July 13, 2015, respondent Donat challenged the Planning Board's issuance of subdivision approval which was ultimately denied as the building permits were granted on March 30, 2016.

By way of an Article 78 proceeding, respondent Donat unsuccessfully challenged the building permits. By decision and order dated August 16, 2016, this court (Zambelli, J.) dismissed the petition on the grounds that respondent Donat failed to exhaust her administrative remedies by first challenging the issuance of the building permits to the ZBA prior to filing the Article 78 proceeding, and because petitioner failed to state a cause of action.

The ARB approved building permits on February 18, 2016 and Inspector Gray subsequently issued building permits and certificates of compliance/occupancy for the development of lot 2 (1019 Grove Street) and lot 3 (1017 Grove Street). On April 1, 2016, petitioner commenced construction of the homes on lot 1 (1021 Grove Street) and lot 2 (1019 Grove Street); construction of lot 3 (1017 Grove Street) started in September 2016. Petitioner claims that, during construction, it discovered architectural drawing and transposition errors on the approved plans, including: windows improperly placed; incorrect ceiling heights for each floor; the lack of structural beams as well as missing steps, a missing rear patio, and missing

consented to staying the eviction despite the revocation of the certificates of occupancy, pending a final decision and order by this court.

windows for the basement and bedrooms. Petitioner submitted amended plans to the Building Department on July 13, 2016. In an ARB meeting on August 18, 2016, petitioner withdrew the application after overwhelming public opposition. According to petitioner, it was subsequently determined by Inspector Gray and Malte Stockhart, Chairman of the ARB, that the items to be rectified could be incorporated into the existing building permit and an amended permit was issued.

On April 13, 2016, respondent Donat appealed the issuance of the building permits and by resolution dated October 13, 2016, the ZBA denied respondent Donat's combined appeals affirming Inspector Gray's determination. In an Article 78 proceeding, respondent Donat unsuccessfully challenged the ZBA's October 13, 2016 resolution. By decision and order dated March 20, 2017, this court (Zambelli, J.) granted AVC's motion to dismiss that proceeding, holding that the petition was moot, as construction was substantially completed, and barred by laches, based on Donat's failure to seek injunctive relief during construction. The court denied AVC's request for sanctions, attorneys fees, and an order requiring Donat to seek court approval prior to commencing further litigation against AVC.

On March 30, 2017, petitioner applied for a fence permit to install a border fence at 1017 Grove Street (lot 3). In a proceeding commenced on June 13, 2017, respondents Donat, Lividini, and Colaneri challenged the permit application, arguing that the fence was an accessory structure violating mandatory property line setbacks set forth in the resolution of the Planning Board granting the subdivision. The Building Inspector granted petitioner's application for the fence permit, finding that it was a permissible accessory use; a certificate of compliance was issued on June 22, 2017 and the fence was constructed.

By resolution dated May 10, 2018, in response to respondent Donat's consolidated appeals, the ZBA determined that Inspector Gray should not have granted building permits, certificates of compliance, a certificate of occupancy, or a temporary certificate of occupancy, as to lot 2 (1019 Grove Street) and lot 3 (1017 Grove Street) without enforcing all of the conditions of the Planning Board's final plat approval and without requiring the ARB's re-approval for changes. By resolution dated July 19, 2018, the ZBA, in pertinent part, adopted the findings and conclusions of its May 10, 2018, resolution, and directed petitioner to comply with the Planning Board's final plat approval, or seek the Planning Board's approval of amendments thereto, and to obtain approval from the ARB for the proposed changes to the subject homes. In pertinent part, the ZBA's challenged determinations ordered petitioner to rectify the fence, window wells, and window egresses on the basis that they were constructed outside of the building envelope and warned that the temporary certificates of occupancy, the certificates of occupancy, and the certificates of compliance would be revoked unless petitioner complied with the Planning Board's final plat plan, or secured the Planning Board's approval for amendments thereto, and secured approval of the ARB, by the end of the compliance period.

On October 18, 2018, the ARB approved all of the proposed changes and the parties agree that the issues relating to the ARB are no longer at issue in this proceeding. However, in October

2018, Inspector Gray determined that petitioner failed to modify the fence and window egresses in compliance with the Planning Board's final plat plan before the expiration of the compliance period. On November 1, 2018, Inspector Gray revoked the certificates of occupancy for the subject homes. Petitioner advises that it removed the fence panels and installed a temporary structure to the window wells.

Present Proceeding

After conferences held before this court, it is undisputed that the only remaining issue is whether to annul the ZBA's resolutions as they relate to the fence and the window wells. In that respect, the petition raises the following claims: (1) the first claim alleges that the May 2018 resolution, to the extent that it involves any components of 1017 Grove Street pertaining to the original building permits, including the window wells, is barred by collateral estoppel, res judicata, judicial estoppel, mootness, laches; (2) the second claim alleges that respondents Donat, Lividini and Colanari lack standing to bring an appeal to the ZBA, as they did not suffer harm different from the general public and are, thus, not aggrieved; (3) the third claim alleges that the ZBA exceeded its authority in that the resolutions cover issues outside its jurisdiction; and (4) the fourth claim alleges that the resolutions are arbitrary and capricious for the above stated reasons.

Inspector Gray's Motion to Dismiss

By motion to dismiss pursuant to CPLR 3211 (a)(7) and CPLR 7804 (f), Inspector Gray seeks dismissal of the petition on the grounds, inter alia, that the petitioner does not seek any relief against him and that he is not a necessary party. In opposition, petitioner argues that Inspector Gray is a necessary party. By reply, Inspector Gray contends that petitioner's arguments are misplaced and fail to address his arguments that the appeal to the ZBA precludes petitioner from initiating a proceeding against him under CPLR Article 78, and that petitioner cannot challenge his decision because petitioner is not aggrieved by that decision. He further states that given petitioner's lack of opposition to those arguments, the petition should be dismissed against him on these grounds alone.

ZBA's Motion to Dismiss

By motion to dismiss pursuant to CPLR 3211(a)(2), 3211(a)(7) and 7804(f)(1), the ZBA seeks an order of this court dismissing the combined petitions on the grounds that the challenged determinations are not final and not ripe for judicial review since petitioner failed to exhaust its administrative remedies. Specifically, the ZBA argues that petitioner was given 120 days for compliance, to return to the Planning Board and the ARB to resolve the issues, and that instead of pursuing those administrative remedies, petitioner commenced this proceeding prematurely. By opposition, petitioner argues that there are no required remaining interim administrative steps, so the resolutions are ripe for review. Petitioner further argues that the challenged ZBA resolutions are based on incorrect legal interpretations which can only be resolved by the court and that, as such, petitioner may be exempt from any requirement to seek further administrative review or to

demonstrate ripeness. By reply, the ZBA maintains that the issues raised herein are not ripe for judicial review because the challenged resolutions are not final, since they directed petitioner to exhaust further administrative remedies, i.e., seek approvals from the ARB, which petitioner has now done, and from the Planning Board, which petitioner has not done, and those administrative remedies may render the issues moot.

Analysis

The court grants the motions to dismiss. As for the ZBA's motion, the court finds convincing the ZBA's position that the challenged determinations are not ripe for judicial review. In assessing whether a controversy is ripe for judicial review, "it is necessary first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied" (*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 519 [1986]). "The 'appropriateness' inquiry looks to whether the administrative action being reviewed is final and whether the controversy may be determined as a 'purely legal' question" (*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d at 519). "Even if an administrative action is final... it will still be 'inappropriate' for judicial review and, hence, unripe, if the determination of the legal controversy involves the resolution of factual issues" (*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d at 519; see *Matter of Town of Riverhead v Central Pine Barrens Joint Planning & Policy Commn.*, 71 AD3d 679, 681 [2d Dept 2010]). A determination becomes final when "the decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury" (*Matter of Essex County v Zagata*, 91 NY2d 447, 453 [1998] [internal quotation marks omitted]), which is "not amenable to further administrative review and corrective action" (*Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 548 [2006]). A controversy is not ripe where the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party (see *Church of St. Paul & St. Andrew v Barwick*, 67 NY2d at 520; *Greenburgh v Assessor of Town of Scarsdale*, 121 AD3d 986 [2d Dept 2014]).

Here, the court finds that the subject ZBA resolutions are not ripe because they lack finality, in that they do not inflict an injury which is actual or concrete; rather, their impact can be prevented, ameliorated or rendered moot by further steps available to petitioner and further administrative action. The resolutions direct petitioner, in pertinent part, to either remedy the issues as to the subject fence and windows in compliance with the Planning Board's final plat plan, or secure amendments to the final plat plan with approval by the Planning Board, by the end of the compliance period. Although the compliance terminated, and the certificates were revoked, petitioner has not demonstrated that exhausting its administrative remedies and going back to the Planning Board would constitute an act of futility. Since the resolutions provide for the avoidance of injury by ameliorative steps available to petitioner and further administrative action, which the ZBA suggests is still available in its submissions, the resolutions are not final and the present controversy is not ripe. The court notes that the factual issues raised during the pendency of this proceeding, as to whether petitioner's conduct, in removing the fence, satisfies the challenged

ZBA resolutions, weigh in favor of finding that this controversy is not ripe because the court is not being presented with a purely legal question as to an administrative action (*see Church of St. Paul & St. Andrew v Barwick*, 67 NY2d at 519). Under the circumstances, the court grants the ZBA's motion to dismiss the petition insofar as asserted against it.

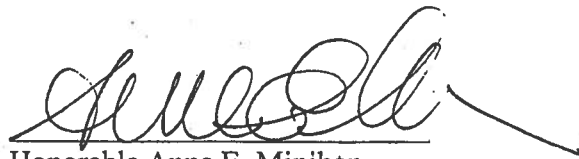
Additionally, the court grants Inspector Gray's motion to dismiss the petition insofar as asserted against him, since he did not render the challenged ZBA determinations (*see CPLR 7804; Matter of LaRusso v Nueringer*, 105 AD3d 743 [2d Dept 2013]); *Matter of Navaretta v Town of Oyster Bay*, 72 AD3d 823, 826 [2d Dept 2010]).

Under the circumstances, it is ORDERED and ADJUDGED that the motions to dismiss are granted and the proceeding is dismissed in its entirety.

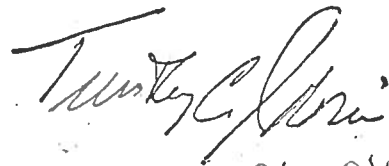
The foregoing constitutes the decision, order, and judgment of this court.

Dated: White Plains, New York

~~March~~ 2019
APRIL 4,


Honorable Anne E. Minihan
Acting Supreme Court Justice

TO: NYSCEF


04-04-2019