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MEMORANDUM

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

TRUMP ON THE OCEAN, LLC,

Petitioner-Plaintiff,

INDEX NO.: 005329/2008

-against-

LORAINA A. CORTES-VASQUEZ, in her official capacity as Secretary of State of the New York Department of State, RONALD PIESTER, in his official capacity as Director of New York State Department of State Division of Code Enforcement, STEVEN ROCKLIN, in his official capacity as Assistant Director of the New York State Department of State Division of Code Enforcement, COURTNEY NATION, in his official capacity as Regional Engineer of New York State Department of State Division of Code Enforcement, ROBERT CLIFTON, GORDON WREN, ROBERT H. GRUFFI, MARCO GENNARELLI, RICHARD BUTLER, ROBERT CARLSON, RICHARD MAGEE and ANDREW HAIM, in their official capacity as MEMBERS OF THE HUDSON VALLEY AND/OR SOUTHERN REGIONAL BOARD OF REVIEW, CAROL ASH, in her official capacity as Commissioner of the New York State Department of Parks and THE NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION,

Respondents-Defendants.

The following papers read on this petition:

Affirmation in Support of Petition and Order to Show Cause of Steven R. Schlesinger & Exhibits Annexed	1
Exhibits N-W to Affirmation in Support of Petition and Order to Show Cause	2
Letter of Christopher M. Pushkarsh, Executive Deputy Commission of New York State Office of Park, Recreation and Historic Preservation dated May 25, 2005 & Exhibits Annexed	3
Verified Answer and Objections in Point of Law & Exhibits Annexed	4
Affirmation in Opposition to Article 78 Petition and in Support of Respondents' Motion to Dismiss of Ronald J. Rosenberg & Exhibits Annexed	5
Memorandum in Opposition to Petitioner's Application for a Variance from Three Sections of the N.Y.S. Uniform Fire Prevention and Building Code and from 27 Sections of ASCE-24 Building Standards & Exhibit Annexed	6
Affirmation in Reply to Amicus Submission of Steven R. Schlesinger & Exhibits Annexed	7
Memorandum of Law in Reply to Objections in Point of Law and in Further Support of the Petition & Appendix	8
Looseleaf Containing Variance Application	9

Before the court is a hybrid plenary action and special proceeding, brought pursuant to Article 78 of the CPLR, to challenge the decision of the New York State Department of State dated April 30, 2008 which denied petitioner's application for a variance from Sections 1003.3.1, 1612.4 and 1612.5.2 of the 2002 [sic] edition of the *Building Code of New York State* as referenced in 19 NYCRR Part 1221, and the relevant provisions of ASCE 24-1998 (the American Society of Civil Engineers) titled *Flood Resistant Design and Construction*. For the reasons that follow it is the decision of the court that the Decision should be set aside as arbitrary and capricious and not supported by the evidence. The Court finds that the evidence in the record does not support the Board's determination that granting the aforesaid variances would adversely affect the health, safety and security of the public, and is an abuse of discretion.

As a threshold matter this memorandum decision will address only the application to set aside the aforesaid decision pursuant to Article 78, found in the first four causes of action. The fifth and sixth causes of action are severed for later consideration and determination.

HISTORY

On January 9, 2004, The New York State Office of Parks, Recreation and Historic

Preservation, known hereinafter as Parks Department, issued RFP No Y 200682, (Request for Proposal) for reconstruction and operation of the "Boardwalk Restaurant" at Jones Beach, under a 40 year lease. Two addendums to the RFP were issued on February 11, 2004 and May of 2004 which responded to certain questions concerning the RFP.

State Parks stated in the RFP Addendum No. 1 at ¶ 7: "it is receptive to design proposals that will create and become a signature year-round public dining and catering facility at the Park." (It bears noting that the RFP Addendum No. 1 contemplated closing the restaurant in the winter months and reducing hours of operation off season.) The RFP did not specify the design of the building to be constructed beyond the requirement that it be consistent with the original Moses design, but fresh and modern. See RFP at p. 6. ("The original design should serve as the starting point for ideas, without fooling anyone that the new building is ca. 1936.")

Under the "Selection Criteria," of a possible 150 points of evaluation only 30 were assigned to a proposal for the design, construction and operation of the property. RFP at p.13. The primary criteria were background and experience of the proposer, and financial return to the State. The winning, and only bid, by Steven Marks Carl, for NRMI, acknowledged that the proposed building "although significantly larger than its predecessor will exhibit a grand scale and voice where it will integrate into the Park," while using the same type of building material in the Moses vernacular. He agreed to pay a base rent of \$200,000 upon "approval of the Lease" and a percentage of sales.

After a period of review, in a letter dated December 21, 2007, addressed to Michael Russo, the Senior Project Manager for Reif Architects, from Daniel Kane, Deputy Commissioner of Operations for Parks Department, the evolved design of a building with a footprint of 36,600 square feet and 22 feet height along the boardwalk was approved. See Petitioner's Exhibit J. The Board's denial of the variance and delay in building is and was not about either the project's size or use as a public restaurant and quality catering facility, as that was resolved by the RFP and the Lease. (In January 2007 the new Commissioner of Parks Department, Carol Ash, requested reconfiguration of the inside public space to give the restaurant an ocean view, and mandated that the project be LEED certified rather than compliant.) Rather, "dangerous conditions which could exist when the proposed flood doors are closed", was the basis for the

decision. Decision at p. 13.

The foregoing notwithstanding, since Park's acceptance in May of 2004 of the proposal submitted by Carl, and entering into a 40 year lease on September 25, 2006 with Trump on the Ocean, LLC, (of which Carl is a member), two concerns have been voiced by an uneasy public. The first is size for the replacement restaurant for Robert Moses' original, the second is about use.

SIZE

The proposer was to use as a starting point the original design for the Central Mall area. RFP at p. 6. The original restaurant consisted of 164 feet by 95 feet, or 15,580 square feet, not including patios. RFP Addendum Number 1. In the Kane-Russo letter from Parks Department, dated May 25, 2005, the State explained that the proposed restaurant was to be built within the existing "and such additional space as is determined to be necessary to implement the project ." The 1960 footprint was represented to be 24,988 square feet. In the aforesaid letter, Parks Department approved a footprint of 36,600 square feet - exclusive of outdoor space. There was approximately 19,000 square feet of basement in the former restaurant; the letter did not specify the amount allowed Carl. The General Building Height was limited to 28 feet at the highest point above the boardwalk, 22 feet at the lowest point.

The RFP warned that parking for the restaurant was limited, and that adjacent Field 4 is in high demand. Carl's proposal expanded the parking area by moving the adjacent pitch and put course to a nearby site and using that 200 feet for restaurant parking, plus a \$100,000 contribution to the new golf area.

USE

The Carl/NRMI proposal outlined the potential market as daily beachgoers, residents of Nassau and Suffolk Counties, Regional visitors, family events, i.e. weddings, bar mitzvah, sweet sixteen parties, Long Island business and civic organizations. Notably, Parks Department reserved the right to use the restaurant for it's own needs. Carl stated that the goal was to offer a "unique venue to those who wish their venue to be special." The proposed building "was to create a vision for the future."

State Parks wrote in the first addendum to the RFP, dated February 11, 2004, that it was

“receptive to design proposals that will create and become a signature year round public dining and catering facility at the Park.” It cautioned that a small facility would cause less environmental impact and that an enlarged one would have to be related and approved through SEQRA. That did not ultimately become an issue as Parks as lead agency issued a negative declaration in September 2006.

However, when the time came for issuing a building permit it developed that although State Parks Department was the property owner, the State Historic Preservation Office, the construction permitting agency and the Lead Agency under the State Environmental Quality Review Act, (“SEQRA”), it needed a variance from Department of State to issue a building permit for construction of the Boardwalk Restaurant since it is in the ”flood management zone” and must comply or be exempted from ASCE 24-1998.

VARIANCES

Of particular importance of buildings so situated is the elevation of the lowest horizontal structural member of a building which requires “[a] certificate prepared by a registered design professional that the building is designed in accordance with ASCE 24, including that the pile or column foundation and building or structure to be attached thereto is designed to be anchored to resist flotation, collapse and lateral movement due to the effects of wind and flood loads acting simultaneously on all building components ...” Section 1612.5.2.2.

The subterranean work center petitioner proposes is below the “Design Flood Elevation” and is open on the north side via a loading ramp, as is the public entrance on the ground floor. There are two stairways between the basement and ground floor, and a service elevator. A review of Map A-001 shows daily ingress and egress of employees through the delivery passage; patrons enter through two Porte Cochères at grade level and proceed through a granite lobby to either a restaurant or conference room, on the ground floor, or one of two ballrooms on the next above floor. Variance Application, Exhibit I. Access is also possible from the beach or boardwalk by outside terraces. Yet ASCE 24-1998, sections 1003.3 through 1003.3.3.4.1 treat exclusively with “Means of Egress components”, while sections 1612.3 et seq focus on building stability.

State Parks, on its own behalf as the property owner and on behalf of its lessee, Trump,

LLC, applied for a variance from the requirements of the State's Building Code sections 1612.4 and 1612.5 which control construction of buildings located within a VE zone as designated by FEMA (the Federal Emergency Management Agency). The aforesaid provisions of the State's Building Code are the FEMA regulations, as particularized in ASCE 24, which are associated with the Federal Flood Insurance Program. See section 1612.4 "Design and Construction."

The first hearing was held in West Chester on December 11, 2007. The variance was turned down based upon insufficient evidence.

A second application for a variance was heard on January 14, 2008. It included the additional variance request for section 1003.3.1.3.3, concerning horizontal flood doors, and the information identified as being incomplete in the first hearing. A hearing was ultimately scheduled for March 4, 2008, agreed, after debate, to be held in Long Island, however three members of the Board who heard the first application in December recused from hearing the second.

The hearing was attended by a mid-level administrator on behalf of the applicant, Parks Department, by the tenant Trump LLC, structural engineers, architects, the environmental consultant and the president of the manufacturer of the active flood doors proposed for the safety of the below the Design Flood Elevation construction, along with numerous members of the public, approximately 200.

At the outset, before considering the Decision, it is well to restate the goals of Parks Department in embarking on this venture to reincarnate Robert Moses' original Boardwalk Restaurant. Doing so will fix the context in which the Board had to decide, inter alia, if there was an alternative means for achieving the goals of the Building Code.

The objective was to cause capital from a private enterprise to be used to create an opportunity for public recreation, to also engage in historic preservation since Robert Moses' design for Jones Beach is of some historic moment, and to provide revenue for the State, to be plowed back into the park to increase opportunity for public recreation. It is, seemingly, a sound financial model.

To this end the financial viability of the proposer was important, as noted above. The design has always insisted on faithfulness to the initial layout of the Mall, the Boardwalk, the

opposing cafeteria and the building materials used. The restaurant on the terraces and the inside are for the public's enjoyment, bearing in mind the prohibition on duplicating the services offered by other concessionaires. The RFP unequivocally asked for a restaurant and catering facility, and consistent with sound economic principles, a reasonable return for the enormous capital investment had to be factored in. The proposed construction has similarities to the original 1936 Boardwalk Restaurant and it has differences. It will look similar, and it will be a restaurant with white tablecloths for the public to enjoy. 2007 Hearing Minutes, p. 111, l.14 -23, p. 112 l. 15 - 24. It will be moved 22 feet further inland and the occupied space will be north of the CHS line. *Id.* p. 115 l.17 - 22. It will be bigger below ground. The most notable difference is the catering availability for special events which imports an aura of glamour.

THE DECISION

The first twelve pages of the nineteen page decision by The Regional Board of Review, New York State Division of Code Enforcement, (the Board) denying Parks Department's application for a variance from the 2003 Building Code of the State of New York (BCNYS) and ASCE 24- 1998 are a recitation of the specific provisions of those documents for which the applicant seeks a variance. It is not necessary to repeat them here for purposes of this decision. They are technical engineering documents and requirements and a strict recitation is generally not instructive on the law this court must follow in reviewing the decision. The variances are required for this proposed project for two reasons: because it is situate at Jones Beach, next to the Atlantic Ocean, on a barrier island, and the property has, long after its original construction in 1936, been designated in a Flood Management Zone subject to High Wave Velocity, and because the proposed building includes 26,700 square feet below grade which will be used inter alia, as a work center for about 35 employees at a time. Were the original building to be faithfully replaced, it would also need a variance.

In general terms the pertinent provisions of the 2003 Edition of the BCNYS require that in such areas the egress doors must be side-hinged swinging but may be powered horizontal sliding doors conditioned upon certain additional requirements dealing with power failure, or technical failure. (Section 1003.3.1). Also pertinent is required documentation of engineering construction re flood loads, wind effects and breakway walls. (Section 1612.5.2.).

Again in general terms, the ASCE 24-1998 provisions pertain to design and construction of buildings in flood hazard areas subject to high velocity wave action and are designed to ensure proper construction to withstand floods and damage from wave action. The pertinent section titles are Siting in Floodways, Use of Fill, structural and non-structural, Enclosures below the Design Flood Elevation, Elevation Requirements, Foundation Requirements, Pile Foundations, Grade Beams, Bracing, Breakway Walls, Dry Floodproofing Requirements, and Care and Placement of Utilities and Elevators. (ASCE 24-1998 sections 2.3.2, 2.5.3 - 2.5.3.2, 2.6, 4.4, 4.5.1, 4.5.5, 4.5.7, 4.5.8, 4.6.1, 7.2.2, 8.1).

The Board made sixteen findings. They can be broken down into two major categories; flood doors and fire-rescue department and emergency relief.

Petitioner had the burden of proof to establish to the satisfaction of the Board that strict compliance with the Building Code would establish practical difficulties or unnecessary hardship, NY Exec. L § 381 1.(f); 19 NYCRR § 1205.4. And, if a variance was granted, whether it would have an adverse impact on provisions for health, safety and security, and that safe alternatives are available. *Id.* “The Petitioner shall provide the Board with facts which demonstrate the burden imposed by strict compliance and with facts as to the safety and propriety of any alternatives to strict compliance.” 19 NYCRR § 1205.5(f). Finally, to answer: does denial of the variance impact upon other important social policy? 19 NYCRR § 1205.4(b). A search of the record now before the court does not support a finding that the concerns identified by the Board are supported by the record, rendering the decision to deny the application for a variance arbitrary and capricious.

In reviewing a challenge to an administrative decision the Court shall determine whether a determination was “arbitrary and capricious, lacked a rational basis or was affected by error of law.” Bd. of Education of Monticello Central School District v Comm. of Education, 91 N.Y. 2d 133, 139 (1977). In the seminal case Pell v Board of Education, 334 N.Y.2d 222 (1974) arbitrary and capricious was defined as being “without sound basis in reason ... and without regard to facts.” *Id.* at 231. A decision which is based upon “general community pressure” and not the facts introduced into the record is arbitrary and capricious and must be set aside. N.Y. State Association of Counties v Axelrod, 78 N.Y.2d 158, 168 (1991).

A major error was committed by the Board; it found that the proposed flood doors would block required exit doors. Finding 1. There is no evidence of that fact in the record and the incorrect assumption renders all the other door findings largely irrelevant. Three primary exits at the loading dock doors will be closed, but they will not block employee exit. Map A-001. The flood doors were designed to seal off the loading dock. The Board's finding that they are not automatic, and therefore have to be closed manually, does not prevent exit by a person by the stair and through ground floor doors. Finding 2 and 7. The finding that the manual closing of the flood doors requires four steps, by trained personnel, and can be damaged by use of the loading dock and hence mal-function if not maintained, does not a priori mean such doors must be rejected. Finding 8, 9, 10 and 11. The Board did not consider that the flood doors could be closed 36 hours in advance of an event by OEM directive. Nor did the Board take into consideration that the flood doors are not a recent, advanced technological product which has never been tested, but one that has been used going back to the 1970s, including by the nuclear industry where it is used for the spent fuel pool gates and is certified by the Nuclear Utilities Procurement Committee. Hearing Transcript at p.118-19. There was no evidence that there was a high percentage of failure. Id at p. 124.

The second lack of understanding manifested by the Board was that the Jones Beach State Park is under the jurisdiction of Nassau County Coastal Management Evacuation Program. Id at p 68. Within 36 hours of a forecasted flood and high wind velocity event that agency, with expertise, evacuates the area. In light of this evacuation plan the Board's concern for time taken for manual flood door closing seems irrational. Finding 13 and 14.

It bears mentioning that the proposed building is at the edge of the Flood area, that the loading dock doors are on the north side of the building, and in the years since 1936 there has not been a flooding event that reached that building. Id at pp 105-06. At the very least, concern for life of those in the basement seems irrelevant as a storm of that magnitude would have caused total evacuation of Jones Beach immediately, and there was no testimony to support a supposition that it would not. As an aside, petitioner is not participating in the Federally funded flood zone insurance, but will obtain private insurance.

A certification of a Licensed Professional Engineer, one Keith Itzler, dated November 6,

2007, attested to the integrity of the construction with adequate foundation anchored to resist flotation, collapse and lateral movement due to the effects of wind and flood simultaneously on all building components and other load requirements of Ch. 16 of the NYS Building Code.

Findings 4 and 5 are concerned with fire-rescue; the Board found that the closest rescue was as far away as Merrick and that the Wantagh Fire Department had not been consulted. This, too, is in error. The record does not support the finding that the Wantagh Fire Department had not agreed to service this property which in fact it had. It also develops that that same Fire Department services the entire Jones Beach Park including events when the population is much higher than anything the Boardwalk Restaurant would attract.

In Finding 3 the Board stated that the maximum occupant load of the basement could be 85 persons, but that petitioner's proposed use would be closer to thirty-five. It is not clear how this circumstance would mandate denial of the variance to protect health, safety and security at the site.

Two legitimate concerns were incorporated in the Findings. The proposed flood doors are manufactured exclusively by Presray Corporation. It recommends an on-site replacement part supply of key seals and parts. Notwithstanding that it has been in business for 50 years were it to go out of business there would be no supplier of parts or maintenance during the forty year lease period. While there is no easy answer to allay that concern, there is the potential for replacing the flood doors as there will always be a need for flood doors. *Id* at p 124 See Finding 11, but see also their presentation on needs for these things.

The other concern is that even if the building was completely evacuated and there was no threat to life, if the flood doors simply failed all of the mechanical equipment located in the basement would be at risk and possible dangerous conditions. The question to be considered is whether this alone is sufficient to deny the variance application, especially in light of Presray's representation that "flood doors are an approved method recognized by FEMA of keeping water out of buildings (reference FEMA Technical Bulletin 3-93)." Letter dated January 30, 2008 to Russo.

In conclusion, the Board's conclusion, which was based upon two erroneous assumptions, and subsequent findings based on the evidence introduced into the record, that plaintiff had not

sustained his burden of proving that granting the requested variance would not substantially adversely effect provisions for health, safety and security is contrary to the uncontradicted evidence in the record and lacked a rational basis, as is the decision that another important public policy is not affected.

Submit Judgment on notice.

Dated: October 21, 2008


J.S.C.