

S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

LORAINÉ LAZARUS,

TRIAL/JAS, PART 3
NASSAU COUNTY

Petitioner,

For a Judgment Under Article 78 of the CPLR

-against-

MOTION SEQ. NO.: 001
MOTION DATE: 2/17/14

THE BOARD OF TRUSTEES OF THE
INCORPORATED VILLAGE OF MALVERNE,

INDEX NO.: 13849/2013

Respondents.

The following papers having been read on the motion (numbered 1-5):

Notice of Petition.....1
 Verified Petition.....2
 Clerk's Return.....3
 Affirmation in Opposition.....4
 Reply Affirmation.....5

Application pursuant to **CPLR Article 78** by petitioner to reverse the decision of respondent Board of Trustees of the Incorporated Village of Malverne (the "Board") denying her application for a special exception is determined as follows.

BACKGROUND

Petitioner commenced this proceeding to set aside/annul the determination of respondent Board, dated October 30, 2013, which, after three public hearings on the matter, denied petitioner's application for a special exception to legalize, and permit the continued use and maintenance of, a rear exterior staircase and second story 104 square foot wooden deck at 105 Wolf Avenue, Malverne, New York. The premises, a two story Cape Cod style dwelling, is located in a Residence B district. Petitioner resides on the second floor of the premises with her husband. Petitioner's adult son resides on the first floor.

By separate decision dated November 1, 2013, respondent Board approved petitioner's application for a special use permit to maintain a second kitchen on the second floor of the premises pending final plumbing and electrical approvals, and granted mother/daughter status to the premises.

In seeking to reverse the challenged decision, petitioner maintains that she has owned and resided at the premises since 1969. In 1981, when the second story deck with exterior stairs was originally constructed, a special exception permit was not required. In 2010, the deck, which had been removed in 2007 because of its deteriorating condition, was rebuilt with an attached exterior staircase leading from the ground level to a separate entrance on the second floor. Both the kitchen and the deck/staircase were constructed without a building permit.

Petitioner has provided the affidavit of her son¹ (Exhibit "K": Petition) attesting that he pays monthly rent in the amount of \$1772.00 and "without [his] own quarters, [he] would not reside at the premises and . . . would not make the rental payments" as described above thereby discontinuing the much needed financial support he provides to petitioner.

In opposition to petitioner's application, respondent Board argues that petitioner's alleged financial hardship and inconvenience are not adequate grounds on which to annul respondent Board's decision denying petitioner's request for special exception permit to maintain the second story deck with attached exterior staircase.

ANALYSIS

In a proceeding pursuant to CPLR Article 78 to review a decision of a zoning board of appeals, a zoning board's interpretation of its zoning ordinance is entitled to great deference. Judicial review is generally limited to ascertaining whether the complained of action was illegal, arbitrary and capricious or an abuse of discretion. The inquiry is whether the determination under review is rationally based. Under this standard, a determination should not be disturbed unless the record shows that the agency's action was arbitrary, unreasonable, irrational or indicative of bad faith (*Matter of Green 2009, Inc. v Weiss*, 114 AD3d 788, 789 [2d Dept 2014] and cases cited therein).

¹Petitioner's son failed to testify at any of the three public hearings held in this matter although the respondent Board indicated an interest in hearing his testimony.

Unlike a use variance, a special exception or special permit allows the property owner to put his property to a use expressly permitted by the ordinance, subject only to conditions attached to its use to minimize the impact on the surrounding area (*Matter of Capriola v Wright*, 73 AD3d 1043, 1045 [2d Dept 2010]).

In approving a special permit, a municipality determines only that the application complies with the municipality's standards and conditions contained in the zoning ordinance (*Chambers v Old Stone Hill Rd. Assocs.*, 1 NY3d 424, 432 [2004]). The inclusion of the permitted use in the ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood (*Matter of G&P Investing Co. v Foley*, 61 AD3d 684 [2d Dept 2009]).

The burden of proof on an owner seeking a special exception is lighter than that on an owner seeking a variance (*Matter of Kabro Assoc., LLC v Town of Islip Zoning Bd. of Appeals*, 95 AD3d 1118, 1120 [2d Dept 2012]). An owner seeking a special exception permit is required only to show compliance with any legislatively imposed conditions pertaining to the otherwise permitted use (*Matter of White Castle Sys., Inc. v Board of Zoning Appeals of Town of Hempstead*, 93 AD3d 731, 732 [2d Dept 2012]). Entitlement to a special exception is not a matter of right. Compliance with the standards of the zoning ordinance must be shown before a special exception permit may be granted (*Matter of Franklin Donut Sys. LLC v Wright*, 63 AD3d 927, 929 [2d Dept 2009]). Failure to comply with any condition upon a special exception, however, is sufficient ground for denial of the exception (*Matter of Dries v Town Bd. of Town of Riverhead*, 305 AD2d 596 [2d Dept 2003], *lv to appeal denied* 100 NY2d 515 [2003]).

Here, the respondent Board's decision to deny petitioner's application to maintain and legalize a 104 square foot second story wood deck, with attached exterior staircase attached to the premises was seemingly appropriate, while at the same time granting petitioner's application to maintain a second kitchen at the premises, was neither arbitrary, capricious or without a rational basis in the record and may have been in accord with its understanding of existing local law and precedence.

The grant or denial of an application for a special use permit is left to the untrammelled, but of course, not capricious discretion of the zoning board with which the courts may interfere only when it is clear that refusal is based solely upon grounds, which as a matter of law, may not control the

discretion of the Board (*Cummings v Town Bd. of N. Castle*, 62 NY2d 883, 855 [1984] [citation and quotation marks omitted]).

Section 49-60(4)(b) of the Code of the Village of Malverne does not authorize respondent Board to approve a special exception for construction of a second story deck with an exterior staircase to street level. Rather, the applicable Code provision (§ 49-60[4][b]) reads as follows:

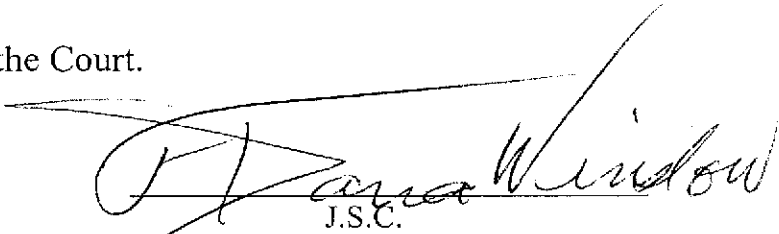
“No decks shall be constructed with the walking surface of the deck at a level higher than grade of the first floor of the dwelling to which it is an accessory, except in the case of a “high-ranch type house,” in which case the deck shall not be constructed at a level higher than the lowest floor of the residence in question. Any application for a permit to construct a deck at a level above those set forth in the previous sentence shall be subject to approval as a Special Exception by the Board of Trustees, upon proper application to the Board.”

The code provision argues in favor of the villages’ position that without further consideration would end the petitioner’s appeal. However the Court finds that the real issue is whether a special exception or special permit may be attached included, or more aptly encompassing a special use permit granted by the Village. Neither petitioner, Village nor respondent, homeowner, has submitted authority precisely on point. The Court finds that the grant of a special use permit on November 30, 2013 legitimizes the buildings’ use as a mother/daughter [probably father/son as well] use from that of a single family dwelling unless prohibited by the grant of the special use permit. Although the special exception requires Village Board action, the criteria for denial is circumscribed and the exception is less difficult for the homeowner to attain. Thus the next question to be asked is, does the grant of a special use permit allow for consideration of a special exception in the context of a new use permitted by the granting of a special use permit? This Court finds, as a seeming first impression, that the answer is yes. The newly permitted use has the Villages’ seal of approval. Access to the area of a home for such use need not be a labyrinth for the “son” or encroachment into the privacy of the parents and son. The Village, has granted thirteen prior mother/daughter special use permits in the last twenty years and can clearly impose appropriate conditions on this entrance/exit to a newly minted special use permit. In the absence of any authority specifically on point, this Court believes that the law, in keeping pace with financial and cultural changes and necessities, has an obligation to examine this issue with a contemporary perspective.

The application pursuant to CPLR Article 78 by petitioner to reverse the decision of respondent Board of Trustees of the Incorporated Village of Malverne is **granted** and the matter will be considered by the Board of Trustees in the context of this Short Form Order.

This constitutes the Order of the Court.

Dated: July 1, 2014


J.S.C.

ENTERED
JUL 29 2014
NASSAU COUNTY
COUNTY CLERK'S OFFICE