

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 9-12-14 (#001)
MOTION DATE 10-21-14 (#002)
ADJ. DATE 12-23-14
Mot. Seq. # 001 - MD
002 - MG; CDISPSJ

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In the Matter of the Application of

301 WEST MAIN STREET, LLC, and BOLLA
OPERATING L.I. CORP.,

Petitioners,

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

- against -

BAY SHORE-BRIGHTWATERS PUBLIC
LIBRARY and BOARD OF TRUSTEES OF
THE BAY SHORE BRIGHTWATERS PUBLIC
LIBRARY,

Respondents.
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the petitioners, dated August 19, 2014, and supporting papers (including Memorandum of Law dated ____); (2) Notice of Motion by the respondents, dated October 6, 2014, supporting papers; (3) Affirmation in Opposition by the petitioners dated December 9, 2014, and supporting papers; (4) Reply Affirmation by the respondents, dated December 22, 2014, and supporting papers; (5) Other Memorandum of Law by respondents dated October 6, 2014 and December 22, 2014 (and after hearing counsels' oral arguments in support of and opposed to the motion); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is .

ORDERED that the motion by respondents for a judgment dismissing the petition against them is granted.

In this hybrid Article 78 proceeding and plenary action for declaratory relief, petitioner seeks a judgment annulling the decision by respondents Bayshore-Brightwaters Public Library and the Board of Trustees of the Bayshore-Brightwaters Public Library to withhold their consent to the issuance of a variance permitting the proposed redevelopment of petitioners' property into a gasoline service station, and for a judgment declaring that respondents' consent is unnecessary for the purposes of determining the issuance of such variance pursuant to Islip Town Code §68-369.

Petitioners are the owner and lessee of real property known as 301-311 West Main Street, Bay Shore, New York. The subject property, located across the street and diagonal from the Bay Shore-Brightwaters Public Library, is situated in a B-1 Zoning District. On March 6, 2014, petitioners submitted an application to the Islip Town Board to re-zone the property to a B-3 Zoning District, and to obtain a variance to Islip Town Code § 68-369 (A), which prohibits the construction of a gas service station within 200 feet of any school, playground, recreation center, public library, or church. Although subsection A of Town Code § 68-369 prohibits the construction of a service station within 200 feet of the public library, subsection B, which lists exceptions to the general prohibition, provides that "[a] gasoline service station . . . may be located within 200 feet of the uses enumerated in Subsection A, provided: (1) The gasoline service station premises are in use prior to the location of one of the uses enumerated in Subsection A, or (2) The written consent to the location of a gasoline service station by such school, playground, recreation center, public library or church is submitted to the Town Board."

To further facilitate the proposed redevelopment, petitioner sought consent from the library, as well as the nearby First Church of Christ, since both entities are located within 200 feet of the subject property. In an effort to obtain such consent from the library, petitioners' attorney sent a letter to the president of the library's Board of Trustees (hereinafter the Board) requesting an opportunity to appear before the Board to discuss the proposed project. On March 31, 2014, petitioner's counsel appeared at the Board's regularly scheduled meeting to discuss the project, and submitted copies of the proposed site plan, building elevations and project overview to the Board's members. At the conclusion of the meeting, petitioner's counsel promised to provide the Board with any additional information it would need to make its determination. Thereafter, on May 8, 2014, the library's director, Michael Squillante, attended a Town of Islip Planning Board public hearing where the proposed redevelopment proposal was presented to the Town Planning Board for consideration of variance and requested change of zone. In his report to the Board, Mr. Squillante advised members of his attendance at the Planning Board's hearing, his plan to amend the agenda of the next Board meeting to include a discussion of the proposed construction of the gas service station, and his intent to make available to the Board material and comments he obtained at the hearing. Mr. Squillante's submissions to the Board also included

petitioner's proposal for the construction of the service station, comments made by Irving Like, Esq., who purportedly represented the interests of property owners located within 100 feet of the library, and an affidavit by Richard Scheyer, the former chairman of the Town of Islip Zoning Board of Appeals, which describes a previous failed application made by the Amerada Hess Corporation and owners of the subject property wishing to construct a gas service station on the same premises.¹

On May 27, 2014, Mr. Like appeared before to the Board to speak in opposition to the proposed construction of the gas service station. Several other residents appeared before the Board to voice their opposition, and the library's director allegedly handed out the documents he obtained at the previously held Town Planning Board hearing held in relation to the construction of the service station. According to the petition, Mr. Squillante allegedly only provided the Board with information meant to oppose the construction of the service station, and excluded expert submissions made by petitioner in support of the proposed construction. The petition further alleges Mr. Squillante cherry-picked the opposing documents to manipulate the Board and failed to give petitioner an opportunity to rebut the claims made at the meeting. Minutes obtained by petitioner indicates that following public comments made by residents who appeared to oppose the Board giving its consent for the proposed project, the Board entered an executive session for approximately 40 minutes, after which time there was a motion that a member of the Board send a letter to the Islip Planning Board expressing the library's opposition to the project due to safety concerns. Shortly thereafter, by letter dated May 29, 2014, the president of the Board informed the Town of Islip Supervisor that following its May 27, 2014 meeting, the Board adopted a resolution not to give its consent to petitioners for the construction of the gas service station, and that it was "opposed to the down-zoning of the [. . .] premises to allow a gas station and convenience store, in such close proximity to the library, raising considerable safety issues, negatively impacting the safety of our library users."

In a decision dated December 2, 2014, the Town of Islip Zoning Board of Appeals denied petitioner's application for an area variance permitting it to construct the gas service station 119.2 feet away from the library's property line rather than the 200-foot setback mandated by Town Code section § 68-369(B). In reaching its determination, the ZBA noted that it was charged with the sole authority to determine the application for the area variance, and that such determination was the sole issue before it, as the power to grant the remaining zone change and permission to operate a convenience store was in the purview of the Islip Town Board and

¹ An Article 78 proceeding was commenced to appeal the Zoning Board's determination on the prior application to construct a gas station on the property. In its April 8, 2002, decision denying the petition, the court (Pitts, J), rejected the petitioner's assertion that Town Code 68-369 (A) permitted the ZBA to measure the 200-foot setback requirement from the library building rather than its property line. The court further noted that regulation of the location of a gas service station was a valid use of the ZBA's regulatory powers and was consistent with the purpose of the Town Code.

Planning Board. The ZBA determined that petitioners had abandoned their previous use of the subject property as a gas service station, and that permitting the proposed use would alter the nature and character of the neighborhood. The ZBA also considered expert testimony regarding increased traffic and environmental and safety impacts, and concluded that the negative impacts militated against the use of the property as gas service station. Additionally, the ZBA noted that while variances permitting the construction of a service station near a library had been previously permitted where the library granted its consent, it distinguished petitioners' application, stating that "[t]his is not a case where an insignificant variance from the 200 foot setback is requested and the withholding of consent could be viewed as unreasonable . . . the variance requested here is quite substantial – 119.2 feet instead of the required 200 feet – so the unwillingness of the library to grant consent is understandable. The relief sought is made even more substantial based upon the legislative intent behind enacting Islip Town Code § 68-369 . . . [by its enactment] the Islip Town Board specifically determined that libraries and gasoline service stations were incompatible uses, and therefore, required at least a 200 foot separation between the two." The ZBA further stated that it viewed "the Town-wide implications and the dangerous precedent set for future applications" as significant factors influencing its decision to deny petitioner's application.

By their amended petition, petitioners allege that the Board's decision to withhold its consent to the construction of the gas service station was irrational, arbitrary, and capricious. More specifically, petitioners allege that the Board's decision should be annulled because, without the exception of unsubstantiated statements by Mr. Like, there was no empirical evidence in the record to support the board's conclusion, and it failed, in reaching its determination, to identify or analyze any facts which support its position. Petitioners further assert that the Board failed to permit its attorney the opportunity to rebut the opposing arguments presented by its director, Mr. Like, and other residents who appeared at the May 27, 2014 meeting, and that the "closed door" executive session was in violation of various sections of the Public Officers Law. Petitioners request a judgment annulling the decision by respondents Bayshore-Brightwaters Public Library and its Board to withhold their consent to the issuance of a variance permitting the proposed redevelopment of petitioners' property into a gasoline service station, and for a judgment declaring that respondents' consent is unnecessary for the purposes of determining the issuance of such variance pursuant to Islip Town Code § 68-369.

Respondents oppose the petition and cross-move for its dismissal, arguing that the library's decision to withhold consent and oppose the proposed re-zoning for the construction of the gas service station is not reviewable in an Article 78 proceeding. Respondents also assert that the petition should be dismissed because petitioners failed to include the Town of Islip Zoning Board as a necessary party, and that the proceeding is nothing more than a non-meritorious "SLAPP" suit designed to burden the library with legal defense costs and strong arm it into withdrawing its opposition to petitioners' construction of the gas service station.

While some actions taken by the board of a public library are reviewable in an Article 78 proceeding (*see e.g. Matter of Grimaldi v Gough*, 114 AD3d 679, 979 NYS2d 682 [2d Dept 2014]; *Matter of E.W. Tompkins Co., Inc. v Board of Trustees of Clifton Park-Halfmoon Public Library*, 27 AD3d 1046, 813 NYS2d 789 [3d Dept 2006]), where, as here, the challenged conduct includes a mere advisory recommendation capable of being rejected by a vote of the ZBA, such conduct is not reviewable pursuant to CPLR Article 78 (*see Matter of Headriver, LLC v Town Bd. of Town of Riverhead*, 307 AD2d 314, 762 NYS2d 808 [2d Dept 2003]). Moreover, the court finds that where, as here, the petition seeks a judgment declaring that respondents' consent is unnecessary for the purposes of the ZBA's determination of petitioner's application for an area variance, the ZBA is a necessary party to the proceeding (*see Matter of Freed v New York State Racing & Wagering Bd.*, 9 AD3d 808, 780 NYS2d 673 [3d Dept 2004]; *Matter of Haddad v City of Hudson*, 6 AD3d 1018, 775 NYS2d 613 [3d Dept 2004]).

Furthermore, the court finds that the requested relief, to wit, the annulment of the library's decision to oppose the proposed re-development of the subject property, and an order declaring consideration of such consent unnecessary, is moot. "Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy" (*Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172, 746 NYS2d 429 [2002]). The mootness doctrine ordinarily precludes courts from resolving disputes which, due to the passage of time or a change in circumstances, would not affect any substantial rights of the parties and would not have an immediate consequence for them (*see Matter of Dreikausen v Zoning Bd of Appeals of City of Long Beach, supra*; *Matter of Johnson v Pataki*, 91 NY2d 214, 668 NYS2d 978 [1997]; *Matter of Gold-Greenberger v Human Resources Admin. of City of New York*, 77 NY2d 973, 571 NYS2d 897 [1991]; *Matter of Hearst Corp. v Clyne, supra*). Thus, an Article 78 action must be dismissed as moot if the issue raised therein has become abstract because of a change in circumstances (*see e.g. Matter of Morrison v New York State Div. of Hous. & Community Renewal*, 93 NY2d 834, 687 NYS2d 621 [1999]; *Matter of DIP Pharmacy v Perales*, 21 AD2d 790, 621 NYS2d 905 [2d Dept 1995]). Likewise, a cause of action for declaratory relief must involve a concrete, actual controversy, since the courts may not issue advisory opinions that can have no immediate effect (*Cuomo v Long Is. Lighting Co.*, 71 NY2d 349, 354, 525 NYS2d 828 [1988]; *New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531, 399 NYS2d 621 [1977]; *see CPLR 3001*; *Village of Mount Kisco Police Benevolent Assn. v Village of Mount Kisco*, 280 AD2d 469, 720 NYS2d 374 [2d Dept 2001]; *Fragoso v Romano*, 268 AD2d 457, 702 NYS2d 333 [2d Dept 2000]).

The determination of mootness may be fact-driven, and chief among the factors to be considered by a court is the failure to seek preliminary injunctive relief or to otherwise preserve the status quo during the pendency of the litigation (*Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach, supra*, at 173). The issue of mootness may be raised at any time since, when a matter becomes moot a court is deprived of an actual controversy, "an essential

wherewithal of a court's jurisdiction" (*Matter of Cerniglia v Ambach*, 145 AD2d 893, 894, 536 NYS2d 227 [1988], *lv denied* 74 NY2d 603, 543 NYS2d 396 [1989]).

Here, the issues raised in the instant proceeding have been rendered moot by the determination of the ZBA denying petitioner's application for a variance of the 200-foot setback requirement set forth in Town Code § 68-369 (A). A close reading of Town Code § 68-369 (B), which provides the exceptions to the general prohibition, reveals that a determination denying the variance may be made even where a library board has granted its consent. Consistent with such an interpretation, the ZBA's determination distinguishes the instant petition – requiring a substantial variance of more than 70 feet – from others which could have been granted because the requested variance was insignificant and the Board's withholding of its consent was unreasonable. Moreover, even assuming *arguendo*, that the court grants the instant petition setting aside the Board's decision to withhold its consent, and declaring that consideration of such consent is unnecessary, such a determination will have no binding effect on the ZBA, which has not been named as a party to the instant proceeding. The court also notes that having commenced this proceeding before the ZBA reached its determination, petitioner failed to seek any preliminary injunctive relief to preserve the status quo during the pendency of this proceeding. As a result, an order granting the petition would not affect any of the parties' substantial rights or have any immediate consequence for them.

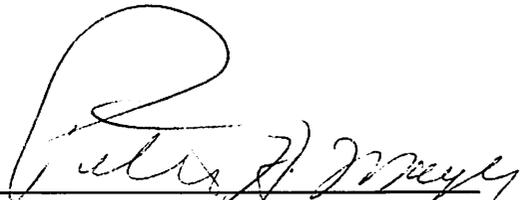
The court also finds that none of the exceptions to the mootness doctrine are applicable under the circumstances of this case, as the instant proceeding does not raise any substantial or novel issues that are likely to recur, nor does the process of obtaining an area variance pursuant to Town §Code 68-369 typically evade review (*see Matter of DeCintio v Village of Tuckahoe*, 100 AD3d 887, 954 NYS2d 563 [2d Dept 2012]; *Matter of Jablonski v Steinhaus*, 48 AD3d 465, 851 NYS2d 634 [2d Dept 2008]; *Matter of Peconic Baykeeper, Inc. v Suffolk County*, 17 AD3d 371, 793 NYS2d 78 [2d Dept 2005]).

Accordingly, the instant motion is granted. The petition is denied and the proceeding is dismissed.

Submit judgment.

Dated: _____

7/6/15



PETER H. MAYER, J.S.C.