

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

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JACOB HALPERN,

*Petitioner,*

In a Judgment Under Article 78  
of the CPLR

- against -

**DECISION AND ORDER,**

Index No. 001599/2016

PLANNING BOARD OF THE TOWN OF RAMAPO, TOWN  
OF RAMAPO, ANTHONY MALLIA, in his capacity as the  
BUILDING INSPECTOR FOR THE TOWN OF RAMAPO  
and ABRAHAM SCHWARTZ.

*Respondents.*

-----X  
Sherri L. Eisenpress, A.J.S.C.,

The following papers, numbered 1 to 12, were considered in connection with the Notice of Petition filed by Petitioner seeking, pursuant to Civil Practice Law and Rules Article 78, a judgment annulling and vacating the conditional final subdivision/site plan approval given to Respondent Abraham Schwartz, initially dated September 21, 2016, and corrected on November 1, 2016, for the property located at 10 Challenger Court, Monsey, New York, on the grounds that Respondents: (i) acted in excess of the jurisdiction prescribed on them by law; (ii) acted beyond lawful procedure; (iii) that their decision is the product of an error of law; (iv) that their decision is arbitrary, capricious and an abuse of discretion; and (v) because their decision is not supported by substantial evidence and is otherwise lacking a legal foundation:

**PAPERS**

**NUMBERED**

NOTICE OF PETITION/VERIFIED PETITION/AFFIRMATION IN SUPPORT BY KEVIN CONWAY, ESQ./EXHIBIT "A-F"	1-3
VERIFIED ANSWER ON BEHALF OF THE PLANNING BOARD OF THE TOWN OF RAMAPO, TOWN OF RAMAPO and ANTHONY MALIA/AFFIRMATION IN OPPOSITION/RECORD AND RETURN/MEMORANDUM OF LAW	3-7
VERIFIED ANSWER ON BEHALF OF ABRAHAM SCHWARTZ/REPLY AFFIRMATION OF DANIEL M. RICHMOND, ESQ./REPLY AFFIDAVIT OF ANTHONY R. CELENTANO/REPLY AFFIRMATION OF AVROHOM SCHWARTZ/EXHIBIT	8-11
AFFIRMATION IN REPLY BY KEVIN T. CONWAY, ESQ.	12

Upon the foregoing papers, the Court now rules as follows:

### **Background**

The subject property at 10 Challenger Court in Monsey, New York, is located in the R-15A zoning district, and contains a single family dwelling on a 0.87 acre parcel of land. Petitioner resides on an adjacent lot at 14 Briarcliff Drive, Monsey, New York. On or about July 27, 2015, Respondent Abraham Schwartz submitted an application for sketch plat approval for a two-lot subdivision of the subject property, wherein each parcel was intended to house a two family dwelling plus an accessory apartment.

On December 2, 2015, the Community Design Review Committee ("CDRC") reviewed the application for sketch plat approval and issued a report which indicated that the application was scheduled for the December 15, 2015, Planning Board meeting to consider adoption of a determination pursuant to the State Environmental Quality Review Act ("SEQRA"), the application for sketch plat approval and possible referral to the Zoning Board of Appeals ("ZBA"). On December 15, 2015, the Planning Board held a public hearing regarding the application and at that time adopted a negative declaration pursuant to SEQRA and granted sketch plat approval.

On February 2, 2016, Respondent Abraham Schwartz submitted an application for final subdivision approval. On February 25, 2016, the ZBA held a public hearing to consider the application of Abraham Schwartz, with respect to the request for a significant number of variances including those related to the required lot width, side setback, front setback, front yard, rear setback, rear setback, street frontage, and greater than permitted development coverage and floor area ratio. The variances were granted by the ZBA on that date. The granting of the variances was not legally challenged and the time to do so has since expired.

On March 30, 2016, the CDRC reviewed the application for final site approval and issued a report of the same date. The report contained memoranda from Ed Moran- Department of Public Works, Adam Peltz- Fire Inspector; Lawrence Picarell- Assistant Plans Examiner and Frederick P. Clark Associates-the Town planning consultant. Respondent Schwartz contends that

he incorporated the suggestions from the CDRC and the other Town and County agencies that reviewed the final subdivision application and plans.

A public hearing was held on May 10, 2016. On that date, Petitioner offered the testimony of Peter Pulice, a duly licensed architect, who testified how the subdivision/site plan at issue alters the public health, safety, welfare, comfort and convenience of the public in general and of the prospective occupants and the immediate neighborhood in a single family residential zone. He further testified with respect to problems with traffic, inadequate off street parking and landscaping issues. Thereafter, neighbors testified with respect to their objections to the subdivision/site plan. The meeting was then adjourned to June 7, 2016.

On June 7, 2016, the applicant requested an adjournment which was granted to August 9, 2016. On August 9, 2016, the Planning Board continued the hearing and at the conclusion, the motion to grant final subdivision approval subject to the CDRC report dated March 30, 2016, was passed by the Planning Board. By corrected decision dated November 1, 2016, final subdivision approval was granted to Respondent Abraham Schwartz.

#### **The Parties' Contentions**

Petitioner commenced the instant action seeking, pursuant to Civil Practice Law and Rules Article 78, a judgment annulling and vacating the conditional final subdivision/site plan approval given to Respondent Abraham Schwartz initially dated September 21, 2016, and corrected on November 1, 2016, for the property located at 10 Challenger Court, Monsey, New York, on the grounds that Respondents (i) acted beyond the scope of their respective jurisdiction as prescribed by law; (ii) failed to follow lawful procedure; (ii) issued a decision that was affected by and was the product of an error of law; (iv) issued a decision that is arbitrary, capricious and an abuse of discretion; and (v) issued a decision that is not supported by substantial evidence and is otherwise lacking a legal foundation.

Petitioner argues that ZBA approved the variances with a "virtual rubber stamp, simply adopting the narrative and rationale provided by the applicant." He states that the ZBA did not state any reason for approving the variances and made no findings with respect to the

required balancing test to measure harm to the community against the benefit to the applicant. Moreover, he argues that although a negative declaration pursuant to SEQRA was adopted, there was no evidence that the board reviewed the environmental assessment form and set forth the reasons for the declaration on the record.

Petitioner further claims that at the final site plan hearing, the applicant failed to offer testimony, sufficient facts or a record from which to support the requested grant of approval by the Planning Board. He claims that Respondents failed to comply with Town Code Section 376-91 which requires that in considering and acting upon site development plans, the Planning Board shall take into consideration the public health, safety and welfare, the comfort and convenience of the public in general of the prospective occupants of the proposed development and of the immediate neighborhood in particular and may prescribe such appropriate conditions and safeguards as may be required in order to further the expressed intent of the fo the chapter including traffic access, circulation and parking, landscaping and screening, environment and development.

In opposition, Respondents argue that Petitioner's challenge is untimely. More specifically, they argue that the negative SEQRA determination was issued in December 2015, and no challenge to those approvals was initiated by anyone. They submit that the time to do so has long since expired. Likewise, Respondents argue that the time to challenge the issued variances is also barred by the statute of limitations. Respondent Schwartz further points out that two-family residences are permitted by right in the subject R-15A zoning district, as are accessory apartments, and that the subdivision is legally classified as "minor." Most significantly, Respondent Schwartz argues that Site Plan approval is not required for the project, as Section 376-90 of the Town Code clearly states that:

"No site development plan approval shall be required for one- or two- or three family residential uses or for additions, alterations or structures accessory thereto, except as provided for conversions of single-family residences in the R-15C District in Sec. 376-98."

As such, he points out that Petitioner's repeated citation to various provisions of the Town's Site Development Plan provisions contained in Town Code Sections 376-90, 376-91 and 376-92, is misplaced.

With respect to evidence supporting the Planning Board's grant of final subdivision approval, Respondent Schwartz argues that he diligently complied with the requests made by the CDRC including an enlargement of Lot 2 and the request to add a play area for the residents of the project. Respondents point out that Mr. Schwartz' Sketch Plat was reviewed by the Town of Ramapo Department of Public Works; the Assistant Plans Examiner for the Town of Ramapo Department of Building, Planning and Zoning; and the Town of Ramapo's outside Planning, Transportation, Environment and Development Consulting Firm, Frederick P. Clark Associates, Inc., and the comments made by these entities were addressed in Mr. Schwartz's revised plans.

Furthermore, Respondents argue that the First Cause of Action alleging that the Planning Board acted in excess of the authority granted to them by state law and has no basis in law or fact must be dismissed because the project is permitted as-of-right by the Ramapo Town Code and the Town Board is lawfully empowered to authorize the Planning Board to review and grant subdivision applications. As to the second cause of action alleging that the record will demonstrate that Respondents failed to follow lawful procedure and accordingly, improperly approved the subdivision request, they argue that it must be dismissed because the Planning Board went through both the Sketch Plat approval process and the Final Plat approval process and prior to doing so, the CDRC, and other Town and County agencies, reviewed the plans, and the agencies' suggestions were implemented into the revised plans. As to the remaining causes of action which essentially allege that the Planning Board proceeded on erroneous and unsupported data, they argue that Petitioner fails to substantiate this claim, and the record itself contradicts this contention.

In Reply, Petitioner contends that the time period for commencing an Article 78 proceeding is 30 days from the date the decision is filed with the Town Clerk and that Petitioner is challenging final subdivision approval and not the sketch plat, SEQRA or ZBA approval. He claims that the references to the sketch plat, SEQRA and the ZBA is to show the complete lack of a deliberative process and rational basis in the prior proceedings leading up to final subdivision approval, and it is that final approval which is challenged.

#### **Discussion**

A local board's zoning determination should be sustained on judicial review if it has a rational basis and is supported by substantial evidence. Pecoraro v. Board of Appeals of Town of Hempstead, 2 N.Y.3d 608, 615, 781 N.Y.S.2d 234 (2004). Substantial evidence has been defined by the Court of Appeals as consisting "of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from the proof as a premise, a conclusion or ultimate fact may be extracted reasonably probatively and logically." 300 Gramatan Avenue Associates v. State Division of Human Rights, 45 N.Y.2d 176, 181, 408 N.Y.S.2d 54 (1978). Thus, "the reviewing court should review the whole record to determine whether there is a rational basis in it for the findings of fact supporting the agency's decision." Id. at 182.

Additionally, a reviewing court should refrain from substituting its own judgment for the reasoned judgment of the zoning board. Id. "It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them." Id.; See also Matter of Kearney v. Village of Cold Spring Zoning Bd. Of Appeals, 83 A.D.3d 711, 714, 920 N.Y.S.2d 379 (2d Dept. 2011). Stated another way, "a zoning board's determination should be sustained if it is not illegal, is not arbitrary and capricious, and has a rational basis." Harris v. Zoning Bd. Of Appeals of Town of Carmel, 137 A.D.3d 1130, 27 N.Y.S.3d 660, 661 (2d Dept. 2016). Arbitrary action has been defined as without sound basis

in reason and is generally taken without regard to the facts. Matter of Pell v. Board of Educ. Of Union Free Sch. Dist. No.1 of Towns of Scarsdale & Mamaroneck, Westchester Co., 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833 (2010).

Although Petitioner contends in reply that he is not seeking to challenge either the negative declaration under SEQRA or the issuance of the variances, a review of the Petition itself reveals otherwise. The Court of Appeals has held that the thirty day statute of limitations under Town Law § 282 applies to decisions of the planning board, including those concerning SEQRA review. Matter of Long Island Pine Barrens Society v. Planning Board of the Town of Brookhaven, 78 N.Y.2d 608, 611, 578 N.Y.S.2d 466 (1991). The Court of Appeals in Matter of Long Island Pine Barrens Society, in dismissing the challenge to the final subdivision approval on statute of limitations grounds, held that when SEQRA review has been completed at the preliminary stage, the statutory purpose of the subdivision approval process and SEQRA, require that a challenge to the project based on SEQRA grounds not be postponed until after final subdivision approval. *Id.* at 614-615. With respect to the subject project, the Planning Board issued its negative declaration pursuant to SEQRA on December 15, 2015, and as such, the time in which to challenge said negative declaration is barred by the statute of limitations.

Likewise, the property owner's variance becomes final and binding as to adjacent property owners on the date it is filed, thereby triggering the limitations period for bringing a proceeding to review the decision to grant the variance. O'Connell v. Zoning Board of Appeals of the Town of New Scotland, 267 A.D.2d 742, 744, 699 N.Y.S.2d 775 (3d Dept. 1999). Here, the variances were granted on February 2, 2016 and thus the time to challenge said decision is also barred by the statute of limitations. As such, any attempt by Petitioner, either directly or indirectly, to challenge the negative declaration or the grant of the variances may not be considered by this Court.

Thus, this Court's review is limited to discerning whether the Planning Board's grant of final subdivision approval is supported by substantial evidence and is rational. As

Respondent Schwartz points out, pursuant to the Town Code, two-family residences are permitted by right in the subject R-15A zoning district, as are accessory apartments, and the subdivision is legally classified as "minor." In addition, final Site Plan approval is not required for the subject project under Ramapo Town Code Section 376-90. As such, Petitioner's argument that Respondents failed to comply with Town Code Section 376-91, which requires that in considering and acting upon site development plans, the Planning Board shall take into consideration the public health, safety and welfare, the comfort and convenience of the public in general and of the prospective occupants of the proposed development and of the immediate neighborhood in particular and may prescribe such appropriate conditions and safeguards as may be required in order to further the expressed intent of the of the chapter including traffic access, circulation and parking, landscaping and screening, environment and development, is without merit, as that section of the Town Code is inapplicable to the subject project.

Upon examination of the record, this Court finds that the Planning Board's grant of final subdivision approval is rational and based upon substantial evidence including the CDRC's review of Mr. Schwartz' Sketch Plat which elicited and considered comments by the Town of Ramapo Department of Public Works; the Assistant Plans Examiner for the Town of Ramapo Department of Building, Planning and Zoning and the Town of Ramapo's outside Planning, Transportation, Environment and Development Consulting Firm, Frederick P. Clark Associates, Inc.

Moreover, the Planning Board itself duly reviewed and considered the project's potential environmental impacts resulting in the adoption of a negative declaration under SEQRA. The law is clear that community opposition in the form of generalized concerns is not sufficient to serve as the basis for denial, especially where the application meets all zoning requirements, as it does here, and there has been a finding that there will be no significant impact on the surrounding area. Falco Realty Inc. v. Town of Poughkeepsie Planning Board, 814 N.Y.S.2d 890, 10 Misc.3d 1078(A)(Sup Ct. Westchester Co. 2006); Matter of Burke v. Denison,

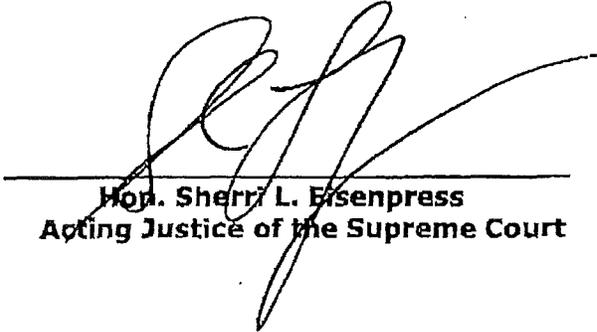
203 A.D.2d 642, 644, 609 N.Y.S.2d 959 (3d Dept. 1994); Brucia v. Planning Bd. Of Town of Huntington, 157 A.D.2d 657, 549 N.Y.S.2d 757 (2d Dept. 1990).

Accordingly, for the foregoing reasons, it is hereby

**ORDERED** that the Article 78 petition which seeks a judgment annulling and vacating the conditional final subdivision/site plan approval given to Respondent Abraham Schwartz for the property located at 10 Challenger Court, Monsey, New York is hereby **DENIED** and the petition is dismissed.

This constitutes the Decision and Order of the Court.

Dated: New City, New York  
May 31, 2017



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**Hon. Sherril L. Eisenpress**  
**Acting Justice of the Supreme Court**