SHORT FORM ORDER

Index No. 602381/2022

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

PRESENT:

HON. CHRISTOPHER MODELEWSKI
Justice of the Supreme Court

MOTION DATE 01/30/2023(001)
Mot. Seq. # 001-MG

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In the Matter of the Application of OREST BLISS, and 88ML LLC,

Petitioners,

- against -

VILLAGE OF SOUTHAMPTON BOARD OF ARCHITECTURAL REVIEW & HISTORIC PRESERVATION,

Respondent.

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Upon the E-file document list numbered 1 to 166 read and considered on this Article 78 petition to reverse, annul, and set aside a determination by the Village of Southampton Board of Architectural Review & Historic Preservation dated January 10, 2022; it is

ORDERED that this CPLR Article 78 petition to reverse, annul, and set aside a determination by the respondent Village of Southampton Board of Architectural Review & Historic Preservation dated January 10, 2022 is granted, for the reasons set forth herein; and it is further

ORDERED that the respondent Village of Southampton Board of Architectural Review & Historic Preservation is directed to issue to petitioners Orest Bliss and 88ML LLC a Certificate of Appropriateness to demolish a single family dwelling on the subject property, located at 88 Meadow Lane in the Village of Southampton, within ten (10) days from the date of this Order.

Before the Court is a CPLR Article 78 petition challenging the decision of respondent Village of Southampton Board of Architectural Review & Historic Preservation ("Board" or "ARB") respecting an application for a Certificate of Appropriateness to demolish a single family dwelling situate in the

Southampton Village Historic District within the Village of Southampton. The petitioners herein, Orest Bliss and 88ML, LLC, are the individual who is Managing Member, and the corresponding Limited Liability Company in fee title to the subject premises. The subject waterfront parcel located at 88 Meadow Lane in the Village of Southampton ("Bliss home") falls within an adopted historic district. The history of the parcel and the litany of municipal applications antedating the present application, which is the subject of this CPLR Article 78 Proceeding, is set out in the decision of the Board and the other papers presented to the Court. A review of the written decision of the Board, the transcript of hearings and the exhibits, which constitute a return of the record, together with all of the papers submitted by all counsel on this CPLR Article 78 Proceeding, compels a reversal of the Board's decision.

It is uncontroverted that the Bliss home was built in 1979. There also appears to be no argument from the ARB that Mr. Bliss caused something of a stir in Southampton Village at that time by advancing a plan for erection of a non-traditional home conceived by architect Norman Jaffe "the prince of Hamptons modernism" (See Board decision NYSCEF #3). Likewise, the Board does not challenge the assertion by Bliss that the Village of Southampton Planning Board conditioned a later subdivision of the four (4) acre parcel upon a deed covenant requiring landscape screening intended to hide the home from public view. The transcript of hearing evinces Mr. Bliss' incredulity at the turnabout in Southampton Village. His home was deemed too incongruous (if not hideous) for the citizenry to bear, so the reviewing Southampton officials decreed that it be surrounded by walls of trees and shrubs (see hearing transcripts NYSCEF #115 and #116). Fast-forward to the present, for what presents as an about-face and subjective determination to preserve the home against the will and contrary to the needs of its owner, notwithstanding that the facts and law do not support such determination.

The law is well settled law in the State of New York that a Court may not substitute its own judgment for that of a reviewing board (*see* ***Matter of Janiak v Planning Bd. of Town of Greenville,*** 159 AD2d 574, 552 NYS2d 436 [2d Dept] appeal denied 76 NY2d 707 [1990]; ***Matter of Mascony Transp. & Ferry Serv. v Richmond,*** 71 AD2d 896, 419 NYS2d 628 [2d Dept 1979] aff'd 49 NY2d 969 [1980]. Therefore, if the decision rendered by the reviewing board is within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is arbitrary, capricious or unlawful (*see* ***Matter of Pecoraro v Board of Appeals of Town of Hempstead,*** 2 NY3d 608, 781 NYS2d 2324 [2d Dept 2004]; ***Matter of Castle Props. Co. v Ackerson,*** 163 AD2d 785, 558 NYS2d 334 [3d Dept 1990]). It is, therefore, indisputable that the standard of review applied to the ARB herein is whether its decision on the Bliss application is arbitrary, capricious and/or unlawful.

Additionally, the law is well settled that the mere fact that one property owner receives relief while others similarly situated are denied, does not, in itself, suffice to establish that the difference in result is due either to impermissible discrimination or to arbitrary action (*see* ***Matter of Cowan v Kern,*** 41 NY2d 394 NYS2d 579 [1977]). However, a decision of an administrative agency which neither adheres to its own precedent, nor indicates its reason for reaching a different result on essentially the same facts, is arbitrary and capricious (*see* ***Matter of Pesek v Hitchcock,*** 156 AD2d 690, 549 NYS2d 164 [2d Dept 1989]). If the determination under review has no rational basis and tends to disregard the facts, then it is arbitrary and capricious (*see* ***Matter of Cowan v Kern,*** *supra;* ***Matter of Pell v Board of Educ.,*** *infra*).

In its written decision on the application (NYSCEF Exhibit #3), the ARB begins by asserting its predicate for jurisdiction over the Bliss home, that being Village Code Section 65-4.[1] Guidance is relied upon first from no less than Judge Learned Hand, writing for the Second Circuit in 1947, wherein he stated "[t]here is no more likely way to misapprehend the meaning of language–be it in a constitution, a statute, a will or a contract–than to read the words literally, forgetting the object which the document as a whole is meant to secure" (***Central Hanover Bank & Trust Co. v. Commissioner of Internal Revenue***, 159 F2d 167, 169 [2d Cir. 1947]). Here the ARB, in the first instance, applies a strict application of statutory language (Village Code Section 65-4) to this matter while completely ignoring vital underlying premises. The laudable objects of preservation within the Southampton Village Historic District where the Bliss home lies are delineated in the highly detailed inventory form of the New York State Parks and Recreation Division for Historic Preservation, date-stamped "AUG 20, 1986" (NYSCEF Exhibit #154 at page 5). Such objects include: "...largely intact settlement period dwellings (dating from the last half of the seventeenth century up to the first half of the nineteenth century) which recall eastern Long Island's ongoing conservative building tradition in their simple utilitarian forms and details". The document continues: "Every episode in the village's historical development are (sic) represented in the nominated district from circa 1660 to 1930." The ARB's denial of the petitioners' application includes not a single syllable to explain how, with these predicates in mind, a reasoned case could be made to preserve a radical-looking modern structure erected decades following the capture period for the historic district. The limited text of Village Code Section 65-5B underscored as a basis for the ARB's decision makes no reasonable sense when the Bliss home is viewed through the lens of this historic district and its constituent "contributing" structures.[2] Viewed from a neutral and detached vantage point, the decision of the ARB on this point alone is reason enough to grant the petition.

Next, we turn to the conduct of the ARB. It is difficult on this record to avoid the conclusion that the Board was not predisposed to a denial before hearing any testimony or considering any of petitioners' offers of proof. This is another reason to grant the petition. The ARB resolved at its very first meeting on this application to hire "a historic consultant as their expert to advise the Board regarding the application" (See ARB decision NYSCEF # 3). The ARB retained Alastair Gordon ("Gordon") who was described as "a cultural historian, critic, author and curator." The non-verbatim ARB transcript ("scribie" as indicated on each title page) of hearing of that first meeting (NYSCEF Exhibit # 134) evinces the predisposition of the ARB: "I wanna make sure that we're clear, this is a significant house. It's a Norman Jaffe house."[3] It is conceded that a major alteration of the subject home was undertaken in 2000. The manifold changes to the original design are clearly articulated by the visual analysis undertaken on behalf of the petitioners by Civic Visions, LP (See NYSCEF Exhibit # 157). Notably, the Gordon report makes no mention of the incongruity of the subject home with the architecture captured within the historic

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[1] The ARB notes that the application was heard at over five (5) hearings conducted between July and December of 2021.

[2] The Bliss home is not a contributing structure and the ARB does not argue that point.

[3] It is not possible for the Court to divine who exactly that declarant was, although it was likely the ARB Chairman. While verbatim transcripts are not required upon review of administrative proceedings (*United States v. City of New York* 96 F.Supp.2d 195, 209 [EDNY 2000]) verbatim transcripts would have facilitated a more swift determination of this matter by the Court.

district described in Village Code section 65-4 (1660-1930), nor does it address, in any meaningful way, differences in nearby examples of similar homes by the same architect, Norman Jaffe, which were granted the same Certificate of Appropriateness by the ARB (to demolish), as was sought by the petitioners herein and denied by the ARB. When discussing those two homes in its decision, which are Jaffe homes located on the very same street as the Bliss home, the ARB omits one salient, yet inconvenient fact: Those other two Jaffe homes which were cleared for demolition by the ARB had not been the subject of substantial structural revision by a successor architect. The Bliss home was substantially revised from the original. In any case, reasonable minds would agree that "pure Jaffe" examples (no subsequent structural renovations) like the two down the street from the Bliss home, would be of greater preservation value than the Bliss home, if in fact, the preservation objectives of this historic district were expanded to include modern forms of architecture. The proffered excuses from the ARB for singling out the Bliss home for special treatment after two other permitted Jaffe knock-downs on the same street are not rational.[4]

Also, the conclusion by the ARB that Gordon is "entirely impartial" is belied not only by the tone, tenor, and content of his report to the ARB[5], but also because of the mantle he assumed in the community as an interested party wholly opposed to the petitioners' application while this matter was pending before the ARB. His social media exhortation respecting the Bliss home: "SAVE BLISS" and solicitation of letters to support the cause[6] (See NYSCEF Exhibit # 158) invites the conclusion that the ARB had decided this application well before Mr. Bliss had attended the first of five hearings on his application and to that end, employing Mr. Gordon to supply a report intended to justify their decision.

The Court notes that the hearing exhibits in this matter include a welter of e-mails or letters of opposition to the application (in excess of 80). Most all of these entreaties directed to the ARB arrived on August 5, 2022. It appears to the Court that these e-mail communications emanated from Mr. Gordon, the ARB's "impartial expert". And if the ARB had not been predisposed to a denial of the Bliss application, it appears that this Board bowed to community opposition, which is yet another reason to overturn its decision. Community opposition is not a predicate for determination of any land use approval (*see* ***O'Connor And Son's Home Improvement, LLC v Achieved***, 197 AD3d 1112, 153 NYS3d 492 [2 Dept 2021]).

In the opposition papers, counsel to the ARB sets out a litany of case law respecting the discretion vested in the ARB. However, the exercise of such discretion is not without limitation. The ARB's use of discretion must be rationally based and predicated upon facts (*see* ***Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaronek, Westchester County***, 34 NY2d

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[4] One, a "speculative house" was deemed inferior by Mr. Gordon, the other, allegedly was leveled prior to acceptance and understanding of Jaffe as an architect worthy of recognition.

[5] Mr. Gordon reveals himself to be an unabashed Jaffe admirer incapable of objective analysis.

[6] Written opposition was received from as far away as Germany and Japan. The Court attributes all, or virtually all, of the written opposition to Mr. Gordon's clarion calls in the public domain.

222, 231, 356 NYS2d 833 [1974]). The Court finds that the ARB decision in this matter was arbitrary, wholly without regard to the facts, and made in derogation of the law.

In this instance the record does not support the departure of the ARB from the previously issued Certificates of Appropriateness granted for the demolition of two other Norman Jaffe modern homes, proximate to the location of the Bliss home (*see* ***Matter of Civic Assn. of the Setaukets v Trotta***, 8 AD3d 482, 778 NYS2d 524 [2 Dept 2004]; ***Matter of Cassano v Zoning Bd. of Appeals of Inc. Vil. of Bayville,*** 263 AD2d 506, 693 NYS2d 621 [2 Dept 1999]. The attempt by the ARB to distinguish prior approvals from the instant denial makes no rational sense where objective facts as posited by the petitioners below should have compelled a grant of the Certificate of Appropriateness.

Accordingly, the petition is granted in its entirety, the matter is remanded and the ARB is Ordered to issue the Certificate of Appropriateness for the demolition of the Bliss home at 88 Meadow Lane.

The foregoing constitutes the decision and Order of the Court.

Dated: March 1, 2023

HON. CHRISTOPHER MODELEWSKI, J.S.C.

_X_ FINAL DISPOSITION ____ NON-FINAL DISPOSITION