

**Steiert Enters., Inc. v City of Glen Cove**

2010 NY Slip Op 32506(U)

September 9, 2010

Supreme Court, Nassau County

Docket Number: 003302/10

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

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STEIERT ENTERPRISES, INC.,

Petitioner,

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

-against-

**MICHELE M. WOODARD  
J.S.C.  
TRIAL/IAS Part 12  
Index No.: 003302/10  
Motion Seq. No.: 01  
DECISION AND ORDER**

THE CITY OF GLEN COVE and THE ZONING BOARD  
OF APPEALS OF THE CITY OF GLEN COVE,

Respondents.

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**Papers Read on this Motion:**

Petitioner's Notice of Petition	01
Respondents' Affidavit in Opposition	XX
Respondents' Verified Answer and Return	XX
Petitioner's Reply	XX

Petitioner, Steiert Enterprises Inc. ("hereinafter referred to as "Steiert"), moves by Notice of Petition pursuant to Article 78 of Civil Practice Law and Rules seeking the review of the proceedings, findings, and conclusions which resulted in the Glen Cove Zoning Board of Appeals (the "ZBA") January 21, 2010 decision and order.

Petitioner STEIERT is the owner of approximately 1.2 acres of property, which is known as 147 Sea Cliff Avenue in Glen Cove, New York. Said property has been used to operate the business known as Buchtenkirch's for over 60 years, which is licensed, registered, and subject to yearly inspections as a nonconforming nursery by the New York State Department of Agriculture and Markets. This petition deals with the structure that is housed on the northern portion of the Petitioner's property ("North Building"). The North Building is a two and a half story structure with a covered porch, constructed in a Tudor style and it is the building on the premises that is closest to the Sea Cliff Avenue thoroughfare. The North Building is used in connection with the florist portion of Buchtenkirch's.

On or about August 13, 2009, STEIERT petitioned the ZBA to review, rescind, and amend the May 28, 2008 Certificate of Use issued by The City of Glen Cove, which stated that the front of the premises is restricted to a one family dwelling with a covered front porch. In addition, said document stated that the rear of the premises is a commercial building (florist) with

an apartment above, attached two car garage, detached shed and greenhouses. Review was sought to the extent that the Certificate of Use failed to recognize the preexisting, historical nonconforming use of the premises and that such amendment should reflect the modern aspects of such nonconforming use. In addition, STEIERT requested that an area and height variance be granted from the strict and literal application of the Glen Cove City Code so as to permit the construction of a prefabricated accessory building on the premises for the use of storing machinery, materials, equipment, and vehicles for a commercial business. The proposed accessory building measured 2,240 square feet in area and has a height of 20 feet. On or about January 21, 2010, the ZBA rendered its decision and order which precluded the Petitioner from ever using the house located on the northern portion of the Petitioner's premises for residential purposes. The Decision also denied the Petitioner's application for two open variances permitting the construction of an accessory building on the Petitioner's 1.2 acre parcel and denied the Petitioner the right to modernize the non-conforming nursery use of the subject premises by permitting the Petitioner to operate landscape design and maintenance services from the premises.

The Petitioner claims that the ZBA reached its conclusions in an arbitrary and capricious manner and it challenged various holdings of the ZBA by contending the following: (1) the ZBA wrongfully restricted the North Building's use to commercial uses only; (2) the ZBA wrongfully denied the area variances that are necessary for the construction of an accessory building in connection with the nursery; (3) the ZBA wrongfully denied the Petitioner the right to reasonably modernize the nonconforming use by prohibiting the Petitioner from offering landscape design and maintenance business from the premises.

The Petitioner claims that the ZBA's restriction on the building to commercial uses only is wrongful because the position taken by ZBA is contrary to the zoning restrictions of the property. The area where the North Building is located is zoned for one family residences pursuant to §280-58 of the Glen Cove City Code.

Also, the Petitioner claims that ZBA erroneously found the benefit of two area variances for the premises would be outweighed by the detriment to the surrounding community, the variances sought would produce an undesirable change in the character of the neighborhood, the variances were substantial, and STEIERT's difficulties were self-created. The Petitioner claims that while ZBA argues that the accessory building is proposed to introduce a new and expanded commercial use at the premises, the Petitioner argues that the accessory building is essential for proper storage of fertilizers, peat moss, vehicles, and equipment. In addition, the accessory building is necessary for operating a wholesale and retail nursery in a safe, efficient, and effective manner.

The Petitioner further claims the ZBA denied its right to reasonably modernize the nonconforming use by prohibiting STEIERT from offering landscape design and maintenance from the premises. The Petitioner argues that it is important to recognize the fact that the modern definition of a nursery includes landscape design and maintenance in connection with the sale of products like trees, bushes, and plants. The Petitioner contends, in order to operate a proper nursery, maintenance and design should accompany the sale of the trees and plants. If not, the nursery will be handicapped and will not qualify as a full service nursery. In addition, the Petitioner claims that traffic will not be adversely affected if the business offered landscape design and maintenance.

In addition to the abovementioned arguments, the Plaintiff raises an issue with a ZBA board member, Mr. John Perrone (“Mr. Perrone”). According to the Petitioner, Mr. Perrone made an unsuccessful attempt to purchase the property in question prior to the Petitioner’s ownership. According to the Petitioner, Mr. Perrone made threats stating that he would “use his position of power to see to it that the Petitioner would never realize its plans for the [p]remises” (Petitioner’s Notice of Petition, ¶108). STEIERT submitted a letter dated August 11, 2009, requesting that Mr. Perrone recuse himself from consideration of the Petitioner’s application to the ZBA. (Petitioner’s Exhibit U). Mr. Perrone recused himself on the record before the hearings commenced. The Petitioner claims, however, that Mr. Perrone subsequently took a copy of the materials that was submitted by the Petitioner, from the ZBA’s office.

In opposition to the motion, the Respondents argue that the Court should affirm the ZBA’s determinations and dismiss the Article 78 Petition because its decisions, with respect to the Petitioner’s application, were rational and based on substantial evidence in the record. The Respondents claim that construction of the proposed accessory building was denied because: (1) pursuant to Section 280-58(A) of the City Code, no commercial business activity is permitted within the R-3A Residential District, so therefore, the proposed new building is a prohibited expansion of the nonconforming use of the property; (2) pursuant to Section 280-58(D)(1) of the City Code, the proposed accessory building exceeds the permitted 14 foot maximum height restriction; (3) pursuant to Section 280-58(D)(2) of the City Code, the proposed accessory building exceeds the permitted 500 square foot maximum area restriction; (4) the proposed accessory building violated Section 280-29 of the City Code, relating to continuance of nonconforming buildings and uses; and (5) the proposed accessory building violates Section 280-30 of the City Code, relating to conditions governing nonconforming uses. (Respondents’ Opposition, ¶14).

Questions of conflict of interest require a case-by-case examination of the relevant facts and circumstances ( see *Matter of Parker v. Town of Gardiner Planning Bd.*, 184 A.D.2d 937, 585 N.Y.S.2d 571). Contrary to the Petitioner’s belief, the Respondents claim that Mr. Perrone

did not in any way participate in the hearings or deliberations as a member of the ZBA. (Respondents' Opposition, ¶17). The Respondents also claim that Mr. Perrone was, nonetheless, entitled to and did appear at the hearings regarding the Petitioner's application and stated his concerns and objections as a neighbor of the premises of the subject application.

Local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion. *Ifrah v. Utschig*, 98 NY2d 304, 308 (2002). A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence. *Pecoraro v. Board of Appeals*, 2 NY3d 608, 613 (2004). The rationale for this rule is that "local officials generally possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community". *Id.* Here, the zoning board based its determination on its application of the local laws, the detriment of the surrounding community and the preservation of the character of the neighborhood in denying the Petitioner's business expansions.

Additionally, Zoning hearings may be quite informal. *Von Kohorn v. Morrell*, 9 NY2d 27 (1961). Since a zoning board's actions are entitled to a presumption of regularity, the board's determination will be upheld absent clear evidence that it failed to exercise independent judgment. *Kontogiannis v. Fritts*, 144 AD2d 850 (1988). Petitioner's unsubstantiated allegation that the ZBA's action was predetermined is insufficient to rebut the presumption that the ZBA exercised independent judgment in reaching the abovementioned conclusions.

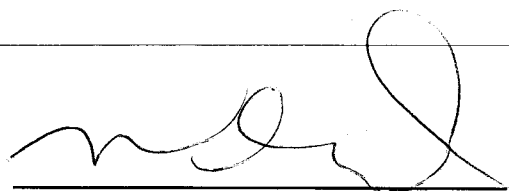
Thus, the hearing was reasonably fair and the decision was neither arbitrary nor capricious.

Accordingly, the petition is **denied** and the proceeding is hereby **dismissed**.

This constitutes the Decision and Order of the Court.

**DATED:** September 9, 2010  
Mineola, N.Y. 11501

**ENTER:**



**HON. MICHELE M. WOODARD**  
J.S.C.

H:\DECISION - ARTICLE 78\STEIERT V. GLEN COVE.wpd

**ENTERED**

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