SHORT FORM ORDER

INDEX
NO.: 25004-05

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 12-7-05
SUBMITTED: 6-28-06
MOTION NO: 002-MG; CASE DISP

---x

In the Matter of the Application of VERONICA MUTH,

Petitioner,

-against-

RICHARD I. SCHEYER, Chairman, ALBERT R. MORRISON, KURT PAHLITZSCH, BARBARA O'CONNOR, and JAMES H. BOWERS, all constituting the Board of Zoning Appeals of the Town of Islip,

Respondents.

---x

EUGENE L. DeNICOLA, ESQ.
Attorney for Petitioner
200 Railroad Avenue
Sayville, New York 11782

PIERCE FOX COHALAN, ESQ.
Attorney for Respondents
655 Main Street
Islip, New York 11751

ORDERED that this petition for a judgment pursuant to CPLR article 78 annulling a determination of the respondent Board of Zoning Appeals of the Town of Islip dated October 17, 2005, which denied the petitioner's application to subdivide a certain parcel of real property and for several area variances, is granted and the determination annulled; and it is further

ORDERED that the matter is remitted to the respondent Board of Zoning Appeals for approval of the subdivision and issuance of the requested area variances.

The petitioner is the owner of a certain parcel of real property located at 29 Greenwood Avenue in East Islip, New York. The parcel, which has an area of 55,560 square feet and frontage of 197.40 feet along Greenwood Avenue, is oversized in the Residence A zoning district in which a conforming lot must have a minimum area of 11,250 square feet and a lot width of 75 feet throughout. The parcel is somewhat irregular in shape and not quite rectangular since its southerly boundary line angles slightly to the north. The property is presently developed with three buildings: a residence, a garage, and a one and one-half story building, all of which are situated toward the center of the property. The property's southerly line abuts commercial property.

Petitioner seeks to demolish the one and one-half story structure and subdivide the parcel into three lots (hereinafter referred to as parcels "A", "B", and "C") as follows:

Parcel A, which lies to the north, would have a new dwelling on a lot having a width of 63.57 feet instead of the required 75 feet throughout.

Parcel B, which lies in the center, would retain the existing dwelling and garage on a lot having a width of 66.81 feet instead of the required 75 feet throughout. In addition, due to the location of the existing structures, the dwelling would have a side yard of 12.01 feet instead of the required 14 feet and a front yard set back of 25.51 feet instead of the required 40 feet, and the garage would have a side yard of 4.6 feet instead of the required 10 feet and a height of 16 feet instead of the required 14 feet.

Parcel C, which lies to the south, would have a new dwelling on a lot having a width of 67.02 feet at the street line and 36.58 feet at the rear line instead of the required 75 feet throughout.

The proposed lots would still be oversized in area for a Residence A zoning district, since Parcel A would be 19,362 square feet, Parcel B would be 20,378 square feet, and Parcel C would be 15,819 square feet rather than the minimum 11,250 square feet.

On November 18, 2003, the Planning Department for the Town of Islip disapproved the petitioner's subdivision request based upon the insufficient lot width throughout and the insufficient side yards on the existing buildings. The petitioner then applied the Town of Islip's Building Department for permits to develop the three lots. That application was denied on May 25, 2004. Thereafter, the petitioner applied to the respondent Board of Zoning Appeals of the Town of Islip (hereinafter referred to as "the Board") for permission to subdivide the parcel into three lots and for the necessary variances. The petitioner's application was denied in a written determination dated June 1, 2004. The petitioner commenced a CPLR article 78 proceeding challenging the Board's determination. By an order of this court dated February 2, 2005, the petition was granted to the extent that the matter was remitted to the Board for the purpose of conducting a new hearing on the petitioner's application. The court found that the Board had improperly relied on information that the petitioner was not given an opportunity to rebut and that, in considering the character of the neighborhood, the Board had improperly placed great importance on the fact that many of the nonconforming parcels were developed prior to 1938, when the Town's zoning code went into effect. In addition, the court noted that the Board had approved a subdivision across the street from the petitioner's parcel on essentially the same facts, which warranted an explanation or a conforming determination.

The Board reheard the matter on August 16, 2005, and incorporated into the record the minutes and record of the prior hearing on April 20, 2004. At the prior hearing, the petitioner's expert testified that the proposed subdivision would not result in an undesirable increase in

population density or overcrowding, that it would not result in any adverse physical or environmental conditions, that it would not result in a significant increase in traffic, that it would not have an adverse impact on property values in the neighborhood, and that a balancing of the equities favored the petitioner's application, which could be granted without compromising the health, safety or welfare of the community. In opposition, a representative from the Town of Islip Department of Planning testified that there are more conforming lots than non-conforming lots in the neighborhood and recommended that the petitioner's parcel be subdivided into two lots rather than three. In addition, several neighbors testified in opposition.

After the hearing was closed, but before the Board issued its decision, the Department of Planning sent a memorandum dated May 26, 2004, to the Board objecting to the petitioner's application for a three-lot subdivision and advising the Board that a majority of the non-conforming lots within 200 feet of the petitioner's parcel were developed prior to 1938. The petitioner was not given an opportunity to respond to the Planning Department's memorandum.

At the rehearing on August 16, 2005, the Board acknowledged that it had already determined that the proposed subdivision would not have any significant environmental impact on the neighborhood. The petitioner's expert testified that, since there are already many non-conforming lots within 200 feet of the petitioner's parcel, the proposed subdivision would not alter the essential character of the neighborhood. In opposition, the representative from the Planning Department testified that many of the non-conforming lots in the neighborhood were built prior to the current zoning code and again recommended a two-lot subdivision instead of three. Several neighbors also testified in opposition. In a written determination dated October 17, 2007, the Board again denied the petitioner's application.

In determining the petitioner's application for an area variance, the respondent Board was required to engage in a balancing test, weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the area variance were granted (*see*, Town Law § 267-b[3][b]; **Matter of Sasso v Osgood**, 86 NY2d 374, 384). The Board was also required to consider (1) whether the granting of the variance would produce an undesirable change in the character of the neighborhood or a detriment to neighboring properties, (2) whether the benefit sought can be achieved by some method, feasible to the applicant, other than a variance, (3) whether the requested variance is substantial, (4) whether the granting of the variance will have an adverse impact upon the physical or environmental conditions in the neighborhood, and (5) whether the alleged difficulty is self-created. While the last factor is not dispositive, neither is it irrelevant (*see*, Town Law § 267-b[3][b]; **Matter of Ifrah v Utschig**, 98 NY2d 304, 307-308; **Matter of Pecoraro v Board of Appeals of Town of Hempstead**, 2 NY3d 608, 612-613).

In a proceeding pursuant to CPLR article 78 to review a determination of a zoning board of appeals, judicial review is limited to determining whether the action taken by the board is illegal, arbitrary, or an abuse of discretion (*see*, **Matter of Ifrah v Utschig,** *supra at* 308). Thus, a determination of a zoning board should be sustained if it has a rational basis and is not arbitrary and capricious (see, **Matter of Sassov Osgood,** *supra* at 384; **Matter of Halperin v City of New**

Rochelle, 24 AD3d 767, 771-772).

The court finds that the denial of the petitioner's application for subdivision approval and area variances was arbitrary and capricious and lacked a rational basis. In denying the petitioner's application, the Board completely disregarded the testimony of the petitioner's experts and, its contentions to the contrary notwithstanding, relied on community opposition and the unsupported and conclusory allegations voiced by neighboring property owners (*see*, **Matter of Ifrah v Utschig**, *supra at* 308; **Matter of Lessings v Scheyer**, 16 AD3d 418, 419; **Matter of Necker, Pottick, Fox Run Woods Bldrs. Corp. v Duncan**, 251 AD2d 333, 335). It also failed to consider that the Town of Islip has already issued a certificate of compliance for the property legalizing the nonconforming structures built on Parcel B, specifically the front yard setback of 25.51 feet instead of the required 40 feet and the nonconforming garage height of 16 feet rather than 14 feet. Moreover, it failed to consider all five of the statutory factors and to engage in the requisite balancing test (*see*, **Matter of Peccoraro v Humenik**, 258 AD2d 465). The record contains no evidence that the granting of the petitioner's application would impact adversely on the physical or environmental conditions in the neighborhood or otherwise result in a detriment to the health, safety, and welfare of the community. In fact, the Board acknowledged at the rehearing that the proposed subdivision would not have any significant environmental impact on the neighborhood. However, it did not take that factor into consideration in reaching its determination.

The court finds the Board's attempt to distinguish the petitioner's application from the approved subdivision across the street to be unavailing. In that case, the Board approved a subdivision to create two lots 65-feet wide throughout. The Board distinguished that case from the petitioner's application on the grounds that it was a two-lot subdivision along existing lot lines, that no other variances were being requested other than a relaxation of the lot width from 75 feet to 65 feet, that those parcels were rectangular in shape and did not taper (as opposed to the petitioner's Parcel C, which tapers to 39 feet in the rear), and that the petitioner's hardship was self-created because a two-lot subdivision would come closer to conformity with the zoning code than the proposed three-lot subdivision. Here, the proposed lots will have widths of 63.57 feet throughout, 66.81 feet throughout, and 67.02 feet at the street line, respectively. The record establishes that the proposed frontal widths of each parcel would be similar to the widths of many others in the neighborhood, including the two across the street, and would not disturb the character of the community (*see*, **Matter of Wantagh Woods Neighborhood Assn. v Zoning Board of Appeals of the Town of Hempstead,** 208 AD2d 935, 937). Although Parcel C tapers to 39 feet in the rear, the other two lots are rectangular in shape. Additionally, the court notes that Parcel C's total area (15,800 square feet) far exceeds the minimum area required by the zoning code (11,250 square feet), and its front width (67.02 feet) is greater than the 65-foot width approved across the street. The other two proposed parcels also exceed the minimum area required by the zoning code: Parcel A would be 19,362 square feet and Parcel B, 20,378 square feet. Moreover, Parcel B would only require variances for the side yards since the Town of Islip has already issued a certificate of compliance legalizing the front yard setback and the nonconforming garage height. The other two proposed parcels require no variances other than a relaxation of the lot width. Finally, the hardship in this case is no more self-created than the hardship in the prior case. Both subdivisions require variances. The fact that the Board would prefer a two-lot

subdivision in this case rather than a three-lot subdivision is of no moment. Under these circumstances, the court finds the two applications to be sufficiently similar as to warrant a conforming determination (*see generally*, **Knight v Amelkin**, 68 NY2d 975). Accordingly, the petition is granted, and the determination of the respondent Board is annulled.

HON. ELIZABETH HAZLITT EMERSON

DATED: September 12, 2006

J. S.C.