SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In Matter of the Application of the Brentwood Preservation Committee, Inc.,

DECISION/ORDER/ JUDGMENT

Petitioner,

Index No. 4416/06

For Relief Pursuant to Article 78 of the CPLR

-against -

Town of Harrison, Town of Harrison Building Department, Town of Harrison Zoning Board of Appeals & Rockwell Properties, LLC,

Respondents.

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LIPPMAN, J.

The following papers numbered 1 to 44 were read on the petition of petitioner, Brentwood Preservation Committee, Inc. ("petitioner" or "Brentwood") for a judgment annulling respondent Town of Harrison Zoning Board of Appeals' decision granting respondent Rockwell Properties, LLC ("Rockwell") area variances in order to build two two family homes on property located at 124-126 Rockwell Street, Harrison, New York (the "property"):

PAPERS	NUMBERED
Order to Show Cause/Notice of Petition/Verified Petition/ Affidavit of Anna Giannetti, Exhibits A-E	1-9
Memorandum of Law	10
Notice of Cross-Motion/Affirmation of Joseph L. Latwin, Esq., Exhibits 1-2	11-14
Reply Affirmation of Frank A. Acocella, Esq.	15
Verified Answer of Rockwell Properties, LLC	16
Affirmation of Alfred A. Delicata, Esq. in Opposition, Exhibit 1	17-18
Reply of Frank A. Acocella, Esq., Exhibits A-C	19-22
Record of Proceedings, Exhibits A-Q	23-40
Verified Answer of the Town of Harrison Zoning Board of Appeals	41
Respondent's Memorandum of Law	42
Affirmation of Frank A. Acocella, Esq. In Opposition	43
Reply Affirmation of Joseph L. Latwin, Esq.	44[1]

Upon the foregoing papers, petitioner's petition is dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

This is an Article 78 proceeding in which petitioner is seeking to annul the decision of the Town of Harrison Zoning Board of Appeals (the "ZBA") dated March 2, 2006, which granted area variances to respondent Rockwell in connection with its proposal to build two two family homes (the "proposal"). For a full recitation of the factual and procedural history underlying this Article 78 proceeding, the Court refers to its prior Decision & Order dated May 26, 2006, which denied petitioner's motion for a preliminary injunction and which granted the motion of respondents Town of Harrison and Town of Harrison Building Department to dismiss the proceeding against them.

Petitioner is a neighborhood group that was instrumental in the passage of the zoning amendment at issue in this proceeding. This zoning amendment, effective as of September 29, 2005, reduced the lot coverage requirements in the B Two Family Zoning District (the zoning district in which the property is located) from 35% to 30%. Petitioner advocated for this zoning change based on its concern that the 35% lot coverage requirement did not provide adequate protection to preserve the character of the neighborhood as well as its concern that the continued development of large two family homes would negatively affect the already problematic parking and flooding conditions experienced in the area.

Respondent Rockwell purchased the property in October 2004 and contends that prior to entering into a non-contingent contract for the property, Rockwell engaged in "a tremendous amount of due diligence ... regarding the applicable zoning laws, specifically the lot coverage provisions, and thereafter ... made a financial determination that it would be worthwhile to purchase the existing structure, effect a demolition and erect two new two family homes on the site" (Affirmation of Alfred A. Delicata, Esq. in Opposition at ¶ 18). It is undisputed that prior

to the change in zoning, Rockwell had obtained subdivision approval from the Town of Harrison Planning Board, and approval from the Town of Harrison's Architectural Review Board ("ARB approval"). However, as a result of the zoning amendment, Rockwell was denied a building permit since the proposal no longer complied with the applicable lot coverage requirement (*i.e.*, the proposed homes have 34.9% as their lot coverage).

During the public hearings held on January 5, 2006 (the "January hearing") and February 2, 2006 (the "February hearing"), Rockwell's counsel provided evidence supporting Rockwell's contention that each of the five factors set forth in Town Law § 267-b(3) weighed in favor of the ZBA's grant of the area variances requested. In opposition to Rockwell's proposal, a number of residents voiced their concerns that Rockwell's homes (each approximately 3500 square feet in size[2]) would alter the character of neighborhood, and negatively affect the area in terms of parking and flooding. The residents also argued that the ZBA's grant of the area variances would undermine the intent behind the recently amended lot coverage requirements and set a bad precedent for future area variance applications.

In response, a couple of members of the ZBA voiced their opinion that Rockwell stood in a position different from future area variance applicants because Rockwell had purchased the property in October 2004 (prior to the adoption of the zoning amendment) and had expended substantial resources both in the subdivision approval process beginning in January 2005 and ending in May 2005, and in the ARB process which concluded with the ARB's approval on September 13, 2005 – again prior to the effective date of the lot coverage zoning amendment (*see* Record, Exhibit A). One member of the ZBA expressed his view that the variances requested were not substantial given the modest difference in lot coverage which would occur if the area variances were granted – an extra 250 square feet of building coverage per lot.

The ZBA closed the public hearing and granted Rockwell's application for area variances in a resolution adopted on March 2, 2006. The vote on Rockwell's area variances was 4 in favor, 2 opposed. The resolution setting forth the ZBA's determination provided, in pertinent part, as follows:

> "WHEREUPON, the Board found, after due deliberation, based upon the testimony and documents submitted and its site visit, pursuant to Town Law § 267-a and 267-b and Harrison Town Code§§ 235-56 et seq., it has jurisdiction to act on the requested lot coverage variances and that the variances sought were the minimum variance necessary and adequate and at the same time preserved and protected the character of the neighborhood and the health, safety and welfare of the community. The Board also found that:
>
> 1. The proposed variances present a unique situation. The necessity for these variances arises from a recent amendment to the Zoning Ordinance decreasing the permitted lot coverage in B Zones from 35% to 30%. This amendment became effective on September 29, 2005.
>
> 2. The proposed variances relate to two separate lots created by subdivision approved by the Planning Board.
>
> 3. The applicant has taken substantial action well before the effective date of the amendment to the Ordinance. The applicant (a) purchased the property in October 2004, (b) applied for subdivision approval in January 2005 and obtained that approval from the Planning Board in May 2005, (c) obtained approval from the Architectural Review Board on September 13, 2005.
>
> 4. We are cognizant of the objections of the neighbors which include (a) the change in the Ordinance was a result of a conscious decision of by Town Board to reduce lot coverage in B zones, (b) the applicant was aware of the proposed change since the amendment was originally passed by the Town Board on August 5, 2005 and its effectiveness was delayed solely as a result of a technicality and (c) potential adverse impacts on the neighborhood relating to over-crowding, flooding and tree removal.
>
> 5. Concerns with respect to the proposed construction, including those relating to screening, flooding and rock and tree removal have been previously addressed by the Planning Board and are covered in the Planning Board's May 2005 final subdivision plat approval. Accordingly, granting of the variances will not produce an undesirable change in the character of the neighborhood.
>
> 6. Applicant has in good faith taken substantial action in relying upon the 35% lot coverage requirement previously contained in the Ordinance" (Resolution dated

March 2, 2006, Record, Exhibit Q).

Petitioner argues that the ZBA's determination of March 2, 2006 should be annulled as arbitrary and capricious and not supported by substantial evidence since it was "apparent from the record that severe detriment and impact to the community far outweighs any benefit to the developer" (Memorandum of Law at 2). Petitioner's other arguments in support of its petition are that Rockwell illegally took down trees and excavated without a permit when it began its construction in January 2006,[3] failed to comply with a stop work order, and that on May 26, 2006, a neighbor wrote to the Town's Building Inspector and advised him that Rockwell had built approximately 4 feet into the setbacks and that the Building Inspector has not responded to this notification. Petitioner contends that the Building Inspector and the ZBA have turned a blind eye to these illegal activities. Petitioner argues that "[i]f turning a ***BLIND EYE*** is not arbitrary and capricious, and Building Inspectors are given the ability to enforce the Zoning Code arbitrarily, and in some cases even discriminatorily, then with all respect to this Court, Article 78 of our CPLR should be repealed" (Affirmation in Opposition to Respondents' Memorandum at ¶11)

In Reply, the Town's attorney, Joseph L. Latwin, argues that not only are petitioner's allegations concerning Rockwell's alleged illegal activities after the granting of the area variances irrelevant since they were not a part of the record supporting the ZBA's determination, but, in addition, they are untrue. Thus, Mr. Latwin avers "[t]he Building Inspector has reviewed the approved plans that show the buildings as they are being constructed. He has not made any determination that Rockwell is building within any required setback and thus has not charged Rockwell with any violation of Harrison's zoning code. Even if he had, that all would have

occurred after the Zoning Board's determination and could not be the basis for the ZBA either granting or denying relief" (Reply Affirmation of Joseph L. Latwin at ¶ 2). Mr. Latwin further contends that Rockwell had applied for the tree removal permit, which was issued the day Rockwell began its tree removal on September 27, 2005 (*id*. at ¶3). Finally, with regard to the stop work order that had been issued by the Town's Fire Inspector, a neighbor whose property directly adjoins Rockwell's property, Mr. Latwin contends that the Fire Inspector had no statutory authority to issue such a stop work order and that it was a conflict of interest for the Fire Inspector to have done so (*id*. at ¶ 4).

With regard to the record supporting the ZBA's determination, respondents argue that the ZBA properly undertook the analysis required by Town Law 267-b(3) and after "weigh[ing] the particulars of this 'unique' circumstance" the ZBA upheld "the integrity of the Zoning Ordinance by providing a relief valve from the strict application of the Ordinance so as not to permit the Ordinance to have a confiscatory effect on property" (ZBA's Memorandum of Law at 4).

LEGAL DISCUSSION

With respect to challenges brought concerning zoning boards' land use determinations, this Court is mindful that these zoning authorities have broad discretion in interpreting local zoning ordinances and a court may not substitute its judgment for that of the zoning board (*Matter of Ifrah v Utschig*, 98 NY2d 304, 308 [2002]; *Matter of 550 Halstead Corp. v Zoning Bd. of Appeals of Town/Village of Harrison*, 307 AD2d 291 [2003], *affd* 1 NY3d 561 [2003]). To that end, the law is well settled that in reviewing a ZBA's decision granting area variances, the standard of review to be applied is whether the action taken by the ZBA was illegal or arbitrary, an abuse of discretion, or the result of the ZBA succumbing to generalized community pressure (*Matter of Pecoraro v Zoning Bd. of Appeals of the Town of Hempstead*, 2 NY3d 608, 613

[2004]; *Matter of Fuhst v Foley*, 45 NY2d 441 [1978]; *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 770 [2005]*; Matter of Baker v Brownlie*, 248 AD2d 527 [1998]). Thus, a determination of a zoning board will be sustained provided it has a rational basis and is supported by substantial evidence (*Matter of Pecoraro,* 2 NY3d at 613). This is true even if a reviewing court would have reached a different result insofar as a contrary determination is itself supported in the record (*Matter of Ifrah*, 98 NY2d at 308; *Matter of Retail Prop. Trust v Board of Zoning Appeals of the Town of Hempstead*, 98 NY2d 190 [2002]; *Matter of P.M.S. Assets v Zoning Bd. of Appeals of Village of Pleasantville*, 98 NY2d 683, 685 [2002]; *Matter of Sasso v Osgood*, 86 NY2d 374, 384 [1995]; *Matter of Savetsky v Board of Zoning Appeals of Town of Southampton*, 5 AD3d 779, 780 [2004], *lv denied* 3 NY3d 604 [2004]).

In determining whether a ZBA's decision is rational and not arbitrary and capricious, courts review the record of the ZBA's proceedings to ascertain whether the ZBA conducted the statutorily- required balancing of the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood/community (*see* Town Law § 267-b(3)). The ZBA is also required to consider: (1) whether granting the area variance will produce an undesirable change in the character of the neighborhood or a detriment to nearby properties; (2) whether the benefit sought by the applicant can be achieved by some other method, feasible to the applicant other than an area variance; (3) whether the requested area variance is substantial; (4) whether granting the proposed variance would have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created. (*see* Town Law § 267-b(3); *Matter of Pecoraro*, 2 NY2d at 613; *Matter of Sasso*, 86 NY2d at 382; *Matter of Berk v McMahon*, 29 AD3d 902 [2006]). The fact that the required variance was self-created should not preclude the granting of the area variance – it

being only one factor to be used in the ZBA's balancing of the interests at stake (*see Matter of Sasso*, 86 NY2d at 382). The Appellate Division, Second Department has further explained that a ZBA's determination "must be confirmed if it has some objective factual basis in the record, as opposed to resting entirely on subjective considerations" (*Matter of Berk*, 29 AD3d at 903).

The record before this Court demonstrates that the ZBA carefully considered the five statutory factors in its review of Rockwell's request for variances and based on the evidence presented, properly concluded that the benefit to Rockwell outweighed the detriment to the health, safety and welfare of the community. The record reveals that the ZBA granted the variances based on the documents and correspondence submitted, two public hearings, a site visit by the members of the ZBA, and the Planning Board's final subdivision plat approval.

In connection with the question of whether an undesirable change would be produced in the character of the neighborhood, the ZBA concluded that the granting of the variance would not produce an undesirable change in the neighborhood's character based on the evidence presented (*i.e.*, the three newly constructed two family homes built directly adjacent to Rockwell' s property were built to the 35% building coverage maximum, at least seven other homes [excluding the three new homes] were almost as large (and some even larger) in terms of square footage as the sizes of the homes Rockwell was proposing, and the Planning Board had already determined in its subdivision approval that the proposal would not produce an undesirable change in the character of the neighborhood – issues relating to screening, flooding and tree and rock removal had been adequately addressed). Although a neighbor, during the January hearing, voiced his opinion that other than the three newly constructed homes, all other homes in the neighborhood were smaller in terms of square footage than Rockwell's homes, no actual data was provided. Indeed, this evidence was directly refuted by Rockwell's counsel who provided

data from the Assessor's Office showing that seven other homes had the following as their square footages – 2345 sq. ft., 3209 sq. ft., 3538 sq. ft., 2966 sq. ft., 3270 sq. ft., 2796 sq. ft., and 3679 sq. ft.. Because the living space associated with Rockwell's homes was 2900 square feet each, Rockwell's homes would be even smaller in size as compared to some of the other houses found in the neighborhood.

The ZBA further considered whether the benefit sought by the applicant could be achieved by some other method other than a variance and found that "variances sought were the minimum variance necessary and adequate" (Record, Exhibit Q at 2). Thus, the ZBA agreed with Rockwell's counsel's assessment that there was no other method available to achieve the result that Rockwell sought without the variance being issued.

With regard to the third factor, Rockwell's counsel argued that the difference in the 30% and 35% building coverage was not substantial given the nature of the variance that could be issued in this type of matter. He also argued that the 4.9% difference equated to an extra 250 feet of building coverage. One member of the ZBA member agreed and stated that the extra 250 square feet was not substantial especially given the equities involved in this area variance request (*i.e.*, the timing of the events leading up to Rockwell's application for the variances).

The ZBA also considered whether granting the proposed variance would have an adverse impact on the physical or environmental conditions in the neighborhood. Rockwell's counsel relied on the fact that Rockwell was entitled to build two houses as of right, and that the only issue was the additional 250 square feet of building coverage on each lot. Rockwell's counsel also relied on the fact that the issues concerning physical/environmental impacts had already been resolved to the satisfaction of the Planning Board during the subdivision approval process.

Although several neighbors raised concerns relating to the current problems in the neighborhood relating to parking and flooding – that the flooding was being caused by the three new homes and that the construction of the proposed homes on Rockwell's property would only exacerbate an already bad situation – there was no objective expert evidence presented to support their claims that the addition of the extra 250 feet of building coverage per lot would deleteriously impact flooding and that the effects could not be effectively mitigated (*e.g.*, dry wells). Instead, the information provided was anecdotal in nature – *i.e.*, one neighbor stated that prior to the three new homes, he had one sump pump running once to twice a month whereas since the construction, three sump pumps running constantly were required. One neighbor went so far to say that given the constant flooding coming off of Rockwell's property, Rockwell should be limited to building one home on the two lots. In response, a ZBA member stated that Rockwell had the absolute right to build two homes provided it stayed within the 30% lot coverage requirement. With regard to the negative impact on parking, the only "evidence" presented by the residents was their speculation that the additional 250 square feet of house necessarily meant the addition of another bedroom and a fortiori another car that would be added to the already overcrowded parking conditions found on the street.[4] The law is clear that community opposition in the form of generalized concerns is not sufficient to serve as the basis for denial. Here, the neighbors did no more than raise generalized community opposition based on unsubstantiated environmental concerns that were, therefore, insufficient to counter the fact that these issues had already been adequately addressed during the subdivision approval process (*see, e.g.*, *Matter of Gonzalez v Zoning Bd. of Appeals of the Town of Putnam Valley*, 3 AD3d 496 [2004]; *Matter of Ernalex Constr. Corp. v Bellissimo*, 256 AD2d 338, 340 [1998]; *see also Matter of Frank v Scheyer*, 227 AD2d 558 [1996] [community resident's arguments that the

construction would affect flooding were based on speculation and conjecture and no evidence was offered that the construction would cause environmental problems]; *Matter of Dodson v Planning Bd. of the Town of Highlands*, 163 AD2d 804, 806 [1990] [citizens' "complaints amounted to nothing more than unsubstantiated fears, providing an impermissible basis for respondent's determination"]).

The ZBA weighed the evidence provided and concluded that the physical and environmental conditions in the neighborhood would not be negatively affected. The primary basis for the ZBA's determination was the fact that the Planning Board, during its subdivision approval process, had specifically looked at the issues of flooding, run-off, tree and rock removal, and parking in connection with its subdivision approval process and despite having heard all of the same arguments that the neighbors had put forth during the ZBA hearings, the Planning Board found that the proposal would not have a detrimental impact on the physical/environmental conditions found in the neighborhood.[5] Thus, the ZBA found that "[c]oncerns with respect to the proposed construction, including those relating to screening, flooding and rock and tree removal have been previously addressed by the Planning Board and are covered in the Planning Board's May 2005 final subdivision plat approval" (Record, Exhibit Q at 2). Another critical point was that because Rockwell was entitled to build two homes as of right, the only issue was whether an extra 250 square feet of building coverage had the potential to negatively impact flooding and parking in the neighborhood. Based on the ZBA's findings, the extra 250 square feet per lot was found to be inconsequential.

With regard to the final factor – self-created hardship – Rockwell's counsel explained that the purchase occurred in October 2004, almost a year before the zoning amendment went into effect, and, therefore, Rockwell was unaware of the zoning amendment restricting building

coverage prior to its purchase. Rockwell's additional expenditures relating to the subdivision and ARB approvals also occurred prior to the zoning amendment going into effect. A member of the ZBA expressed his view that Rockwell was blameless and stood in a unique position having taken substantial actions prior to the importation of the law and it simply got caught in the timing.

In this case, it was entirely proper for the ZBA to determine that the equities weighed heavily in Rockwell's favor – *i.e.*, that the hardship was not self-created since the property was purchased prior to the zoning amendment having been adopted. Thus, a hardship will only be found to be self- created only "where the applicant for a variance acquired the property subject to the restrictions from which he or she seeks relief" (*Matter of Lim-Kim v Zoning Bd. of Appeals of the Village of Irvington*, 185 AD2d 346, 347 [1992]; *see also Matter of Weisman v Zoning Bd. of Appeals of Village of Kensington*, 260 AD2d 487, 488 [1999]).

Finally, petitioner's arguments relating to Rockwell's having taken down trees and excavated without permits were considered during the hearing and, according to Rockwell, dismissed by the ZBA as untrue based on the testimony of the building inspector. The neighbors' objections relating to Rockwell's alleged noncompliance with the area variances and the ZBA's turning a blind eye to this noncompliance are dehors the ZBA's record. Those facts occurred subsequent to the ZBA's grant of the area variances and are not properly considered by this Court in its review of the ZBA's determination (*Matter of Kam Hampton Realty Corp. v Board of Zoning Appeals of the Village of East Hampton*, 273 AD2d 387, 388 [2000] ["Judicial Review of an administrative determination is limited to the record before the administrative agency, and proof outside of the administrative record should not be considered"]; *see also Matter of Levine v New York State Liq. Auth.*, 23 NY2d 863 [1969]).

Based on the foregoing, it is ordered and adjudged that the petition is dismissed.

The foregoing constitutes the Decision, Order and Judgment of the Court.

Dated: White Plains, New York
September 8, 2006

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HON. JONATHAN LIPPMAN, J.S.C.

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[1]While this Court would ordinarily not consider the ZBA's sur-reply (denominated as a reply), which was submitted in opposition to petitioner's reply, because petitioner raised for the first time in its reply an issue that was outside the record of the ZBA's proceedings, the Court has considered respondent's sur-reply in its determination of this Article 78 proceeding.

[2]There was evidence presented at the hearing that these figures were overstated since they included covered porches. Thus, the architect stated that if the square footage were limited to actual living space, each home is actually 2900 square feet in size (*see* Transcript of January hearing, Record, Exhibit E at 11).

[3] Petitioner has submitted an Affidavit from Pat Vetere, Town Councilman, who attests that he participated in the vote to amend the zoning law regarding the lot coverage requirements. He further attests that he appeared before the ZBA on January 6, 2006 and reported that Rockwell had been taking down trees without a permit and that he advised the building department that Rockwell was excavating without a permit and Mr. Vetere had Rockwell's activities stopped.

Mr. Vetere further states the he doesn't know why the "Harrison Building Department failed to issue violations or formal stop work orders .... The facts and circumstances surrounding this matter suggest impropriety and therefore, it is requested that this Court grant the Article 78 relief requested by the Petitioner herein" (Affirmation of Pat Vetere at ¶¶ 3,5).

[4]Rockwell's counsel responded to this concern by stating that it was equally plausible that the house would be occupied by a family with only one car. In any event, the proposal met the off-street parking requirements so there was no evidence presented that cars from these homes would be parked in the street. In this regard, the ZBA's Memorandum of Law explains that the concerns relating to parking and flooding were not shown to be caused "or exacerbated by the addition of 245 square feet of coverage on these lots. The structure will all have to comply with the off-street parking requirements of the Zoning Code regardless of whether the variance is granted" (Respondent's Memorandum of Law at 9).

[5] Rockwell's counsel explained that the drainage issues were reviewed before the Planning Board, regulation tests were done and the property was designed for a "25 year storm." He further stated that based on neighbors' concerns relating to flooding in the rear of the property, the property was re-graded so that run-off would be diverted to the front of the house where the dry wells would be located.