

**Matter of Lighen v Zoning Bd. of Appeals of the City
of New Rochelle**

2006 NY Slip Op 30628(U)

September 27, 2006

Supreme Court, Westchester County

Docket Number: 6670/2006

Judge: Jonathan Lippman

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order, with notice of entry, on all parties.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
In Matter of the Application of WILLIAM LIGHTEN
and JANIFER LIGHTEN For a Judgment under Article
78 of the CPLR Reviewing Respondent's Determination
Denying Variances,

DECISION/ORDER/
JUDGMENT

Petitioners,

Index No. 6670/2006

-against -

ZONING BOARD OF APPEALS OF THE CITY OF NEW
ROCHELLE,

Respondent.

-----X
LIPPMAN, J.

The following papers numbered 1 to 18 were read on this petition for a judgment pursuant to CPLR article 78 cancelling, annulling and voiding the decision and determination by respondent, Zoning Board of Appeals of the City of New Rochelle (the "Zoning Board"), which denied petitioners' application for area variances:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Petition/Verified Petition/ Exhibits A-F	1 - 8
Memorandum of Law	9
Verified Answer	10
Affirmation in Opposition, Exhibits A-C	11-14
Certified Record	15
Respondent's Memorandum of Law	16
Reply Affirmation	17
Reply Memorandum of Law	18

Upon the foregoing papers, the petition is granted to the extent that the matter is remanded to the Zoning Board for further findings in accordance with this decision.

FACTUAL BACKGROUND

Petitioners are the owners of certain real property known as 48 Wellington Avenue, New Rochelle, New York, and designated on the tax assessment map of the City of New Rochelle as Section 6, Block 2130, Lot 24. The property is improved with a residence. Petitioners submitted an application to the Bureau of Buildings of the City of New Rochelle seeking approval to construct an in-ground swimming pool with a fence enclosure in their rear yard.

By notice dated November 16, 2005, petitioners were advised that their application had been denied. The notice indicated that petitioners' application did not comply with the requirements of the Chapter 331 of the New Rochelle Zoning Ordinance because the "proposed 10' setback to left side property line is less than 20' minimum required," the "proposed fence enclosure varying distance of +/- 22.68' to +/-47' from pool is more than 20' maximum permitted," and the "proposed evergreen screening along right hand side property line is outside said property"(Petition, Exhibit A).

Consequently, on or about January 19, 2006, petitioners applied to the Zoning Board for an area variance. On March 7, 2006, a public hearing on the application was held and the Zoning Board denied petitioners' application by a divided vote: three in favor, three opposed, and one member absent. The March 17, 2006 resolution of the Zoning Board denying the application reads as follows:

- "1. The Applicant has not demonstrated entitlement to the requested variances., (sic)
 - a. The variances sought are substantial and the hardship alleged by the applicant is not unique with respect to the surrounding area.
 - b. Based upon an inspection of the property and a review of the application, the Board finds that the variances requested by the applicant are not the minimum variances required in order for the applicant to have a pool on their property.
 - c. The granting of these substantial variances will affect the character of the surrounding neighborhood.
 - d. That is [*sic*] view of the manner in which the hardship arose and considering all of

the above factors, the interests of justice will be served by denying the variance” (Petition, Exhibit A).

This article 78 proceeding ensued. Petitioners allege that such determination was “contrary to law, without basis in fact, arbitrary and capricious, and is unfair and unjust to the property owner/taxpayer” (Petition ¶16).

LEGAL DISCUSSION

A zoning board's determination should be sustained if it has a rational basis and is supported by substantial evidence (*Matter of Pecoraro*, 2 NY3d 608, 613 [2004]). In determining whether a zoning board's decision regarding the area variance was supported by substantial evidence, the Court must review the record of the zoning board's proceedings to determine whether the zoning board balanced the benefit to petitioners if the area variance was granted as compared to the detriment to the health, safety and welfare of the neighborhood/community as required by General City Law § 81-b. Pursuant to that statute, the zoning board is required to review five factors: (1) whether the granting of 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 can be achieved by some other method, feasible to the property owner other than an area variance; (3) whether the requested area variance is substantial; (4) whether granting the area 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* General City Law § 81-b; *Matter of Pecoraro*, 2 NY2d at 613; *Matter of Sasso v Osgood*, 86 NY2d 374, 382 [1995]).

An administrative determination must set forth sufficient factual findings to allow for intelligent judicial review (*see Matter of Tobin v Board of Zoning & Appeals of Inc. Village of Manorhaven*, 295 AD2d 524 [2002]). Indeed, “[c]onclusory findings of fact are insufficient to support a determination of a zoning board of appeals, which is required to clearly set forth “how” and “in what manner” the granting of a variance would be improper” (*Matter of Gabrielle Realty Corp. v Board of Zoning Appeals of Village of Freeport*, 24 AD3d 550, 550 [2005], quoting *Matter of Farrell v Board of Zoning & Appeals of Inc. Village of Old Westbury*, 77 AD2d 875, 876 [1980]).

In the instant matter, the zoning board’s conclusory findings of fact are patently deficient. While the Zoning Board’s decision states that it is based on an inspection of the property and a review of the application, the Zoning Board has provided no factual findings or reasoning in support of its conclusions (*see Sarcona v Board of Appeals of the Inc. Village of Floral Park*, 2001 NY Slip Op. 40399(U) [2001]). Moreover, the record lacks sufficient factual basis to support the denial of the variances.

Further, the zoning board failed to address all of the factors set forth in General City Law § 81-b. In particular, the determination does not address whether the Zoning Board considered whether the proposed variances would have an adverse impact on the physical or environmental conditions in the neighborhood. Where a zoning board fails to consider all of the factors applicable to an application required by law, it is well settled that an administrative determination should be annulled and the proceeding remanded for further factual findings (*see Corter v Board of Appeals of the Village of Fredonia*, 46 AD2d 184 [1974]).

Accordingly, the petition is granted insofar as the matter is remitted to the Zoning Board

to make the requisite factual findings required by General City Law § 81-b.

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

Dated: White Plains, New York
September 27, 2006

/S/

HON. JONATHAN LIPPMAN, J.S.C.

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