

**Fulfaro v Board of Zoning Appeals of Town of
Brookhaven**

2007 NY Slip Op 30141(U)

February 2, 2007

Supreme Court, Suffolk County

Docket Number: 0019410

Judge: Thomas F. Whelan

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Town of Brookhaven, New York. The lot is now in an A-5 Residential Zone having been rezoned in 1989 from A-1. The property is located in the Compatible Growth Area of the Central Pine Barrens Preserve. The lot is also located in an area where a high percentage of the land area is preserved by Suffolk County, Suffolk County Water Authority and the Town of Brookhaven (hereinafter "Town"). Petitioners are seeking a total of five area variances to allow them to construct a single family residence on the subject property, which has a street frontage on Bartlett Road of 50.07 feet, a lot depth of 400 feet and a lot area of 20,028 square feet.

In 1989, the Town amended the applicable zoning code in the area wherein the petitioners' lot is located and the zoning code amendment increased the road frontage and lot area requirements of the lot to be 200,000 square feet, the road frontage to 300 feet, the front yard setback to 70 feet, the rear yard setback to 80 feet and the total side yard to 85 feet, with a minimum of 35 feet. According to petitioners, prior to 1999, the Town granted a self-executing exemption for all single and separate lots 40 feet in width or greater rendered substandard by various up-zonings for lots less than 60 feet in width and the side yards were to be 20 feet with a minimum side yard of 9 feet. The Town again amended the code in 1999 to require a special permit from the Board on lots less than 60 in width.

In 2001, the zoning code was again amended by the deletion of the special permit provision for lots less than 60 feet in width, eliminated the single and separate exemption and now required an area variance application to the Board. Thus, the code, as now amended, left in place a self-executing exemption for lots having a minimal width of 60 feet or greater and a minimum lot area of 6,000 square feet in addition to a total side yard of 25 feet with a minimum side yard of 12 feet.

A public hearing was held on April 26, 2006 before the Board wherein petitioners' representative appeared with petitioners and testified on their behalf. During the public hearing before the Board, petitioners' expert testified that prior to 1998, petitioners would have had the ability to obtain a building permit without the requirement of seeking any variances from the Board. Petitioners presented a copy of a radius map which encompassed a total of 35 lots. Six of the lots were not relevant to the proceeding as four of them were owned by the Town and the other two were used for municipal drainage purposes. Thus, 29 lots were left for the Board to consider in its determination. Three of those lots had a 50 foot frontage and the remaining lots had a street frontage greater than that of the petitioners' lot. The distribution of the frontages of the improved lots within the 500 feet radius and their percentile is that one is 50 feet (4%); ten are equal to 50 feet (42%); eleven are greater than one hundred feet (46%) and the remaining two are flag lots with 20 and 53 feet respectively (8%).

The Department of Planning, Environmental and Land Management of the Town had recommended that the petitioners' application be denied based upon nonconformance with a majority of the lots within 500 feet. Denial was also recommended based upon the grounds that the lot failed to meet the minimum dimensional requirements under the single and separate owner provision of § 85-372(B)(2) and C (3). The petitioners never attempted to sell the property since purchasing it and as their representative testified, had an awareness of the zoning history of their property.

In a 5-2 decision, dated June 14, 2006, the Board denied the application and petitioners commenced this Article 78 proceeding seeking to nullify the Board's decision in that the denial was an error of law, arbitrary, capricious and an abuse of discretion.

When considering an application for an area variance, a zoning board is required under Town Law § 267-b(3)(b) to engage in a balancing test and weigh the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood in order for the area variance to be granted. In considering the application, the Board is required to consider five criteria: (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 would have an adverse affect upon the physical or environmental conditions in the

neighborhood; and (5) whether the alleged difficulty is self created (see *Matter of Pecoraro v Board of Appeals of the Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234 [2004]; *Ifrac v Utschig*, 98 NY2d 304, 746 NYS2d 667 [2002]; *Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 259 [1995]). While the last factor is not dispositive, it is also not irrelevant. The role of a court is to determine whether the board's findings concerning each of the foregoing factors are supported by substantial evidence and are rational (see *Matter of Fuhst v Foley*, 45 NY2d 441, 410 NYS2d 56 [1978]; *Matter of Cowan v Kern*, 41 NY2d 591, 394 NYS2d 305 [1997], *rearg den.* 42 NY2d 912, 397 NYS2d 1029 [1977]).

It is well settled that local zoning boards have broad discretion in considering applications for variances and judicial review of a zoning board's decision is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion (see *Inlet Homes Corp. v Zoning Bd. of Appeals of the Town of Hempstead*, 2 NY3d 769, 780 NYS2d 298 [2004]). Thus, the determination of a local zoning board will be sustained if it has a rational basis and is supported by substantial evidence (see *Ceballos v Zoning Bd. of Appeals of the Town of Mt. Pleasant*, 304 AD2d 575, 758 NYS2d 139 [2d Dept 2003]; *Witzl v Zoning Bd. of Appeals of the Town of Berne*, 256 AD2d 775, 681 NYS2d 634 [3d Dept 1998]; *Krouner v City of Albany*, 192 AD2d 930, 596 NYS2d 885 [3d Dept 1993]; *app den* 82 NY2d 656, 602 NYS2d 805 [1993]).

Petitioners' variance application sought a total of five variances, which if granted, would allow a 90% relaxation of the lot area requirements, 84 % relaxation of frontage requirements, 43 % relaxation from the front yard setback, a 60 % relaxation of lot minimal side requirements and a 77 % total side yard relaxation. Unquestionably, the requested variances are substantial (see *Inquant v Board of Zoning Appeals of the Town of Brookhaven*, 304 AD2d 831, 757 NYS2d 860 [2d Dept 2003]). Thus, in view of the substantial nature of the variance requested (see *Bari Homes v Zoning Bd. of Appeals of Town of Yorktown*, 226 AD2d 368, 640 NYS2d 222 [2d Dept 1996]), the Court cannot state that the Board acted irrationally or capriciously in denying the application (see *Tetra Blders., Inc. v Scheyer*, 251 AD2d 589, 674 NYS2d 764 [2d Dept 1998]; *Becvar v Scheyer*, 250 AD2d 842, 673 NYS2d 210 [2d Dept 1998]; *Sakrel Ltd. v Roth*, 182 AD2d 763, 582 NYS2d 492 [2d Dept 1992]; *app disp.* 79 NY2d 851, 580 NYS2d 200 [1992]).

In support of their petition, petitioners argue that if the Town or the Suffolk County Water Authority (hereinafter "SCWA"), the adjoining landowner, wanted to preserve petitioners' parcel, the Town or SCWA could have accomplished same by negotiating a sale or by exercising its powers of eminent domain. While the petitioners raise a dubious claim that the Town and SCWA sought to hinder development of their property, thus influencing the Board, petitioners have not presented any evidentiary facts to support this contention either in their moving papers or at the public hearing wherein they had the opportunity.

Petitioners contend that the decision ignores the fact that there are three other similar lots in the surrounding neighborhood which are developed. In denying the application, the Board noted the existence of the three lots and indicated that said lots may have been developed as a matter of right before the Board's approval was required. The fact that a similarly situated lot may or may not have been granted a variance or have been developed as a matter of right does not, in and of itself, establish arbitrary action by the Board (see *Matter of Cowan v Kern*, 41 NY2d 591, *supra*). The proof that the lot is uniquely substandard alone is, in of itself, sufficient to show an adverse impact (see *Four M Const. Corp. v Fritts*, 151 AD2d 938, 543 NYS2d 213 [3d Dept 1989]) and the Board in its decision, noted this fact. The Board acknowledged petitioners' difficulty but found that if it approved the application, it would create a substantial precedential adverse impact on the neighborhood in the A-5 Residential Zone; that the requirements of the Town Code would have to be substantially relaxed in order for the Board to grant the petitioners' application; and this was supported by the evidence on the record (see *NcNair v Board of Zoning Appeals*, 285 AD2d 553, 728 NYS2d 73 [2d Dept 2001]; *Ron Rose Group, Inc. v Baum*, 275 AD2d 373, 712 NYS2d 174 [2d Dept 2000]; *Feldi v Amster*, 250 AD2d 612, 671 NYS2d 990 [2d Dept 1998]).

The denial of the application by the Board was not only on the totality of the requested variances but also the numerical substantiality of the variances as noted herein. Also, in addition to the numerical

substantiality of the variances, the evidentiary record is quite clear that the variance application is not in conformity with the other lots in the neighborhood in view of the undisputed fact that the other lots in the 500 foot radius each contain substantially more lot frontage and lot area, with the exception of one other similarly developed lot. Therefore, the Board found that the cumulative effect of the multiple variances on the surrounding community would be substantial.

The Court may not substitute its judgment for that of the zoning board. “A municipality may in the reasonable exercise of its police powers change its zoning to control land use and development. A municipality that chooses to make such changes may, but not need, exempt existing owners of substandard lots from the changes more onerous effects” (*Khan v Zoning Bd. of Appeals of Vil. of Irvington*, 87 NY2d 344, 639 NYS2d 350 [1996]; *rearg den.* 87 NY2d 1056, 644 NYS2d 148 [1996]). Petitioners proffered no proof that financial hardship may be sustained because of the denial of the variance nor did they set forth any proof on the record that they could benefit by any other means other than by their application for an area variance.

Further, there was no evidence or testimony presented at the hearing to indicate that the property would have no “value” if the variances requested were denied and the Board found that with the exception of one lot, all of the lots noted to be within the 500 foot radius contained substantially more lot frontage and lot area. The Board did address its concerns regarding the Central Pine Barrens Region and the fact that if the variances were granted, the lots development would have a negative cumulative impact in view of the large developed lots in the area, the majority of which were twice the size of the petitioners.

Petitioners’ inability to pursue development of their lot does not mandate the Board’s granting of the variances and is not dispositive of the issue when viewing the nature and character of the area and the substantial relaxation of the code requirements (*see Bari Homes, Inc. v Zoning Bd. of Appeals of the Town of Yorktown*, 226 AD2d 368, *supra*). Additionally, the Board in its decision, noted that upon a review of the testimony given at the hearing, the record before it and the zoning code, any hardship alleged by the petitioners was largely self-created because of the petitioners’ continued ownership of the land during those periods when the lot was the subject of various zoning changes by the Town. Furthermore the Board, while acknowledging the property is now zoned A-5 Residential, stated in its conclusions and findings that the lot was acquired by the petitioners even when it did not conform to the A-1 Residential zoning requirements at the time of their purchase in 1975 (*see Matter of Stamm v Board of Zoning Appeals of the Town of Greece*, 282 AD2d 995, 723 NYS2d 737 [4th Dept 2001]; *Matter of Diana v City of Amsterdam Zoning Bd. of Appeals*, 243 AD2d 939, 664 NYS2d 634 [3d Dept 1997]; *Matter of Tharp v Zoning Bd. of Appeals of the City of Saratoga Springs*, 138 AD2d 906, 526 NYS2d 646 [3d Dept 1988]; *see also Bari Homes, Inc. v Zoning Bd. of Appeals of the Town of Yorktown*, 226 AD2d 368, *supra*).

The Court of Appeals has repeatedly noted that local zoning boards have broad discretion in considering applications for area variances and the judicial function in reviewing such decisions is a limited one (*see Matter of Ifrah v Utschig*, 98 NY2d 304, 308, *supra*; *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613, *supra*). A determination may be set aside only where the record reveals that the Board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure (*see Matter of Milburn Homes, Inc. v Trotta*, 7 AD3d 531, 776 NYS2d 312 [2d Dept 2004]; *Matter of Leon Petroleum, LLC v Board of Trustees of Inc. Vil. of Mineola*, 309 AD2d 804, 765 NYS2d 656 [2d Dept 2003]; *Matter of Kuhlman v Board of Zoning Appeals of Town of Brookhaven*, 305 AD2d 683, 759 NYS2d 896 [2d Dept 2003]; *Matter of Inguant v Board of Zoning Appeals of Town of Brookhaven*, 304 AD2d 831, *supra*; *Matter of Cashy v Goehring*, 303 AD2d 753, 756 NYS2d 865 [2d Dept 2003]; *Matter of Rina v Baum*, 300 AD2d 665, 754 NYS2d 644 [2d Dept 2002]). A determination of a Board shall be sustained on judicial review if it has a rational basis and is supported by substantial evidence (*see Matter of Inlet Homes Corp. v Zoning Bd. of Appeals of Town of Hempstead*, 2 NY3d 769, *supra*; *Matter of Sundial Asphalt Co., Inc., v Dark*, 294 AD2d 585, 742 NYS 2d 891 [2d Dept 2004]; *Matter of Ifrah v Utschig*, 98 NY2d 304, *supra*; *Matter of Sasso v Osgood*, 86 NY2d 374,

supra). “As with board determinations on variances, a reviewing court is bound to examine only whether substantial evidence supports the determination of the board. Where substantial evidence exists, a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record” (*Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 196, 746 NYS2d 662 [2002] *citation omitted*). “Substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably, probatively and logically” (*300 Gramaton Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181, 408 NYS2d 54 [1978]). This is not a case where denial was solely the result of general community opposition (*cf. Matter of Hugel v Campbell*, 276 AD2d 488, 713 NYS2d 697 [2d Dept 2000]; *Matter of Buckley v Amityville Vil. Clerk*, 264 AD2d 732, 694 NYS2d 739 [2d Dept 1999]), as no one from the immediate neighborhood testified at the public hearing.

Under the facts and circumstance of this matter, the Court finds that the Board’s determination was supported by substantial evidence in the record, was not arbitrary and capricious, had a rational basis and did not abuse its discretion in denying the application (*see* Town Law § 267-b[3][b]; *Matter of Wolf Hill Props., Inc. v Modelewski*, 19 AD3d 429, 796 NYS2d 141 [2d Dept 2005]; *Matter of Inlet Homes Corp. v Zoning Bd. of Appeals of Town of Hempstead*, 2 NY3d 769, *supra*; *Ifrac v Utschig*, 98 NY2d 304, *supra*; *Polson v Rosenberg*, 295 AD2d 352, 743 NYS2d 879 [2d Dept 2002]; *lv app den*, 98 NY2d 613, 749 NYS2d 475 [2002]; *NcNair v Zoning Bd. of Appeals of the Town of Hempstead*, 285 AD2d 553, *supra*; *Toussie v Trotta*, 283 AD2d 433, 723 NYS2d 890 [2d Dept 2001], *lv app den*, 98 NY2d 613, 749 NYS2d 475 [2002]; *Bivona v Town of Plattekill Zoning Bd. of Appeals*, 268 AD2d 877, 701 NYS2d 734 [3d Dept 2000]; *Monte v Edwards*, 258 AD2d 584, 685 NYS2d 479 [2d Dept 1999]; *Tetra Bldrs., Inc. v Scheyer*, 251 AD2d 842, *supra*; *Becvar v Scheyer*, 250 AD2d 842, *supra*; *Budget Estates v Roth*, 203 AD2d 287, 610 NYS2d 69 [2d Dept 1994]; *Kroumer v City of Albany*, 192 AD2d 930, *supra*; *Sakel Ltd. v Rother*, 182 AD2d 763, *supra*).

Finally, since the matter was not affirmatively raised in this proceeding, the Court takes no position as to whether or not the determination denying the request for a reduction of the variance constitutes a taking of the property (*see Matter of Johnson v Village of Westhampton Beach*, 244 AD2d 335, 663 NYS2d 663 [2d Dept 1997]). Also, petitioners have failed to demonstrate that they were denied due process as to the subject variance (*see Nicolakis v Rotella*, 24 AD3d 739, 806 NYS2d 700 [2d Dept 2005]).

Accordingly, the petition is denied as herein indicated. This constitutes the Order and Judgment of the Court.

DATED: 2/2/09


THOMAS F. WHELAN, J.S.C.