Matter of London v Zoning Bd. of Appeals of Town of Huntington

2007 NY Slip Op 30510(U)

March 19, 2007

Supreme Court, Suffolk County

Docket Number: 0027601/2006

Judge: Thomas F. Whelan

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INDEX No. 06-27601

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 11/22/06
ADJ. DATES 3/2/07
Mot. Seq. # 001 - MD; CDISP

In the Matter of the Application of JOANN LONDON,

Petitioner,

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

-against-

ZONING BOARD OF APPEALS OF THE TOWN OF HUNTINGTON,

Respondent

CAPUTI, WEINTRAUB & NEARY
Attys. For Petitioner
50 Elm St.
Huntington, NY 11743

JOHN J. LEO, ESQ.
Attys. For Respondent
Town Hall
100 Main St.
Huntington, NY 11743

Upon the following papers numbered 1 to 12 read on this Article 78 petition ______; Notice of Motion/Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ______; Answering Affidavits and supporting papers 7-8 ; Replying Affidavits and supporting papers ______; Other 5-6 (Index); 9-10 (memorandum); 11-12 (memorandum) ; and after hearing counsel in support of and in opposition to the motion on March 2, 2007, it is,

ORDERED that this Article 78 Petition, for an Order annulling and setting aside a default denial of the respondent, Zoning Board of Appeals of the Town of Huntington, and directing the granting of petitioner's application for an area and lot width variance so as to permit petitioner to apply to the Planning Board of the Town of Huntington for a two-lot subdivision, is denied and the petition is dismissed; and it is further

ORDERED AND ADJUDGED that this constitutes the decision and judgment of the Court and that respondent shall recover from petitioner costs and disbursements in the sum of $ ______ as taxed by the clerk and respondent shall have execution therefor; and it is further

ORDERED that counsel for the petitioner shall serve a copy of this Order with Notice of Entry upon counsel for respondent, within twenty (20) days of the date herein pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court.

Petitioner commenced this Article 78 proceeding seeking a judgment annulling and setting aside a default denial of the respondent, Zoning Board of Appeals of the Town of Huntington ("Board"), dated

September 21, 2006 and filed with the Town Clerk on September 29, 2006, which, by statute, denied petitioner's application for an area and lot width variance, which would permit her to apply to the Planning Board of the Town of Huntington for a two-lot subdivision. Petitioner claims such would be consistent with the pattern of development in the area.

The legal membership of the Board is seven members. However, since at least June of 2005 and continuing to date, there has been one vacancy on the Board. The first decision by the Board, dated May 18, 2006, on petitioner's variance application resulted in a vote of three in favor and two against, with one absent. Such constitutes a denial by default pursuant to Town Law §267-a(13)(b) for failure to attain at least four votes. Petitioner requested the absent member, pursuant to §198-112-H of the Code of the Town of Huntington, to review the minutes and exhibits and the Board withdrew the prior default denial. A new meeting was scheduled for September 21, 2006, at which time, the absent member voted to deny the application. Such, rendered the vote a three to three deadlock and once again, resulted in a default denial.

Town Law §267-a(13)(b) states in pertinent part:

> In exercising its appellate jurisdiction only, if an affirmative vote of a majority of all members of the board is not attained on a motion or resolution to grant a variance or reverse any order, requirement, decision or determination of the enforcement official within the time allowed by subdivision eight of this section, the appeal is denied.

This new provision of the Town Law was added to the statute as part of a 2002 amendment that became effective July 1, 2003 (*see* L.2002, c. 662, §7, eff. July 1, 2003). The amendment was in response to the Court of Appeals decision in ***Tall Trees Const. Corp. v Zoning Bd. of the Town of Huntington***, 97 NY2d 86, 735 NYS2d 873 (2001). Prior to that decision, if a majority of the total membership of a board failed to act, under General Construction Law §41, the board was considered not to have acted and its vote was called a "no-action." However, with the "no-action" vote, an applicant was precluded from judicial review (*see* ***Walt Whitman Game Room, Inc. v Zoning Bd. of the Town of Huntington***, 54 AD2d 764, 367 NYS2d 698 [2d Dept 1976]). The particularly egregious facts of the ***Tall Trees*** case lead the high court to conclude that with regard to variance cases before a zoning board, "a vote of less than a majority of the Board is deemed a denial" (***Tall Trees***, at 88, 735 NYS2d at 875), thereby permitting judicial review of that denial.

As explained in Rice, Practice Commentaries (McKinney's Cons Laws of NY, Book 61,Town Law §267-a, at 273), "[t]he unorthodox conclusion reached by the Court of Appeals was rectified by" the above cited legislative amendment. A review of the Legislative Bill Jacket for Chapter 662 of the Laws of 2002 reveals that the legislation was in response to the ***Tall Trees*** case, with the need for a clarification of the existed law recognized by all participants. The Department of State, in its July 10, 2002 Memorandum, explained :

> [t]he default denial occurs when the board does not muster a concurring majority of the board in favor of the motion or resolution to grant a variance or reverse a decision of an enforcement officer. The failure to attain an affirmative vote of a majority results in a de facto denial, otherwise known as a default denial.... In other words, if a motion to grant a variance does not muster a majority vote, i.e. the motion fails, then this failure is deemed a denial."

The Budget Report on Bills, in the section entitled Summary of Provisions, states that "[t]he failure to attain a majority vote results in a 'default denial' and the aggrieved party can apply to the New York State Supreme Court for review." The legislative bill jacket is silent as to whether or not a denial decision can be offered by the members voting to deny the variance application.

In the instant case, the default denial is supported by a detailed four-page decision submitted on behalf of the three members who voted against the application. The decision discusses the lack of an

exemption emanating from the 1947 zone change from the Town Board for the lot in question, the undesirable change in the character of the areas which have not been exempted from that zone change, the substantiality of the variances requested, and the fact that the applicant suffers from a self-created hardship. Petitioner argues that the decision is superfluous since there is no determination by a majority of the Board one way or the other.

The issue of whether it is appropriate to submit a written decision on a default denial has been previously addressed, without objection, by other Justices in Suffolk County. In ***Dish Realty, LLC v Modelewski***, 4 Misc3d 1017(A), 798 NYS2d 344 (Sup Ct Suffolk County, 2004), the Hon. Michael F. Mullen utilized a similar three to three tie vote and the accompanying denial decision to deny an Article 78 proceeding that sought to annual a default denial by the Board at issue herein. Additionally, in ***Your Money, Inc. v Planning Bd. of the Town of Huntington***, 5 Misc3d 1002(A), 798 NYS2d 714 (Sup Ct Suffolk County, 2004), the Hon. Sandra L. Sgroi criticized the Planning Board for not providing specific reasons for its failure to approve a subdivision in the face of a three to three tie vote. While Town Law §276(6)(l)(4) calls for grounds for disapproval to be set forth on the record, here, Town Law §267-a(13)(b) requires an affirmative majority vote of the board in order to grant a variance, otherwise the appeal is denied and Town Law §267-a(9) mandates the filing of the decision of a zoning board in the office of the town clerk within five business days after the decision is rendered. Reading these statutory directions together, the Court finds that the board's submission of a default denial decision is not in contravention of the Town Law, and it will be considered.

In any event, the standard for review is that which is set forth in CPLR 7803(3) and requires a determination as to whether the default denial was arbitrary and capricious. In an Article 78 proceeding, judicial review is limited to determining whether the Board's action was illegal, arbitrary and capricious, or an abuse of discretion (*see* ***McNair v Board of Zoning Appeals of the Town of Hempstead,*** 285 AD2d 553, 728 NYS2d 73 [2d Dept 2001]; ***Toussie v Trotta,*** 283 AD2d 433, 723 NYS2d 890 [2d Dept 2001]). It is now beyond cavil that the pertinent criteria for determining an application for an area variance are those set forth by Town Law § 267-b(3)(b) (*see* ***Matter of Sasso v Osgood***, 86 NY2d 374, 633 NYS2d 259 [1995]). Pursuant to that statute, the Board must, based upon the listed factors, engage in a balancing test, weighing the benefit to petitioner if the variances are granted against the detriment to the health, safety, and welfare of the surrounding neighborhood or community (*see* ***Matter of Sasso v Osgood***, *id*).

The determination of the Board must be upheld if it is rational and supported by substantial evidence (*see* ***Matter of Khan v Zoning Bd. of Appeals of Vil. of Irvington***, 87 NY2d 344, 639 NYS2d 302 [1996][construing an analogous provision in Village Law §7-712-b(3)(b)]). The consideration of "substantial evidence" is limited to determining "whether the record contains sufficient evidence to support the rationality of the Board's determination" (***Matter of Sasso v Osgood***, 86 NY2d 374, 384, n 2, *supra*). Where a Board does not properly consider and weigh all the relevant statutory criteria and its determination is not supported by substantial evidence, courts should not hesitate to annul such determinations (*see* ***Matter of Lazzara v Kern***, 269 AD2d 449, 702 NYS2d 898 [2d Dept 2000]; ***Matter of Peccoraro v Humenik***, 258 AD2d 465, 684 NYS2d 588 [2d Dept 1999]). Finally, a court may not substitute its judgment for that of the Board unless its determination is arbitrary or contrary to law (*see* ***Matter of Baker v Brownlie***, 248 AD2d 527, 670 NYS2d 216 [2d Dept 1998]). In fact, the Court of Appeals has reaffirmed a zoning board's "broad discretion in considering applications for variances" (***Matter of Ifrah v Utschig,*** 98 NY2d 304, 308, 746 NYS2d 667 [2002]).

In order to make a determination as to whether the default denial was arbitrary and capricious, the Court must examine the record before the Board. As noted, petitioner's intention was "to apply for a 2-lot subdivision, which will require variances on each lot reducing the area of each lot from one acre required to one-half acre" (*see* Letter of denial, June 9, 2005, R Ex 1), with additional variances for width at the setback. The record reveals that the subject lot is in a R-40 Residential District (one acre of area) and has been so zoned since 1947. The property is a 1.1 acre lot and is improved with a one and one-half story frame dwelling with a detached, 22 ft. by 20 ft. garage in the rear (*see* Certificates of Occupancy, R Ex 7).

The Town of Huntington, Department of Planning and Environment argued strongly against the variance request (*see* Intra-Office Memorandum, September 1, 2005, R Ex 10):

> In the application it is argued that the new lots would conform with the character of the neighborhood, since there are other undersized lots as a result of the area being rezoned to R-40 in 1947 (see attached section of resolution). This rezoning affected all of Ft. Salonga north of Middleville Road. In the rezoning resolution, the Town Board exempted all of the existing filed map lots that did not comply with the new area requirements from the rezoning. The purpose of this condition was to prevent legally created lots from being rendered unbuildable. As a result there are varied lot sizes in the neighborhood today.
>
> The attached tax map copy of the area shows that there are other one-acre lots in proximity to the subject parcel. Several lots to the north are over one acre in size, including the property directly across the street. Parcels to the east and northeast contain one acre of land, despite each being made up of two smaller filed map lots. Their nonconforming status has probably been lost since they merged into conforming R-40 lots. This application could set a precedent for these merged lots and other oversized lots in the area to pursue the same variances.
>
> The Planning Board strongly recommends that these variances be denied. The argument that the existence of smaller lots in the area justifies this subdivision runs contrary to the intent of the Town Board in rezoning the surrounding area to R-40. If the Town Board thought that smaller lots were appropriate, they would not have rezoned the neighborhood. Instead, the rezoning resolution specifically authorized different lot sizes in the community. A clause that sought to avoid harming people that had purchased building lots (preventing loss) should not be interpreted to benefit future developers (creating profit). The Town Board's zone change clearly established the rules for appropriate development.

The County of Suffolk, Department of Planning, in reviewing the application pursuant to the Suffolk County Administrative Code (*see* Letter, June 24, 2005, R Ex 11), while finding that the nine applications under review were considered to be matters for local determination, expressly noted with regard to the subject application:

> The following warrants consideration: Creation of substandard lots, that is, lots whose areas are less than the minimum required by the zoning classification of the property, constitutes an overintensification of land use in an area that is already densely developed. Creation of this subdivision could result in the establishment of precedence for the subdivision of other similar parcels in the area, overloading the road system, increasing on-street parking, and the overburdening of other public facilities.

Letters were received from neighbors detailing the claim that the variances requested would be out of character to the neighborhood. One noted that "[t]he West side of Rinaldo Road is developed with lots greater than 1.4 acre and about 60 lots of R-40 cluster zone with greenbelt areas" and that "[t]he localized area may have some lots smaller than R-40 but were grand-fathered in as a filed lot during the rezone by the Town Board" (Letter, R Ex 12; *see also* Letters, R Ex 15 and Ex 16). A letter from the local civic association opposed the "major variances that essentially downgrade one or more zoning requirements, in this case, from one acre zoning to one half acre zoning, allowing a second home to be constructed, where there had originally been a single home"(*see* Letter, January 19, 2006, R Ex 15). An additional letter from the President of the local civic association detailed the contention that the subject lot "is surrounded by a majority of lots which are 1 acre and more" and that the two lots to the west which are not, were

"grandfathered" by virtue of the old zoning regulations (*see* Letter, May 18, 2006, R Ex 23). The letter also detailed the five factor balancing test under Town Law § 267-b(3)(b) and argued that the variance request failed to satisfy a majority of those factors (*see* Letter, May 18, 2006, R Ex 23).

At the public hearing held on May 15, 2006, petitioner's counsel summarized the application as "reducing the area requirements from R-40, one acre, to R-20, one-half acre, and the width at the setback line in the acre zone that requires 125 feet, and we have 160 on one and 103.67 on the other" (*see* Transcript, p 4). It was noted that when the entire area was rezoned in 1947 to one acre, a filed map, with many lots, was exempted from the rezoning (*see* Transcript, p 6). Petitioner offered a real estate expert who displayed photographs of the neighborhood (*see* Photographs, R Ex 19) and a composite map of development in the area (*see* Area Map, R Ex 20). The witness acknowledged that the subject lot was not exempt from the one-acre zoning (*see* Transcript, p 15-6).

Two lots were discussed which involved prior variance applications before the Board which were granted. However, when questioned, the expert noted that with regard to the first lot, denoted as lot 30.1, variances were granted ten years ago (*see* Transcript, R Ex 24, p 18) and the lot was situated on the filed map of Surrey Ridge. As noted, the variances were granted before the Board "became cognizant of the existence of the exemption"(*see* Transcript, R Ex 24, p19). The other lot, that is, lot 30.2 or the Holman application, was also on the filed map of Surrey Ridge and the lot was split to create access to Timberpoint Drive (*see* Transcript. R Ex 24, p 19). As noted by one of the Board members and conceded by the expert, "[t]hat eliminated a thru-lot problem by doing that" (*see* Transcript, R Ex 24, p 20; see *also id*, p 38) The expert acknowledged that the lots to the north are outside the filed map line and are larger parcels (*see* Transcript, R Ex 24, p 20).

The expert offered that the variance application would not have any adverse impact on property values or development patterns (*see* Transcript, R Ex 24, p 33). He acknowledged that the benefit to petitioner is solely economic but disagreed with the contention of some members of the Board that the granting of the variance application would have a dramatic change on the development of the number of lots directly across the street and going toward Route 25A (*see* Transcript, R Ex 24, p 36-7). At least 6 residents of the Town spoke against the application, many fearing that the application will destroy the integrity of the neighborhood and lead to more subdivision applications (*see for example* Transcript, R Ex 24, p 59). Some residents stated that they moved to the area based upon the existing one-acre zoning and asked that it be enforced (*see* Transcript, R Ex 24, p 62; 64).

Here, in light of the record as detailed above, the Board acted appropriately and within its powers in not granting the variances when it issued its default denial. There can be no disputing that the variances sought for this property, that is, a 100% area variance and 20% setback variance, are substantial (*see* Town Law § 267-b[3]). Such was found by the Board, by virtue of its default denial, to be a significant nonconformity with the general character of the community. Courts have sustained similar multiple variance denials (*see* ***Matter of Bari Homes, Inc. v Zoning Bd. of Appeals of Town of Yorktown***, 226 AD2d 368, 640 NYS2d 222 [2d Dept 1996]; ***Matter of Tetra Bldrs., Inc. v Scheyer***, 251 AD2d 589, 674 NYS2d 764 [2d Dept 1998]; ***Matter of Four M Constr. Corp. v Fritts***, 151 AD2d 938, 543 NYS2d 213 [3d Dept 1989]; ***Matter of Vivest Bldg. Corp. v Auwarter***, 152 AD2d 582, 543 NYS2d 701 [2d Dept 1989]). In light of the substantial nature of the variances requested and their cumulative effect, the Court cannot conclude that the Board acted irrationally or capriciously in denying the application (*see* ***Becvar v Scheyer***, 250 AD2d 842, 673 NYS2d 210 [2d Dept 1998]; ***Matter of Tetra Bldrs., Inc. v Scheyer***, 251 AD2d 589, *supra*).

Moreover, the Board's finding that the difficulty was self-created is supported by evidence that the petitioner had purchased the property for her own usage and only later did she seek to obtain the variances for the subdivision (*see* Town Law § 267-b[3][b][5]; *see also* ***Matter of Rogers v Baum***, 234 AD2d 685, 650 NYS2d 452 [3d Dept 1996]; ***Matter of Strohli v Zoning Bd. of Appeals of Vil. of Montebello***, 271 AD2d 612, 706 NYS2d 447 [2d Dept 2000]; ***Matter of Weisman v Zoning Bd. of Appeals of Vil. of Kensington***, 260 AD2d 487, 688 NYS2d 215 [2d Dept 1999]; ***McGlasson Realty, Inc. v Town of Patterson Bd. of Appeals***, 234 AD2d 462, 651 NYS2d 131 [2d Dept 1996], *lv app den* 89 NY2d 812, 657 NYS2d 404 [1997]; ***Matter of Lakeland Park Estates v Scheyer***, 142 AD2d 582, 530 NYS2d 240 [2d Dept 1988]). The Board's finding that the difficulty was self-created is supported by evidence. Although such a consideration,

while relevant, does not necessarily preclude the granting of the variance (*see* Town Law § 267-b[3][b][5]; ***Matter of Peccoraro v Humenik***, 258 AD2d 465, *supra*), this factor has been found to be relevant where an applicant seeks to subdivide a parcel zoned for one home (*see* ***Matter of Rod Staten Corp. v Trotta***, 278 AD2d 328, 718 NYS2d 201 [2d Dept 2000], *lv app den* 96 NY2d 701, 727 NYS2d 696 [2001]; *see also* ***DaSilva v Zoning Bd. of Appeals of Vil. of Mineola***, 266 AD2d 458, 699 NYS2d 67 [2d Dept 1999], *lv app den* 94 NY2d 761, 706 NYS2d 81 [2000]; ***Matter of Kennedy v Zoning Bd. of Appeals of the Vil. of Dobbs Ferry***, 145 AD2d 487, 535 NYS2d 636 [2d Dept 1988]).

Here, while the record contains little evidence that the granting of the variances would have an adverse impact on physical and environmental conditions (*see* Town Law § 267-b[3][b][4]), it does contain sufficient evidence supporting the Board's claim that the variances would have an undesirable effect on the character of the neighborhood (*see* Town Law § 267-b[3][b][1]; *see also* ***Matter of Sakrel, Ltd. v Roth***, 182 AD2d 763, 582 NYS2d 492 [2d Dept 1992], *app den* 79 NY2d 851, 580 NYS2d 200 [1992]; *cf.*, ***Matter of Witzl v Zoning Bd. of Appeals of Town of Berne***, 256 AD2d 775, 681 NYS2d 634 [3d Dept 1998]; ***Matter of Rider v Bd. of Appeals of Town of Islip***, 172 AD2d 673, 568 NYS2d 638 [2d Dept 1991]). The lack of conformity, by permitting this one acre lot to be subdivided, was noted in the reports submitted by the Town's Department of Planning and Environment and the County's Department of Planning and in the comments before the public hearing. There is no dispute that the lots to the north are all one acre lots and a concern was expressed that the granting of the variances would lead to successive applications to subdivide more one acre parcels.

Furthermore, no proof was presented indicating that a denial of the application would deprive petitioner of the use of his property as he originally intended (*see e.g.* ***Matter of Bauer v Zoning Bd. of Appeals of the Town of Yorktown,*** 121 AD2d 627, 503 NYS2d 652 [2d Dept 1986]). The denial does not leave petitioner with a parcel which could not be put to use in a manner consistent with the existing R-40 zoning classification, as there now exists a single family dwelling on petitioner's parcel.

The Court attaches no merit to petitioner's contention, based upon the holding in ***Knight v Amelkin***, 68 NY2d 975, 510 NYS2d 550 (1986), that the Board had previously granted similar variances to two other applicants in the past. The facts and circumstances of those applications are markedly dissimilar to the present application, as detailed above, that is, they are located on the filed map and one was "a thru-lot problem." Under such circumstances, where there is a lack of factual similarity, such does not warrant an explanation from the Board (*see* ***Matter of Conversions for Real Estate, LLC, v Zoning Bd. of Incorp. Vil. of Roslyn***, 31 AD3d 635, 818 NYS2d 298 [2d Dept 2006]).

While petitioner attacks the Board's default denial since the Board had granted two dissimilar variances in the past, a Board does not act arbitrarily if, in light of what it perceives could be a precursor to future nonconformity, it puts a stop to all but those applications which are in conformity with the requirements of the zoning ordinance (*see* ***Matter of Nozzleman 60, LLC v Village of Cold Spring Zoning Bd. of Appeals***, 34 AD3d 682, 825 NYS2d 107 [2d Dept 2006]; ***Matter of Sakrel, Ltd. v Roth***, 176 AD2d 732, 574 NYS2d 972 [2d Dept 1991]; *cf.* ***Matter of Richter v Curran***, 5 AD3d 687, 774 NYS2d 754 [2d Dept 2004]; ***Matter of Lim-Kim v Zoning Bd. of Appeals of the Vil. of Irvington*** , 185 AD2d 346, 586 NYS2d 633 [2d Dept 1992]; ***Matter of Rider,*** 172 AD2d 673 *supra*).

The decision of the Court of Appeals in ***Tall Trees Const. Corp. v Zoning Bd. of the Town of Huntington***, 97 NY2d 86, *supra*, is distinguishable and does not compel a different result (*see* ***Matter of Wolf Hill Properties, Inc. v Modelewski***, 19 AD3d 429, 796 NYS2d 141 [2d Dept 2005]). In ***Tall Trees***, the applicant was seeking to subdivide a 1.94 acre parcel into two lots; one which would be greater than the one acre minimum lot size and the other only slightly smaller than that which was required. Both lots would be "indistinguishable" from other neighborhood lots (*see* 97 NY2d at 93). The court characterized the case as involving "nothing more than a minor variance application which in prior similar circumstances was routinely granted" (97 NY2d at 94; *see also* ***Matter of Buckley v Amityville Village Clerk***, 264 AD2d 732, 694 NYS2d 739 [2d Dept 1999]).

Although it may be argued by petitioner that there was a factor or two weighing in favor of granting the variances, a court cannot substitute its judgment for that of the Board where, as here, the determination,

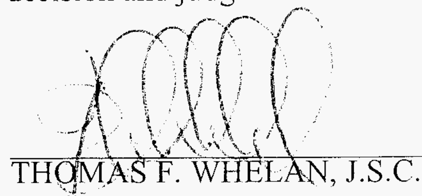
as a whole, that the benefit to petitioner from the requested variances was outweighed by the detriment to the health, safety, and welfare of the surrounding neighborhood, was supported by substantial evidence (*see*, ***Matter of Beirne v Zoning Bd. of Appeals of Vil. of Pleasantville***, 267 AD2d 234, 699 NYS2d 315 [2d Dept 1999]; ***Matter of Cullen v Scheyer***, 265 AD2d 410, 696 NYS2d 489 [2d Dept 1999]; ***Matter of Weisman***, 260 AD2d 487, *supra*; ***Matter of Johnson v Vil. of Westhampton Beach***, 244 AD2d 335, 663 NYS2d 663 [2d Dept 1997]; ***McGlasson Realty, Inc.***, 234 AD2d 462, *supra*; ***Matter of DeJoy v Zoning Bd. of Appeals of Town of Babylon***, 249 AD2d 389, 670 NYS2d 793 [2d Dept 1998]; ***Matter of Csuha v Trotta***, 261 AD2d 618, 688 NYS2d 918 [2d Dept 1999]). 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, *supra*). In fact, "testimony by neighbors with actual knowledge of the conditions alone [Twin Cedar Lane]" (***Matter of Ifrah***, 98 NY2d at 308, *supra*), support the Board's determination.

Substantial evidence in the record discloses that the economic benefit to petitioner failed to outweigh the detriment to the health, safety, and welfare of the community (*cf* ***Matter of Csuha v Trotta***, 261 AD2d 618, *supra*). There is no evidence that the default denial was illegal or arbitrary (*see* ***Dish Realty, LLC v Modelewski***, 4 Misc3d 1017(A), *supra*). So where, as here, a landowner seeks variances to accomplish a subdivision of a parcel already improved in a manner consistent with the use contemplated by the zoning classification, the fact that a portion of the neighborhood is already developed with smaller lots based upon a Town Board's determination to exempt previously filed maps, should not, *ipso facto*, warrant the granting of the requested variances. In fact, where the granting of variances would result in the creation of two substandard lots, each requiring a substantial variance from the required minimum lot area, the determination of a zoning board in denying the variances will be upheld (*see* ***Matter of Mattiaccio v Zoning Bd. of Appeals of Vil. of Pleasantville***, 22 AD3d 758, 804 NYS2d 385 [2d Dept 2005]; *compare* ***Matter of Kaufman v Mansi***, 1 AD3d 514, 767 NYS2d 240 [2d Dept 2003] [only lot-width and rear-yard variances, not lot area]). The mere fact that the parcel could be more profitable if it were subdivided is insufficient to warrant granting petitioner's application (*see* ***Matter of Graziano v Scalafini***, 143 AD2d 664, 532 NYS2d 931 [2d Dept 1988]; ***Matter of Cowan v Kern***, 41 NY2d 591, 394 NYS2d 579 [1977]).

Based upon the entire record and balancing all the factors, the Board, by virtue of its default denial, could rationally conclude that the detriment the proposed construction posed to the neighborhood outweighed the benefit sought by petitioner, and the denial of the requested variances was not arbitrary or capricious (*see* ***Ifrah v Utschig,*** 98 NY2d 304, *supra*).

In light of this Court's holding, there is no need to examine the principle of separation of governmental powers and whether the granting of such variances would have constituted a legislative act, infringing upon the powers of the legislative body, that is, the Town Board (*see e.g.* ***Van Deusen v Jackson***, 28 NY2d 608, 319 NYS2d 855 [1971]; ***Matter of Giuntini v Aronow***, 92 AD2d 548, 459 NYS2d 117 [2d Dept 1983]; *cf* ***Matter of Cohalan v Schermerhorn***, 77 Misc2d 23, 351 NYS2d 505 [Sup Ct Suffolk County 1973]). However, the Court is cognizant of the understanding that zoning ordinances are enacted to protect the health, safety, and welfare of the community (*see* ***Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead***, 69 NY2d 406, 412, 515 NYS2d 418 [1987]). Municipalities that adopt zoning ordinances enter into a contract with its citizens whereby permitted uses are set forth, in particular, distinct districts. Here, the application for variances to go from a R-4- zoning classification to a R-20 district seems to run counter to that contract with the residents of the affected neighborhood.

Accordingly, the petition is dismissed. This constitutes the decision and judgment of the Court.



DATED: [handwritten date]

THOMAS F. WHELAN, J.S.C.