Short Form Order

Index Number: 30361-2006

Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

Hon. Emily Pines
Justice Supreme Court

Original Motion Date: 12-11-2006
Motion Submit Date: 02-22-2007
Motion Sequence No.: 001 MG
CASEDISP

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In the Matter of the Application of EUREKA CONSTRUCTION CORP.,

Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

TERRY J. KARL, Chairman, MARVIN L. COLSON, Vice-chairman, PAUL DeCHANCE, KERI PERAGINE, EDWARD P. MORRIS, JR., JAMES WISDOM, and MICHAEL SCHAEFER constituting the ZONING BOARD OF APPEALS of the Town of Brookhaven, the ZONING BOARD OF APPEALS of the Town of Brookhaven and the TOWN OF BROOKHAVEN,

Respondents.
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The Court is considering herein an Article 78 proceeding involving variance applications for property located on West Yaphank Road, 141.45' south of Ethel Lane, Middle Island, New York (Suffolk County Tax Map No. District 0200, section 498.00, block 04.00, lot 017.00) (the "subject property"). This a challenge by Petitioner, Eureka Construction Corp. ("Petitioner") to a determination by respondent Zoning Board of Appeals of the Town of Brookhaven

(Respondent or the "Board") which denied its application for lot area, lot frontage and minimum and total side yard set back variances for the construction of a single family dwelling on the subject property.

The subject property is located in an A-1 residence zoning district in the Town of Brookhaven and consists of approximately 10,113 square feet and 52 feet of frontage (or lot width) on West Yaphank Road. In the A-1 residence zoning district, 40,000 square feet of lot area and 175 feet of lot frontage is required. Petitioner acquired the subject property on June 22, 2005.

A public hearing was held before the Board on September 13, 2006 and petitioner was represented by Salvatore Malguanera, a real estate expert. Mr. Malguanera submitted photographs of the subject property together with photographs of the properties adjoining to the north and south. He testified that both these parcels were basically the same size as the subject property and that they were improved with houses that were probably constructed within the last five years. Mr. Malguanera further testified, that, based upon the radius map submitted with the application, there were 52 lots within the 500' radius of the subject property and that 41 of those lots, or 79% of the neighborhood were improved. He testified that with regard to the lot frontage, the subject property conformed to 29% of the lots within the radius but that none of the lots in the area met the A-1 zoning district requirements of 175 feet of frontage. Mr. Malguanera submitted evidence that petitioner had offered to sell the subject property to either of the adjoining landowners but did not receive a response.

The Board read into the record a report from the Town of Brookhaven Department of Planning, Environment & Development ("PED"), which recommended denial of the application. The report found that the subject property conformed to only 32% of the lots within the 500' radius for lot frontage, but 50% for lot area. It recommended denial of the requested variances based upon "gross nonconformance" with the zoning requirements in the A-1 residence district; specifically, a 75% variance for lot area (10,113 square feet of subject property vs.

40,000 square feet required); a 70% variance for lot frontage (52 feet of subject property vs. 175 required); a 60% variance for minimum side yard (10 feet in subject property vs. 25 feet required); and a 73% variance for total side yards (20 feet in subject property vs. 75 feet required).

In response to the PED report, Mr. Malguarnera testified that the subject premises was held in single and separate ownership since 1956 and that until the change in the Brookhaven Town Code in 1998 requiring Board approval, it could have been built on as of right. He further testified that the development of the subject property would be in conformance with the parcels adjoining both to the north and south which are approximately the same size. Finally, Mr. Malguanera testified that it was his opinion that the granting of the application would not adversely change the area or affect any of the property values in the immediate area.

There was no opposition to the application from any member of the public. However, Board Member Marvin Colson testified that it was his recollection that lot #15 on the radius map (2 lots to the south of the subject premises) was denied permission by the Board for variances.

After the public hearing on September 15, 2006, the Board voted to hold the application on the decision calendar. Thereafter, on October 11, 2006, at a public hearing, the Board voted to deny the application and Petitioner was notified of same by letter dated October 13, 2006. Petitioner commenced the instant Article 78 proceeding challenging the Board's denial by filing of Notice of Petition and Petition on November 15, 2006 and service upon respondent on November 16, 2006. In obvious response to the Petition, on January 3, 2007, the Board then adopted Findings and Conclusions in an apparent attempt to satisfy the requirements of **Town Law §267.** As Respondent is fully aware, the Court does not condone such after the fact adoption of Findings and Conclusions upon commencement of a lawsuit, although such defect is insufficient to warrant granting of the Petition without consideration of the underlying merits.

The Board's Findings and Conclusions consisted of thirteen (13) findings of fact and four (4) conclusions. Of the thirteen findings, three are comprised of descriptive information regarding the subject property. In the findings, the Board noted that the hardship to petitioner was self-created because it acquired the property on June 22, 2005, thus, with knowledge of its current zoning classification. The Board found that the subject parcel was 75% deficient to A-1 zoning district requirements of 40,000 square feet of lot area and was located in Hydrogeologic Zone III and the Compatible Growth Area of the Central Pine Barrens District. The Board summarized the characteristics of the thirty-eight (38) developed parcels in the 500' radius and found that there were twelve (12) parcels or 32% that had lot frontage similar to the subject premises and three (3) additional developed parcels that had smaller lot frontages than the subject premises.[1] The Board noted that the parcel was located on a "busy thru street with a northerly incline of perhaps 10% and an easterly bend in the road, both of which limit sight to the south." The Board noted the percentages of the variances requested (as set forth above) and that the Department of Planning, Environment and Land Management recommended denial of the variances. The Board did acknowledge that there were other developed lots within the surrounding neighborhood similar in terms of lot area and frontage, but stated that there was no evidence that any of these smaller parcels were the result of approval from the Board, but rather, they may have been developed as of right.

In its Conclusions, the Board found that the "granting of the application will cause an undesirable change in the character of the neighborhood would be a detriment to nearby properties and would have an adverse impact on the physical and environmental conditions of the neighborhood, much of which has been developed with lots maintaining more significant frontage. It is clear that the requirements of the Town Code for lot area, lot frontage, minimum and total side yard would have to be substantially relaxed in order to grant the

[1] Although the Board notes that 2 of these additional 3 developed parcels were the result of a land division in 1976 prior to the up-zonings in this area, it still increases the conformity of the subject parcel to 39% for lot frontage.

proposal." The Board further concluded that the "benefit sought by the applicant may be achieved by means other than seeking such substantial variances from the Board of Zoning Appeals. Benefit to the property owner could be realized by the sale of the property to a contiguous landowner." The Board further noted what they considered to be the numerically substantial nature of the variances and that such variances were not in general conformity with the size of other properties in the neighborhood and that the "cumulative effect on the community would be substantial." Finally, the Board concluded that any hardship to petitioner was self-created as he acquired the parcel with knowledge of its current zoning classification.

Town Law §267-b(3)(b) requires a zoning board, when making its determination on an area variance application to "take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant." The board must also consider:

> (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;
> (2)whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
> (3) whether the requested variance is substantial;
> (4) whether the proposed variance will 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, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

As set forth in **Town Law §267-b,** the Board was required to engage in a balancing test, weighing the benefit to the Petitioners of granting the application against the detriment to the health, safety and welfare of the neighborhood or community. *See, Lessing v. Scheyer*, 16 A.D.3d 418, 790 N.Y.S.2d 545 (2d Dept. 2005) . It is well settled, that zoning boards have "broad discretion in considering applications for area variances, and a zoning board's determination should not be set aside unless there is a showing of, inter alia, arbitrariness." *Carlino v. Scheyer*, 30 A.D.2d 594, 817 N.Y.S.2d 375 (2d Dept. 2006).

Recently, the Second Department reiterated and articulated a standard for determining whether a zoning board determination is arbitrary and capricious. The Court stated that "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis. Under this standard, a determination should not be disturbed unless the record shows that the agency's action was 'arbitrary, unreasonable, irrational or indicative of bad faith. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.'" ***Halperin v. City of New Rochelle***, 24 A.D.3d 768, 809 N.Y.S.2d 98 (2d Dept. 2005) (internal citations omitted). The Board may not simply reiterate the prongs of the balancing test without setting forth the specific facts or reasons that it relied upon in making its determination to deny the application. ***Necker Pottick v. Duncan***, 251 A.D.2d 333, 673 N.Y.S.2d 740 (2d Dept. 1998).

Application of these principles to the facts of the case at bar mandates the annulment of the Board's determination denying the requested variances as the record before the Court does not support the denial. ***Tall Trees Construction Corp., v. Zoning Board of Appeals of the Town of Huntington***, 97 N.Y.2d 86, 735 N.Y.S.2d 873, 761 N.E.2d 565 (2001). Respondent's Findings and Conclusions fail to set forth a rational basis for its determination that the development of the subject property, which conforms to 50% of the lots in the area for lot frontage and almost 40% for lot frontage, would be a detriment to the health, safety and welfare of the community or the neighborhood. Although the Board, in its Findings and Conclusions purports to comply with the mandates of **Town Law §267-b,** such determination merely impermissibly reiterated those criteria, unsupported by any testimony to counter the evidence presented by petitioner's expert. ***Gonzalez v. Zoning Board of Appeals of Town of Putnam Valley***, 3 A.D.3d 496, 771 N.Y.S.2d 142 (2d Dept. 2004). Although arguably the variances requested by Petitioner were substantial numerically, there was no evidence presented to support the Board's finding that "the granting of the application will cause an undesirable change in the character of the neighborhood would be a detriment to nearby properties and would have an adverse impact on the physical and environmental conditions of the neighborhood". ***Beyond Builders, Inc., v.***

Pigott, 20 A.D.3d 474, 799 N.Y.S.2d 241 (2d Dept. 2005). ***See also, Filipowski v. Zoning Board of Appeals of Village of Greenwood Lake***, 2007 W.L. 678260, __A.D.3d __, __N.Y.S.2d __; ***Baker v. Brownlie***, 248 A.D.2d 527, 670 N.Y.S.2d 216 (2d Dept. 1998). The Board's sole evidence consisted of the report from the Department of Planning, Environment & Land Management, who recommended denial of the application due to the substantial nature of the variances requested and the alleged non-conformity to the surrounding area, despite the fact that the report noted that the parcels adjoining the subject property to the north and south had shallow side yards. Additionally, the Board recognized that the area consisted of lots that were similar to the subject property in terms of lot area and lot frontage and it was undisputed that none of the lots within the 500' radius complied with the current A-1 zoning district requirements with regard to lot frontage. ***See, Easy Home Program v. Trotta***, 276 A.D.2d 553, 714 N.Y.S.2d 509 (2d Dept. 2000). With regard to the remaining elements of the balancing test, the Board's finding that the benefit sought by Petitioner may be achieved by the sale to a contiguous property owner, such finding is erroneous. Petitioner demonstrated that it offered the subject property for sale to adjoining owners and was unsuccessful. Finally, although arguably Petitioner's hardship was self-created, such finding does not preclude the granting of the variance pursuant to the explicit terms of **Town Law §267-b.**

Based upon the foregoing, the Board's denial of Petitioner's application for variances was arbitrary and capricious and lacked a rational basis in the record. The Petition is therefore granted and the matter is remitted to the Board for issuance of the variance with such conditions as it deems appropriate.

The foregoing constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: April 20, 2007
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.