

Monaghan v Smith

2007 NY Slip Op 31339(U)

May 4, 2007

Supreme Court, Ontario County

Docket Number: 0098087/2007

Judge: John J. Ark

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SUPREME COURT STATE OF NEW YORK
COUNTY OF ONTARIO

L. Edward Monaghan and Marlene H. Monaghan
as Trustees of the Monaghan Living Trust
dated May 10, 1999

Petitioner,

Index No. 98087

v

DECISION

Graham Smith, Chair Richard Szkapi, Carl P. Sahler,
Gary Davis, Julie Hoffman, Constituting the
Zoning Board of Appeals of the Town of Canandaigua,

Respondent.

Petitioner seeks an order pursuant to CPLR Article 78 annulling the determination of the Zoning Board of Appeals of the Town of Canandaigua. This Court rendered a Decision dated November 3, 2006 and remitted the matter to the Zoning Board of Appeals for findings of fact.

As noted in the November 3, 2006 decision, the subject property is an irregularly shaped parcel located on the west side of Canandaigua Lake. The parcel contains a 12' x 22' one car garage. In October 2003, petitioner applied for area variances, site plan approval, demolition of a garage, and zoning variances to erect a new single family residential structure, a use permitted by the Town Zoning Code. All of the requested set back variances were denied.

Due to changes in the zoning regulations between 1940 and the present, the property cannot be developed without variances. There is a 60 foot setback requirement from the road and a 60 foot setback from the lake. The depth of the subject property is 76 feet on one side and 98 feet on the other side.

In August 2004, petitioner completed a full EAF under the SEQR regulations. On January 18, 2005, respondent determined that the proposal submitted petitioner would not have a

significant environmental impact (a negative declaration). That negative declaration has not been challenged.

Ultimately, petitioner's submitted a new, smaller design. In October 2005 the revised application for a rehearing was denied on the ground that the revised application was not substantially different from the application denied in January 2005.

In December 2005, the Ontario County Planning Board approved (with modifications) the application submitted by petitioner. The modifications/recommendations of the OCPB were resolved.

In July 2006 a hearing on a revised plan and new variance application was held. The hearing was adjourned to August 2006. Petitioner prepared a spreadsheet for the hearing and showed that petitioner's neighbors' houses were closer to the road and had greater percentage of lot coverage.

The Court now has before it a decision, with reasons stated for each of the variance denials: rear setback, depth of the second parking space, driveway setback, and front setback. The Court has received petitioner's response to the Findings dated March 23, 2007, a response from Marion Cassie, intervener, dated March 27, 2007, a responding letter from respondent dated April 4, 2007, and finally a reply letter from petitioners stated April 5, 2007.

The ZBA carefully considered all four factors set forth in Town Law § 267-b(3)(b).

Those factors are,

- (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 area 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.

With respect to the first factor, “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,” the ZBA noted that the variance is larger than is typical for the neighborhood and that the neighboring properties would be adversely impacted.

In response to the issue of whether “the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance,” the ZBA stated that petitioner could eliminate the garage and reduce the size of the structure.

The ZBA further stated that in the aggregate, the variances were substantial, especially the driveway variance (Town Law § 267-b(3)(b)[3]).

The fourth factor set forth in Town Law § 267-b(3)(b) requires the ZBA to consider “whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.” The ZBA noted that the total aggregate variances will have a detrimental impact on the neighborhood by increasing building congestion. The ZBA also noted that “The large amount of fill required to complete the project * * * will result in the detrimental alteration of natural topography and drainage patterns increasing the flow rate of surface water discharge onto the adjoining property and into Canandaigua Lake” (Town of Canandaigua ZBA Findings dated February 13, 2007).

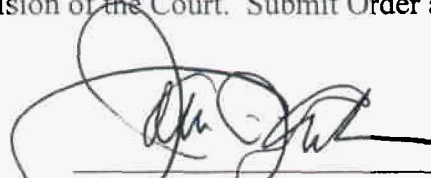
Finally, the ZBA considered whether the difficulty was self-created (Town Law § 267-b(3)(b)[5]). The ZBA noted that the lot was *non-conforming* when the petitioner purchased it in 1970. The Board also noted that the petitioner, “a practicing attorney, can not be heard to

complain that he was unaware of the zoning requirements applicable to the project site when he purchased the site. In fact, the applicant himself acknowledged that the site was not buildable [sic] during grievances against the tax assessment on the site” (Town of Canandaigua ZBA Findings dated February 13, 2007).

“It is well established that local zoning boards have discretion in considering applications for variances and that a reviewing court’s function is a limited one [citation omitted]. ‘A zoning board determination should not be set aside unless there is a showing of illegality, arbitrariness or abuse of discretion’ (Matter of Fuhst v Foley, 45 NY2d 441, 444; see also, Matter of Cowan v Kern, 41 NY2d 591, 599)” (*D’Angelo v Hartman*, 187 AD2d 927).

Here, the Zoning Board of Appeals carefully considered the five factors set forth in Town Law § 267-b(3)(b). Petitioner has failed to show that the determination is arbitrary or capricious. The petition is denied.

This constitutes the Decision of the Court. Submit Order accordingly.



Hon. John J. Ark
Supreme Court Justice

Dated at Canandaigua, New York
this 4th day of May 2007.