

Matter of Rosasco v Village of Head of the Harbor

2007 NY Slip Op 31920(U)

June 26, 2007

Supreme Court, Suffolk County

Docket Number: 0017570/2006

Judge: Peter Fox Cohalan

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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 24

In the Matter of the Application of TROY ROSASCO,

By: Cohalan, J.S.C.

Petitioner,

Dated: June 26, 2007

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

Index No. 17570-06

- against -

Mot. Seq. # 001 - CDISPSUBJ

VILLAGE OF HEAD OF THE HARBOR, JEFFREY D. FISCHER, Chairman of the Zoning Board of Appeals of the VILLAGE OF HEAD OF THE HARBOR, and the Zoning Board of the Appeals of the VILLAGE OF HEAD OF THE HARBOR,

Return Date: August 16, 2006
Calendar Date: December 13, 2006

Respondents.

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This is an Article 78 special proceeding brought by the petitioner seeking to reverse, annul and set aside a determination and denial by the respondents, Zoning Board of Appeals of the Village of Head of the Harbor (hereinafter ZBA), of an application for relaxation of a side yard variance for the proposed construction of a swimming pool on a non-conforming parcel in the Village of Head of the Harbor (hereinafter Village).

The petitioner Troy Rosasco is the owner of a residential parcel of real estate located at 19 Highland Avenue in St. James, Suffolk County on Long Island New York. The petitioner resides in a residence built in approximately 1890 on a non-conforming lot well before the Village was established, circa 1950. The petitioner's parcel is the largest lot on Highland Avenue, measuring 280 feet deep with a 140 feet frontage, containing a total of 39,427 square feet, just shy of a builder's acre. The respondent Village requires two (2) acre zoning with 200 foot frontages and 55 foot side yard setbacks on its residential

properties. The petitioner sought to place a 20 feet x 40 feet in ground pool in his yard and hired William Jaeger, an engineer and design consultant, to draw up a site plan for constructing the pool. The proposed pool was sited where the prior owner had previously constructed a pool, however the pool was moved six (6) feet further back towards the rear yard based upon a recommendation by the Village's Architectural Review Board. The Village's Environmental Conservation Board and the Architectural Review Board both approved of the proposed construction and the petitioner sought a 35 foot variance from the 55 foot side yard setback requirements of the Village Code. The proposed construction attempted to situate the pool in the rear yard but closer to the property line of the petitioner's neighbor to the south, St. James Episcopal Church.

The petitioner made application to the ZBA for a 35 feet variance from the 55 feet side yard setbacks on this non-conforming lot and a hearing was held on June 26, 2006. The petitioner presented William Jaeger, who testified about the site plan, and noted that moving the proposed pool into the center rear yard of the house to avoid the side yard restrictions would interfere with access to a rear garage, require the installation of retaining walls and the removal and clearing of the area including the cutting down of a long standing bonsai tree of historical significance. Eric Neitzel, a real estate expert, noted the petitioner's property was the largest on the block and the proposed construction would not impact adversely on the character of the neighborhood or the homes in the area. The petitioner's attorney noted that Highland Avenue is the only non-conforming street in the Village with 100% of the houses non-conforming to the Village Code and that it was developed prior to the establishment of the Village or its code and its two acre zoning. There was no opposition to the application and the petitioner states that the community, including the church most affected by the placement of the pool closer to its property line, was in favor of the requested variance. The petitioner also brought before the ZBA the fact that the petitioner's adjoining neighbor to the north with an even smaller lot sought a side yard variance to construct a pool within 21 feet of the property line which application was granted by the ZBA in 1999.

The ZBA, after the hearing, denied the application for a variance in a one page decision, dated June 26, 2006, finding the applicant did not demonstrate adequate hardship, that the proposed variance would represent an undesirable change in the neighborhood, the difficulty was self-created and the variance sought was excessive. The petitioner thereafter brought this Article 78 proceeding claiming that the ZBA's denial of his application was arbitrary, capricious, against the weight of the substantial evidence presented and legally without merit.

For the following reasons, the petitioner's Article 78 special proceeding seeking to vacate and annul the decision of the ZBA on the grounds that the decision is arbitrary, capricious and not supported by substantial evidence is granted, the ZBA's determination is vacated and annulled and the Court remits this case matter to the respondent ZBA to grant the necessary permits and certificate of occupancy with any reasonable conditions

necessary to address any alleged concerns about visibility with plants and other screening material.

It is well settled law “that in a proceeding seeking judicial review of administrative action the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary or capricious.” **Flacke v. Onondaga Landfill Systems, Inc.**, 69 NY2d 355, 363, 514 NYS2d 689,693 (1987).

The proper standard for a reviewing court is whether the challenged administrative ruling lacked a rational basis for the action taken and was arbitrary and capricious. As set forth by the court in **Matter of Halpern v. City of New Rochelle**, 24 AD3d 768, 809 NYS2 98 (2nd Dept. 2005),

“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’ (**Matter of Cowan v. Kern**, 41 NY2d 591, 599; see **Matter of Pell v. Board of Educ.**, 34 NY2d 222, 231 [“Arbitrary action is without sound basis in reason and is generally taken without regard to the facts”]).

The Court in **Halpern**, supra, went on to state:

“The Court of Appeals has long recognized the ‘settled rule’ that ‘in reviewing board actions as to variances or special exceptions the courts...restrict themselves to ascertaining whether there has been illegality, arbitrariness, or abuse of discretion’ (**Matter of Lemir Realty Corp. v. Larkin**, 11 NY2d 20, 24 [collecting cases]; see **People ex rel. Hudson-Harlem Val. Tit. & Mtgw. Co. v. Walker**, 282 NY 400, 405 [determination of zoning board of appeals ‘may not be set aside unless it appears to be arbitrary or contrary to law’][collecting cases]). The Court of Appeals has continued to articulate the CPLR 7803 (3) standard of review in zoning cases, emphasizing the deference that must be afforded to local officials in making judgments concerning land use in their community (see **Matter of Pecoraro v. Board of Appeals of Town of Hempstead**, 2 NY3d 608, 613 [‘courts may set aside a zoning board determination 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’] **Matter of Ifrah v. Utschig**, 98 NY2d 304, 308 [‘Local zoning boards have broad discretion in considering applications for variances and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion’]; **Matter of Cowan v. Kern**, supra at 599 [‘Where there is a rational basis for the local decision, that decision should be sustained’]).

Thus the determination of the Board must be upheld if it is rational, and supported by substantial evidence. **Khan v. Zoning Board of Appeals of Village of Irvington**, 87 NY2d 344, 639 NYS2d 302 (1996) rehearing den. 87 NY2d 1056, 644 NYS2d 148. The consideration of “substantial evidence” is limited to determining “whether the record contains sufficient evidence to support the rationality of the [Respondent’s] determination.” **Sasso v. Osgood**, 86 NY2d 374, 633 NYS2d 259 (1995).

A review of the record presented establishes that the petitioner’s property on Highland Avenue and the neighboring properties on this avenue are non-conforming to the Village Code in that the properties on Highland Avenue are less than one acre in a Village with a minimum zoning of two (2) acres. The petitioner presents compelling evidence by experts that in the placement and siting of the pool on the petitioner’s property, the placement was critical because of the configuration of the land, its non-conforming nature and the rear garage access problem. The reviews by the Village’s Environmental Conservation Board and its Architectural Review Board recommending favorable consideration were virtually ignored or unexplained by the ZBA. Indeed, while the ZBA seemed concerned with the pool’s placement, these review boards considered placement within their reports and they discussed the placement of the pool as “allow(ing) the preservation of the rear area and its environmental and historical integrity, but yet keep the pool in the ‘rear’ and out of the side yard between the house and the Church property line next door.” Again, it must be stressed that the ZBA clearly ignored the onerous impact of its zoning regulations on the Highland Avenue community as the only area (approximately nine homes) which predates both the Village and its code and contains homes on non-conforming lots of less than two acres.

Notwithstanding the plaintiff’s two experts, the lack of opposition, and in some cases, the support of the surrounding community for the petitioner’s application and the approval by the Village’s own Environmental Conservation Board and Architectural Review Board, the ZBA rendered its denial in conclusory terms using phrases such as “undesirable change in the neighborhood” “weighing the interest of the applicant as against the neighborhood” and “relief was determined... to be excessive.” However, the conclusions drawn by the ZBA not only are unsupported by any factual determination but are contradicted by the testimony presented and the Village’s own Environmental Conservation Board and its Architectural

Review Board. In fact, while the ZBA points to an alleged undesirable change in the neighborhood it ignores the precedential effect of giving similar relief to the petitioner's adjoining neighbor who was granted a sideyard variance to install his own pool which was 21 feet from his side yard when 55 feet is required by Code.

In ***Matter of Campo Grandchildren Trust v. Colson, et. Al.***, AD3d , NYS2d (2nd Dept 2007) [WL 1149241] decided April 17, 2007, the Court held that

“ A determination of a zoning board of appeals that ‘neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious’ “ (citations omitted)...” and mandates reversal, even if there may otherwise be evidence in the record sufficient to support the determination.”

The ZBA, in its extremely short decision containing conclusions without any supporting factual detail, failed to discuss or mention the precedential value or effect of its prior decision or why it reached a different result when dealing with the petitioner's application. This failure to make detailed factual findings to support the conclusions reached in the decision is fatal to a reasoned approach to its review. The petitioner's evidence presented before the ZBA set forth a reasoned and calculated review of the non-conforming nature of the petitioner's property and the surrounding properties on Highland Avenue so as to substantiate a considered opinion of the ZBA that such a relaxation of the side yard requirements should be granted. The fact that the ZBA reached a contrary result from the substantial evidence presented to it which favored the application and then failed to detail the factual evidence to support its determination is the very arbitrariness and capriciousness of the decision which fails to withstand judicial scrutiny. There is nothing within the fact finding process of the hearing or the decision of the ZBA to suggest or find that its denial of the petitioner's application was not arbitrary, capricious and an abuse of discretion since the conclusions reached by the ZBA lack support in the record presented before it.

The Court finds that the ZBA did not conduct or engage in the required balancing test based upon the evidence submitted in support of the application and therefore should have granted the application. ***Mattiacco v. Zoning Bd. of Appeals of Village of Pleasantville***, 22 AD3d 758, 804 NYS2d 385 (2nd Dept. 2005).

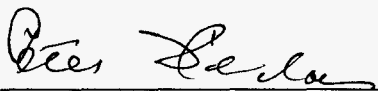
Based upon the entire record before it, and balancing all the factors set forth, the ZBA could not rationally conclude that there was a detrimental impact in the proposed pool construction on this non-conforming lot with the variance requested in side yard setback

which would have posed a negative impact to the character of the neighborhood. Its failure to base its decision on the substantial evidence presented in support of the proposed variance is arbitrary, capricious and fails to detail the factual basis which would support a denial of the application. ***Matter of Ibrah v. Utschig***, supra. Accordingly, the petition seeking to vacate and annul the decision is granted and the matter is remanded back to the ZBA to grant the necessary permits and certificate of occupancy with any reasonable conditions necessary to address any alleged concerns about visibility with plants and other screening material.

Settle Judgment

The foregoing constitutes the decision of this Court.

Date: June 22, 2007



J.S.C.