

**Matter of Goncalves Props., LLC v Colson**

2007 NY Slip Op 32002(U)

June 26, 2007

Supreme Court, Suffolk County

Docket Number: 0017183/2006

Judge: Peter Fox Cohalan

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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 24

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In the Matter of the Application of :  
GONCALVES PROPERTIES, LLC, :

By: Cohalan, J.S.C.

Petitioner, :

Dated: June 13, 2007

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

Index No. 17183-06

- against - :

Mot. Seq. # 001 - CDISPSUBJ

MARVIN L. COLSON, Chairman, RUSSELL :  
P. SCOTTO, JR., GRACE COPPES, PAUL M. :  
DeCHANCE, LOUIS J. GALLO, JR., KERI :  
PERAGINE and EDWARD P. MORRIS, JR., :  
constituting the Board of Zoning Appeals of the :  
Town of Brookhaven, :

Return Date: August 11, 2006  
Cal. Date: December 6, 2006

Respondents.:

-----X  
Attorney for Petitioner

Attorney for 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 Town of Brookhaven (hereinafter ZBA) of an application for relaxation of front yard setbacks and a side yard variance for a proposed one family dwelling on a parcel measuring only 14,461 square feet.

The petitioner, Goncalves Properties, LLC, is the owner of a residential parcel of real estate located on the north east corner of Middle Island Road and Cedarhurst Avenue in Medford, Suffolk County on Long Island New York. This parcel is located within the A-1 Residential Zoning District which permits a single family dwelling on a minimum lot size of 40,000 square feet, but since the parcel, which is only 14,461 square feet, is held in single and separate ownership it does not require a lot size variance pursuant to Brookhaven Town Code §85-372. However, the ZBA did note that the petitioner's property is described as substandard in terms of lot size and is 63% deficient of the zoning

requirements in this mixed use area which consists of residential and commercial properties. The petitioner bought the property on June 8, 2005 and the property is best described as a substandard triangular piece of residential property on the corner of Middle Island Road and Cedarhurst Avenue with the proposed plan to have the residence front on Middle Island Road with a 20' set back from Middle Island Road and a 12' side yard to the next parcel which is commercial and a 20' set back in the back yard after taking into consideration the Brookhaven Town 25' dedication of the back property for the widening of Cedarhurst Avenue. The petitioner's property has all commercial properties to its north and residential lots south and opposite the petitioner's property.

Petitioner's application sought front yard set back variances to reflect a 20' setback for both Middle Island Road and Cedarhurst Avenue from the actual taking line for road widening (on Cedarhurst Avenue) and a side yard variance to reflect a 12' setback from the commercial property to the north to accommodate the proposed residential dwelling to be built. Brookhaven Town Code Section 85-58 requires 50' front yard setbacks and 25' side yard setbacks, and because the parcel lies between two (2) roads Middle Island Road and Cedarhurst Avenue, a dual front yard setback and variances were required as to this property. Petitioner sought these variances to accommodate the construction of a 40' by 35' two story dwelling with an attached garage. A public hearing was conducted on April 1, 2006 and the ZBA, in a five page decision dated May 24, 2006, denied the petitioner's request for the variances. The ZBA noted that the petitioner's request for variance relief would require a 60% relaxation of the front yard setbacks and a 54% relaxation of the side yard setback of 25' and the ZBA considered these variances substantial in nature. ZBA also noted that this developer bought the property in 2005 and thus the hardship was self created and that the proposed variances would not only impact on the general development and adversely effect the character of the neighborhood but could provide precedential value for future claims in the area. 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 denied and the special proceeding is dismissed.

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 NYS2d 98 (2<sup>nd</sup> 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 **Halpern**, supra, Court 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. & Mtge. 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 ZBA 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 more than enough support within the record of the proceedings to substantiate the ZBA’s decision to deny the petitioner’s application. Not only did the ZBA find that “ the size and configuration of the subject parcel will not support development of a dwelling that conforms with the remainder of the neighborhood” but that there were no other homes in the area with minimum side yards of 12’ as opposed to Brookhaven Town Code requirements of 25’ and a review of the plans for the dwelling show that the residence had to be configured on such an angle as to allow a residence and yet require a substantial relaxation of standards on both front yard variances from both roads and the side yard variance. The fact that the hardship was self created and that the petitioner, a real estate developer, when purchasing the lot thought no variances were required because it was classified as single and separate ownership, is of little import. See, ***Weissman v. ZBA Village of Kensington***, 260 AD2d 487, 688 NYS2d 215 (2<sup>nd</sup> Dept. 1999). Single and separate ownership as to a substandard, non conforming lot only relaxed the 40,000 square foot requirements in this A-1 residentially zoned district, not the front yard or side yard variances required to build. Finally, the ZBA noted the proposed dwelling was significantly smaller than the other homes in the area and expressed concern that “permitting construction on such a substandard parcel will set an adverse precedent in terms of future development... .”

In ***Matter of Campo Grandchildren Trust v. Colson, et. Al.***, AD3d , NYS2d (2<sup>nd</sup> 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).

Thus, the ZBA could take into account the precedential value such an approval of a substandard lot with such significant front and side yard variances would have on the

future development of the area and the negative impact such a ruling would have in the future. This was a concern to the ZBA which noted "there are other lots in the neighborhood that remain vacant and therefore the ZBA finds that the potential for further development on substandard lots exists." This is a valid concern of the ZBA.

The ZBA, in a lengthy five page opinion, set forth fourteen separate findings of fact before concluding that the relaxation of front and side yard setbacks on this substandard and substantial non-conforming lot would have an adverse impact on the neighborhood. The ZBA further found that the petitioner failed to explore or provide any information with regard to alternate uses such as selling the parcel to the adjoining parcel owners "in an effort to maintain conformity to surrounding commercial development." The evidence presented before the ZBA sufficiently set forth a reasoned and calculated review of the substandard lot and the surrounding area to substantiate the considered opinion of the ZBA that such a substantial relaxation of front and side yard requirements should be denied. There is nothing within the fact finding process or the decision of the ZBA to suggest or find that the ZBA's denial of the petitioner's application was arbitrary, capricious, an abuse of discretion or that its decision lacked support in the record presented before it. It is not this Court's duty to second guess or substitute its judgment for a well reasoned analysis by the ZBA as to the denial of the instant application for a zoning variance. The Court finds that the ZBA conducted and engaged in the required balancing test and found the petitioner's application wanting and properly denied the application. *Mattiacco v. Zoning Bd. of Appeals of Village of Pleasantville*, 22 AD3d 758, 804 NYS2d 385 (2<sup>nd</sup> Dept. 2005).

Based upon the entire record before it, and balancing all the factors set forth, the ZBA could and did rationally conclude that the detrimental impact of the proposed construction of this residence on a non-conforming lot with the variances requested in front yard and side yard setbacks would have posed a negative impact to the character of the neighborhood and that this outweighed the benefit sought by the petitioner and, thus, its determination denying the requested relief was not arbitrary or capricious. *Matter of Ifrah v. Utschig*, supra. Accordingly, the petition is denied and the proceeding dismissed.

#### Settle Judgment

The foregoing constitutes the decision of this Court.

Date: June 26, 2007

  
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J.S.C.