

**Driftwood Modern Architectural Trust v Zoning
Bd. of Town of Brookhaven**

2007 NY Slip Op 32296(U)

July 24, 2007

Supreme Court, Suffolk County

Docket Number: 0028842/2006

Judge: Melvyn Tanenbaum

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

PRESENT:

Hon. MELVYN TANENBAUM
Justice

MOTION #001-Mot D
R/D: 111706
S/D 031507

DRIFTWOOD MODERN ARCHITECTURAL TRUST

PLTF'S/PET'S ATTY:
J. LEE SNEAD, ESQ.
155-C South Country Road, 2nd Floor
Bellport, New York 11713

Plaintiff,

- against -

ZONING BOARD OF TOWN OF BROOKHAVEN,
BERNARD COHEN, DARRYL MURPHY AND BRIAN
MCGUINNESS, AS VENDEES OF REAL PROPERTY

DEFT'S/RESP'S ATTY
ROBERT F. QUINLAN, ESQ.
One Independence Hill
Farmingville, New York 11738

:

Defendants.

Upon the following papers numbered 1 to 15 read on this motion for an order pursuant to CPLR § 7102

_____ Notice
of Motion/Order to Show Cause and supporting papers 1-8; Notice of Cross Motion and supporting papers _____ Answering
Affidavits and supporting papers 9-13 _____ Replying Affidavits and supporting papers 14-15 Other
_____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this CPLR Article 78 petition by petitioner DRIFTWOOD MODERN ARCHITECTURE TRUST (“DMAT”) seeking a judgment annulling the September 6, 2006 determination of respondent BOARD OF ZONING APPEALS OF THE TOWN OF BROOKHAVEN (“ZONING BOARD”) supplemented by Findings and Conclusions adopted January 3, 2007 which granted respondent/applicant BERNARD COHEN’s (“COHEN”) area variance application is determined as follows:

In 1997 respondent “COHEN” purchased residential property located on Fire Island with frontage on the Atlantic Ocean. “COHEN” submitted a variance application to respondent “ZONING BOARD” seeking to “legalize” additions made to the residence in the 1980's on the existing decks. Such additions include kitchen, bathroom and deck extensions. The application also sought front yard setback and height variances for an existing 7 foot privacy wall, a rear yard variance for an existing deck addition and a side yard variance for existing steps. While “COHEN’s” variance application was pending, respondents BRIAN MCGUINNESS and DARRYL MURPHY purchased the premises. Petitioner “DMAT” owns premises directly across from respondents’ property.

Public hearings were held on August 16, 2006 and September 6, 2006. By written notation dated September 6, 2006 the "ZONING BOARD" issued a decision stating: "Granted, as presented; no further encroachments permitted". Petitioner filed this CPLR Article 78 petition based upon the respondent's September 6th decision. On January 3, 2007 the respondent "ZONING BOARD" issued a written determination entitled "FINDINGS AND CONCLUSIONS". The "ZONING BOARD" found that : 1) the variances requested did not have a significant impact upon the environment or the community; 2) the additions conformed to the nature and character of the surrounding community; 3) the variances did not pose a detriment to the health, safety or nature of the surrounding community or to surrounding property values; 4) the additions were not substantial in nature; 5) the hardship to the applicant to demolish a portion of the existing home outweighed any hardship to the surrounding community; 6) by granting the variance no negative precedent occurred in terms of future development since the structure conforms with other houses in the community; and 7) the applicant's hardship was not self-created since the additions existed prior to respondent "COHEN's" purchase of the premises.

"DMAT's" petition seeks a judgment annulling and vacating the respondent "ZONING BOARD's" determination claiming that the "BOARD's" action was arbitrary, capricious and not supported by substantial evidence in the record. Petitioner claims that since the property is located in the "Oceanfront Dune District" in an environmentally sensitive area the law requires that the respondent "ZONING BOARD" undertake an environmental review citing the State Environmental Quality Review Act ("SEQRA") and Chapter 76 of the Town Code concerning Coastal Erosion Hazard Area permits. Petitioner claims that prior to granting a building permit the "BOARD" was required to establish a lead agency and to undertake a review of the possible environmental impact the proposed construction would have on the affected area. Petitioner asserts that the Town Code also requires that the Town's Division of Environmental Protection must determine whether a Coastal Erosion Hazard Permit ("CEHA") can be issued based upon the dwelling's location and that the "BOARD's" determination provided that approval was subject to the issuance of a "CEHA" permit. Petitioner argues that respondent's contention that the need for the "CEHA" permit was withdrawn by the Town is without basis since under these circumstances the Town is required to determine whether a potential environmental impact exists. It is petitioner's position that the respondent "BOARD" failed to comply with these provisions and therefore the variances issued by the respondent are nullities.

"DMAT" also argues that additional variances are required but not addressed by the "BOARD" based upon testimony and the evidence presented during the hearings concerning the expansion of the kitchen (a 23.5' x 35' irregular kitchen addition) and the discrepancies in the description of the size of respondents' lot. Petitioner claims the evidence describes the premises lot area as either 10,890 square feet (90' by 121' measurement from "Map: Fire Island Pines, Section 5, Lot 565-A-B-C" filed 3/12/55 as File No. 2333, Abstract No. 2474) or 11,340 square feet (90' by 126' measurement from Deed dated 1/30/97 from Cohen and McNeely to Cohen & filed at liber 11820, cp.686) or 32,220 square feet (90' by 358.55' measurement from respondents surveyor Norton Brothers-Dunn Engineering and Surveying, LLP dated 6/27/06). Petitioner claims the filed map must be presumed to be correct and therefore the existing lot occupancy is approximately 55% based on the total lot area and not 18.7% claimed in the survey. It is petitioner's contention that the "BOARD's" failure to investigate these discrepancies and to address the lot occupancy variance issue mandates that the "BOARD's" determination be vacated.

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"DMAT" maintains that the "BOARD" also failed to properly review and analyze the five factors set forth pursuant to Town Law Section 267-b(3)(b) and argues that the respondent's conclusory findings granting the area variances are not supported by the evidence presented during the hearings. Petitioner claims that respondents dwelling is one of the largest structures in the community with little vegetation maintained to provide a buffer. Petitioner claims that the construction is not in character with the neighborhood and that by permitting such building additions the respondent "BOARD" is setting an unwarranted precedent. Petitioner asserts that the variances are substantial and argues that the applicant's claimed hardship was self-created since the purchaser took title to the premises with knowledge that the additional improvements occurred without necessary permits in violation of zoning restrictions. Petitioner contends that the "BOARD's" analysis concerning possible detriment to the applicant and the surrounding community misstates the basis for "DMAT's" opposition since petitioner never sought removal of the existing structures but sought an effective limitation of further construction on the lot in the form of covenants and restrictions. It is petitioner's contention that the "BOARD's" determination was arbitrary, capricious and not supported by substantial evidence in the record and therefore it must be vacated.

In opposition respondent "BOARD" and respondents "McGUINNESS" and "MURPHY" submit an answer and return and claim that no basis exists to vacate the "BOARD's" January 3, 2007 determination. Respondents claim no environmental review was warranted in this case pursuant to 6 NYCRR Sections 617.5 since additions to single family dwellings which require area variances are classified as Type II Actions not subject to review under "SEQRA" or Article 8 of the Environmental Conservation Law. Respondent contends the dwelling had certificates of occupancy issued from 1977 through 1980 and claims that SEQRA review is required only for proposed construction of a new residence. Respondents also claim that a "CEHA" permit was also not required since the Town Department of Environmental Protection determined that the structures predated Town Code Chapter 76 requirements. It is the respondents position that the Town's issuance of the certificate of occupancy dated 12/05/2006 was within its discretionary authority and occurred after consideration of the necessity of a "CEHA" permit under these circumstances. Respondents claim the "BOARD's" decision was rationally based and supported by substantial evidence in the record. Respondents claim the "ZONING BOARD" considered all factors delineated in Town Law Section 267-b and determined that the applicant should be granted area variances for the existing additions. It is respondents position that no basis exists to vacate the "BOARD's" determination and therefore the petition must be dismissed.

In a proceeding seeking judicial review of administrative action, the court must determine whether there is a rational basis for the decision or whether it is arbitrary and capricious (MATTER OF WARDEN v. BOARD OF REGENTS, 53 NY2d 186, 194, 440 NYS2d 875, 881 (1981)). The determination of responsible local officials in the affected community will be sustained if it has a rational basis and is supported by substantial evidence (MATTER OF FUHST v. FOLEY, 45 NY2d 441, 410 NYS2d 565 (1978)).

The law is clear that a zoning board has broad discretion in considering an application for a variance and their determination should not be set aside unless there is a showing of illegality, arbitrariness or abuse of discretion. The decision must have a rational basis and be supported by substantial evidence (MATTER OF FUHST v. FOLEY, 45 NY2d 44, 410 NYS2d 56 (1978); MATTER OF GOWAN v. KERN, 41 NY2d 591, 394 NYS2d 579 (1977); MATTER OF WOLFSON v. CURCIO, 150 AD2d 586, 541 NYS2d 243 (2nd Dept., 1989); MATTER OF FRINK v. ZONING BOARD OF APPEALS, 149 AD2d 592, 540 NYS2d 679 (2nd Dept., 1989)).

In determining whether to grant an area variance, the Board must consider the following factors:

- (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.

(Town Law §267-b; SASSO v. OSGOOD, 86 NYS2d 374, 633 NYS2d 259 (1995)).

“SEQRA’s” fundamental policy is meant to inject environmental considerations directly into governmental decision making so that “social, economic and environmental factors are considered together in reaching proposed activities” (MATTER OF COCA-COLA v. NY CITY BOARD OF ESTIMATE, 72 NY 2d 674, 679 (1988) citing ECL §8-0103 (7)). “SEQRA” requires the lead agency (defined as the governmental entity principally responsible for carrying out, funding or approving the proposed action (ECL §8-0111(6); 6 NYCRR 617.2(v)) to initially determine whether a proposed action may have a significant effect on the environment (ECL §8-0109(2), (4); 6 NYCRR 617.2). If no significant effect is found, the lead agency may issue a “negative declaration” identifying areas of environmental concern, and provide a reasoned explanation of the reasons why the proposed action will not significantly affect the environment (6 NYCRR 617.6(g), (MATTER OF COCA-COLA v. NY CITY BOARD OF ESTIMATE, supra). If the lead agency determines that there may be significant environmental impact, it must see to it that an environmental impact statement (EIS) is prepared, which fully evaluates the potential environmental effects, assesses mitigation measures, and considers alternatives to the proposed action (ECL §8-0109(4), (2)).

In this case the variance application sought by the applicant did not concern any “proposed” action which would have triggered a “SEQRA” or environmental review. The application sought to legalize twenty plus year old structures and did not concern a proposal which could have significantly affected the surrounding environment. There was therefore no need for “SEQRA” procedures since the relief sought was clearly a Type II action. Similarly no reasonable basis exists to vacate the “BOARD’s” decision concerning requirements of Chapters 76 & 80 of the Town Code based upon the “Town’s” determination that a “CEHA” permit was not required where the structures sought to be legalized pre-date the relevant Code provisions.

A variance is designed to authorize a specific use of property in a manner otherwise prescribed (PANARIELLO v. DEMETRI, 99 AD2d 770, 472 NYS2d 17 (2d Dept., 1984)). The purpose of variance is to afford a safety valve, so that the carrying out of the strict letter of the zoning ordinance may not occasion unnecessary hardship to particular property owners. But even where a variance is granted a necessity persists

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to maintain public welfare and safety (BAZINSKY v. KESBEC, 259 AD 467, 19 NYS2d 7116 (1st Dept., 1940). affirmed 286 NY 655 remittitur amended 286 NY 723)).

A zoning board is authorized to impose reasonable conditions for area variances as (1) are related and incidental to the proposed use of the property, (2) are consistent with the spirit and intent of the zoning ordinance, and (3) minimize any adverse impacts resulting from the variance BAKER v. BROWNLIE, 270 AD2d 484, 705 NYS2d 611 (2d Dept., 2000); SHORELANDS INC. V. MATTHEW, 230 AD2d 862, 646 NYS2d 560 (2d Dept., 1996)).

The record indicates that the premises in issue were repaired and in some respects rebuilt as a result of significant damage incurred from the effects of a hurricane in the 1980's. Clearly the "BOARD's" determination took into account the fact that the additions performed on the house and upon the deck had been in place for more than two decades and posed no drastic or substantial change on the character of the community. The "BOARD's" decision also considered the factors set forth pursuant to Town Law Section 267-b prior to granting the relief requested. However the record is unclear concerning whether the addition to the kitchen was included as part of this application and whether the lot dimensions submitted by the applicant's surveyor are accurate given that the filed map has different lot area dimensions. Based upon these issues not having been satisfactorily resolved by the "BOARD" the Court directs that this matter be remitted to the "ZONING BOARD" for resolution of these issues. It appears that respondents/applicants are entitled to area variances under the circumstances with imposition of reasonable restrictions of further development. The "BOARD's" determination must therefore be vacated to the extent that a further hearing and determination is necessary to address the issues set forth hereinabove. Accordingly it is

ORDERED that petitioner's CPLR Article 78 petition seeking a judgment annulling the determination of respondent BOARD OF ZONING APPEALS OF THE TOWN OF BROOKHAVEN ("ZONING BOARD") of September 6, 2006 (Findings and Conclusions adopted January 3, 2007) is deferred pending a further report from the "ZONING BOARD". The matter is remitted for further consideration of the grant as it related to the kitchen and a re-examination as to the size of the affected lot. A report and determination as to those matters shall be submitted to the Court on or before September 21, 2007.

Dated: July 24, 2007

MELVYN TANENBAUM

J.S.C.

NON-FINAL DISPOSITION