Hahn v Karl
2007 NY Slip Op 32994(U)
September 19, 2007
Supreme Court, Suffolk County
Docket Number: 0030363/2006
Judge: Melvyn Tanenbaum
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SHORT FORM ORDER

INDEX No. 30363-2006

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

PRESENT:
Hon. MELVYN TANENBAUM
Justice

001 - CASE DISP
MOTION #002, 003- Mot D
R/D: 021307
S/D 072507

SANG HAHN

Plaintiff,

- against -

TERRY J. KARL, Chairman, MARVIN J. COLSON, Vice-Chairman, PAUL M. DECHANCE, KERI PERAGINE, EDWARD P. MORRIS, JR. JAMES WISDOM and MICHAEL SCHAEFER, Constituting the BOARD OF ZONING APPEALS OF THE TOWN of BROOKHAVEN

Defendants.

PLTF'S/PET'S ATTY:
ERIN SIDARAS, ESQ.
320 West Main Street
Sayville, New York 11752

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

Upon the following papers numbered 1 to 63 read on this motion for an order pursuant to CPLR § Notice of Motion/Order to Show Cause and supporting papers 1-8 ; Notice of Cross Motion and supporting papers 9-19 Answering Affidavits and supporting papers 20-29 Replying Affidavits and supporting papers 30-32 Other 33-57, 58-59, 6-61, 62-63 ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this CPLR Article 78 petition by petitioner SANG HAHN ("HAHN") seeking a judgment annulling the October 11, 2006 determination of the respondent ZONING BOARD OF APPEALS ("ZONING BOARD") which denied petitioner's area variance application for construction of a proposed one family dwelling and the cross motions by DAVID J. RAIMONDO ("RAIMONDO") and SHORIDGE HILLS ASSOCIATION INC. ("SHA") each seeking an order an order pursuant to CPLR Section 7802(d) granting leave to intervene as additional party respondents and amending the caption of this proceeding are determined as follows:

On March 31, 1982 petitioner "HAHN" purchased two contiguous lots in from WARREN and JOYCE WENBERG. Lot #22 contained a residential dwelling with a certificate of occupancy while lot #34 was improved with a tennis court. Petitioner sold lot #22 in 2004. "HAHN"s" application seeks an area variance to build a single family dwelling on lot #34. The parcel is 14,892 square feet (.37 acres) with 100 foot frontage and 56 foot rear yard in an A-1 Residential Zone. A-1 Residential zoning requires 175 foot frontage, 75 foot total side yard, 60 foot rear yard setback and a 40,000 square foot lot area.

Following a public hearing held on September 13, 2006 the respondent "ZONING BOARD" by decision dated October 11, 2006 denied "HAHN's" area variance application. The "BOARD" concluded: 1) that granting the application would cause an undesirable change in the character in the neighborhood and have an adverse impact on the neighborhood's physical and environmental condition; 2) the parcel is best used as an accessory use to the adjacent lot formerly owned by the petitioner; 3) the relief requested is substantial; 4) the variance is self-created since both parcels were commonly owned by the petitioner until "HAHN" sold the adjoining lot in 2004; 5) the land division is substantial and out of character with the neighborhood considering the tapering nature of the rear yard.

This petition seeks to set aside the "BOARD'" determination claiming that it was arbitrary, capricious and not supported by substantial evidence in the record. In support "HAHN" submits a verified petition together with an attorney's affidavit and an attorney's affirmation and claims that no relevant evidence was submitted to support the "BOARD's" conclusion that the requested variance would produce an undesirable change in the character of the community or have an adverse impact on the neighborhood's physical and environmental condition. Petitioner claims that none of the surrounding parcels within a 500 foot radius conform to the Town's A-1 Residential zoning requirements and argues that no factual basis exists in the record to support the "BOARD's" findings that "HAHN's" application would be detrimental to nearby properties. Petitioner claims that the respondent's determination was largely influenced by community opposition which was led by the proposed additional respondents who testified during the September hearing. It is petitioner's position that community opposition cannot form the predicate to justify denying the variances requested. Petitioner also claims that no credible proof was submitted, other than an engineer's mere visual parcel inspection, to support respondent's contention that flooding would likely occur if a dwelling were built on the lot and argues that all but two lots in the neighborhood are developed with single family residences. Petitioner contends that the Civic Association's motion seeking intervention should be denied since "SHA" had an adequate opportunity to oppose petitioner's application during the September, 2006 hearing. Petitioner also contends that the return submitted by the Town was incomplete since respondent failed to include all relevant records which were considered by the "BOARD" including a photograph offered by proposed respondent "RAIMONDO", a copy of the filed map of SHORIDGE HILLS offered by petitioner's expert during the hearing and a copy of a summons submitted by proposed respondent "RAIMONDO" concerning the adverse possession action instituted by "RAIMONDO" against "HAHN". Petitioner claims that the "BOARD's" decision to deny the area variance application was in all respects arbitrary and not supported by substantial evidence in the record and must therefore be vacated.

In opposition and in support of their motions seeking leave to intervene proposed additional respondents "RAIMONDO" and "SHA" submit affidavits from "RAIMONDO" and the Civic Association's vice president and claim that their motions must be granted since they are interested parties whose interests will be affected by the respondent "BOARD's" decision. "RAIMONDO" claims that his property is adjacent to "HAHN's" and will be directly affected if the petition is granted. "RAIMONDO" asserts that the "BOARD's" determination was rationally based and supported by substantial evidence and must not therefore be vacated. "RAIMONDO" also claims that petitioner's parcel's narrow shape, topographical elevation and size warrant its use as an accessory lot and that evidence presented by an engineer confirms the likelihood that his parcel would be flooded if "HAHN" were permitted to build a dwelling as proposed on the parcel. "SHA" claims that it has an interest in petitioner's application since the rural beach community would be adversely affected by "HAHN's" proposed construction and since residents pay an annual fee to maintain the community property

[* 3]

The test to determine whether in a particular proceeding intervention should be granted, is whether the proposed intervenors have a real and substantial interest in the outcome of the proceeding(PLANTECH HOUSING, INC. v. CONLON, 74 AD2d 920, 426 NYS2d 81 (2nd Dept., 1980)).

The proposed intervenors have made a sufficient showing to justify granting both applications seeking to intervene in this proceeding.

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, teh 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)).

The record indicates that the respondent "ZONING BOARD" weighed each of the factors set forth in the statute and determined that petitioner was not entitled to the area variance requested. Although none of the surrounding properties conform to A-1 Residential zoning requirements, petitioner's application seeking front and rear yard variances was substantial given the character and placement of the lot in

relation to other nearby lots. Moreover petitioner's application resulted from its own act in selling one of the adjoining lots which clearly merged by common ownership since 1972. Based upon a review of this record it cannot be said that the "BOARD's" decision was irrational or an abuse of discretion (MATTER OF FUHST v. FOLEY, supra.; KRUCKLIN v. NAMMACK, 149 AD2d 596, 540 NYS2d 272 (2nd Dept., 1989)). No basis exists therefore to grant the petition. Accordingly it is

ORDERED that the motions seeking leave to intervene in this proceeding pursuant to CPLR Section 7802 are granted. The caption is hereby amended to include the additional party respondents, and it is further

ORDERED that petitioner's CPLR Article 78 proceeding seeking a judgment annulling respondent "ZONING BOARD's" October 11, 2006 determination is denied, and it is further

ORDERED that the petition is hereby dismissed.

Dated: September 19, 2007

MELVYN TANENBAUM

J.S.C.

FINAL DISPOSITION