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SHORT FORM ORDER md

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY

Justice.

IAS PART 8
NASSAU COUNTY
INDEX NO. 10899/07

In the Matter of the Application of
DUNWOOD PARK COMPANY and ESTATE OF
FRANK T. WATERS,

Petitioner,

MOTION DATE: 8/9/07
MOTION SEQUENCE NO. 1
X X X

- against -

THE BOARD OF ZONING AND APPEALS OF
THE TOWN OF NORTH HEMPSTEAD,

Respondent(s).

The following papers read on this motion:

Notice of Motion/Order to show cause	1-3
Answering Affidavits	4-6
Replying Affidavits	7,8
Briefs	9,10

Upon the foregoing papers, it is ordered that this application by petitioners for a judgment pursuant to CPLR Article 78 annulling respondent's denial of petitioners' applications for yard width variances to enable the premises located at Section 6 Block 64 Lot 22 on the Land and Tax Map of Nassau County and also known as 46 Lowell Road, Port Washington, New York, to be subdivided into two residential building lots and granting petitioners' application for the yard width variances for said premises is denied.

This is a proceeding to annul respondent's determination denying two variances to petitioners, which, if granted, would have enabled petitioners to subdivide residential property at 46 Lowell Road in Port Washington (premises) into two building lots for

single family homes.

Dunwood Park, Co., LLC. (hereinafter "Dunwood") entered into a contract with the Estate of Frank T. Waters (hereinafter "Estate") to purchase the premises in December of 2006. Dunwood intended to subdivide the premises into two lots, demolish the existing house and build a single family dwelling on each lot. The premises is at the northeast corner of Lowell and Guiford Roads.

Dunwood applied to the Nassau County Planning Commission for a waiver of subdivision approval, which was adjourned sine die before a hearing could be held. On January 6, 2006, the Town Board of the Town of North Hempstead adopted amendments to the Town's Building Zone Ordinance (BZO) which changed the way that minimum lot width was measured for residential properties. The premises are in a Residential B District of the Town, and the amendment relating to that district is Section 70-37 of the BZO (a new code section). The application for the subdivision was submitted to the Building Department of the Town for review. It denied both applications, under Section 70-37.1B of the code, deciding that a variance of the minimum lot width requirements was needed for each of the proposed lots. In Application 20065396 the Building Department found that the minimum permitted width of Parcel 1 was 69.4 feet, but the lot was only 66 feet wide. In Application 20065396 it determined Parcel 2 needed to be the same width of 69.4 feet, but the lot was only 67.6 feet wide.

Petitioners applied to respondent for the variances. The applications were submitted to the Nassau Planning Commission which recommended they be denied. A hearing was held on November 15, 2006. A decision denying the variances was issued by respondent on May 16, 2007 and filed with the Town Clerk on May 30, 2007.

The respondent BZA concluded that the granting of the variances would impose a detriment on the community that outweighs the benefit sought to be obtained by the applicants. Section 70-37.1.B of the Town Code provides that the minimum lot width be the same as the average lot width of existing residential lots within 200 feet on each side of the lot within the same blockfront(s) and district. For lots within 200 feet of an intersection, the blockfront(s) shall be assumed to continue across the intersection,

excluding the width of the intersection. The BZA concluded that "Section 70-37.1.B is unique in that it mandates comparison of the subject premises with neighboring properties, subject to the same zoning within 200 feet in each direction on its specific blockfront. Within that zone of measurement, the proposed lot width dimensions are out of character." The BZA also stated that "[t]he Board seldom grants variances from zoning restrictions based upon averages. Zoning restrictions which fix minimums and maximums are applicable equally throughout a zoning district, regardless of the development which characterizes the area. Zoning requirements based upon an average take into account the pattern of development of the area in the immediate vicinity of the property at issue."

Through recent amendments to the code creating and subsequently restricting floor area ratios, tightening height restrictions, creating average lot width requirements and up-zoning several areas the Town Board demonstrated its intent to control population density and preserve the character of its neighborhoods. BZA found that allowing the subdivision would run counter to the Town Board's clearly enunciated legislative policy and out of character with neighboring properties. "The proposed creation of two substandard lots and the introduction of an additional dwelling into the neighborhood would also lead to an adverse effect on physical and environmental conditions in this zoning district. The Board agrees with the Commission that an additional dwelling adds to neighborhood, road and on-street parking congestion, increases the potential for traffic accidents and pedestrian/vehicular conflicts, and increases the burden on municipal services. Placement of two dwellings on substandard lots also has an adverse physical and environmental effect on neighboring properties, inclusive of reduction in present set backs, possible loss of trees and vegetation, and potential adverse impacts on the present levels of exposure to sun, light and sky. Further, as stated by the commission, if this Board were to grant the requested relief, it would set a precedent for development of similar substandard lots, with the strong potential of adding additional residences to this neighborhood. In this particular neighborhood, while additional variances might be required for lot area, the precedent would be set for average lot width. The specific benefit, construction of two new single-family dwellings at the premises, cannot be achieved without the requested variances."

In the **Matter of Russia House at Kings Point, Inc. v Zoning Board of Appeals of Village of Kings Point** (40 AD3d 767) the Court stated that:

> "Local zoning boards have broad discretion in considering applications for area variances and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary and capricious, or an abuse of discretion [internal citations omitted]. Therefore, the determination of a zoning board should be sustained if it has a rational basis and is not illegal or an abuse of discretion [internal citations omitted].
>
> In determining whether to grant an area variance, a zoning board is required . . . to engage in a balancing test 'weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the variances is granted.' [internal citations omitted]. The zoning board is required to consider whether: (1) 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 variances, (2) the benefit sought by the applicant can be achieved by some method, other than an area variance, feasible for the applicant to pursue, (3) the required area variance is substantial, (4) the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district, and (5) the need for the variance was self created." [internal citations omitted].

The benefit to petitioners of obtaining the variance is the maximization of profit. Against that economic benefit, the BZA engaged in the appropriate analysis, examining whether granting the

area variance would have produced an undesirable change in the character of the neighborhood or a detriment to nearby properties. The BZA looked at the properties within a 200 foot radius of the subject parcel as the relevant "neighborhood." The investigation undertaken by the BZA was concerned not only with the proposed lot width deviations but also with the cumulative effect of such deviations. The analysis also looked at the bulk of the residential lots in the area to ascertain how the substandard lots (in terms of lot width) would "fit in" with the neighborhood.

The BZA's study found that the neighborhood is comprised of oversized lots. The lot areas of the residential properties in the neighborhood ranged in size from 7085 square feet to 12375 square feet. The average lot area in the neighborhood was 8308 square feet. The areas of the proposed lots, should the lot width variances have been granted, would have been 6026 square feet and 6462 square feet. It is acknowledged by all sides that the areas are code compliant. (Town Code § 70-37. Plot area states that "No dwelling or other building shall be constructed on a lot containing an area of less than 6,000 square feet.") However, according to the calculations of BZA they represent a sharp deficiency from the average lot area in the neighborhood; to wit, roughly 27% and 22% respectively. The respondent concluded that the two smaller lots would be out of character with the oversized lots in the neighborhood and create an undesirable change.

The BZA also considered that the subject parcel is a corner lot, and compared the lot area of the proposed corner lot with the lot area of the four other corner lots in the neighborhood. After undertaking this analysis, it was found that the average lot area of those four corner lots was 9879 square feet, while the lot area of the proposed corner lot was 6461 square feet. That proposed square footage represents a deficiency of roughly 35% as compared to the average lot area of the other corner lots in the neighborhood.

The BZA acknowledged in its findings of fact that the specific benefit sought by the applicants, the subdivision of the parcel and the construction of two new single family dwellings, could not be achieved without a variance. Petitioners' inability to maximize the economic potential of the property, however, does not mandate the

grant of a variance. The Board considered the petitioners' benefit (maximum economic gain) against the detriment to the community. The record before the BZA, and its findings of fact, indicate that it engaged in the appropriate balancing test. The property already contains a habitable single family residence. Petitioners do not dispute they could sell the property for a substantial sum without the variance and the concomitant subdivision.

While the BZA denials concerning variances have been struck down where the properties neighboring the petitioner's property are equally substandard, this is not the situation in the within action (see, for example, **Matter of Sautner v Amster**, 284 AD2d 540; **Matter of Easy Home Program v Trotta**, 276 AD2d 553). In those cases, since the neighboring properties and/or houses were equally substandard, the aesthetic concerns did not have the potential of adversely impacting the present character of the neighborhoods as the two proposed parcels would in the within action.

Dunwood's contract to purchase the lot was contingent upon it obtaining the necessary variance so as to allow it to move forward with a subdivision. Given such contingence, its economic loss is minimal (**Tetra Builders, Inc. v Scheyer**, 251 AD2d 589). As to the contract vendor, while the subject parcel was purchased and utilized prior to the average lot width legislation, there was never any guarantee that the parcel could be subdivided. The only benefit to the Estate is additional profit, and that benefit was rationally deemed subordinate to the negative effect granting the variance would have on the character of the community. Dunwood executed this condition in its contract with knowledge of the governing zoning ordinance so that any hardship it faces is self-created and given its "out clause," its economic loss is minimal. Likewise, the BZA considered that the Estate's ownership of the property pre-dated the enactment of the ordinance, and that in the BZA's opinion, its hardship was not self created. Nevertheless, it was a factor that was greatly subordinate to the negative impact that the proposed subdivision would have on the character of the community (**Matter of Westervelt v Zoning Board of Appeals of the Town of Woodbury**, 7 AD3d 964).

Both the petitioners' and the respondent's counsel have presented mathematical computations to support their respective

positions. Annexed to the Affidavit of petitioners' counsel is a "Statement of Lot Widths for Properties Within a Radius of Two Hundred Feet of 46 Lowell Road, Port Washington, New York." The affidavit states "how the calculations to which petitioners referred in their petition were computed and why they substantiate petitioners' assertions that one of the two lots, Parcel I, only needs a minimal variance, and that a variance is required for the other lot, Parcel II, only if an abutting right-of-way owned by LIPA is excluded from the calculations." Petitioners' inclusion in their calculations of the LIPA right of way is misplaced. The right-of-way (Section 6, Block 64, Lot 23) is a Class 4 utility property and taxed as such. Although located in a residential zone, it is not residential, and not capable of residential development. Further, petitioner's argument that the BZA factored more lots into the calculation by misreading the definition of "blockfront" is misplaced. Town Code defines "blockfront" as "[t]he street and the space surrounding it, including the buildings and open space fronting on both sides of the streets. [Added 1-3-2006 by L.L. No. 1-2006]" (emphasis added). "Blockfront" by its definition includes lots on both sides of Lowell Street.

At the hearing on November 15, 2006 before the BZA the attorney for the petitioners stated:

> "... it's the most confusing zoning ordinance I have ever seen. I don't know how to calculate anything. You can go up and down the streets, especially with this property which is somewhat unique, and come up with a whole slew of different calculations." (Minutes of BZA hearing 11/15/06 at p. 39).

Therefore, it is not surprising that the petitioners would arrive at a different set of figures on which to base their conclusions. The petitioners' evidence presented to the BZA is insufficient to set aside the determination of the respondent based on calculations used by the respondent, the survey by Albert W. Tax dated December 8, 2005, the 200' Radius Map and the Map of Southport dated May 20, 1949 which demonstrate that the variances sought on the resultant lots are not consistent with the present character of the neighborhood. The BZA's interpretation of a zoning

ordinance must be given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable, an abuse of discretion, nor inconsistent with the governing statute. (**Matter of Falco Realty, Inc. v Town of Poughkeepsie Zoning Bd. of Appeals**, 40 AD3d 635, 636). A zoning board's determination must be upheld if it is rational and supported by substantial evidence, even if the reviewing court would have reached a different result. (**Ifrah v Utschig**, 98 NY2d 304; **Matter of PMS Assets v Zoning Board of Appeals of Vil. of Pleasantville**, 98 NY2d 683; **Matter of Savetsky v Board of Zoning Appeals of Town of Southampton**, 5 AD3d 779, 780).

Based on the foregoing the court finds the decision dated May 16, 2007 was not arbitrary, capricious or an abuse of discretion (**Matter of Falco Realty, Inc.**, supra). The petition is dismissed.

Dated: OCT 03 2007

J.S.C.

ENTERED
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COUNTY CLERK'S OFFICE