

Matter of Gallo v Town of Islip Zoning Bd. of Appeals

2007 NY Slip Op 33849(U)

November 26, 2007

Supreme Court, Suffolk County

Docket Number: 0019427/2007

Judge: Arthur G. Pitts

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Supreme Court of the State of New York
IAS Part 43 - County of Suffolk

PRESENT: HON. ARTHUR G. PITTS

IN THE MATTER OF AN ARTICLE 78
 PROCEEDING

ROBERT GALLO, RENATE GALLO

Petitioners,

-against-

TOWN OF ISLIP
 ZONING BOARD OF APPEALS,

Respondents.

ORIG. RETURN DATE: 7/30/07
FINAL SUBMIT DATE: 8/30/07
MOTION SEQ. NO.: 001-MD

PLTF'S/PET'S ATTY:
ROBERT D. GALLO, ESQ.
 10 Wendover Road
 Sayville, New York 11782

DEFT'S/RESP'S ATTY:
ISLIP TOWN ATTORNEY
 By: Michael p. Walsh
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 Islip, New York 11751

TOWN OF ISLIP
ZONING BOARD OF APPEALS
 40 Nassau Avenue -Suite 1
 Islip, New York 11751

Upon the following papers numbered 1 to 8 read on this motion article 78
 Notice of Motion/OSC and supporting papers 1-6; Notice of Cross-Motion and supporting papers _____;
 Affirmation/affidavit in opposition and supporting papers 7-8; Affirmation/affidavit in reply and supporting papers _____
 Other _____; (and after hearing counsel in support of and opposed to the motion) it is,

ORDERED that petitioners Robert Gallo and Renate Gallo's application for a judgment, pursuant to CPLR Article 78, annulling the determination of the respondent Zoning Board of Appeals of the Town of Islip ("ZBA") which denied their application for permission to reconfigure the existing garage structure of their premises located at 10 Wendover Road, Sayville, Town of Islip, Suffolk County, New York to include a garage, storage, laundry room, half bath and den upon the grounds that the determination of said Board is illegal, arbitrary, capricious, unjust, contrary to law, an abuse of discretion and an unconstitutional taking of property without due process is denied under the circumstances presented herein.

Petitioners Robert Gallo and Renate Gallo are the owners of a one family dwelling located at 10 Wendover Road, Sayville, Town of Islip, Suffolk County, New York. (Suffolk County Tax Map # 0500-430.00-04.00-027.000) The subject parcel is located in a residential B zoning district as defined by Islip

Town Code 68-105. Pursuant to Town Code 68-115 (A) all main buildings located in a residential B zoning district are required to have a minimum side yard set back of fourteen (14) feet from the property line. By prior decision of the respondent ZBA dated August 8, 2006 the petitioners were granted permission to convert a screened porch to habitable space having side yards of 4.8 feet and 13.2 feet instead of required 14 feet each and total side yard 18 feet instead of required 28 feet, to alter roof line of attached garage and porch having side yards of 4.8 feet and 13.2 feet instead of required 14 feet each and total side yard 18 feet instead of required 28 feet, to erect one-story entry portico leaving floor area ratio of 29.82% instead of permitted 25%, under the specific condition that the roof peak not exceed 14 feet from the ground, and that it is built in accordance with the diagrams that have been submitted and that the garage not be used for habitable space without seeking further permission.

On February 21, 2007 the petitioners filed a second application with the ZBA seeking the following additional relief:

Permission to reconstruct an existing attached garage & sun porch in conformance w/NY Residential State Const.Code having exist. Side yard setback of 4.8 feet and 13.2 feet instead of the Req 14 feet and totals of 18 feet instead of the required 28 feet. The reconfigured structure to consist of garage, storage, laundry room, ½ bath and den as per attached plan.

A public hearing was held on this application on March 27, 2007. Testimony was elicited from Kristy Winser of the Town of Islip Department of Planning and Development, Robert M. Paul, the petitioners' architect and Robert and Beatrice Clark, owner's of the adjacent premises. By decision dated June 5, 2007 the petitioners' application was denied, the respondent ZBA finding that the previous decision did not allow for the conversion of the garage into habitable living space with the inclusion of a laundry room, den and half bath and that by said previous determination "this board never intended nor has ever granted living space 4 feet from the property line on new construction. The applicants here have attempted to take a decision of this Board, which specifically said you cannot do that and use it as a stepping stone to try to create living space 4 foot from the property line." By the testimony of their architect, Mr. Paul it is apparent that the petitioners were aware that the relief previously granted by the ZBA was insufficient thereby requiring a second application for further variance relief; that is, although he initially argued that a half bath and laundry does not constitute habitable space, he later stated that "so if we convert the existing porch to living space and re-roof the garage with a flat roof and put no bathroom and laundry in there, we wouldn't even have to come before the board."

Town Law Section 267-b provides that "in making its determination whether to grant an area variance, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or

community by such grant. In making such determination the board shall also consider: (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 other 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." In applying Town Law § 267-b(3)(b) the 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 area variance is granted, and that an applicant need not show 'practical difficulties' as that test was formerly applied." (*Sasso v. Osgood*, 86 N.Y.2d 374, 633 N.Y.S.2d 259, 264 [1995]).

In the matter at bar the petitioners are requesting a 71% degree of relaxation of the applicable code. In opposition to the petition, the respondent avers that the variance would create an undesirable change in the area by allowing for a much closer construction of livable space on individual lots and that the hardship presently affecting the petitioners is self imposed by their failure to comply with the prior decision of the ZBA. The petition fails to address either of these issues, nor were they addressed by the petitioners or their representatives at the public hearing of their application.

"It is well settled that 'the determination of the responsible officials in the affected community will be sustained if it has a rational basis and is supported by substantial evidence in the record' (*Matter of Cowan v. Kern*, 41 N.Y.2d 591, 598, 394 N.Y.S.2d 579, 363 N.E.2d 305; see also, *Matter of Fuhst v. Foley*, 45 N.Y.2d 441, 444, 410 N.Y.S.2d 56, 382 N.E.2d 756)." (*Buckley v. Amityville Village Clerk*, 264 A.D.2d 732, 694 N.Y.S.2d 739, 741 [2nd Dept. 1999]) In reviewing a determination of a zoning board of appeals as to an application for an area variance, the scope of judicial review is limited to whether the action taken is illegal, arbitrary, or an abuse of discretion (see, *Matter of Tarantino v. Zoning Bd. of Appeals of Town of Brookhaven*, 228 A.D.2d 511, 644 N.Y.S.2d 296; *Matter of Smith v. Board of Appeals*, 202 A.D.2d 674, 609 N.Y.S.2d 912). The court may not substitute its judgment for that of the Board unless its determination is arbitrary or contrary to law (see, *Matter of Brucia v. Planning Bd. of Town of Huntington*, 157 A.D.2d 657, 549 N.Y.S.2d 757). (*Baker v. Brownlie*, 248 A.D.2d 527, 670 N.Y.S.2d 216 [2nd Dept. 1998])

It is clear that upon review of the record herein, there was a rational basis to warrant the respondent Zoning Board of Appeals denial of the subject variance. The subject variance seeks a side yard setback of 4.8 feet from the required 14 feet as well as converting garage space to habitable living space resulting in the living space being only 4.8 feet from the adjoining property line. Furthermore, the respondent ZBA's finding that such variance would result in a negative effect on the surrounding neighborhood because larger homes would be squeezed into lesser sized lots was not rebutted by the petitioners.

Accordingly, based upon the foregoing and the circumstances presented herein, the action on the part of the respondent Zoning Board of Appeals in denying the subject variance was not illegal, arbitrary and

capricious, nor an abuse of discretion and, as such, the petition is denied.

This shall constitute the decision and order of the Court.

Settle judgment

So ordered.

**Dated: Riverhead, New York
November 26, 2007**



J.S.C.

CHECK ONE: FINAL DISPOSITION NON-FINAL DISPOSITION DO NOT SCAN