

Matter of David v Baranello

2007 NY Slip Op 33881(U)

November 27, 2007

Supreme Court, Nassau County

Docket Number: 7197-07/

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

In the Matter of the Application of

ALVIN DAVID, JACOB SIMON and GEORGE
ABRAHAM,

Petitioners,

ORIGINAL RETURN DATE: 06/01/07
SUBMISSION DATE: 10/19/07

for Judgment Pursuant to Article 78, Civil
Practice Law and Rules

INDEX No.: 007197/07

-against-

PATRICIA A. BARANELLO, Chairwoman, JOSEPH
BORDINO, SCOTT F. GUARDINO, JACQUELINE
A. WATTERS, SUSAN CLONINGER, JOHN J.
FANNING and LOIS SCHMITT, constituting the
members of the Zoning Board of Appeals of the Town
of Oyster Bay,

MOTION SEQUENCE #1

Respondents.

The following papers read on this motion:

Notice of Petition.....	1
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This Petition pursuant to Article 78 of the CPLR for a judgment vacating and annulling the determination of the respondent Zoning Board of Appeals of the Town of Oyster Bay ("Zoning Board") dated March 15, 2007, which denied petitioners' application for area variances for real property located at 1226 Cortland Avenue in Hicksville, N.Y. is determined as provided herein.

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Peter Abraham owns the real property at 1226 Cortland Avenue in Hicksville. He acquired ownership in 2006. The property is 100' in width and 103' in depth, with a total area of 10,300 square feet. The property is presently improved with a single family wide-line ranch in which petitioner Abraham lives. Petitioners sought to demolish the existing home; to subdivide the property into two 50 foot wide by 103 foot deep lots; and, to build two colonial homes, each with a detached garage. Petitioners originally sought to subdivide the property into two 5,150 square foot lots, although 7,000 square feet was required by the Village Code and they sought a width of 50 feet for each lot, although 70 feet was required by the Village Code. Petitioners also sought side yards of 18 feet although 20 feet was required by the Village Code and a garage height of 12.5 feet although 12 feet was the Village Code's limit. In addition, petitioner originally sought lot coverage of 30.9% although only 25% was allowed by the Code. Petitioners' applications for building permits were denied on September 5, 2006 on the ground that numerous variances were required, to wit: area, width, side yard and height variances.

Petitioners thereafter made application for variances to the Zoning Board of Appeals which, in turn, referred the application for initial review by the Nassau County Planning Commission.

By Resolution dated November 17, 2006, the Nassau County Planning Commission found that "[t]he application represents a significant departure from the standards of the Town zoning code for aggregate frontage . . . and aggregate area. . . ." It noted that "[t]he majority (66 percent) of properties within 200 feet of the subject site have greater property widths and are larger than each of the proposed lots." It further noted that "73 percent of properties along Cortland St. within 200 feet of the subject property have a greater width and are larger than each of the proposed lots." The Planning Commission concluded that "the proposed application represents a shoe-horn type subdivision that the Nassau County Planning Commission discourages" and that "[a]pproval of this substandard subdivision may establish a precedent for the creation of other substandard lots in the neighborhood." The Planning Commission further noted that "[t]he creation of substandard lots in an area adds to neighborhood road and on-street parking congestion, increases the potential for traffic accidents and pedestrian/vehicular conflicts, increases the burden on municipal services and may eventually change the character of a neighborhood." The Nassau County Planning Commission recommended that petitioners' application be denied.

A hearing was held before the Zoning Board of Appeals on January 25, 2007 during which petitioners modified their application and sought only three variances to enable the construction of cape cods with detached garages. Petitioners still sought a width variance allowing a 50 foot width where 70 feet is required and an area variance allowing a 5,150 square foot lot where 7,000 square feet is required. Having changed the design of the homes to cape cods, petitioners no longer needed a garage height variance and their lot coverage variance was reduced from 30.0% to 25.5%.

By decision dated March 15, 2007, the Zoning Board of Appeals denied petitioners' application. In considering the factors set forth at Town Law § 267-b(3)(b), it concluded that an undesirable change in the character of the neighborhood or a detriment to nearby properties would result if

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the variances were granted. The Zoning Board noted that the variances were substantial, in particular the width variance. It reasoned that only 10 of the 36 lots within a 200' radius of petitioners' property had frontage of 50' or less, thus 73% of the 36 nearby lots' frontage exceeded that proposed. The Zoning Board concurred with the Nassau County Planning Commission's findings that the variances would result in additional road congestion as well as the increased potential for traffic accidents and pedestrian/vehicular conflicts and agreed with the Planning Commission that the variances would increase the burden on municipal services as well as create a precedent in the neighborhood for similar substandard lots. And, the Zoning Board noted that the Town Board of the Town of Oyster Bay sought to prevent this kind of development in enacting the R1-7 zoning ordinance which sought to avoid "shoe-horn type subdivisions" and made "wide yards and quiet neighborhoods" of "paramount importance." The Zoning Board also noted that the applicants only sought profit since they did not intend to live at the properties and that a profit could be realized by increasing the value of the property by adding a second story without any area variances. The Zoning Board further noted that the need for the variances was entirely self-created and that no practical difficulties existed. The Zoning Board also stated that:

"the type of the structures that are proposed to be built on [the] parcel are center hall colonial homes. Such homes are not in keeping with the character of the homes that presently exist in the neighborhood. The photographs that were presented to this Board established that the other parcels in the neighborhood have homes that are predominantly cape or ranch style homes, without full second floors, and without detached garages.

The Zoning Board similarly found that petitioners sought a lot coverage of 30.9 percent to enable the construction of the colonials.

In passing on an application for an area variance, a Town Zoning Board is required to "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" (Town Law § 267-b(3)). In making such determination, the Zoning Board is required by Town Law § 267-b(3)(b) to 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 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."

"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

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community pressure” (Matter of Pecoraro v Board of Appeals of Town of Hempstead, 2 NY3d 608, 613 (2004), citing Matter of Ifrah v Utschig, 98 NY2d 304, 308 (2002); Matter of Twin County Recycling Corp. v Yevoli, 90 NY2d 1000, 1002 (1997); Matter of Cowan v Kern, 41 NY2d 591, 598 (1977)). In evaluating applications, “[a]s a general rule, a zoning board’s interpretation of a zoning ordinance ‘must be given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute’” (151 Route 17M Associates, LLC v Zoning Board of Appeals of Village of Harriman, 19 AD3d 422, 424 (2d Dept. 2005), *lv den.*, 6 NY3d 709 (2006), quoting Matter of Toys “R” Us v Silva, 89 NY2d 411, 418-419 (1996)).

“A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence (Matter of Pecoraro v Board of Appeals of Town of Hempstead, *supra*, at p. 613, citing Matter of Ifrah v Utschig, *supra*, at p. 308; Matter of Fuhst v Foley, 45 NY2d 441, 444 (1978)). “[T]he determination of a municipal land use agency must be confirmed if it ‘was rational and not arbitrary and capricious’” (Halperin v City of New Rochelle, 24 AD3d 768, 772, *lv den.* 7 NY3d 708 (2006), quoting Matter of Sasso v Osgood, *supra* at 384; *see also*, Merlotto v Town of Patterson Zoning Bd. of Appeals, 43 AD3d 926 (2nd Dept. 2007); Ram v Town of Islip, 21 AD3d 493 (2nd Dept. 2005)). “A determination will be deemed rational if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition” (Halperin v City of New Rochelle, *supra* at p. 772).

As the Court stated in Pecoraro v Board of Appeals of Town of Hempstead, *supra*, at p. 613, quoting Matter of Cowan v Kern, *supra*:

“The crux of the matter is that the responsibility for making zoning decisions has been committed primarily to quasi-legislative, quasi-administrative boards composed of representatives from the local community. Local officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community. Absent arbitrariness, it is for locally selected and locally responsible officials to determine where the public interest in zoning lies.”

“[A] reviewing court should refrain from substituting its own for the reasoned judgment of the zoning board” (Matter of Pecoraro v Board of Appeals of Town of Hempstead, *supra*, at p. 613). “It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them” (Matter of Cowan v Kern, *supra*, at p. 599; *see also*, Pecoraro v Board of Appeals of Town of Hempstead, *supra*, at p. 613).

The Zoning Board’s denial was based at least in part on the 30.9 percent lot coverage and the style of the homes originally proposed by petitioners to be built; i.e., colonials, which the Zoning

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Board found were not in character with the neighborhood. These factual conclusions, however, are not supported by the record. Indeed, even the Zoning Board noted that petitioners modified their proposal, substituting cape cod style homes, which decreased the lot coverage variance from 30.9 percent to 25.5 percent.

In view of these errors, the Zoning Board's determination is annulled and the matter is remanded to the Zoning Board for reconsideration and the issuance of a new determination.

This decision constitutes the order of the court.

Dated: 11-27-07

HON THOMAS P. PHELAN

Thomas P. Phelan

J.S.C.

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ENTERED

NOV 29 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**