MEMORANDUM DECISION

COPY

Index No: 021521/2007

SUPREME COURT - STATE OF NEW YORK
IAS/TRIAL PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. EDWARD D. BURKE
Acting Justice of Supreme Court

Motion R/D : **08/30/07**
Adj. Date : **11/28/07**
Mot Seq # : **001 MD**
CASE DISPOSED
SETTLE JUDGMENT

MEMORANDUM DECISION

In the Matter of the Application of

STANISLAW ZANIEWSKI and CZESLAWA ZANIEWSKI,

Petitioner(s),

For a judgment pursuant to Article 78 of the Civil Practice Laws & Rules

- against -

ZONING BOARD OF APPEALS OF THE TOWN OF RIVERHEAD,

Respondent(s),

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Petitioners commenced this Article 78 proceeding for a judgment reversing and annulling the April 12, 2007 determination of the respondent Zoning Board of Appeals for the Town of Riverhead (hereinafter referred to as "respondent ZBA") which denied the petitioner's application to construct a single-family residence on a lot known as SCTM# 600-124-2-15.3 and for several area variances from the setback, side yard and impervious surface area requirements imposed by Section 108-10.1 of the Riverhead Zoning Ordinance. For the reasons set forth below, the petition is granted.

In May of 1981, the petitioners acquired title to the 5,712 square foot vacant lot now owned by petitioner Czeslawa Zaniewski, that is the subject of this action, and an adjacent lot improved with a single-family residence. At the time of the 1981 purchase, the vacant lot was known as SCTM# 600-124-2-14 and the improved, adjacent lot was known as SCTM# 600-124-2-15. The conveyance of both lots to the petitioners was made under a single deed.

Sometime after the May 22, 1981 conveyance and prior to July 9, 1988, the Suffolk County Real Property Tax Service, upon request of the Riverhead Tax Assessor's office, combined the two (2) lots and assigned a new tax map designation number of 600-124-2-15.1 thereto. The area of said lot totaled some 14,168 square feet.

In July of 1988, the petitioners appeared before the respondent ZBA in connection with their filed application to subdivide lot 600-124-2-15.1 into the two (2) lots conveyed and described in the petitioners' deed. The application was denied because neither of the lots created by the subdivision met the minimum lot area requirement of 20,000 square feet then in effect. In 2005, the petitioners purported to subdivide the 14,168 square foot parcel, known as 600-124-2-15.1, into two (2) separate parcels by conveying the vacant lot, formerly known as 600-124-2-14, to petitioner Czeslawa Zaniewski and the improved lot, formerly known as 600-124-2-15, to petitioner Stanislaw Zaniewski. Thereafter, the improved lot was assigned the new tax map designation of 600-124-2-15.2 and the vacant lot was assigned the new tax map designation of 600-124-2-15.3.

Petitioner Czeslawa Zaniewski thereafter applied to the building inspector for a permit to construct a single-family residence on the vacant lot now known as 600-124-2-15.3. The application was denied for failure to conform to the zoning ordinance requirements and the matter was referred to the respondent ZBA subject to the filing of an application by said petitioner for variances. On January 10, 2006, petitioner, Czeslawa Zaniewski, submitted an application to the respondent ZBA for three (3) setback variances. The application was modified on September 14, 2006 to include the following relief: [1] reduction of the front yard setback of fifty (50) feet to thirty-five (35) feet; [2] reduction of the rear yard setback of sixty (60) feet to forty-one and nine-tenths (41.9) feet; [3] side yard width reductions of the required twenty-five (25) feet and thirty (30) feet to thirteen (13) feet, each; [4] an increase in the percentage of impervious surface from the permitted fifteen percent (15%) to twenty-five (25%); and [5] a reduction of the minimum square foot lot area from forty thousand (40,000) square feet to five thousand seven hundred twelve (5,712) square feet.

At the several public hearings conducted by the respondent ZBA in 2006 and 2007, the petitioners argued that their lot should be accorded single and separate status because the merger of the two (2) lots occurred at the behest of the town tax assessor and by reason of the assignment of the tax map designation of 600-124-2-15 by the Suffolk County Real Property Tax Service. The petitioners argued that the vacant lot was thus buildable as a right without the need for subdivision approval Petitioners further argued that the variances requested from the Residence A-40 zoning requirements, enacted in 2004, would not adversely impact the nature and character of the neighborhood nor cause an undesirable change as said neighborhood was principally developed well before the recent amendments adopted by the Riverhead Town Board in 2004.

On April 12, 2007, the respondent ZBA, by written findings and conclusions, denied the petitioners' application for the subject variances which would have effected a subdivision of the petitioners' improved parcel of real property into two (2) substandard lots. The respondent ZBA specifically found that the previously separate parcels merged by the petitioners' common ownership in 1981. Petitioners commenced this Article 78 proceeding in July of 2007 seeking a judgment reversing the April 12, 2007 determination of the respondent ZBA. After several adjournments, the matter was marked submitted for determination by the court on November 28, 2007.

Local zoning boards have broad discretion in considering applications for area variances (*see, **Matter of Inlet Homes Corp. v Zoning Board of Appeal of Town of Hempstead***, 2 NY3d 769, 780 NYS2d 298, 812 NE2d 1246; ***Matter of Pecoraro v Board of Appeals of Town of Hempstead***, 2 NY3d 608, 781 NYS2d 234, 814 NE2d 404; ***Matter of Ram v Town of Islip***, 21 AD3d 493, 801 NYS2d 40). A determination of a zoning board should be sustained on judicial review if it "was rational and not arbitrary or capricious"; *see, **Matter of Halperin v City of New Rochelle***, 24 AD2d 768, 809 NYS2d 98).

In making a determination as to whether to grant an area variance, local zoning boards are required by Town Law §267-b(3) 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 variance is granted: (***Matter of Ifrah v Utschig***, 89 NY2d 304, 307, 746 NYS2d 667, 774 NE2d 732; *see, **Matter of Pecoraro v Board of Appeals of Town of Hempstead***, *supra*; ***Matter of Sasso v Osgood***, *supra*).

Here, the court finds that the respondent ZBA's determination to deny the petitioner the requested area variances is subject to reversal. The respondent Board did not engage in the required balancing test and its determination to deny the subject variances does not have a rational basis in the record and was arbitrary and capricious. The court finds that the respondent ZBA offered no evidence or an attempt to engage in the requisite balancing test (*see, **Matter of Sasso v Osgood***, *supra*). The uncontradicted evidence clearly demonstrated that the character of the neighborhood would not be adversely affected by a grant of the relief requested. The lots at issue were two lots formed in 1924 and 1965; two separate lots were deeded to the petitioners herein in 1981. Un-merging the lots would be in keeping with the character of the neighborhood.

Additionally, the benefit sought can not be feasiblely achieved by any other method. The Town Law then directs the zoning board to determine whether the benefit sought by the applicant can be achieved by some method feasible by the applicant. The transcript of the hearings will demonstrate that the petitioners informed the respondent ZBA that, if they wished, the petitioners would reduce the size of lot 15.2 from 8,000> square feet to allow lot 15.3 to be larger than what it was on the filed subdivision map of 5,250 square feet. The respondent ZBA refused.

Also, the variance is not substantial. Rather, it is consistent with the well established character of the neighborhood in terms of size. The lot sizes that would be legalized by un-merger would be the same approximate size as every other lot in the neighborhood. Recognizing the two lots as they have existed for decades does not require a substantial variance. A grant of the variance to un-merge the two lots would not be substantial, but merely the same as the well established pattern of lot size and dimension. The respondent ZBA offered no evidence, beyond mere conclusory statements, that the variance requested is substantial.

Furthermore, there would be no adverse environmental impact to the neighborhood. Petitioners demonstrated that there would be no environmental impact resulting from the granting of the petitioners' request, as the properties that the petitioners seek to un-merge are the same in size and configuration as they were prior to the merger in 1981.

Finally, the petitioners' hardship was self-created, but was created by the Town when its assessor, *sua sponte*, and without notice to the petitioners, unilaterally requested Suffolk County Real Property to merge lots 14 and 15. The petitioners' submissions established Suffolk County Real Property will no longer merge property without the property owner's consent. The respondent ZBA was advised of this by the petitioners' counsel at a public hearing.

In view of the foregoing, the relief requested by the petitioner is granted and the respondent ZBA is directed to issue the necessary variance to un-merge the two parcels and to grant the requested set-back variances for lot 15.3.

Settle judgment.

Dated: December 27, 2007.

EDWARD D. BURKE, A.J.S.C.