

**Matter of Curtis v Town of Islip**

2007 NY Slip Op 34252(U)

December 4, 2007

Supreme Court, Suffolk County

Docket Number: 0151117/2007

Judge: Thomas F. Whelan

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The petitioner, Patrick A. Curtis, is the owner of a conforming parcel of land with a postal address of 217 Vanderbilt Boulevard., Oakdale, New York 11769 (hereinafter “subject property”), which is located in an AA residential zone and a Wetlands Overlay District in the Town of Islip. The lot is presently burdened with a two story, one family dwelling. Petitioner sought to subdivide the property to build an additional two story, one family dwelling on the subdivided lot.

Three public hearings were held on August 26, 2006, December 12, 2006 and March 61, 2007 before the Town of Islip Zoning Board of Appeals (hereinafter “Board”), at which petitioner’s counsel appeared and testified on his behalf. In an unanimous decision dated April 17, 2007, the Board denied the application. Petitioner then commenced this Article 78 proceeding seeking to nullify the Board’s decision alleging that the denial was a violation of due process, an error of law, arbitrary, capricious and an abuse of discretion. The application is timely.

When considering an application for an area variance, a zoning board is required under Town Law § 267-b(3)(c) to engage in a balancing test and weigh the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood in order for the area variance to be granted. In considering the application, the Board is required to consider five criteria: (1) whether the granting of the variance would produce an undesirable change in the character of the neighborhood or a detriment to neighboring properties; (2) whether the benefit sought can be achieved by some method, feasible to the applicant, other than a variance; (3) whether the requested variance is substantial; (4) whether the granting of the variance would have an adverse affect upon the physical or environmental conditions in the neighborhood; and (5) whether the alleged difficulty is self created (*see Matter of Pecoraro v Board of Appeals of the Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234 [2004]; *Ifrah v Utschig*, 98 NY2d 304, 746 NYS2d 667 [2002]; *Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 259 [1995]). While the last factor is not dispositive, it is also not irrelevant. The role of a court is to determine whether the board’s findings concerning each of the forgoing factors are supported by substantial evidence and are rational (*see Matter of Fuhst v Foley*, 45 NY2d 441, 410 NYS2d 56 [1978]; *Matter of Cowan v Kern*, 41 NY2d 591, 394 NYS2d 305 [1997]; *rearg den.* 42 NY2d 912, 397 NYS2d 1029 [1977]).

It is well settled that local zoning boards have broad discretion in considering applications for variances and judicial review of a zoning board’s decision and is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion (*see Inlet Homes Corp. v Zoning Bd. of Appeals of the Town of Hempstead*, 2 NY3d 769, 780 NYS2d 298 [2004]). Thus, the determination of a local zoning board will be sustained if it has a rational basis and is supported by substantial evidence (*see Ceballos v Zoning Bd. of Appeals of the Town of Mt. Pleasant*, 304 AD2d 575, 758 NYS2d 139 [2d Dept 2003]; *Witzl v Zoning Bd. of Appeals of the Town of Berne*, 256 AD2d 775, 681 NYS2d 634 [3d Dept 1998]; *Krouner v City of Albany*, 192 AD2d 930, 596 NYS2d 885 [3d Dept 1993]; *app den* 82 NY2d 656, 602 NYS2d 805 [1993]).

Since the petitioner’s property lies partially within the Wetlands Overlay District, the granting of the requested variance would only provide a density yield of .361 instead of the required 1 on Lot 1 and .563 instead of the required 1 on Lot 2 per the provisions of the Town of Islip Code § 68-485. Additionally, there would only be usable areas of 11,800 and 14,500 square feet respectively on the lots. Unquestionably, the requested variance is, therefore, substantial (*see Inquant v Board of Zoning Appeals of the Town of Brookhaven*, 304 AD2d 831, 757 NYS2d 860 [2d Dept 2003]). In view of the substantial nature of the variance requested (*see Bari Homes v Zoning Bd. of Appeals of Town of Yorktown*, 226 AD2d 368, 640 NYS2d 222 [2d Dept 1996]), the Court cannot state that the Board acted irrationally or capriciously in denying the application (*see Tetra Blders., Inc. v Scheyer*, 251 AD2d 589, 674 NYS2d 764 [2d Dept 1998]; *Becar v Scheyer*, 250 AD2d 842, 673 NYS2d 210 [2d Dept 1998]; *Sakrel Ltd. v Roth*, 182 AD2d 763, 582 NYS2d 492 [2d Dept 1992]; *app disp.* 79 NY2d 851, 580 NYS2d 200 [1992]).

Although petitioner contends that the Board has previously granted similar applications as to nonconforming lots in the same zoning district and within the Wetlands Overlay District, he has failed to submit documentation to that effect. Further, the Board noted that it could not consider the properties on

the other side of Vanderbilt Boulevard because they were not in a wetlands area. It is only on petitioner's side of Vanderbilt Boulevard that wetlands exist. The Board found that if it approved the application, it would create a substantial adverse impact on the neighborhood and that creating two nonconforming lots from one conforming lot would be without merit. This was supported by the evidence on the record (*see NcNair v Board of Zoning Appeals*, 285 AD2d 553, 728 NYS2d 73 [2d Dept 2001]; *Ron Rose Group, Inc. v Baum*, 275 AD2d 373, 712 NYS2d 174 [2d Dept 2000]; *Feldi v Amster*, 250 AD2d 612, 671 NYS2d 990 [2d Dept 1998]). The Board denied the application based upon the fact that an approval of the application would run counter to the legislative intent of § 68-483 of the Code which was enacted to protect flagged wetlands and was a problem that was self created. "Hardship in the context of zoning is self-imposed where the applicant for a variance acquired the property subject to the restrictions from which he or she now seeks relief" (*Matter of First Natl. Bank of Downsville v City of Albany Bd. Of Zoning Appeals*, 216 AD2d 680, 628 NYS2d 199 [3d Dept 1995]).

The Court may not substitute its judgment for that of the zoning board. "A municipality may in the reasonable exercise of its police powers change its zoning to control land use and development. A municipality that chooses to make such changes may, but not need, exempt existing owners of substandard lots from the changes more onerous effects" (*Khan v Zoning Bd. of Appeals of Vil. of Irvington*, 87 NY2d 344, 639 NYS2d 350 [1996]; *rearg den.* 87 NY2d 1056, 644 NYS2d 148 [1996]).

Petitioner's inability to pursue development of his lot does not mandate the Board's granting of the variances and is not dispositive of the issue when viewing the nature and character of the area and the requested substantial relaxation of the code requirements (*see Bari Homes, Inc. v Zoning Bd. of Appeals of the Town of Yorktown*, 226 AD2d 368, *supra*).

The Court of Appeals has repeatedly noted that local zoning boards have broad discretion in considering applications for area variances and the judicial function in reviewing such decisions is a limited one (*see Matter of Ifrah v Utschig*, 98 NY2d 304, 308, *supra*; *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613, *supra*). A determination may be set aside only where the record reveals that the Board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure (*see Matter of Milburn Homes, Inc. v Trotta*, 7 AD3d 531, 776 NYS2d 312 [2d Dept 2004]; *Matter of Leon Petroleum, LLC v Board of Trustees of Inc. Vil. of Mineola*, 309 AD2d 804, 765 NYS2d 656 [2d Dept 2003]; *Matter of Kuhlman v Board of Zoning Appeals of Town of Brookhaven*, 305 AD2d 683, 759 NYS2d 896 [2d Dept 2003]; *Matter of Inguant v Board of Zoning Appeals of Town of Brookhaven*, 304 AD2d 831, *supra*; *Matter of Cashy v Goehringer*, 303 AD2d 753, 756 NYS2d 865 [2d Dept 2003]; *Matter of Rina v Baum*, 300 AD2d 665, 754 NYS2d 644 [2d Dept 2002]). A determination of a Board shall be sustained on judicial review if it has a rational basis and is supported by substantial evidence (*see Matter of Inlet Homes Corp. v Zoning Bd. of Appeals of Town of Hempstead*, 2 NY3d 769, *supra*; *Matter of Ifrah v Utschig*, 98 NY2d 304, *supra*; *Matter of Sasso v Osgood*, 86 NY2d 374, *supra*). "As with board determinations on variances, a reviewing court is bound to examine only whether substantial evidence supports the determination of the board. Where substantial evidence exists, a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record" (*Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 196, 746 NYS2d 662 [2002] *citation omitted*). "Substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably, probatively and logically" (*300 Gramaton Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181, 408 NYS2d 54 [1978]). This is not a case where denial was solely the result of general community opposition (*cf. Matter of Hugel v Campbell*, 276 AD2d 488, 713 NYS2d 697 [2d Dept 2000]; *Matter of Buckley v Amityville Vil. Clerk*, 264 AD2d 732, 694 NYS2d 739 [2d Dept 1999]) as the concerns raised by the public concerned overall drainage issues and that McMansions would change the complexion of the neighborhood.

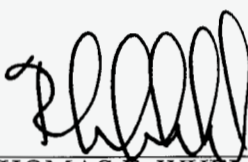
Under the particular facts and circumstance of this matter, the Court finds that the Board's determination was supported by substantial evidence in the record, was not arbitrary and capricious and had

a rational basis, nor did it abuse its discretion in denying the application (*see* Town Law § 267-b[3][b]; *Matter of Wolf Hill Props., Inc. v Modelewski*, 19 AD3d 429, 796 NYS2d 141 [2d Dept 2005]; *Matter of Inlet Homes Corp. v Zoning Bd. of Appeals of Town of Hempstead*, 2 NY3d 769, *supra*; *Ifrac v Utschig*, 98 NY2d 304, *supra*; *Polson v Rosenberg*, 295 AD2d 352, 743 NYS2d 879 [2d Dept 2002]; *lv app den*, 98 NY2d 613, 749 NYS2d 475 [2002]; *NcNair v Zoning Bd. of Appeals of the Town of Hempstead*, 285 AD2d 553, *supra*; *Toussie v Trotta*, 283 AD2d 433, 723 NYS2d 890 [2d Dept 2001], *lv app den*, 98 NY2d 613, 749 NYS2d 475 [2002]; *Bivona v Town of Plattekill Zoning Bd. of Appeals*, 268 AD2d 877, 701 NYS2d 734 [3d Dept 2000]; *Monte v Edwards*, 258 AD2d 584, 685 NYS2d 479 [2d Dept 1999]; *Tera Bldrs. v Scheyer*, 251 AD2d 842, *supra*; *Becvar v Scheyer*, 250 AD2d 842, *supra*; *Budget Estates v Roth*, 203 AD2d 287, 610 NYS2d 69 [2d Dept 1994]; *Kroumer v City of Albany*, 192 AD2d 930, *supra*; *Sakel Ltd. v Rother*, 182 AD2d 763, *supra*).

Finally, since the matter was not affirmatively raised in this proceeding, the Court takes no position as to whether or not the determination denying the request for a reduction of the variance constitutes a taking of the property (*see Matter of Johnson v Village of Westhampton Beach*, 244 AD2d 335, 663 NYS2d 663 [2d Dept 1997]). Petitioner has failed to demonstrate that he was denied due process as to the subject variance (*see Nicolakis v Rotella*, 24 AD3d 739, 806 NYS2d 700 [2d Dept 2005]).

Accordingly, the petition is denied as herein indicated. This constitutes the Order and judgment of the Court.

DATED: 12/4/07

  
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THOMAS F. WHELAN, J.S.C.