

Matter of Gebbie v Mammina

2007 NY Slip Op 34429(U)

August 29, 2007

Supreme Court, Nassau County

Docket Number: 5665/07

Judge: Thomas Feinman

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

In the Matter of the Application of

JOHN GEBBIE,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules,

- against -

DAVID MAMMINA, Chairman, and PAUL GOODSSELL,
MILDRED LITTLE, DONALD McCARTHY and PAUL
ALOE, constituting the Board of Zoning Appeals of the
Town of North Hempstead,

Respondents.

TRIAL/IAS, PART 22
NASSAU COUNTY

INDEX NO. 5665/07

X X X

MOTION SUBMISSION
DATE: 7/25/07

MOTION SEQUENCE
NO. 001

The following papers read on this motion:

- Notice of Petition and Affidavits..... X
- Verified Answer and Return and Affidavits..... X
- Affirmation in Opposition..... X
- Reply Affirmation..... X

The petitioner, John Gebbie, moves for a Judgment, pursuant to Article 78 of the Civil Practice Law and Rules, (CPLR), (a) annulling the decision of the Respondent, The Board of Zoning Appeals of the Town of North Hempstead, (hereinafter referred to as "BZA"), dated March 7, 2007, denying the application requested by petitioner for area variances to (1) develop and improve parcel of real property, and (2) maintain an existing dwelling, and requests an order awarding petitioner reasonable attorneys' fees, and the costs and disbursements of this action, and for such other and further relief as the Court may deem just and proper.

The respondent, BZA, submits a Verified Answer and Return to the Verified Petition. The petitioner, John Gebbie, submits a Reply Affirmation.

The petitioner seeks judgment reversing and annulling the determination of the BZA which denied petitioner's application for an area variance allowing petitioner to maintain his existing home on the corner lot at or near Bryant Avenue and Hillside Boulevard, Floral Park, New York, while creating a new building lot on the interior lot which faces Hillside Boulevard.

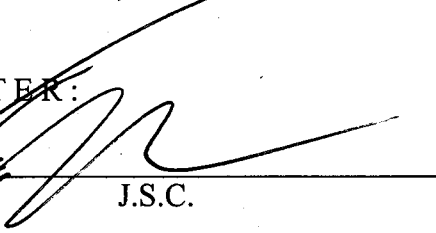
The instant proceeding challenges the determination of the BZA. The determination of the BZA, an agency, is reviewed under the "arbitrary and capricious" standard of CPLR §7803(3). (*Matter of Sasso v. Osgood*, 86 NY2d 374). In applying this standard, a determination will not be disturbed unless the record shows that the agency's action was "arbitrary, unreasonable, irrational or indicative of bad faith." (*Matter of Cowan v. Kern*, 41 NY2d 591.) "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." (*Matter of Pell v. Board of Education*, 34 NY2d 222).

The Court of Appeals has long recognized the "settle rule" that "in reviewing board actions as to variances or special exceptions to the courts ... restrict themselves to ascertaining whether there has been illegality, arbitrariness or abuse of discretion." (*Matter of Lemir Realty Corp. v. Larkin*, 11 NY2d 20; *People ex rel. Hudson-Harlem Val. Titl. Mtge. Co. v. Walker*, 282 NY 400). Deference must be afforded to local officials in making judgments concerning land use in their community. (*Matter of Pecoraro v. Board of Appeals of Town of Hempstead*, 2 NY3d 608; *Matter of Ifrah v. Utschig*, 98 NY2d 304; *Matter of Cowan v. Kern*, supra).

Upon the foregoing submissions, the BZA has demonstrated that in determining the petitioner's application for an area variance, it has taken into consideration (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 benefits sought by the applicant can be achieved by some feasible method other than a 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 district, and (5) whether the alleged difficulty was self-created.

Here, the BZA has balanced and weighed the statutory factors, and its determination to deny the requested area variance was not arbitrary or capricious.

In light of the foregoing, the petition is denied and therefore, dismissed.

ENTERED
AUG 31 2007 ENTER:
NASSAU COUNTY
COUNTY CLERK'S OFFICE

J.S.C.

Dated: August 29, 2007

cc: William A. DiConza, Esq.
Richard S. Finkel, Town Attorney