Short Form Order

Index Number: 19798-2007

Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

HON. EMILY PINES
Justice Supreme Court

Original Motion Date: 08-16-2007
Motion Submit Date: 11-29-2007
Motion Sequence No.: 001 MD

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The Application of
THOMAS SCHERIFF,

Petitioner,

for a Judgment pursuant to Article 78 of The Civil Practice Law and Rules,

-against-

ZONING BOARD OF APPEALS OF THE TOWN OF BABYLON,

Respondents.
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ATTORNEY FOR RESPONDENT
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ZBA Board of Appeals
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In this Article 78 proceeding, petitioner, Thomas Scheriff ("petitioner") seeks to annul the determination of the respondent Zoning Board of Appeals of the Town of Babylon ("respondent" or the "Board") which denied petitioner's request for a certain area variance needed in connection with his plan to construct a one-family residence upon a vacant lot. The application is opposed by the Board.

The petitioner is owner of the lot in question, located on the east side of Marion Court, 79.76 feet south of Parker Place, West Babylon, New York (Suffolk County Tax Map No. 100-139-3-53.1) (the "subject premises"). The subject premises is located in the Town's "A" Residence District which requires a minimum street frontage of 70 feet and total side yards of 28 feet for a lot that was held in single and separate ownership prior to the effective date of the ordinance. Petitioner's application to the Board sought approval of a lot with only 31.54 feet of street frontage and total side yards of 21.54 feet.

A hearing before the Board on petitioner's application was held on January

6, 2007 and petitioner was represented by counsel who presented his case. Counsel testified that the subject premises is 8,096 square feet, which is larger than many of the surrounding parcels. Counsel stated that although the parcel only contained 31.54 feet of frontage on Marion Court, that is because a triangle portion or the property was taken by the Town by condemnation in 1976 for access to a town sump that was never constructed. Ultimately, the parcel was sold to an adjoining property owner. Counsel testified that the application was in character with the community as there were a number of lots with 40 and 50 feet of frontage in the immediate area. Counsel stated that additional frontage could not be obtained because there is no land available to purchase adjoining the subject premises. Further, she argued that the variance relief is not substantial because petitioner should be credited for the portion that was taken by the town for municipal purposes and there are similar size lots in the are with similar or less frontage. Counsel argued there was no harm to the environmental conditions in the neighborhood by the addition of a one-family dwelling and the hardship was not self-created because a portion of the property was taken in a condemnation proceeding. She testified that even without a credit for the portion taken, the lot is still oversized compared to surrounding parcels with respect to lot area. Petitioner also submitted a tax map of the subject premises and surrounding parcels which demonstrated that there was only one other lot in the surrounding area with thirty feet of street frontage. Two (2) lots had 40 feet of lot frontage; two (2) lots had 50 feet of lot frontage and four (4) lots had 60 feet of lot frontage. Counsel testified that the Board had previously granted lot width variances for two (2) lots in the surrounding area - one being a flag lot with a width of 25 feet.

Several neighbors testified in opposition to the application. The residents testified that the width of Marion Court was only 20 feet and that a previous variance application for the subject premises was denied. Mr. John Geronomo testified that the existing houses on Marion Court on lots with small frontages were built in the 1920's as bungalows. Ms. Mary Griffin also testified regarding the narrow width of Marion Court and indicated that the school bus stop had to be relocated because the bus could not get down the street.

At the conclusion of the hearing, the Board reserved decision. At its meeting on June 14, 2007, the Board voted to deny the application and issued Findings and Conclusions. In its Findings and Conclusions, the Board initially noted that the subject premises was single and separate, although it still needed to comply with the reduced Code requirements for Residential "A" zone. The Board noted that the evidence submitted by petitioner's counsel, including a Suffolk County Tax Map for section 139, was evidence of conformity of the subject premises to lot area with the surrounding neighborhood, but did not address

conformity to lot frontage or total side yards. The Board noted that in section 139, only one lot had street frontage of thirty (30) feet, similar to the petitioner's request of 31.54 feet. Thus, the Board concluded that the request was not consistent with the character of the area especially considering that several lots in the area contained in excess of sixty (60) feet of street frontage. Specifically, the Board noted that lot 46, directly abutting the subject premises, has one hundred (100) feet of frontage. Additionally, the Board concluded that the granting of the total side yard variance would create a "physically and visually conflated effect between the dwelling and the abutting parcel," and "that such a piled up effect is both out of character with the surrounding community."

The Board found that the benefit sought by petitioner could be achieved by a means other than a variance by either purchasing land from an adjoining landowner or selling the parcel.

The Board concluded that the variance relief sought by petitioner was substantial in that he sought to reduce the street frontage from 70 feet to 31.54 feet, requiring a 55% reduction in lot width and to reduce the total side yards from 28 feet to 21.54 feet, requiring a 23% reduction in total side yards. The Board noted that even though petitioner's lot was single and separate, requiring conformity to a reduced Zoning Code requirement, the proposal still requested substantial relief. Additionally, the Board found that the proposal had the "cumulative effect of creating a feeling of congestion and intrusive encroachment" and that the "proposed dwelling would have a substantial impact on the use of the surrounding neighbors and create a potential hazard to the quiet enjoyment of neighboring inhabitants." The Board recognized that this particular lot was unique in that it lies on a dead end of Marion Court which has a diminished street width of only approximately twenty-five (25) feet, and that the addition of another home would congest an already overburdened roadway. Thus, the Board concluded that the development would have a deleterious effect on the physical and environmental conditions in the neighborhood.

Finally, the Board found that any difficulty claimed by petitioner was self-created in that he purchased the lot subject to the restrictions of the zoning code.

Based on these findings, the Board voted to deny the application.

Petitioner now challenges the Board's determination and claims that the Board failed to follow its own precedent in denying the subject application. **Petition at ¶35.** Specifically, petitioner refers to a variance granted by the Board for a "flag" lot with only twenty-five (25) feet of frontage. Petitioner argues the

flag lot is similar to the subject premises and thus, the Board's refusal to grant the frontage variance requested here was arbitrary and capricious. Moreover, petitioner asserts that the Board should have disregarded the objections of the neighbors as several had parcels containing less than the required lot frontage. **Petition at ¶36.**

Respondent submits a Verified Answer with Affirmative Defenses and Memorandum of Law in Opposition to the Petition. Respondent argues that it applied the criteria set forth in Town Law §267-b(3)(b) and determined that the proposed dwelling would have an undesirable impact on the surrounding community. **Answer at ¶22.** Respondent argues that the record demonstrates the "severely diminished width at front street line" does conform to the larger parcels immediately surrounding the subject premises. With regard to the flag lot referred to by petitioner, respondent argues that such approval for diminished lot frontage is distinguishable from the case at bar. Specifically, respondent argues that without the granting of the variance, the flag lot would be "landlocked" due to the nature of this type of parcel, where one parcel sits directly behind another parcel and the parcel in the rear is accessible only by a narrow common driveway. Here, by contrast, respondent argues that petitioner's parcel is not landlocked and does not require such a substantial reduction in lot frontage for ingress and egress. Rather, the variance is required because petitioner is seeking to develop a substandard parcel. Additionally, respondents argue that the variances referred to by petitioner at the hearing are distinguishable from the instant case because they involved existing dwellings and not development of a vacant, substandard parcel. Thus, respondent argues, it properly determined that the relief sought was not in character with the surrounding community. Moreover, respondent asserts that they properly considered the testimony of the residents of the community regarding the congested nature of this area and the problems associated with the narrow width of Marion Court.

Respondent also argues that the variances sought by petitioner are substantial, 55% reduction in lot width and 23% reduction in total side yards and that petitioner did not justify the need for such substantial variances. Respondent argues that even if petitioner were given a credit for the portion of property taken by condemnation, the subject premises would still require a 26% reduction in lot frontage. Additionally, respondent asserts, as substantiated by the residents who testified at the hearing, that this narrow portion of Marion Court cannot absorb any more traffic and another home would only congest an already overburdened 25 foot roadway.

Town Law §267-b(3)(b) requires a zoning board, when making its

determination on an area variance application 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." The board must 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 method, feasible for the applicant to pursue, other than an area variance;
> (3) whether the requested 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.

As set forth in **Town Law §267-b**, the Board was required to engage in a balancing test, weighing the benefit to the petitioners of granting the application against the detriment to the health, safety and welfare of the neighborhood or community. ***See, Lessing v. Scheyer*, 16 A.D.3d 418, 790 N.Y.S.2d 545 (2d Dept. 2005).** It is well settled, that zoning boards have "broad discretion in considering applications for area variances, and a zoning board's determination should not be set aside unless there is a showing of, inter alia, arbitrariness." ***Carlino v. Scheyer*, 30 A.D.2d 594, 817 N.Y.S.2d 375 (2d Dept. 2006).**

Recently, the Second Department reiterated and articulated a standard for determining whether a zoning board determination is arbitrary and capricious. The Court stated that "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis. Under this standard, a determination should not be disturbed unless the record shows that the agency's action was 'arbitrary, unreasonable, irrational or indicative of bad faith. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.'" ***Halperin v. City of New Rochelle*, 24 A.D.3d 768, 809 N.Y.S.2d 98 (2d Dept. 2005)**(internal citations omitted). The Board may not simply reiterate the prongs of the balancing test without setting forth the specific facts or reasons that it relied upon in making its determination to deny the application. ***Necker Pottick v. Duncan*, 251 A.D.2d 333, 673 N.Y.S.2d 740 (2d Dept. 1998).**

Given the facts of this case, this Court cannot find the Board's decision arbitrary and capricious or unsupported by substantial evidence. ***Ifrah v. Utschig*, 98 A.D.2d 304, 746 N.Y.S.2d 667 (2002).** Respondent, in adoption of its Findings and Conclusions, considered the factors as set forth in the Town Law and determined

that the benefit to petitioner was outweighed by the detrimental effect on the surrounding community. Respondent considered the single and separate status of the parcel, requiring adherence to reduced requirements and the fact that the parcel still required substantial variances, 55% and 23%, respectively. Respondent considered the narrow width of Marion Court, only twenty-five (25) feet, and the impact of an additional house in this area. Respondent also considered that only one hou se in the surrounding area had similar lot frontage, and properly distinguished a nearby "flag" lot from the subject premises. Finally, respondent found any hardship was self-created in that petitioner acquired the subject premises with knowledge of the applicable zoning restrictions. Based upon the foregoing, respondent properly denied petitioner's application for lot frontage and total side yard variances. Accordingly, the Petition is denied in its entirety.

The foregoing constitutes the ***DECISION*** and ***JUDGMENT*** of the Court.

Dated: January 23, 2008
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.