SHORT FORM ORDER INDEX NO. 23850/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:
HON. JOSEPH FARNETI
Acting Justice Supreme Court

Application of DARSHAN BHATT,

Petitioner,

For a judgment pursuant to Article 78 of the CPLR,

-against-

BOARD OF ZONING APPEALS OF THE TOWN OF BROOKHAVEN,

Respondent.

ORIG. RETURN DATE: AUGUST 22, 2007
FINAL SUBMISSION DATE: NOVEMBER 1, 2007
MTN. SEQ. #: 001
MOTION: MD CASEDISP

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Upon the following papers numbered 1 to 7 read on this petition FOR A JUDGMENT PURSUANT TO ARTICLE 78; Notice of Petition and supporting papers 1-3; Verified Answer and supporting papers 4, 5; Respondent's Return and supporting papers 6, 7; it is,

ORDERED that this petition for a judgment, pursuant to Article 78 of the CPLR and Town Law § 282, annulling, vacating and setting aside the decision of respondent to deny petitioner's application for eleven area variances, is hereby **DENIED** for the reasons set forth hereinafter.

Petitioner commenced this Article 78 proceeding seeking to annul the determination of respondent which denied petitioner's application for eleven area variances with respect to the property located on the west side of Berkshire Drive, between the intersecting streets of Brentwood Avenue and Highland Avenue, in Farmingville, New York, situated within the Town of Brookhaven. The parcel is approximately 20,000 square feet and is currently improved with a single family residence.

Petitioner alerts the Court that the subject property is located within an A-1 residence district. Petitioner had applied to respondent Board for a land division of the parcel into two plots, lot 1 and lot 2. Lot 1 would have road frontage on Berkshire Drive of 120 feet and a depth of 100 feet for the existing one family dwelling. Lot 2 would have road frontage on Berkshire Drive of 80 feet and a depth of 100 feet for a proposed one family dwelling.

A public hearing was held on May 16, 2007, wherein petitioner was represented by counsel. A report by CHRISTOPHER WREDE, a planner for respondent, was submitted at the hearing and read into the record. Said report recommended a denial of petitioner's application upon the grounds that: granting the relief would result in a substantial deviation from the A-1 residence zoning criteria; the hardship was self-imposed in that petitioner's proposed division of the property would result in two non-conforming lots; the multiple variances and relaxation requested were significant; there are other similar sized lots in the locale susceptible to similar relief, which would set a precedent and may result in a cumulative adverse impact on the neighborhood including a deterioration of groundwater and surface water quality; and petitioner has reasonable use of the subject property under the current zoning classification. Mr. Wrede had indicated in his report that the property is located within hydrogeologic zone III, which requires 40,000 square feet per lot dwelling, and the proposal did not conform to that requirement.[1] Mr. Wrede opined that the proposed development could exacerbate potential adverse impacts to groundwater and surface water.

On June 27, 2007, respondent Board voted unanimously to deny petitioner's application. On or about July 2, 2007, the Board issued a written denial, along with its findings and conclusions. Respondent alleges that it properly balanced and weighed the factors set forth in Town Law § 267-b and the holding of the Court of Appeals in *Sasso v Osgood*, 86 NY2d 374 (1995) when reaching its determination, and therefore the denial cannot be deemed arbitrary or capricious. Respondent argues that the eleven variances requested were substantial, and that the granting of the variances would have an adverse impact

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[1] In 1988 and 1989, the Town Board re-zoned large areas of the Town to increase the lot area needed for residential dwellings in order to protect groundwater and surface water quality, to protect wildlife habitat, and to limit the burden on public facilities and infrastructure. SEQRA findings statements which were adopted by the Town Board at the time recommended minimum housing density of 40,000 square feet per dwelling unit within hydrogeologic zone III. At 20,000 square feet, the subject property as it exists as a single parcel is currently substandard in terms of lot area.

on the environment. Further, respondent informs the Court that in 2001 the Town Board eliminated any special permit exception to the A-1 residence district zoning requirements so as to limit and restrict development on small lots such as the subject property. Moreover, respondent indicates that any hardship of petitioner is self-created, as petitioner purchased the property in 2001 when the A-1 zoning was already in effect.

In a proceeding under CPLR Article 78 when reviewing a determination of an administrative tribunal, courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence (*Pell v Board of Education*, 34 NY2d 222 [1974]; *Matter of Isaksson-Wilder v New York State Div. of Human Rights*, 43 AD3d 921 [2007]; *Allen v Bane*, 208 AD2d 721 [1994]). This approach is the same when the issue concerns the exercise of discretion by the administrative tribunal (*Pell v Board of Education*, 34 NY2d 222, *supra*). The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious (*Gilman v N.Y. State Div. of Hous. & Cmty. Renewal*, 99 NY2d 144 [2002]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 43 AD3d 1057 [2007]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact (*Pell v Board of Education*, 34 NY2d 222, *supra*). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Pell v Board of Education*, 34 NY2d 222, *supra*). Where a hearing is held, the determination must be supported by substantial evidence (CPLR 7803[4]).

In addition, local zoning boards have broad discretion in considering applications for area variances and the judicial function in reviewing such decisions is a limited one (*Pecoraro v Bd. of Appeals*, 2 NY3d 608 [2004]). 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 community pressure (*Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*). A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence (*Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*; *Matter of Hannett v Scheyer*, 37 AD3d 603 [2007]; *Matter of B.Z.V. Enter. Corp. v Srinivasan*, 35 AD3d 732 [2006]).

Pursuant to Town Law § 267-b(3), when determining whether to grant an area variance, a zoning board of appeals must weigh the benefit of the grant to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted (*see Matter of Ifrah v Utschig*, 98 NY2d 304 [2002]; *Matter of Sasso v Osgood*, 86 NY2d 374 [1995]). The zoning board is also required to consider whether: (1) granting the area variance will produce an undesirable change in the character of the neighborhood or a detriment to nearby properties; (2) the benefit sought by the applicant can be achieved by some method, feasible to the applicant, other than a variance; (3) the requested area variance is substantial; (4) granting the proposed variance would have an adverse effect or impact on physical or environmental conditions in the neighborhood or district; and (5) the alleged difficulty is self-created. While the last factor is not dispositive, it is also not irrelevant (*see Matter of Ifrah v Utschig*, 98 NY2d 304, *supra*; *Matter of Sasso v Osgood*, 86 NY2d 374, *supra*).

Here, the Court finds that the denial by respondent of petitioner's application for eleven area variances has a rational basis and is supported by substantial evidence. After conducting a hearing on the matter in which petitioner appeared by counsel, respondent properly considered the benefit to petitioner as weighed against the detriment to the health, safety and welfare of the surrounding community. Respondent also weighed and applied the five aforementioned factors, in compliance with Town Law § 267-b(3)(b) and controlling case law, when reaching its decision to deny petitioner's application. Respondent's determination to deny the application based upon, among other things, the finding that the requested area variances were substantial and would have an adverse impact on the environment, in particular the groundwater and surface water, had a rational basis in fact, was supported by the evidence presented, and cannot be deemed an abuse of discretion. Accordingly, for the foregoing reasons, the instant petition is **DENIED** and this special proceeding is dismissed.

This constitutes the decision and Order of the Court.

Dated: January 29, 2008

HON. JOSEPH FARNETI
Acting Justice Supreme Court