

**Matter of Russia House at Kings Point, Inc. v Zoning  
Bd. of Appeals of Vil. of Kings Point**

2008 NY Slip Op 31216(U)

April 15, 2008

Supreme Court, Nassau County

Docket Number: 3835-07/

Judge: Thomas P. Phelan

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

*Present:*

**HON. THOMAS P. PHELAN,**

*Justice*

TRIAL/IAS PART 5  
NASSAU COUNTY

In the Matter of the Application of

RUSSIA HOUSE AT KINGS POINT, INC. and  
TIMUR ON RODNEY, INC.,

Petitioners,

ORIGINAL RETURN DATE: 09/14/07  
SUBMISSION DATE: 02/26/08

For a Judgment Pursuant to CPLR Article 78

INDEX No.: 013835/07

-against-

ZONING BOARD OF APPEALS OF THE  
VILLAGE OF KINGS POINT,

MOTION SEQUENCE #1

Respondent.

The following papers read on this motion:

Notice of Petition and Verified Petition.....	1
Amended Verified Petition.....	2
Verified Answer.....	3
Memorandums of Law.....	4, 5
Record of the Proceedings.....	6

Petitioner moves by notice of petition for an order, pursuant to Article 78 of the CPLR, annulling and reversing so much of a determination of respondent which denied petitioners' applications for variances or other approvals to authorize or permit certain improvements to petitioners' properties. Respondent ("the Board") opposes the petition.

Petitioner, Russia House at Kings Point, Inc. ("Russia House"), is the owner of premises known as 26 Pond Road, Kings Point, New York. Petitioner, Timur on Rodney, Inc. ("Timur"), is the owner of premises known as 7 Rodney Lane, Kings Point, New York. Both properties adjoin each other with a common boundary and are located within the Residential A2 zoning district of the Village of Kings Point. Applications for permits for certain improvements already made to the properties, which violate zoning ordinances, were denied.

**RE: RUSSIA HOUSE v. ZONING BOARD**

Thereafter Russia House and Timur applied for area variances. After a hearing held on or about January 31, 2005, the board granted the applications in part and denied the applications in part. Petitioners commenced an Article 78 proceeding, which was denied by judgment dated December 6, 2005 (Feinman, J.). The Appellate Division, Second Department, reversed the judgment, annulling the initial determination and remitting the matter to the Board to determine whether the requested variances would have an adverse impact on the neighborhood and character of the community. The new determination, issued by the Board on July 18, 2007, again denied the variances.

Petitioner submits that the Board's determination of July 18, 2007, "suffers from the same deficiencies and legal infirmities as did the March 17, 2005 determination" (Am. Pet. ¶30) in that the denials "were illegal, irrational, arbitrary and capricious, unreasonable and contrary to the evidence in the record of the public hearing" (Id. ¶32). The Board counters that its determination was amply supported by the record and that code-compliant alternatives exist.

The July 18, 2007, determination of the Board contained Additional Findings of Fact with regard to the variances' impact on the neighborhood and the character of the community. The piers, gates and walls within the front yards of both properties were discussed together. The Board determined that the variances would create an undesirable change in the character of the neighborhood and a detriment to nearby properties.

According to the Board, the Village Code provides that a front yard may contain:

'only' fences [as defined in Code § 161-35(A)(2) are permitted, either post and rail, with not more than three rails and not more than four feet in height, or wrought iron type open fences, not more than four feet in height and driveway gates not more than six feet in height. Moreover, the fences and gates, if wrought iron, must be black in color . . . (Am. Pet., Ex. C, p. 13)

The Board asserts that the purpose of the foregoing restrictions is "to provide for a certain ambiance of the community, with open vistas along the streets visually unobstructed, except for trees and shrubs" (Id.) The Board determined that the solid masonry walls, the piers and the stainless steel and gold driveway gates are totally out of character with the open front yards of the neighborhood. The Board concluded that "[i]f the illegal walls, piers, with their huge lighting fixtures, and gates are permitted to remain, they will radically change the character of the neighborhood and remain a significant eye-sore to nearby properties" (Id., p. 17). Moreover, the Board contends that the requested variances are substantial "not only in the amounts and proportions of the variances, but also in the deleterious impacts upon the neighborhood and the community that the variances will create" (Id., p. 18). The Board reached the same determination with regard to the walls within the side yards.

Petitioners argue that "[t]he current location [of the gate] is safer, and also conceals the pier and gate from view by people off the property" and that "the slightly enhanced gate height would improve security at the property" (Mem., p 4). It is the contention of petitioners that the Board's

## RE: RUSSIA HOUSE v. ZONING BOARD

Page 3.

determination was conclusory in that the record did not contain any testimony to support its findings. Petitioners further argue that “[a] review of the record demonstrates that petitioners established that the benefits to them clearly outweighed any detriment to the community, and there was no evidence to the contrary” (Id. , p. 17).

In its initial decision of May 6, 1997, the Board considered that the applicant desired a “secure compound” (R-5, p. 3). The Board did not believe, however, that such “security” was required nor was “it in keeping with the character of the community nor the balance of the Village” (Id.). At a hearing held on January 31, 2005, Mr. Levin, counsel for applicant, testified as follows:

Many of these are elements which the owner would like to have because they would enhance the development of the property and make it, in his view, more attractive and more utilitarian. . . .

We think we meet the other issues and there is an appropriate case to grant the variances. There’s clearly a benefit to the applicant in doing so. It will enhance his overall use and enjoyment of the property and we’re not aware of any adverse impact this would have on anybody. . . . (R-13, pp. 39-40).

“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 (see *Matter of Ifrah v Utschig*, 98 NY2d at 308; *Matter of Twin County Recycling Corp. v Yevoli*, 90 NY2d 1000, 1002 [1997]; *Matter of Cowan v Kern*, 41 NY2d 591, 598 [1977]).” (*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 [2004]). In evaluating applications, “[a]s a general rule, a zoning board’s interpretation of a zoning ordinance ‘must be given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute’ (*Matter of Toys “R” Us v Silva*, 89 NY2d 411, 418-419 [1996] [internal quotation marks omitted])”. (*151 Route 17M Associates, LLC v Zoning Bd. of Appeals of Vill. of Harriman*, 19 AD3d 422, 424 [2d Dept. 2005]), *leave denied*, 6 NY3d 709 [2006]).

“A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence (see *Matter of Ifrah v Utschig*, 98 NY2d at 308; *Matter of Fuhst v Foley*, 45 NY2d 441, 444 [1978]).” (*Matter of Pecoraro v Board of Appeals of Town of Hempstead, supra*, at 613). “[T]he determination of a municipal land use agency must be confirmed if it ‘was rational and not arbitrary and capricious’ (*Matter of Sasso v Osgood, supra* at 384, 633 NYS2d 259, 657 NE2d 254).” (*Halperin v City of New Rochelle*, 24 AD3d 768, 772 [2d Dept. 2005], *leave denied*, 7 NY3d 708 [2006]; see also, *Merlotto v Town of Patterson Zoning Bd. of Appeals*, 43 AD3d 926 [2<sup>nd</sup> Dept. 2007]; *Ram v Town of Islip*, 21 AD3d 493 [2<sup>nd</sup> Dept. 2005]). “A determination will be deemed rational if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition.” (*Halperin v City of New Rochelle, supra*).

RE: RUSSIA HOUSE v. ZONING BOARD

As the Court stated in *Pecoraro, supra*, at 613, quoting *Matter of Cowan, supra* at 599:

The crux of the matter is that the responsibility for making zoning decisions has been committed primarily to quasi-legislative, quasi-administrative boards composed of representatives from the local community. Local officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community. Absent arbitrariness, it is for locally selected and locally responsible officials to determine where the public interest in zoning lies.

"[A] reviewing court should refrain from substituting its own for the reasoned judgment of the zoning board." (*Matter of Pecoraro v Board of Appeals of Town of Hempstead, supra*, at 613). "It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them" (*Matter of Cowan v Kern, supra*, at 599; *see also, Pecoraro v Board of Appeals of Town of Hempstead, supra*, at 613).

"In determining whether to grant an area variance a zoning board of appeals is required 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 (citations omitted)" *Little v. Bean*, 6 Misc.3d 1028(a) [Sup. Ct. Suffolk Co. 2004]. "The variances are substantial and adversely affect the character of the neighborhood in that they directly conflict with the purposes of the creation of" the Village Code (Id.). "Not only were the requested variances substantial, but the hardship was self-created (citations omitted)" *Rodrigues v. Zoning Bd. Of Appeals of Vill. of Sleepy Hollow*, 21 A.D.3d 1108 [2d Dept. 1005].

Accordingly, petitioner's application is denied.

This decision constitutes the order of the court.

Dated: 4-15-08

HON THOMAS P. PHELAN

*[Handwritten signature]*

J.S.C.

Meyer, Suozzi, English & Klein P.C.  
Attn: A. Thomas Levin, Esq.  
Attorneys for Petitioners  
P. O. Box 9194  
990 Stewart Avenue, Suite 300  
Garden City, NY 11530-9194

**ENTERED**

APR 21 2008

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

**RE: RUSSIA HOUSE v. ZONING BOARD**

**Page 5.**

Ackerman, Levine, Cullen, Brickman  
& Limmer, LLP  
Attn: Andrew J. Luskin, Esq.  
Attorneys for Respondent  
1010 Northern Boulevard, Suite 400  
Great Neck, NY 11021