

**Matter of Zhang v Zoning Bd. of Appeals of
Vil. of Sea Cliff**

2008 NY Slip Op 31340(U)

March 29, 2008

Supreme Court, Nassau County

Docket Number: 9203-07/

Judge: F. Dana Winslow

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

In the Matter of the Application of VIVIAN ZHANG

**TRIAL/IAS, PART 7
NASSAU COUNTY**

Plaintiff,

**MOTION DATE: 01/28/2007
MOTION SEQ. NO.: 001**

-against-

INDEX NO.:019203/07

**ZONING BOARD OF APPEALS OF THE VILLAGE
OF SEA CLIFF**

Defendant.

The following papers having been read on the motion (numbered 1-4):

Notice of Petition.....1
Petitioner’s Reply Memorandum of Law.....2
Reply Affidavit.....3
Respondent’s Memorandum of Law.....4

The petitioner moves, pursuant to Article 78, to annul a prior determination of the respondent which denied her application for variances on a parcel of property.

Petitioner owns an unimproved lot located at 219 19th Avenue, Sea Cliff, N.Y. (the “premises”). The premises is located in a Residence A zoning district in the Village of Sea Cliff. This zoning district requires, pursuant to the Village Code of the Village of Sea Cliff (“Village Code”) a minimum lot area of 7,500 square feet; a minimum street frontage of 75 feet and a minimum width at the front set back line of 75 feet. The premises at issue has a lot area of 2,400 square feet, a street frontage of 40 feet and a width at the front set back line of 40 feet. Petitioner proposes to construct a two-story single family house with a side yard setback of seven feet where a minimum of ten feet is required by the Village Code § 138-411 and a gross front

square foot area where § 138-414 of the Village Code requires a minimum of 500 square feet. Petitioner maintains avers that Village Code § 138-414 states, with the exception of the lot area, street frontage and width at the front set back line, her lot in issue is a legally buildable lot. Petitioner filed an application with the Sea Cliff Building Department for a two-story single family dwelling on the premises, and it disapproved the application based on the lot size, front property line, set back line, side yard setback, gross area first floor area and the fact that the plan exceeded the maximum permitted height/setback ratio. Petitioner then sought an application for a variance of the Village Code with respondent. A hearing was held on July 24, 2007. At the end of the public hearing on petitioner's application, respondent closed the hearing and reserved decision on petitioner's application. By letter dated September 26, 2007, the Village Clerk mailed petitioner a copy of the decision that had been filed in the office of the Village Clerk (*see* Exhibit A annexed to the Notice of Petition).

Respondent contends the petitioner's application is untimely. The court disagrees. The written decision of the respondent was filed on September 26, 2007 (*see* ¶ 13 of respondent's verified answer and objection). The minutes containing the vote of the respondent were filed with the Village on September 7, 2007. Petitioner filed this action on October 25, 2007. Thus, it was instituted within thirty day after filing of the decision with the Clerk (*Matter of O'Connell v Zoning Bd.*, 267 AD2d 742, *lv den.*, *dism.* 94 NY2d 938).

Since a zoning board is given discretion in matters of variance, the court's function is limited and the board's determination may not be set aside in the absence of illegality, arbitrariness, or abuse of discretion; the board's determination will be sustained if it has a rational basis and is supported by substantial evidence. (*Sasso v*

Osgood, 86 NY2d 374; *Con Ed Co. of NY v Hoffman*, 43 NY2d 598; *Bari Homes, Inc. v Zoning Board of Appeals of the Town of Yorktown*, 226 AD2d 368). The determination of a local zoning board is entitled to great deference and will be sustained as long as it has a rational basis, is not arbitrary and capricious and is supported by substantial evidence (*Matter of Pecorano v Board of Appeals*, 2 NY 3d 608; *North Shore F.C.P., Inc. v Mammina*, 22 AD3d 759). A court cannot substitute its judgment for that of the zoning board even if compelling inferences to the contrary can be made (*Matter of Doyle v Amster*, 79 NY2d 592).

When reviewing the determination of a zoning board, the courts consider substantial evidence only to determine whether the record contains sufficient evidence to support rationality of the board's determination (*Matter of Sasso v Osgood, supra*).

The zoning board is required, in addition to the health, safety and welfare of the community (*Pecorano v Board of Appeals, supra*) to consider 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, the benefit sought by the applicant can be achieved by some other method than an area variance that is feasible for the applicant to pursue, the proposed variance will have an adverse effect or impact on the physical or environmental condition in the neighborhood or district, and the alleged difficulty was self created (*Schumacher v Town of East Hampton*, 46 AD2d 691; *Filipowski v Zoning Board of Appeals of the Village of Greenwood Lake*, 38 AD3d 545).

A showing that the petitioner's lot is uniquely substandard in the surrounding neighborhood was alone sufficient to show an adverse impact (*113 Hillside Avenue Corp. v Zaino*, 27 NY2d 258).

Further, a property owner's failure to consider alternatives was properly held to be a negative consideration in determining whether relief should be granted (*Weissman v Village of Kensington*, 260 AD2d 487). Here, petitioner could sell the property to one or several adjoining neighbors (*Weissman v Village of Kensington, supra*).

Further, there is a rational basis for the determination of the respondent which affirmed the denial of a construction permit to petitioner (*Gas City, Inc. v Zoning Board of Appeals of the Town of LaGrange*, 112 AD2d 422).

A zoning board may engage in a balancing test and conclude that the requested variance was substantial and would have an adverse impact on the surrounding area. Even the petitioner would benefit from respondent's granting the relief sought, the record shows such a benefit was considered in its examination of character of the neighborhood.

A zoning board does not abuse its discretion in denying a variance where the variances were substantial, the alleged difficulties were self-created, and the proposed changes would have had an undesirable effect on the character of the neighborhood (*McNair v Board of Zoning Appeals of the Town of Hempstead*, 285 AD2d 553).

While non-conforming uses of property are tolerated, the overriding policy of zoning is aimed at their eventual elimination (*P.M.S. Assets, Ltd. v Zoning Board of Appeals of the Village of Pleasantville*, 98 NY2d 683; *Toys-R-Us v Silva*, 89 NY2d 411). The respondent is required to assess the petitioner's request in the current environment of the Village, and it need not base its decisions on conditions (i.e., lot size, population) in the Village as it existed a century ago.

The municipality must consider the significant factor at the magnitude of the variance sought since the greater the deviation the more likely it is that the impact on

the community will be severe (*Con Ed Co. of N.Y. v Hoffman*, 43 NY2d 598).

While scientific or expert testimony is not required in every case to support a zoning board's determination, a zoning board may not base its determination solely upon generalized community objections (*Twin County Recycling Corp. v Yevoli*, 90 NY2d 1000; *Greenfield v Board of Appeals*, 21 AD3d 556).

As noted, there was community opposition to petitioner's proposal (*see* respondent's return, Exhibit). Respondent did not solely rely on the objections viewed by local residents, but it can consider them. The opposition was specific as to the adverse effect the proposed house would make on the community. Here, the community objections are specific (*see* Exhibit 8 annexed to respondent's record of proceeding) which respondent considered: some current residents own two 40 x 60 lots; petitioner's plan does not provide for proper parking (pgs. 44-45, 53, 67, 68); small houses on small lots are not being build now (p. 48); it would lead to overcrowding (p. 49); streets could be blocked worse than presently (p. 53).

Although there is no single controlling factor in determining whether strict compliance with a zoning law will cause practical difficulties warranting a grant of the area variance, the issue of whether the difficulty was self-created is significant in determining whether the application should be granted (*Kattke v Incorporated Village of Freeport*, 200 AD2d 746).

Here, the petitioner is presumed to have known the applicable zoning regulations at the time it recently purchased the property (*Strohli v Zoning Board of Appeals of the Village of Montebello*, 271 AD2d 612).

A self-imposed hardship does not, in and of itself, preclude a zoning board from granting a variance (*Putrino v Zoning Board of Appeals, Town of Union*, 115 AD2d 932).

A hardship is self created for zoning purposes, where the applicant for a variance acquired property subject to restrictions from which he or she seeks relief (*Lim-Kim v Zoning Board of Appeals*, 185 AD2d 346).

In calculating whether a financial hardship to the landowner would be inflicted by adherence to the zoning standard, inquiry should properly focus upon the value of the parcel as presently owned rather than upon the value that the parcel would have if the variance was granted (*Cowan v Kern*, 41 NY2d 591).

As evidence of the self-created hardship, the respondent noted the petitioner acquired the premises in 2005, and petitioner was deemed to have full knowledge of all zoning restrictions at the time she obtained the property and the fact that the same property (with a different owner) had sought variances and had been rejected. Thus, the hardship that exists was self-created. This was a factor which was properly considered by the respondent in denying the petitioner's application. Respondent found the premises grossly undersized to the point of denying the variances. Respondent found the profit to be had from the improved lot (i.e. with a house) took a back seat to the character of the community.

In this instance the respondent could conclude that the granting of the variances would have resulted in the creation of a substandard lot requiring a substantial variance from the required minimum lot area (*Ceballos v Zoning Board of Appeals of the Town of Mount Pleasant*, 304 AD2d 575).

The respondent's decision found the proposed changes would produce an undesirable change in the character of the neighborhood or a detriment to nearby properties. It found the petitioner's property was completely dissimilar to the vast majority of properties around petitioner's premises; it found the sought-after variances to be excessive and substantial. The board addresses Village Code § 138-

1201 saving clause. The fact that the premises may be a buildable parcel does not entitle it to relief from the side yard setback and highest setback ratio just due to the fact that the premises "pre-exists" the enactment of the provisions. The respondent found that to allow the variances required by petitioner would detract from the community character.

Although local zoning boards have substantial discretion in considering applications for variances, their decisions must set forth the factual basis for each conclusion reached and may not merely state bold conclusions or restate the applicable statutory criteria (*Necker Pottick, Fox Run Woods Builders Corp. v Duncan*, 251 AD2d 333). The respondents clearly set forth, from the minutes of the meeting and its decision, the reasons for its rejection of petitioner's variance request.

Respondent properly considered the petitioner's application for area variances, and its determination denying those variances were neither arbitrary nor capricious; respondent's decision was, from the record herein, supported by substantive evidence (*Efracim v Trotta*, 17 AD3d 463).

Accordingly, the petitioner's application is **denied**, and the motion is **dismissed**.

This Constitutes the Order of the Court.

Dated: *March 27, 2008* ENTER:

[Handwritten signature]

ENTERED
MAY 01 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE