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SHORT FORM ORDER AND JUDGMENT

INDEX No. 38754-07

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

P R E S E N T :

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1/16/08
ADJ. DATES 3/14/08
Mot. Seq. # 001 - MD; CDISP

In the Matter of the Application of DREW E. OLSON and CHRISTINA OLSON, Petitioners, For a Judgment under Article 78 of the Civil Practice Law and Rules reversing, annulling and setting aside the decision of respondent filed on November 14, 2007 and directing respondent to grant petitioners' application for the variance requested in said application, -against- RICHARD I. SCHEYER, Chairman, ALBERT R. MORRISON, Vice Chairman, KURT PAHLITZSCH, JAMES H. BOWERS and BARBARA O'CONNOR, constituting the Zoning Board of Appeals of the town of Islip, Respondents.	ACKERMAN, RAPHAN & SULTZER Attys. For Petitioners 2949 Long Beach Rd. Oceanside, NY 11572 ROBERT L. CICALE, ESQ. Islip Town Attorney Atty. For Respondents 655 Main St. Islip, NY 11751

Upon the following papers numbered 1 to 13 read on this Article 78 Petition; Notice of Petition and supporting papers 1 - 5; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 8-9; Replying Affidavits and supporting papers 11-12; Other 6-7 (affirmation); 10 (Return); 13 (Memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this petition for a judgment pursuant to CPLR Article 78 annulling and reversing the decision of the respondent, Town of Islip Zoning Board of Appeals, which denied petitioners' application for a variance to construct a wall on their property, is denied and the action is dismissed; and it is further

ORDERED AND ADJUDGED that the respondents shall recover from petitioners costs and disbursements in the sum of $ ____ as taxed by the Clerk and respondents shall have execution therefor: and it is further

ORDERED that the counsel for the petitioners shall serve a copy of this Order with Notice of Entry upon counsel for respondents within forty (40) days of the date herein pursuant to CPLR 2130(b)(1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court.

The petitioners, Drew E. Olson and Christina Olson (hereinafter "petitioners") are the owners of a parcel of land with a postal address of 79 Anchorage Drive, West Islip, New York (hereinafter "subject property"), which is zoned Residence "A" under the Islip Town Code. The subject property is presently burdened with a building and improvements not relevant to the matter before the Court.

Petitioners had applied to the Zoning Board of Appeals of the Town of Islip (hereinafter "Board ") for a variance to maintain and finish construction of a concrete wall, which they had started building without a permit on their property. The wall was built on the property line. A public hearing was held on October 16, 2007 wherein petitioners' architect appeared on their behalf and two neighbors appeared in opposition. In an unanimous decision dated November 13, 2007 and filed in the office of the Town Clerk on November 14, 2007, the Board denied the application. Petitioners then commenced this Article 78 proceeding seeking to nullify the Board's decision alleging that the denial was a violation of due process, an error of law, arbitrary, capricious and an abuse of discretion. The application is timely.

When considering an application for an area variance, a zoning board is required under Town Law § 267-b(3)(b) to engage in a balancing test and weigh the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood in order for the area variance to be granted. In considering the application, the Board is required to consider five criteria: (1) whether the granting of the variance would produce an undesirable change in the character of the neighborhood or a detriment to neighboring properties; (2) whether the benefit sought can be achieved by some method, feasible to the applicant, other than a variance; (3) whether the requested variance is substantial; (4) whether the granting of the variance would have an adverse affect upon the physical or environmental conditions in the neighborhood; and (5) whether the alleged difficulty is self created (*see* ***Matter of Pecoraro v Board of Appeals of the Town of Hempstead,*** 2 NY3d 608, 781 NYS2d 234 [2004]; ***Ifrah v Utschig,*** 98 NY2d 304, 746 NYS2d 667 [2002]; ***Matter of Sasso v Osgood,*** 86 NY2d 374, 633 NYS2d 259 [1995]). While the last factor is not dispositive, it is also not irrelevant. The role of a court is to determine whether the board's findings concerning each of the forgoing factors are supported by substantial evidence and are rational (*see* ***Matter of Fuhst v Foley,*** 45 NY2d 441, 410 NYS2d 56 [1978]; ***Matter of Cowan v Kern,*** 41 NY2d 591, 394 NYS2d 305 [1997]; *rearg den.* 42 NY2d 912, 397 NYS2d 1029 [1977]).

It is well settled that local zoning boards have broad discretion in considering applications for variances and judicial review of a zoning board's decision and is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion (*see* ***Inlet Homes Corp. v Zoning Bd. of Appeals of the Town of Hempstead,*** 2 NY3d 769, 780 NYS2d 298 [2004]). Thus, the determination of a local zoning board will be sustained if it has a rational basis and is supported by substantial evidence (*see* ***Ceballos v Zoning Bd. of Appeals of the Town of Mt. Pleasant,*** 304 AD2d 575, 758 NYS2d 139 [2d Dept 2003]; ***Witzl v Zoning Bd. of Appeals of the Town of Berne,*** 256 AD2d 775, 681 NYS2d 634 [3d Dept 1998]; ***Krouner v City of Albany,*** 192 AD2d 930, 596 NYS2d 885 [3d Dept 1993]; *app den* 82 NY2d 656, 602 NYS2d 805 [1993]).

The application by the petitioners was seeking leave to construct a 2.5 foot high wall with a 2 foot fence on top of it with a zero front yard setback, another 4.5 foot wall with decorative fixtures also having a zero front yard setback instead of the required 15 feet and a third 6.5 foot wall having a side yard setback of 0.3 feet instead of the required 6.5 feet and exceeding the permitted height of 6 feet. Six buttress's with decorative light fixtures also require a front yard and a side yard relaxation of 0.0 feet instead of the required 7.2 foot setback. Unquestionably, the requested variance of 100% relaxation is, therefore, very substantial

(*see* ***Inquant v Board of Zoning Appeals of the Town of Brookhaven,*** 304 AD2d 831, 757 NYS2d 860 [2d Dept 2003]). In view of the substantial nature of the variance requested (*see* ***Bari Homes v Zoning Bd. of Appeals of Town of Yorktown,*** 226 AD2d 368, 640 NYS2d 222 [2d Dept 1996]), the Court cannot state that the Board acted irrationally or capriciously in denying the application (*see* ***Tetra Blders., Inc. v Scheyer***, 251 AD2d 589, 674 NYS2d 764 [2d Dept 1998]; ***Becar v Scheyer,*** 250 AD2d 842, 673 NYS2d 210 [2d Dept 1998]; ***Sakrel Ltd. v Roth,*** 182 AD2d 763, 582 NYS2d 492 [2d Dept 1992]; *app dism.* 79 NY2d 851, 580 NYS2d 200 [1992]).

In its decision, the Board addressed petitioners' contention that it ignored its own precedent when it denied their application to construct concrete walls on their property line. The Board stated that the prior application was extremely unique based on the fact that the wall was located at the end of a street bordering a very large preserve; that the prior application was for a 4.4 foot masonry wall on property where 4 feet is permitted; that there would only be a 4 inch deviation and therefore, not substantial; that in weighing the equities, it would serve no public purpose to reduce the fence by 4 inches; that the other property was not near the water; that the other property was in a completely different part of the town, 5 miles away from where petitioners' property is located, on a completely different size parcel of property; and that the other property was not visible to the public. The Board did not find that the other property created a precedent for this particular application because of the uniqueness of that other parcel and its location in a remote area which bordered a forest preserve where problems with wild animals existed and the property owners wanted to keep the animals from their property. The Board further stated that although the petitioners wished to construct the wall for aesthetic purposes, aesthetic purposes were not a zoning issue and there is no basis or hardship upon which there has to be a wall in their particular location.

The Board found that if it approved the petitioners' application, the type of concrete wall they sought to construct would have an adverse impact on the aesthetic character of the neighborhood and would require a 100% relaxation of the Code. This was supported by the evidence on the record (*see* ***NcNair v Board of Zoning Appeals,*** 285 AD2d 553, 728 NYS2d 73 [2d Dept 2001]; ***Ron Rose Group, Inc. v Baum,*** 275 AD2d 373, 712 NYS2d 174 [2d Dept 2000]; ***Feldi v Amster,*** 250 AD2d 612, 671 NYS2d 990 [2d Dept 1998]). The Board denied the application based upon the fact that an approval of the application would be precedent setting running counter to the legislative intent of § 68-406-f of the Code and effectively eliminating it. The Board also found that it was self-created and intentional.

Petitioners' inability to pursue their construction of the wall does not mandate the Board's granting of the variances and is not dispositive of the issue when viewing the nature and character of the area and the requested substantial relaxation of the code requirements (*see* ***Bari Homes, Inc. v Zoning Bd. of Appeals of the Town of Yorktown,*** 226 AD2d 368, *supra*).

The Court of Appeals has repeatedly noted that local zoning boards have broad discretion in considering applications for area variances and the judicial function in reviewing such decisions is a limited one (*see* ***Matter of Ifrah v Utschig***, 98 NY2d 304, 308, *supra*; ***Matter of Pecoraro v Board of Appeals of Town of Hempstead***, 2 NY3d 608, 613, *supra*). A determination may be set aside 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 Milburn Homes, Inc. v Trotta***, 7 AD3d 531, 776 NYS2d 312 [2d Dept 2004];.***Matter of Leon Petroleum, LLC v Board of Trustees of Inc. Vil. of Mineola***, 309 AD2d 804, 765 NYS2d 656 [2d Dept 2003]; ***Matter of Kuhlman v Board of Zoning Appeals of Town of Brookhaven***, 305 AD2d 683, 759 NYS2d 896 [2d Dept 2003]; ***Matter of Inguant v Board of Zoning Appeals of Town of Brookhaven***, 304 AD2d 831, *supra*; ***Matter of Cashy v Goehringer***, 303 AD2d 753, 756 NYS2d 865 [2d Dept 2003]; ***Matter of Rina v Baum***, 300 AD2d 665, 754 NYS2d 644 [2d Dept 2002]). A determination of a Board shall be sustained on judicial review if it has a rational basis and is supported by substantial evidence (*see* ***Matter of Inlet Homes Corp. v Zoning Bd. of Appeals of Town of Hempstead***,

2 NY3d 769, *supra*; ***Matter of Ifrah v Utschig***, 98 NY2d 304, *supra*; ***Matter of Sasso v Osgood***, 86 NY2d 374, *supra*). "As with board determinations on variances, a reviewing court is bound to examine only whether substantial evidence supports the determination of the board. Where substantial evidence exists, a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record" (***Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead***, 98 NY2d 190, 196, 746 NYS2d 662 [2002] *citation omitted*).

"Substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably, probatively and logically" (***300 Gramaton Ave. Assoc. v State Div. of Human Rights,*** 45 NY2d 176, 181, 408 NYS2d 54 [1978]). This is not a case where denial was solely the result of general community opposition (*cf.* ***Matter of Hugel v Campbell***, 276 AD2d 488, 713 NYS2d 697 [2d Dept 2000]; ***Matter of Buckley v Amityville Vil. Clerk***, 264 AD2d 732, 694 NYS2d 739 [2d Dept 1999]) as only two persons who resided in the community testified at the public hearing.

Under the particular facts and circumstance of this matter, the Court finds that the Board's determination was supported by substantial evidence in the record, was not arbitrary and capricious and had a rational basis, nor did it abuse its discretion in denying the application (*see* Town Law § 267-b[3][b]; ***Matter of Wolf Hill Props., Inc. v Modelewski,*** 19 AD3d 429, 796 NYS2d 141 [2d Dept 2005]; ***Matter of Inlet Homes Corp. v Zoning Bd. of Appeals of Town of Hempstead***, 2 NY3d 769, *supra*; ***Ifrah v Utschig,*** 98 NY2d 304, *supra*; ***Polsen v Rosenberg,*** 295 AD2d 352, 743 NYS2d 879 [2d Dept 2002]; *lv app den,* 98 NY2d 613, 749 NYS2d 475 [2002]; ***NcNair v Zoning Bd. of Appeals of the Town of Hempstead,*** 285 AD2d 553, *supra*; ***Toussie v Trotta,*** 283 AD2d 433, 723 NYS2d 890 [2d Dept 2001], *lv app den.* 98 NY2d 613, 749 NYS2d 475 [2002]; ***Bivona v Town of Plattekill Zoning Bd. of Appeals,*** 268 AD2d 877, 701 NYS2d 734 [3d Dept 2000]; ***Monte v Edwards,*** 258 AD2d 584, 685 NYS2d 479 [2d Dept 1999]; ***Tera Bldrs. v Scheyer,*** 251 AD2d 842, *supra*; ***Becvar v Scheyer,*** 250 AD2d 842, *supra*; ***Budget Estates v Roth,*** 203 AD2d 287, 610 NYS2d 69 [2d Dept 1994]; ***Kroumer v City of Albany***, 192 AD2d 930, *supra*; ***Sakel Ltd. v Rother,*** 182 AD2d 763, *supra*).

The Court notes that it only considered those facts which were presented on the record , pertinent to the application and its determination therein by the Board (*see* ***Matter of von Kohorn v Morrell,*** 9 NY2d 27, 210 NYS2d 525 [1961]; ***Matter of Holy Spirit Assn. for Unification of World Christianity v Rosenfeld***, 91 AD2d 190, 458 NYS2d 920 [2d Dept. 1983]).

Accordingly, the petition is denied as herein indicated. This constitutes the Order and judgment of the Court.

DATED: 5/14/08

THOMAS F. WHELAN, J.S.C.