SHORT FORM ORDER

INDEX NO. 4356/2008

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

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

In the Matter of the Application of
DONNA CACCIOPPO,

Petitioner,

-against-

PAUL M. DeCHANCE, CHAIRMAN, EDWARD MORRIS, VICE CHAIRMAN, JAMES WISDOM, DIANE BURKE, TERRI KARL, KERRI PERAGINE, and KEVIN McCARRICK, all constituting the Zoning Board of Appeals of the Town of Brookhaven,

Respondents.

ORIG. RETURN DATE: MARCH 31, 2008
FINAL SUBMISSION DATE: JUNE 12, 2008
MTN. SEQ. #: 001
MOTION: MD

PETITIONER'S ATTORNEYS:
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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 6; Replying Affirmation and supporting papers 7; it is,

ORDERED that this petition for a judgment, pursuant to Article 78 of the CPLR, annulling and setting aside the determination of respondent ZONING BOARD OF APPEALS OF THE TOWN OF BROOKHAVEN ("Zoning Board") and directing the Zoning Board to grant petitioner's application for area variances to divide petitioner's parcel of 7.695 acres of land into four lots, is hereby **DENIED** for the reasons set forth hereinafter.

Petitioner commenced this Article 78 proceeding to direct respondent Zoning Board to grant petitioner's applications, all dated November 21, 2007, for area variances to divide petitioner's parcel of 7.695 acres of land into four lots that would allegedly equal or exceed the total area requirements of the zoning district.

Petitioner is the owner of real property located on the northwest corner of the Long Island Expressway Service Road and Bellport Station Road, in the hamlet of Yaphank, Town of Brookhaven, State of New York. The property is currently unimproved, consists of a single tax lot, and is located in a high-density residential area within an A-1 zoning district, which requires a minimum lot size of 40,000 square feet. Petitioner proposes a division of the land to create four separate lots, resulting in a "flag" configuration. Petitioner alleges that the lot as it exists now is "grossly oversized" in terms of overall lot area requirements. Petitioner contends that because of the unusual shape of the northernmost extension of the property, the proposed development would provide greater conformity with the developed lots on Winged Foot Drive, appurtenant to the property on the northwest side.

Petitioner had submitted four building permit applications all dated September 6, 2007, and four applications to the Zoning Board all dated November 21, 2007, with respect to the subject parcel, seeking:

(1) a division of the parcel into 4 plots (1, 2, 3 and 4), requiring relief of arterial highway buffer and setback requirements for a proposed one-family dwelling on plot 1;

(2) lot frontage and relief of arterial highway buffer requirement for a proposed one-family dwelling on plot 2;

(3) relief of arterial highway buffer and setback requirements for a proposed one-family dwelling on plot 3; and

(4) lot frontage and relief of arterial highway buffer requirement for a proposed one-family dwelling on plot 4.

A public hearing was held on January 9, 2008, wherein petitioner was represented by her husband and partner JOSEPH CACCIOPPO. At the hearing, a report by CHRISTOPHER WREDE, a planner for the Zoning Board, was submitted and read into the record, and five neighbors testified against the proposed subdivision. The matter was held on the decision calendar, and on January 16, 2008, the Zoning Board granted petitioner's application to the extent of a subdivision of three lots only, subject to certain conditions. The Zoning Board informed petitioner by letter dated January 18, 2008. By letter dated January 31, 2008 from Mr. Caccioppo to the Chairman of the Zoning Board, Mr.

Caccioppo requested reconsideration of the matter. At a public hearing on February 6, 2008, the Zoning Board reconsidered the application and held "no motion attained." Petitioner was informed of the Zoning Board's denial by letter dated February 8, 2008. Thereafter, by Findings and Conclusions dated April 16, 2008, the Zoning Board outlined its reasons for granting petitioner's application to the extent of subdividing the property into three lots as opposed to four.

The Zoning Board 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. The Zoning Board argues that the variances requested were substantial, and that the granting of the variances would have an adverse impact on the neighborhood and cause an undesirable change in the character of the neighborhood. Further, the Zoning Board indicates that any hardship of petitioner is self-created, as petitioner purchased the property in 2004 after the Town Code was amended with respect to the requirement of a 100' setback for all buildings and structures on an arterial highway (*see* Brookhaven Town Code §§ 85-406, 85-407), and with full knowledge of the unique configuration of the property.

Petitioner alleges that in the context of similar land divisions in the immediate area, the proposed division would be in character with the surrounding area and would not negatively affect property values. Petitioner argues that the Zoning Board's decision to deny the fourth lot fails to find any support in the evidence set forth in the record. Petitioner contends that the Zoning Board did not cite a single negative impact if the parcel was divided into four lots, as there would be no negative effect produced. Moreover, petitioner alleges that the Zoning Board's decision makes no mention of the potential salutary effect of granting the fourth lot, which would have "effectively sterilized from future development the greatest portion of the fourth lot." Petitioner claims that a review of the surrounding area reveals "grossly undersized" developed lots and land divisions of "precisely the same character and kind" as proposed by petitioner. In addition, petitioner argues that the Zoning Board's Findings and Conclusions of April 16, 2008, is flawed, as it: (1) misstated or deliberately confused certain facts in the record; (2) merely restated statutory requirements; and (3) failed to set forth any facts based upon evidence to support its decision.

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*, 2007 NY Slip Op 6681 [2d Dept]; *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*, 2007 NY Slip Op 6879 [2d Dept]; *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]).

Moreover, 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*).

Section 85-406 of the Brookhaven Town Code provides in pertinent part, "[t]hroughout the Town there are numerous arterial roadways, which are vital transportation corridors and merit protection from uncontrolled commercial and industrial development. On such vital roadways, a greater, more restrictive, setback may be necessary" (*see* Brookhaven Town Code § 85-406). In addition, Section 85-407 of the Town Code provides in pertinent part, "[a]ll buildings or structures erected on any of the following roadways shall maintain a setback distance not less than the following . . . on Interstate 495 and Service Roads (S.R. 112 to Riverhead Town line) 100-foot setback and buffer" (*see* Brookhaven Town Code §§ 85-407).

Here, the Court finds that the grant by the Zoning Board of three subdivisions only had a rational basis and was supported by the evidence presented. After conducting a hearing on the matter in which petitioner appeared by her husband and partner, a licensed architect, the Zoning Board properly considered the benefit to petitioner as weighed against the detriment to the health, safety and welfare of the surrounding community. The Zoning Board 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 on petitioner's application. The Zoning Board's determination was based upon, among other things, the finding that the requested area variances were substantial, would have an adverse impact on the surrounding neighborhood, and raise safety concerns relative to the proposed access driveway for the subdivisions. Moreover, five neighbors testified at the hearing against petitioner's application, alleging that the character of the neighborhood, i.e., one and one-half to two acre parcels with horses present, would be changed by the proposed subdivision.

Specifically, the Zoning Board found that the unique configuration of the parcel includes an appendage of approximately 4.5 acres with no frontage, which would not be conducive for use in connection with the lots in question. As such, petitioner would seek to create four lots with each of the residential structures concentrated in 3.2 acres of the site. This concentration of homes

would require an access driveway traveling through the residential structures with a curvature at the center. The Zoning Board concluded that this proposed driveway poses questions concerning the safety of the residents therein, as emergency vehicles may be delayed or unable to access certain lots.

Further, the Zoning Board found that petitioner proposed no buffer and setbacks of as small as 50 feet for the proposed residences, which would require relief from the Town Code of up to 100%. In addition, petitioner sought relief of lot frontage requirements for lots 2 and 4 to accommodate the access driveway, proposing 20.3 feet while 175 feet is required. The Zoning Board considered such relief substantial, and not in conformance with the surrounding development pattern. The Zoning Board concluded that the parcel should be divided into three lots only, which would better conform to the neighboring parcels, eliminate the dangers associated with the proposed access driveway, and reduce the relief from the buffer requirements to 50% as opposed to 100% if a four-lot subdivision was granted (*see* Brookhaven Town Code §§ 85-406 and 85-407).

In view of the foregoing, the Court finds that the Zoning Board's decision had a rational basis in fact and law, was supported by the evidence presented, and cannot be deemed an abuse of discretion. Accordingly, the instant petition is **DENIED** and this special proceeding is dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: November 24, 2008

HON. JOSEPH FARNETI
Acting Justice Supreme Court