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

MARGARET NORDMANN-MORONEY and
FRANCIS X. MORONEY,

Petitioners,

ORIGINAL RETURN DATE:08/09/07
SUBMISSION DATE: 10/28/08

for a Judgment pursuant to Article 78 of the Civil Practice Law and Rules

INDEX No.: 011065/07

-against-

BOARD OF APPEALS OF THE VILLAGE OF WESTBURY and WILLIAM M. MELLO, SENIOR BUILDING INSPECTOR OF THE VILLAGE OF WESTBURY,

MOTION SEQUENCE #1

Respondents.

The following papers read on this motion:

Notice of Petition.....	1
Answering Papers.....	2,3
Reply.....	4
Petitioners' Memorandum of Law.....	5
Respondents' Memorandum of Law.....	6
Respondents' Return.....	7,8,9,10

In this Article 78 proceeding petitioners seek judgment (a) annulling the decision of the respondent Board of Appeals of the Village of Westbury ("the Board") and reinstating the existing certificates of occupancy issued on February 24, 1978; (b) directing the Superintendent of Buildings to issue the appropriate certificate of occupancy or certificate of completion for the new build-out over the existing one-car garage; (c) annulling the Stop Work Order and so much of the decision that exercises jurisdiction over windows, heat/air conditioning and roof pitch of the East Side Room and permitting the completion of the renovation of the East Side Room.

Petitioners are the owners of property located at 86 Longwood Avenue, Westbury, New York. The property is a corner lot at the intersection of Longwood Avenue and Harvard Street, with a frontage of 100 feet along Longwood Avenue and 80 feet along Harvard Street. A two-story single-family dwelling and garage, constructed in 1937, currently exist on the property. In 1958, the owners added a additional garage stall to the existing garage. In 1977 a patio was enclosed and windows were installed in what is now referred to as "the East Side Room." At some point a heating system was added to the East Side Room.

At the time that petitioners purchased the property in November 2007, their search of the Village's Building Department records revealed a certificate of occupancy dated Feb. 24, 1978, and an open building permit for the replacement of the East Side Room's roof. Petitioners planned the following renovations: converting the garage to living space; building a second-story addition over the second garage; renovating the East Side Room, including the removal of certain windows and replacement of the flat-type roof with a pitched roof. On January 6, 2007, petitioners obtained a building permit for the proposed construction.

Petitioners' neighbors, the Mastroiannis, objected to the proposed renovations. A notice to "Stop Work" on the enclosed porch was issued by the Building Department on January 12, 2007. On January 18, 2007, petitioners filed an application with the Board for a determination that their proposed renovations to the East Side Room are permitted as of right or alternatively for an area variance to proceed with the renovations to the East Side Room. Objections were filed by Ms. Mastroianni. Consequently, in March 2007, petitioners filed an amended application with the Board, including a request to legalize the garage certificate of occupancy condition and the new second-floor addition constructed above the second garage.

Hearings before the Board were held on March 19, and April 16, 2007. The Board issued its decision dated May 21, 2007. The Board approved petitioners variance application, except for the change to the East Side Room's roof pitch.

Petitioners commenced this Article 78 proceeding, contending that the Board's decision was arbitrary and capricious and not supported by substantial evidence. They insist that they were permitted to perform the proposed renovations as a matter of right. In the alternative, petitioners argue that they satisfied the statutory balancing test for a variance under Village Law §7-712-b; and, therefore, the Board should have granted them all of their requested relief.

Ms. Mastroianni sought to intervene in this proceeding, but her application for that relief was denied by this Court as untimely in November 2007. That denial was upheld by the Appellate Division, Second Department (55 AD3d 738).

The starting point for this Court's consideration is the Board's decision at issue. The Board made the following findings of fact:

(1) Petitioners may not engage in the proposed construction as of right because it is within the setback area;

(2) the garage as it existed in 1978 and as it currently exists violates the rear yard setback and should have been approved by a variance;

(3) there is only one method for calculating rear and side yard; the front yard is located on the narrower street front; consequently petitioners' front yard is located on Harvard Street; and

(4) it is within the authority of the Board to correct, by way of granting a variance, conditions which come before the Board where an application for a variance should have been made and a certificate of occupancy was previously issued in error.

The Board then performed the balancing test required by Village Law §7-712-b(3)(b) and concluded that with the exception of the change of the roofline in the East Side Room, the benefit to petitioners outweighs the detriment to the health, safety and welfare of the community. Therefore, the Board granted the requested variance, as modified.

Petitioners rely upon *Matter of Palm Management Corp v Goldstein* (8 NY3d 337 [2007]) to argue that they are entitled to rely on the validity of the 1978 Certificate of Occupancy. In that case the Court of Appeals construed the 60-day time limit in Village Law §7-712 and stated that its purpose is "to provide repose for property owners and those who might buy or lend money on the property; they should be able to rely on the fact that the time to appeal from the issuance of a certificate of occupancy has run" (8 NY3d at 341). Nevertheless petitioners' reliance upon *Matter of Palm Management Corp v Goldstein* is misplaced. There, the petitioner sought and obtained a new certificate of occupancy in connection with a refinance of the premises. The petitioner there did not seek to make changes; and, therefore, a rule of repose for an owner maintaining the property makes sense.

Here, petitioners sought to renovate and improve the East Side Room, and those changes brought up for review the certificates of occupancy. Moreover, it is well established that estoppel is not available against a local government unit for the purpose of ratifying an administrative error; a municipality is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches (*Parkview Associates v City of New York*, 71 NY2d 274, cert den and app dsmd 488 US 801 [1988]).

The right to continue a nonconforming use does not include the right to extend or enlarge the use in the absence of a variance (*Reichenbach v Windward at Southampton*, 80 Misc 2d 1031, 1036 (Sup Ct., Suffolk Co.), affd 48 AD2d 909 [2d Dept.1975], app dsmd 38 NY2d 912 [1976]). The fact that proposed construction does not alter the footprint of the existing dwelling is not determinative; where the existing dimensions of a building do not conform to setback requirements, any protection afforded the first floor does not extend to the proposed construction of a second story (*Hannett v Scheyer*, 37 AD3d 603 [2d Dept. 2007]).

Secondly, a zoning board's interpretation of its zoning ordinance is entitled to great deference (*Falco Realty Inc. v Town of Poughkeepsie Board of Zoning Appeals*, 40 AD3d 635 [2d Dept. 2007]; *Hoag v Zoning Board of Appeals of Town of Clinton*, 27 AD3d 742 [2d Dept. 2006]). The Court cannot say that the Board's interpretation of Village Code §248-17, governing the front yards of corner lots, is irrational or unreasonable. In this regard the Court notes the Board's conclusion: "The garage has existed for over 29 years and we find it would be unjust to require its removal due to an administrative error, which was relied upon by several different owners" (Decision dated May 21, 2007, last page).

Third, a variance was required for the change to the roof pitch over the East Side Room because the room itself required a variance. *Matter of Sposato v Zoning Board of Appeals of Village of Pelham*, (287 AD2d 639 [2d Dept. 2001]) is inapposite because there the new garage roof was actually lower than its predecessor. That is not the case here where the predecessor roof was flat, and the new roof is pitched.

Similarly, *Marro v Libert*, 12 Misc 3d 1152(A), affd 40 AD3d 1100 [2d Dept. 2007], does not help petitioners here, as that case was not about changes made as of right. There the denial of an area variance was annulled.

Based on the foregoing, the Court is compelled to reject petitioners' argument that they were permitted to perform the proposed construction as a matter of right. The Court now must consider petitioners' alternative argument that to the extent that the Board determination denied petitioners' request to change the roof pitch over the East Side Room, the determination is arbitrary, irrational and not supported by substantial evidence.

In making a determination whether to grant an area variance, a zoning board must engage in a balancing test, weighing the benefit to the applicant against the detriment to the health, safety and welfare of the community if the variance is granted (*Khan v Zoning Board of Appeals of the Village of Irvington*, 87 NY2d 344 [1996]). The criteria for the balancing test are as follows: (1) whether an undesirable change in the character of the neighborhood or a detriment to neighboring properties will result; (2) whether the benefit can be achieved by some other feasible method; (3) whether the requested area variance is substantial; (4) whether an adverse impact upon the physical or environmental conditions in the neighborhood will result; and (5) whether the alleged difficulty is self created (Village Law §7-712-b(3)(b)).

In this case the Board expressly considered each of the five criteria but further expressly excluded the change to the pitch of the roof over the East Side Room from its otherwise favorable conclusions. The Board found that most of petitioners' proposed changes were minor, or not substantial, and would have minimal impact on the character of the neighborhood, with the exception of the change to the pitch of the roof over the East Side Room. The Board found no other feasible method for petitioners to pursue and that the difficulty was not self-created. The Board determined that the proposed variance, except for the change in the roof line over the East Side Room, would not have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.

This Court has reviewed the minutes of the transcript of the hearings and has examined the evidence submitted to the Board on this limited issue of the roof pitch in the East Side Room. Petitioners' attorney described petitioners' request as follows:

> "We're talking now about the rear room, the patio addition that was previously a nonheated patio addition. This room as shown on the plans have [sic] dimensions of 20.7 feet by 22.2 feet. It is used as a den. It was an enclosed nonheated patio and the applicant proposes to use that area as a den. Again, by the information we provided, this was constructed by the prior owners with the permission of the Village. The only change that the applicant proposes to make and for which a permit was originally granted is to change the pitch of the roof over this area." Transcript of hearing on March 19, 2007, p.15.

The attorney then submitted copies of the plans to show the area of the change of the roof pitch and explained that the reason for the change was to allow petitioners "to put a shingle roof on top as opposed to some other type of flat roofing material that is not as aesthetically pleasing" (Transcript from March 19, p. 16). The reason that petitioners decided to do work to the East Side Room was that their contractor noted there was a great deal of wood rot and water damage in the room (Transcript from March 19, p. 17). Petitioners submitted a letter from the Building Department to the former owners, indicating that the heating elements that were installed in the East Side Room did not require a permit at the time of installation (Transcript from March 19, p.22).

Mr. Mastroianni attempted to cross-examine the architect to establish that the proposed height of the new roof in the East Side Room according to certain plans was 16 feet (Transcript from March 19, p. 42) and claimed that the construction to petitioners' home was "spoiling their backyard" and "we were there first" (Transcript from March 19, p.77). Petitioners purchased their property in 2007; the Mastroiannis purchased their property in 1999 (see Transcript of hearing on April 16, 2007 at p. 50).

On the issue of height, Mr. Mastroianni introduced a plan drawn by prior owners in 2004, showing that the roof was 9.1 feet high (Transcript from March 19, pp. 97-98). At the adjourned hearing on April 16, 2007, Mr. Mastroianni introduced an exhibit W, showing proposed plans approved by the Building Department on January 5, 2007. A handwritten note on the exhibit states "Roof pitch to remain as existing"(Transcript of hearing on April 16, 2007, p. 29; see also p. 36). Mrs. Mastroianni herself testified that she objects to petitioners' construction and it should be torn down (Transcript of hearing on April 16, 2007, pp. 51-52).

Petitioners submitted a report by Neal Peysner, a professional appraiser, who opined that the proposed construction will create no undesirable changes in the character of the neighborhood nor any detriment to nearby properties (Transcript from April 16, p. 95). He specifically testified that changing the pitch of the one-story East Side Room in order to put on "architectural shingles to match the shingles on the residence would not be a substantial variance" (Transcript from April 16, p. 96).

The Court finds that this is not a neighborhood issue but an issue created by one objecting next door neighbor. The complaints of the Mastroiannis were uncorroborated by any empirical data or expert testimony in the record (*Greenfield v Board of Appeals of the Village of Massapequa Park*, 21 AD3d 556 [2d Dept. 2005]). There is no evidence in the record supporting a conclusion that an undesirable change in the neighborhood will be created by the granting of the area variance for the change in the pitch of the East Side Room nor that such a variance would have any adverse affect or impact on the physical or environmental conditions in the neighborhood. The variance sought is not substantial, and the need for it is not self-created. The benefit to petitioners cannot be achieved by some other feasible method. Overall, there is no detriment to the health, safety and welfare of the community if the variance is granted, so the balance must be struck in favor of petitioners. To the extent that the Board determination holds otherwise, it is arbitrary and not supported by substantial evidence. For this reason, and as limited to the denial of the variance for the roofline of the East Side Room only, the Board's determination must be annulled. The Court hereby directs the Board to grant petitioners a variance for the change of the roofline in the East Side Room (*Marro v Libert*, 40 AD3d 1100 [2d Dept. 2007]; *Greenfield v Board of Appeals of the Village of Massapequa Park*).

For the record, the Court has not considered the supplemental affidavit by Building Inspector Mello submitted by respondents. Petitioners are correct that the court's review is limited to the record before the board, and proof outside of that record may not be considered (see *Kam Hampton I Realty Corp v Board of Zoning Appeals of the Village of East Hampton* , 273 AD2d 387 [2d Dept. 2000]).

This decision constitutes the order of the court.

Dated: 12-23-08

HON THOMAS P. PHELAN

J.S.C.

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