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COPY **MEMORANDUM**

SUPREME COURT, SUFFOLK COUNTY		I.A.S. PART 43
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In the Matter of the Application of RICHARD K. KORZENKO, Petitioner, for a Final Judgment Reversing And Setting aside a Decision of the Zoning Board of Appeals of the Town of Islip,	:	By: Pitts, J.S.C. Dated: January 14, 2009
Petitioner,	:	Index No. 08-25024
- against -	:	Mot. Seq. # 001 - CDISPSUBJ
	:	Return Date: 9/2/08 Adjourned: 10/23/08
RICHARD I. SCHEYER, Chairman, AL MORRISON, BARBARA O'CONNOR, KURT PAHLITZSCH, and JAMES BOWERS, Constituting the Zoning Board of Appeals of the Town of Islip, and EUGENE MURPHY, as Commissioner of Permits with the Building Division of the Town of Islip,	:	GILBERT W. McGILL, ESQ. Attorney for Petitioner P.O. Box 176 Sea Cliff, New York 11579
	:	ROBERT F. QUINLAN, ESQ. Town Attorney - Town of Islip 655 Main Street Islip, New York 11751
Respondents.	:	
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In this Article 78 proceeding petitioner seeks a judgment annulling and reversing a determination by respondent Zoning Board of Appeals of the Town of Islip which denied petitioner's application for certain area variances. The petition is dismissed.

Petitioner is the owner of a parcel of real property located on Richmond Boulevard in Ronkonkoma, New York. The property which is irregular in shape is comprised of a 42' wide by 67' long rectangular parcel with a 12' by 187' strip at one end causing the property to have a T-shape configuration. The parcel which has a lot area of approximately 5,000 square feet is substandard in this Residence B zoning district wherein a conforming lot has a width of 75 square feet and a lot area of 7,500 square feet. The property was developed with a legal nonconforming 24' by 35' one-story residence for which a certificate of compliance had been issued. The petitioner applied for permission to erect a one-story addition as well as a second-story addition to one portion of the existing dwelling which was granted by respondent Board in a determination dated October 3, 2006.

Petitioner obtained a building permit based upon the respondent Board's determination, and commenced construction on the addition to his residence. When the petitioner demolished the entire residence and began excavations on the property for a basement foundation, the Town issued a "stop work" order on the construction. Petitioner concedes he did not obtain a demolition permit prior to demolishing the premises but contends that once construction began on the additions it was clear that

the existing structure was unsound and could not be salvaged. He also contends he was advised by the staff at the Town's Building Department that a demolition permit would not be necessary. Petitioner alleges he was instructed to re-apply to the respondent Board for permission to rebuild the structure, based upon the plans which had already been approved by the board, and the building permit issued by the Building Department.

Petitioner applied to respondent Board of Zoning Appeals and at public hearings held on September 4, 2007 and January 29, 2008, the Board recited that petitioner was "requesting permission to erect dwelling (35' x 27' Irrg.) on a lot not having required width of 75 feet throughout, a lot area of 5064 square feet instead of required 7500 square feet, having a front yard setback of 17.8 feet instead of required 25 feet side yard setbacks of 4.6 feet and 9.8 feet instead of required 14 feet each and total side yards of 14.4' instead of required 28 feet." In a unanimous determination, dated June 17, 2008, respondent Board denied the petitioner's application.

Petitioner commenced the instant Article 78 proceeding challenging the Board's determination denying his application on the basis that the determination is arbitrary and capricious, unreasonable, a misinterpretation of law and fact, and deprives petitioner of his only legal use of his property.

Petitioner contends he is entitled to build a residence on the property based on its status as a "single and separate lot" and also contends he acquired a vested right in his legitimately-issued building permit as soon as he started construction based upon the permit.

The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them. Upon judicial review, the general rule is that, absent evidence of illegality, a court must sustain the determination if it has a rational basis in the record before the zoning board [*citations omitted*] (***Muth v Scheyer,*** 51 AD3d 799, 857 NYS2d 706 [2008]; ***Merlotto v Town of Patterson Zoning Board of Appeals,*** 43 AD3d 926, 841 NYS2d 650 [2007]).

Initially, the Court notes that petitioner's contention that he is entitled to build on the parcel as a matter of right based upon its "single and separate" status is erroneous, and his reliance upon the case of ***Siciliano v Scheyer,*** 150 AD2d 460, 541NYS2d 69 [1989], in support of this contention is misplaced. In ***Siciliano,*** the Appellate Division Second Department held that, "...Islip Town Code §§ 68-111. 68-113 and 68-115 expressly provide that the owner of a plot which has been held in single and separate ownership at the time of the passage of the ordinance or any amendment thereto may qualify for only one variance as of right (i.e., either as to area density, total width, or side yard width), since each section requires 'compliance with all zoning requirements other than the one for which the single and separate dispensation is conferred'" (***id. at*** 150 AD2d 461). Where, as here, a landowner requires multiple variances, he fails to comply with the aforesaid provisions and is not entitled to variances as a matter of right but may apply to the Board of Appeals for the variances as a matter within its discretion (***id.***). However, the Court also held in ***Siciliano*** that when a petitioner fails to establish entitlement to the variances as a matter or right, or as a matter within the Board's discretion, a strict application of the zoning code constitutes a taking of the petitioner's property in violation of the Just Compensation clause of the Fifth Amendment of the United States Constitution.

This holding was overruled by the Appellate Division Second Department in ***Kransteuber v Scheyer,*** 176 AD2d 724, 574 NYS2d 968 [1991] *aff'd* 80 NY2d 783, 587 NYS2d 272). In ***Kransteuber***, the Court held in order to establish that an unconstitutional taking has occurred, a landowner must prove that the subject property cannot yield an economically reasonable return as zoned.

Petitioner's contention that he acquired a vested right in his building permit as soon as he commenced construction based upon that permit is also erroneous. As a general rule, "the protection of vested rights in a nonconforming structure existing at the time a prohibitory code is enacted does not extend to subsequent construction [*citations omitted*]. The zoning code in this proceeding provides that '[n]o building or land shall be used *and no building shall be erected or structurally altered except in conformity with this ordinance'* (Town of Islip Code § 68-130 [emphasis in original]"(***Frisenda v Zoning Board of Appeals of the Town of Islip,*** 215 AD2d 479, 480, 626 NYS2d 263 [1995]). Where, as here, the petitioner's original residence was a permitted nonconforming structure since it was built in compliance with preceding zoning ordinances, that factor does not mean the structure was legalized for all future construction and the petitioner was entitled to a building permit as of right. There is no requirement that the new improvements be afforded the same protection as the original structure, thereby entitling the petitioner to a building permit without a variance (***id.***). The Town of Islip Code provides at § 68-15[c] that

> No building which has been damaged by fire or other causes to the extent of more than 50% if physical structure, as determined by the Commissioner of Planning and Development, or his designee, exclusive of foundations, shall be repaired, rebuilt or used except in conformity with the provisions of this ordinance.

Citing the above provision, respondent Board determined that the petitioner's residence lost its legal conforming status when the petitioner demolished it. This determination is not inconsistent with the cases cited by the petitioner with respect to a landowner's vested right in legitimately-issued building permits. The cases cited by the petitioner relate to circumstances in which the ordinance itself was altered after the building permit was issued and construction was commenced. Here, there was no change in the ordinance which brought the nonconforming structure into conflict with the ordinance. It was petitioner's own decision to demolish the structure.

Inasmuch as a local zoning board is entrusted with a reasonable measure of discretion in the interpretation of its own ordinances and the judicial function in reviewing the board's decision is a limited one, a board's determination should not be cast aside unless there is a showing of illegality, arbitrariness or an abuse of discretion (***Richard Dudyshyn Contr. Co. v Zoning Board of Appeals of the Town of Mount Pleasant,*** 255AD2d 445, 680 NYS2d 571 [1998] *citing* ***Bockis v Kayser,*** 112 AD2d 222, 491 NYS2d 438 [1985]; *see also,* ***Town of Huntington v Five Towns College Real Property Trust,*** 293 AD2d 467, 740 NYS2d 107 [2002]). Thus, 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 Board of Appeals of the Town of Hempstead,*** 2 NY3d 608, 781 NYS2d 234 [2004]). In view of the foregoing respondent Board's determination that petitioner was required to obtain the subject area variances had a rational basis.

A zoning board considering a request for an area variance is required, pursuant to Town Law § 267-b[3][b], 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 area variance is granted. The zoning board is also required to consider whether (1) 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; (2) the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) the requested area variance is substantial; (4) the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district and (5) the alleged difficulty was self-created. While the last factor is not dispositive, neither is it irrelevant (***Ifrah v Utschig,*** 98 NY2d 304, 746 NYS2d 667 [2002]).

Here, the record establishes that the Board properly applied Town Law § 267-b[3][b] in considering the petitioner's application for area variances. Furthermore, its determination denying the petitioner's application for area variances was not arbitrary and capricious, was supported by the substantial evidence, and had a rational basis (***David Park Estates v Trotta,*** 283 AD2d 429, 723 NYS2d 885 [2001]; ***Budget Estates v Roth,*** 203 AD2d 287, 610 NYS2d 69 [1994]). Although the petitioner is unable to develop the property without the requested variances, the record reveals that the strict application of the zoning ordinance was necessary to promote and protect the public health, safety and welfare and the need to promote public good outweighed any injury to the petitioner (***Allt v Zoning Board of Appeals of the Town of Hyde Park,*** 255 AD2d 311, 679 NYS2d 422 [1998]).

Petitioner needed a 33 % variance of zoning requirements for total lot area, a 42 % relaxation of lot frontage requirements, a 67 % relaxation of minimum side yard set back for one side yard and a 30% relaxation of the other side yard and a 50 % relaxation of the total sideyard requirements. The requested variances are unquestionably substantial (***Inguant v Board of Zoning Appeals of the Town of Brookhaven,*** 304 AD2d 831, 757 NYS2d 860 [2003]). In light of the substantial nature of the multiple variances requested and their cumulative effect, the Court cannot conclude that the Zoning Board of Appeals acted irrationally or capriciously in denying the application (***Tetra Builders, Inc. v Scheyer,*** 251 AD2d 589, 674 NYS2d 764 [1998]; ***Becvar v Scheyer,*** 250 AD2d 842, 673 NYS2d 210 [1998]; ***Sakrel, Ltd. v Roth,*** 182 AD2d 763, 582 NYS2d 492 [1982]).

The Board concluded the petitioner's proposed development would not be in conformity with any of the lots in the surrounding area, and thus, would not conform to the nature and character of the area. The Board's findings that the proposed changes would have an undesirable effect on the neighborhood were thus supported by the evidence in the record (***Inlet Homes Corp. v Zoning Board of Appeals of the Town of Hempstead,*** 304 AD2d 758, 757 NYS2d 784 [2003] *aff'd* 2 NY3d 769, 780 NYS2d 298; ***Inguant v Board of Zoning Appeals of the Town of Brookhaven,*** supra; ***McNair v Zoning Board of Appeals of the Town of Hempstead,*** 285 AD2d 553, 728 NYS2d 73 [2001]). Moreover, there is substantial evidence in the record to support the Board's conclusion that granting the area variances for the construction of a single family dwelling on the subject property would have a negative impact on the character of the neighborhood (*see,* ***Linzenberg v Summer,*** 277 AD2d 316, 715 NYS2d 886 [2000]; ***Strohli v Zoning Board of Appeals of the Village of Montebello,*** 271 AD2d 612, 706 NYS2d 447 [2000]***; Sakrel, Ltd. v Roth,*** 204 AD2d 331, 611

NYS2d 268 [1994]; ***Robbins v Seife,*** 215 AD2d 665, 628 NYS2d 311[1995]). Although petitioner presented evidence at the hearing that there are many substandard parcels in the immediate area, the Board found most of the substandard parcels are at least 60 feet in width. The Board further noted the adjoining parcel was the only lot on the entire radius map which was in any way near the size of petitioner's lot, and even so the adjoining lot was larger than the petitioner's lot. Inasmuch as the record reflects that the majority of the parcels in the area are substantially larger than the subject parcel, the subject parcel does not conform to the nature and character of the area, and thus, the Board's findings that the proposed changes would have an undesirable effect on the neighborhood were supported by the evidence in the record (***Inlet Homes Corp. v Zoning Board of Appeals of the Town of Hempstead,*** *supra*; ***Inguant v Board of Zoning Appeals of the Town of Brookhaven,*** supra; ***McNair v Zoning Board of Appeals of the Town of Hempstead,*** *supra*).

The Board's further findings that the alleged difficulties were self-created and the proposed changes would adversely impact the neighborhood were also supported by the evidence in the record (***McNair v Board of Zoning Appeals, Town of Hempstead,*** *supra*; ***Ron Rose Group, Inc. v Baum,*** 275 AD2d 373, 712 NYS2d 174 [2000]; ***Feldi v Amster,*** 250 AD2d 612, 671 NYS2d 990 [1998]). Petitioner created his own hardship when he demolished his legal nonconforming residence without obtaining the necessary municipal approvals. The record supports the Board's findings that petitioner's excuse for proceeding without such approvals, to wit, that certain unidentified members of the Building Department's staff assured him that he did not need a demolition permit, and advised him to go ahead without one so as to avoid entanglements with the Suffolk County Health Department, lacks credibility. The Board's findings are further substantiated by the petitioner's foregoing of the Board's offer to issue subpoenas of the Building Department staff to obtain their testimony at a further hearing. The Board also noted the memorandum of the Director of the Town's Building Department to the effect that the Inspector had not made any such representations to petitioner was furnished to the petitioner's counsel before the second hearing, and was not unaddressed by the petitioner at that hearing.

In addition, the petitioner's claim that respondent Board's determination to deny petitioner's variance application was discriminatory because the Board granted other applications for similar area variances is not supported by the evidence on the record. The fact that the Board reached contrary results on essentially the same facts, warrants an explanation or, in the alternative, a conforming determination (***Knight v Amelkin,*** 68 NY2d 975, 510 NYS2d 550 [1986]). Nevertheless, the granting of variances to those similarly situated does not, in itself, suffice to establish that the denial of an area variance to the applicant is due either to impermissible discrimination or arbitrary action. A zoning board of appeals can properly decide that additional variances would impose too great a burden and strain on the existing community, or that previous variances had been a mistake and should not be repeated (***Cowan v Kern,*** 41 NY2d 591, 394 NYS2d 579 [1977]).

Moreover, the fact that a board had granted an area variance to a similarly situated landowner does not mandate the granting of variance to an applicant where the board's denial of the variance is sufficiently explained by its conclusion that additional variances would change the character of the neighborhood (*see,* ***Spandorf v Board of Appeals,*** 167 AD2d 546, 562 NYS2d 215 [1990]; *see also,* ***Pesek v Hitchcock,*** 156 AD2d 690, 549 NYS2d 164 [1989]). In its determination the Board

discussed why it believed that each of the various applications for which variances were granted were distinguishable from that of the petitioner. The Board also determined that the granting of the relief sought by petitioner herein could lead to future applications for similar relief on nearby lots which would have additional negative impacts on the neighborhood. The Court concludes that the explanations provided by respondent Board for why it granted the prior requests for area variances for nearby parcels and denied the instant request to be rational and supported by the evidence on the record (***Muth v Scheyer***, *supra;* ***Berk v McMahon,*** 29AD3d 902, 814 NYS2d 753 [2006]; ***Cullen v Scheyer,*** 265 AD2d 410, 696 NYS2d 489 [1999]).

Based upon the entire record before it, and balancing all the factors established, the Board could rationally conclude that the detriment the proposed development posed to the neighborhood outweighed the benefit sought by the petitioner, and its determination denying the request and its determination denying these variances was not arbitrary and capricious (***Ifrah v Utschig,*** supra).

Accordingly, the petition is denied and the proceeding is dismissed.

Submit judgment.

J.S.C.