

Heilbronn v Guidera

2009 NY Slip Op 31116(U)

May 1, 2009

Supreme Court, Suffolk County

Docket Number: 08-39026

Judge: Thomas F. Whelan

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MEMORANDUM DECISION

SUPREME COURT, SUFFOLK COUNTY

IAS PART 33

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 In the matter of the application of LAURENCE
 HEILBRONN and ROBIN WAMBOLD,

BY: WHELAN, J.S.C.

Index No. 08-39026

For a judgment pursuant to Article 78 of the
 Civil Practice Law and Rules,

Motion Date: 11/21/08

Adj. Date: 4/3/09

Petitioners,

Mot. Seq. # 002 - MD;

-against-

CDISPSJ

KEVIN GUIDERA, Chairman, DAN GUZEWICZ,
 RICHARD McMAHON, ROB DEVINNEY, GERRY
 FERRARA, constituting the VILLAGE OF
 SOUTHAMPTON ZONING BOARD OF APPEALS,
 JOSEPH D. ABRUZZESE and SHERRI J.
 ABRUZZESE,

Respondents.

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The petitioners commenced this Article 78 proceeding for a judgment reversing and annulling the September 25, 2008 determination of the respondent, Zoning Board of Appeals (hereinafter "ZBA"), which granted three area variance to respondents, Joseph D. and Sherri J. Abruzzese. For the reasons set forth below, th petitioners' demands for relief are denied and the petition is dismissed.

The Abruzzese respondents are the owners of an irregularly shaped parcel of real property situated on the south side of Great Plains Road in the Village of Southampton, New York. The premises are comprised of 1.86 acres and are located in a district zoned R-120. In August of 2008, the Abruzzeses filed an application with the respondent, ZBA, for two, four foot side yard

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variances (26 feet instead of 30 feet of side yards) and an 88 foot front yard variance (12 feet instead of 90 feet of front yard) in order to construct a three car, detached garage on the south eastern portion of their property.

The Abruzzeses' parcel is bounded to the north by Great Plains Road for a distance of 184 feet. The 238 foot southern border is bounded by two land-locked residential lots. The eastern boundary is formed by a 16 foot wide right of way that extends some 420 feet to the southern boundary of the premises. At a distance of 322 feet south of Great Plains Road, the eastern border of the subject premises extends east for a distance of 89 feet and 86 feet south to the southern border. This eastern boundary bump-out adds a southeastern, square "pan-handle" to the otherwise rectangular shape of the Abruzzeses' parcel. It also causes the right-of-way, which continues straight south from Great Plains Road, to dissect the southeastern, square pan-handle portion of the Abruzzeses' parcel where it meets the rectangular portion thereof. Consequently, the western edge of the square pan-handle fronts the eastern side of the right-of-way at a distance of 322 feet south of Great Plains Road.

The right of way continues past the southern border of the Abruzzeses' property for an additional 260 feet. It is considered a "street" by zoning officials and the parties to this action as it affords Great Plains Road access to the two adjacent, land-locked properties south of the Abruzzeses' parcel. These properties are owned by petitioner, Robin Wambold. Petitioner Heilbronn owns a residential lot which backs up against the entire 86 foot eastern border of the square pan-handle portion of the Abruzzeses' parcel.

In the summer of 2008, the Abruzzeses decided to improve the southeastern, square pan-handle of their residential lot by the construction of a new, three car garage. As proposed, the new garage would front the eastern side of the right-of-way and be set only 12 feet from its eastern edge. A variance relaxing the front yard set back from the 90 feet required by the zoning ordinance to 12 feet is thus necessary for the construction of the new garage. Also required are two, four foot variances from the north and south side yard minimums of 30 feet since the garage, as proposed, would be set 26 feet from each of these side yards. The eastern side yard minimum of 30 feet is satisfied by the proposed new garage.

By written application dated August 5, 2008, the Abruzzeses applied for the variances necessary for the construction of their new garage. The application was calendared for a public hearing on August 28, 2008. Thereat, counsel for the Abruzzeses appeared and submitted a portion of the Suffolk County Tax Map that depicts the subject premises and surrounding properties, an aerial photograph of same, four separate ZBA decisions granting variances for surrounding parcels. Counsel for petitioner Heilbronn also appeared and opposed the granting of the variances in accordance with a letter of opposition dated August 28, 2008. Counsel also submitted

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photographs depicting the existence of mature trees and other physical characteristics of the property where the proposed garage is to be built. At the conclusion of the hearing, the matter was held for decision and calendared for September 25, 2008.

By letter faxed to the respondents on September 16, 2008, petitioner Wambold requested an adjournment of the September 25, 2008 public hearing. Petitioner Wambold then set forth her reasons for opposing the variance relief requested by the Abruzzeses. A follow-up correction letter was faxed to the respondents by petitioner Wambold on September 17, 2008.

On September 25, 2008, the matter appeared on the public hearing calendar. The respondent ZBA denied petitioner Wambold's request to reopen the meeting and to adjourn same so that she could retain and appear by counsel. The board then resolved to enter its decision granting the requested variances in accordance with a prepared written decision dated September 25, 2008.

The petitioners then commenced this Article 78 proceeding for a judgment reversing the ZBA's September 25, 2008 decision to grant the requested variances. After the joinder of issue and the recusal of the Justice first assigned to this proceeding in March of 2009, the matter was calendared before the undersigned and marked submitted on April 3, 2009. The petitioners claim that the ZBA's decision is arbitrary, capricious and erroneous are principally based upon the following allegations: (1) that the ZBA failed to properly consider and weigh all of the statutorily enumerated factors in making its determination; (2) that the ZBA's determination is without a rational basis and is not supported by "substantial evidence;" and (3) that the board failed to consider the facts enumerated in the Southampton Village Code at § 116-27(A) and (C).

It is well settled law that local zoning boards have broad discretion in considering applications for variances and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion (*see Matter of Ifrah v Utschig*, 98 NY2d 304, 746 NYS2d 667 [2002]; *Matter of Filipowski v Zoning Bd. of Appeals of Vil. of Greenwood Lake*, 38 AD3d 545, 832 NYS2d 578 [2d Dept 2007]; *Matter of Mann v Zoning Bd. of Appeals of Town of E. Hampton*, 34 AD3d 588, 825 NYS2d 91 [2d Dept 2006]; *Matter of DiPaci v Zoning Bd. of Appeals of the Vil. of Upper Nyack*, 4 AD3d 354, 770 NYS2d 884 [2d Dept 2004]). That the substantial evidence standard applicable to judicial review of quasi-judicial proceedings has no application to the court's review of determinations of zoning officials made after informational hearings such as those at issue here is now clear (*see Moy v Board of Trustees of Town of Southold*, ___ AD3d ___, 2009 WL 1016092 [2d Dept 2009]; *Matter of Zupa v Board of Trustees of Town of Southold*, 54 AD3d 957, 864 NYS2d 142 [2d Dept 2008]). A determination of a zoning board should thus be sustained upon judicial review if it has a rational basis and is not arbitrary and capricious (*see Matter of Sasso v Osgood*, 86 NY2d 384, 633 NYS2d 259 [1995]; *Matter of Filipowski v Zoning Bd. of Appeals of Vil. of Greenwood Lake*, 38 AD3d 545, *supra*; *Matter of*

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Pietrzak & Pfau Assoc., LLC v Zoning Bd. of Appeals of Town of Wallkill, 34 AD3d 818, 827 NYS2d 84 [2d Dept 2006]; *Matter of Pasceri v Gabriele*, 29 AD3d 805, 815 NYS2d 218 [2d Dept 2006]).

In determining whether to grant an area variance, a zoning board of appeals is required by Village Law § 7-712-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 variance is granted (*see Matter of Ifrah v Utschig*, 98 NY2d 304, *supra*; *Matter of Sasso v Osgood*, 86 NY2d 384, *supra*; *Matter of Russia House at Kings Point, Inc. v Zoning Bd. of Appeals of Vil. of Kings Point*, 40 AD3d 767, 835 NYS2d 450 [2d Dept 2007]; *Matter of Filipowski v Zoning Bd. of Appeals of Vil. of Greenwood Lake*, 38 AD3d 545, *supra*; *Matter of Martino v Board of Zoning Appeals of Inc. Vil. of Great Neck Plaza*, 26 AD3d 382, 809 NYS2d 182 [2d Dept 2006]). 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 other method, other than an area variance, feasible for the applicant to pursue; (3) the required 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 (*see* Village Law § 7-712-b(3)[b]; *Matter of Ifrah v Utschig*, 98 NY2d 304, *supra*; *Matter of Russia House at Kings Point, Inc. v Zoning Bd. of Appeals of Vil. of Kings Point*, 40 AD3d 767, *supra*; *Matter of Filipowski v Zoning Bd. of Appeals of Vil. of Greenwood Lake*, 38 AD3d 545, *supra*; *Matter of Hutchinson v Zoning Bd. of Appeals of Inc. Vil. of Cove Neck*, 302 AD2d 526, 755 NYS2d 273 [2d Dept 2003]).

Under the statutory balancing test imposed by Village Law § 7-712-b(3), a local zoning board is not required to justify its determination with supporting evidence as to each of the five enumerated factors. Rather, the board's decision will be sustained where its ultimate determination balancing the relevant considerations was rational (*see Merlott v Town of Patterson Zoning Bd. of Appeals*, 73 AD3d 926, 841 NYS2d 650 [2d Dept 2007]; *Berk v McMahon*, 29 AD3d 902, 814 NYS2d 753 [2d Dept 2006]; *cf. Kaufmann v Incorporated Vil. of Kings Point*, 52 AD3d 664, 860 NYS2d 573 [2d Dept 2008]). A determination will be deemed rational if it has some objective, factual basis as opposed to resting entirely on subjective considerations (*see Berk v McMahon*, 29 AD3d 902, *supra*; *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 809 NYS2d 98 [2d Dept 2005]).

Upon application of the foregoing principles to the facts ascertainable from the record, the court finds that the respondents' determination was not erroneous nor was it arbitrary, capricious or an abuse of discretion. The ZBA's determination to grant the requested variances has a rational basis and reflects that the ZBA properly weighed the benefit to the applicants against the detriment to the health, safety and welfare of the neighborhood. In this regard, the court notes that while there was

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ample, substantive evidence in the record demonstrating the benefit to the Abruzzeses, there was no objective evidence of any detriment to the health, safety and welfare of the community if the variances were granted.

The record also reflects that the respondent ZBA adequately considered the relevant other factors enumerated in § 7-712-b(3) of the Village Law. The ZBA found that of the three requested variances, only the front yard variance was substantial. It then found that the substantial nature of this variance was ameliorated, in large part, because its impact principally affected the Abruzzeses' parcel rather than any neighboring parcel due to the unique configuration of the subject parcel. The fact that this finding was supported by objective evidence in the record, is clear upon even a most cursory review of the record.

The ZBA also found that the granting of the requested variances were consistent with the character of the surrounding neighborhood. The record clearly supports this finding as it includes ample evidence of the present condition of neighboring parcels and the substantial improvements erected thereon, many of which do not conform to current zoning requirements. Moreover, a review of the record reflects that there was insufficient objective evidence tending to establish that the greater of the requested variances would adversely impact any physical or environmental conditions. The generalized complaints of the petitioners regarding the disturbance of mature trees and the detrimental affects they would suffer due to the increase in traffic over the right-of-way are entirely subjective and without any objective basis in the record.

The petitioners' speculative concerns that the proposed garage would someday be converted into additional living quarters or its use or otherwise enlarged, are rejected as unmeritorious as such concerns provide no basis for the denial of area variances or building permits (*see Association of Friends of Sagnoponack v Zoning Bd. of Appeals of the Town of Southampton*, 287 AD2d 620, 731 NYS2d 851 [2d Dept 2001]; *Kam Hampton I. Realty v Board of Zoning Appeals of the Vil. of East Hampton*, 273 AD2d 385, 709 NYS2d 613 [2d Dept 2000]). In any event, these speculative concerns were eviscerated by the ZBA's impositions of conditions by which the proposed garage was deemed to be an accessory building to the existent one-family dwelling on the subject premises and its use limited to a permitted accessory garage.

Also rejected as unmeritorious are the petitioners' claims that the ZBA determination is subject to reversal since the Abruzzeses failed to show "practical difficulties." The practical difficulty standard set forth in the Village Code is pre-empted by the provisions of the Village Law at § 7-712-b(3) (*see Cohen v Board of Appeals of the Vil. of Saddle Rock*, 100 NY2d 395, 764 NYS2d 64 [2003]). Nor does the petitioners' alternate claim that the ZBA's failure to acknowledge or otherwise consider that the physical garage could be located elsewhere on the premises without


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the need for any variances warrant a reversal of the ZBA's determination. While the ZBA failed to comment upon whether the benefit sought by the applicants could be achieved by some feasible means other than a variance, the record suggests the ZBA's conclusion that benefit of constructing the garage in the location proposed far outweighed any detriment to the health, safety and welfare of the neighborhood or community (see *Erisman v Town of Poughkeepsie ZBA*, 50 AD3d 793, 855 NYS2d 623 [2d Dept 2008]; see also *East Home v Trotta*, 276 AD2d 553, 714 NYS2d 509 [2d Dept 2000]).

The court has considered the remaining contentions of the petitioners and find them to be without merit. Accordingly, the petitioners' demands for a judgment reversing the September 25, 2008 determination of the respondent ZBA are denied and the petition is dismissed.

Settle judgment upon a copy of this decision.

DATED: 5/10/09



THOMAS F. WHELAN, J.S.C.