

**Matter of Wenz v Board of Zoning Appeals of Vil. of  
Lloyd Harbor**

2009 NY Slip Op 31783(U)

August 4, 2009

Supreme Court, Suffolk County

Docket Number: 46026/2008

Judge: William B. Rebolini

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK****I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**  
**Justice**

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In the Matter of the Application of  
Perr Krusos Wenz,

Petitioner,

For a Judgment under Article 78 of the Civil  
Practice Law and Rules in writ of mandamus

- against -

Board of Zoning Appeals of the  
Village of Lloyd Harbor,

Respondent.

Defendants.

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Motion Sequence No.: 002;  
CDISPOMotion Date: 1/29/09  
Submitted: 4/22/09Index No.: 46026/2008Attorney for Petitioner:Stein Riso Mantel, LLP  
405 Lexington Avenue  
New York, NY 10174Attorney for Respondent:Humes & Wagner, LLP  
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Locust Valley, NY 11569

In this Article 78 proceeding petitioner seeks a judgment annulling and reversing a determination by respondent Zoning Board of Appeals of the Village of Lloyd Harbor insofar as the determination denied petitioner's application for an area variance with respect to the location of three air conditioning units. The petition is dismissed.

Petitioner is the owner of a certain parcel of waterfront property located on Mallard Drive in the Village of Lloyd Harbor. The subject parcel, which has a lot area of 2.12 acres, is presently developed with a single family residence, an accessory building described as both a cabana and a garage, a tennis court and a swimming pool. When petitioner purchased the property in or about 1994, she applied for and received the area variances necessary to perform substantial renovations on the dwelling house, including: a side yard variance permitting a 33.1 foot set back instead of the required 40 foot set back for a gable roof addition; a side yard variance permitting petitioner to

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maintain a 22 foot set back instead of the required 40 feet for an existing outdoor staircase; and to maintain a deck having a setback of 43.7 feet instead of the required 50 feet set back from a bluff. In the process of performing these renovations petitioner moved three air conditioning units from their original location adjacent to the outdoor staircase to their current location along the parcel's southerly property line. Upon completion of the renovations in 1996, the petitioner was issued a certificate of occupancy for the premises.

In 2006, petitioner's neighbor to the south complained that the three air conditioning units along their property line violated the provisions of the Village's zoning code regarding side yard setbacks. In response, the Building Inspector conducted an investigation of petitioner's property and issued a code violation with respect to the petitioner's air conditioning units and her swimming pool. Petitioner was advised to apply to the respondent Zoning Board of Appeals for the necessary area variances to legalize the air conditioning units and her pool in their present locations. Following a public hearing held on October 22, 2008, the respondent issued a "short form" decision, without findings, on that same date, which was filed with the Village Clerk on December 4, 2008. Subsequently, respondent Board issued a "long form" decision setting forth the Board's findings which was filed with the Village Clerk on January 29, 2009. Petitioner's application for area variances was granted with respect to the swimming pool but denied with respect to the air conditioning units.

Petitioner commenced the instant Article 78 proceeding challenging the respondent's "short form" determination filed on December 4, 2008<sup>1</sup>. Petitioner commenced a second Article 78 proceeding<sup>2</sup> challenging the respondent's "long form" decision filed on January 29, 2009.

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. Thus, a determination of a zoning board should be sustained upon judicial review if it was not illegal, has a rational basis, and is not arbitrary and capricious. When reviewing the determinations of a zoning board, courts consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the board's determination (see, Gallo v. Rosell, 52 AD3d 514 [2<sup>nd</sup> Dept., 2008]).

In determining whether to grant an area variance a zoning board of appeals is required by Village Law § 7-712-b[3] 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, Tsunis v. Zoning Board of Appeals of Inc. Village of Poquott, 59 AD3d 726 [2<sup>nd</sup> Dept.,

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<sup>1</sup> Although petitioner has termed the relief she requests herein as being in the nature of mandamus, the allegations of the petition clearly demonstrate that she is seeking the more appropriate certiorari relief.

<sup>2</sup> The second Article 78 proceeding was filed under Suffolk County Index No. 09-3567.

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2009)). 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 application 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, Filipowski v. Zoning Board of Appeals of the Village of Greenwood Lake, 38 AD3d 545 [2<sup>nd</sup> Dept., 2007]).

As noted, *infra*, respondent Board did not issue its findings at the time that it made its determination on petitioner's application for the subject area variances. Instead, the Board followed a procedure enacted by the Village of Lloyd Harbor in 1989 (Local Law 1-1989) which provides, in pertinent part, as follows:

The board of appeals may render its decision on any appeal or application in a short form format, setting forth the board's determination and conditions, if any, without enumerating the findings which formed the basis for its determination. Any appellant, applicant, or person or persons, jointly or severally aggrieved by a decision of the board, may within thirty days after the filing of the short form decision in the office of the village clerk, file a written demand with the village clerk requesting that the board of appeals render its decision in a long form format containing findings which formed the basis for the board's determination. The village clerk shall promptly deliver this written demand to the chairman of the board of appeals. The chairman shall then cause the long form decision to be prepared and upon its approval by the board, file it with the village clerk.

In cases where the board renders a short form decision, and no written demand requesting a long form decision is filed within the required thirty day period, the date of the filing of the short form decision with the Village Clerk shall be deemed the date of the filing of the board's decision for all purposes. In cases where the board renders or is required to render a long form decision the date of the filing of the long form decision shall be deemed the date of filing of the board's decision for all purposes.

By objection in point of law, the respondent Board alleges that the instant proceeding is premature because petitioner did not await the issuance of the "long form" decision before commencing the proceeding. Petitioner, by her reply, alleges that Local Law 1-1989 is invalid because it invades an area preempted by State Law and cites Municipal Home Rule Law §10 and Village Law §7-712 et. seq.

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An Article 78 proceeding is not the proper vehicle to challenge the validity of legislative enactments (see, Garden City Center Assocs. v. Incorporated Village of Garden City, 193 AD2d 740 [2<sup>nd</sup> Dept., 1993]). Although CPLR §103[c] gives the court the power to treat an Article 78 proceeding as an action for a declaratory judgment, this power is conditioned on jurisdiction over the parties (see, Overhill Building Co. v. Delaney, 28 NY2d 449 [1971]). In an action seeking to declare a legislative act of a village invalid, the Board of Trustees of the Village would be necessary parties (see, Garden City Center Assocs. v. Incorporated Village of Garden City, 193 AD2d 740 [2<sup>nd</sup> Dept., 1993]). Inasmuch as the Board of Trustees of the Village of Lloyd Harbor is not a party, the Court declines to consider the validity of the Village's Local Law 1-1989 in this proceeding.

In any event, respondent Board did attach a copy of the "long form" decision disclosing its findings to its answer and return in this proceeding. The Board's procedure is analogous to an enduring practice engaged in by zoning boards in numerous municipalities who wait to draft their findings until such time as their determination is challenged via an article 78 proceeding. Such practice, while not condoned, is acceptable and does not serve as a basis for a reversal of the Board's decision (see, Thirty West Park Corp. v. Zoning Board of Appeals of the City of Long Beach, 43 AD3d 1068 [2<sup>nd</sup> Dept., 2007]; 215 East 72<sup>nd</sup> Street Corp. v Klein, 58 AD2d 751 [1<sup>st</sup> Dept., 1977], app. dismissed 42 NY2d 1012 [1977]; see, also, Ohrenstein v. Zoning Board of Appeals of Canaan, 39 AD3d 1041 [3<sup>rd</sup> Dept., 2007]; Efraim v. Trotta, 17 A.D.3d 463 [2<sup>nd</sup> Dept., 2005]; Iwan v. Zoning Board of Appeals of the Town of Amsterdam, 252 AD2d 913 [3<sup>rd</sup> Dept., 1998]). In any event, the petitioner was afforded an ample opportunity to address the Board's findings in her reply papers.

The record herein establishes that the Board properly applied the five factors set forth in Village Law §7-712 in considering petitioner's application for area variances. Furthermore, its determination denying petitioner's application for area variances was not arbitrary and capricious, was supported by the substantial evidence and had a rational basis (see, Muth v. Scheyer, 51 AD3d 799 [2<sup>nd</sup> Dept., 2008]; David Park Estates v. Trotta, 283 AD2d 429 [2<sup>nd</sup> Dept., 2001]; Budget Estates v. Roth, 203 AD2d 287 [2<sup>nd</sup> Dept., 1994]).

Petitioner needed a 96.5 % variance of the minimum zoning requirement of 40 feet for side yard set backs to retain the air conditioning units in their present location of 1.4 feet from the property line. The requested variance is unquestionably substantial (see, Kraut v. Board of Appeals of the Village of Scarsdale, 43 AD3d 923 [2<sup>nd</sup> Dept., 2007]). In light of the substantial nature of the variance requested, the Court cannot conclude that the Zoning Board acted irrationally or capriciously in denying the application (Fagan v. Colson, 49 AD3d 877 [2<sup>nd</sup> Dept., 2008]; see also, Pecoraro v. Board of Appeals of the Town of Hempstead, 2 NY3d 608 [2004]; Tetra Builders, Inc. v. Scheyer, 251 AD2d 589 [2<sup>nd</sup> Dept., 1998]; Becvar v. Scheyer, 250 AD2d 842 [2<sup>nd</sup> Dept., 1998]).

The Board also concluded that there were reasonable alternatives to retaining the air conditioners in their present location which would be feasible for the petitioner to pursue. The Board found, noting that petitioner's own engineer conceded as much, that the air conditioning units could be moved closer to the petitioner's own dwelling without incurring significant financial expense.

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The Board also noted that a lesser variance might be necessary for such a relocation and granted leave to the petitioner to revise her application to request a lesser variance.

Inasmuch as the petitioner is presumed to have known the applicable zoning regulations at the time she purchased the property in 1994, the Court perceives no basis to disturb the Board's findings that petitioner's hardship was self-created (see, Strohli v. Zoning Board of Appeals of the Village of Montebello, 271 AD2d 612 [2<sup>nd</sup> Dept., 2000]; see, also, Millennium Custom Homes, Inc. v. Young, 58 AD3d 740 [2<sup>nd</sup> Dept., 2009]). The Board noted in its findings that petitioner's knowledge of the zoning ordinance is underscored by the fact that she applied for area variances from the side yard property line when renovating her dwelling in 1994 to accomplish the renovations. Thus, petitioner, or her contractors, should have known that the units violated the side yard set requirements when the units were moved to their present location during the renovations. The Board found that the current location of the units is for the personal convenience of the petitioner to remove the sight and sound of the units from the area adjacent to the home.

The Board also indicated in its findings that air conditioner units by their nature are noisy, a fact recognized by the petitioner when she offered to install noise attenuation materials on the fence shielding the units from the adjoining parcel. The Board concluded that the retention of the noisy air conditioning units 1.4 feet from the neighboring property will create a substantial adverse impact on the neighborhood, in particular the adjoining property. Due to the adverse impacts petitioner would understandably prefer to retain the units on the property line to her benefit, but this preference is at her neighbor's detriment. The Board further concluded that the granting of the requested variance would be a detriment to the community as a whole by creating a practical precedent for the Board, by which other residents would seek similar relief and the Board would have little ability to distinguish the applications. The Court cannot conclude therefore that the Board acted irrationally in determining that the requested relief was not in conformity with the general character of the neighborhood, would produce an undesirable change in the neighborhood and would have an adverse impact upon the physical and/or environmental conditions in the neighborhood. 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 (see, Gallo v Rosell, 52 AD3d 514 [2<sup>nd</sup> Dept., 2008]).

Petitioner further contends that the air conditioning units in question were in their present location at the time a final inspection was made the Village Building Inspector after completion of the renovations in 1996, and that the Building Inspector did not object to their location before issuing a certificate of occupancy for the renovated premises. Petitioner also asserts that the relocated units were depicted on the revised survey submitted with her final application for a certificate of occupancy but no objection was made to their relocation. At the hearing, the Building Inspector stated that the final survey depicted the air conditioning units' new location, but he did not observe their actual location when he did his inspection of the premises before issuing the certificate of occupancy. He also stated that had he observed the units in their location he would not have issued the certificate of occupancy. Petitioner is, in effect, arguing that the issuance of the certificate of occupancy legalizes the air conditioner units in their present location and that the Board should not

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be heard to complain some 13 years later that their location violates the zoning code. Such contention is, however, without merit. “[W]here a local building inspector improperly issues a certificate of occupancy, and as a result the property owners acts in violation of the zoning ordinance, a zoning board of appeals may nevertheless correct the mistake by enforcing the ordinance. Indeed, estoppel is not available against a local government unit for the purpose of ratifying an administrative error and a municipality, it settled, is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches [citations omitted]” (Palm Management Corporation v. Goldstein, 29 AD3d 801 [2<sup>nd</sup> Dept., 2006], aff’d 8 NY3d 337 [2007]).

Finally, petitioner contends that the fact certain exhibits she submitted at the public hearing on this matter were, admittedly, misplaced by the Board, has greatly prejudiced and harmed her right to judicial review, and mandates that the Board’s determination to deny the variance be annulled and the variance issued. The misplaced exhibits include a copy of a site plan, photographs of the petitioner’s property, the letter from an air conditioning company regarding the decibel levels of the air conditioner units and a letter setting forth a ground’s company estimate of the cost of moving the units. Whether petitioner has, in fact, declined the Board’s invitation, or was unable to recreate these exhibits for the certified record is unclear. Nevertheless, the determination of the Board must be upheld if it is rational and supported by the substantial evidence (see, Ifrac v. Utschig, 98 NY2d 304 [1998]; Khan v. Zoning Board of Appeals of the Village of Irvington, 87 NY2d 344 [1996] rehearing den 87 NY2d 1056 [1996]). The consideration of “substantial evidence” is limited to determining “whether the record contains sufficient evidence to support the rationality of the [respondent’s] determination,” (Sasso v. Osgood, 86 NY2d 374 [1995]; see, Gallo v. Rosell, 52 AD3d 514 [2<sup>nd</sup> Dept., 2008]). As the Board’s factual findings have a rational basis in the record and are supported by the substantial evidence, its determination must be sustained (see, Hutchinson v. Zoning Board of Appeals of the Inc. Village of Cove Neck, 302 AD2d 526 [2<sup>nd</sup> Dept., 2003]; Johnson v. Village of Westhampton Beach, 244 AD2d 335 [2<sup>nd</sup> Dept., 1997]).

Under the circumstances presented, the Court finds that the petitioner’s need for the requested variance is not compelling. The existence of reasonable alternatives which do not require as extensive a variance approval as sought here, justifies and supports the respondent Board’s denial of the petitioner’s application. The conclusions reached by the Board are supported by the substantial evidence on the record and are not found to be arbitrary, capricious, erroneous as a matter of law or an abuse of discretion.

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

Settle judgment.

Dated: August 4, 2009

  
HON. WILLIAM B. REBOLINI, J.S.C.