SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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TIMOTHY CHOU,

Petitioner,

For an Order and Judgment Pursuant to Article 78 of the New York State Civil Practice Law and Rules,

-against-

THE BOARD OF ZONING APPEALS OF THE TOWN OF NORTH HEMPSTEAD, and KEVIN CRONIN, in his capacity as the CHIEF BUILDING OFFICIAL OF THE TOWN OF NORTH HEMPSTEAD,

Respondents.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 16300/09
Motion Seq. No.: 01

DECISION

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This is an Article 78 proceeding in the nature of mandamus to review a decision of the Board of Zoning Appeals of the Town of North Hempstead which denied Petitioner's application for a gross floor area variance.

Petitioner is the owner of a parcel of real property which is known as 16 Ashland Avenue, New Hyde Park. The property is located in the Town of North Hemstead in a Residence C District. The lot has 50 feet of frontage on Ashland Avenue and a depth of 100 feet. The property is improved with a single family home which is occupied by Petitioner as his primary residence. When it was constructed in 1941, the house consisted of 1 ½ stories. A photo maintained by the Nassau County Department of Assessment indicates that the house was converted to two stories sometime before November 2000.[1] Another addition was constructed in 2002, and after taking title in July 2004, Petitioner again expanded the premises.

[1]Respondents' ex. M.

Section 70-49 (B) of the Town Code provides that, "The gross floor area [of properties in a Residence C District] shall not exceed 50% of the lot area." Section 70-51 (A) of the Town Code provides that, "On an interior lot, a single-family dwelling shall have two side yards, one on each side of the main building, the aggregate width of which shall be not less than 25% of the width of the lot, but in no case shall any side yard be less than five feet in width."[2]

On June 29, 2005, Jarro Building Industries submitted an application on Petitioner's behalf to the Town's Building Department. The application requested a permit to construct a "1-story side addition and 2-story rear addition" to the residence and designated Jarro as the contractor and John Stumpf as the architect.[3] It is unclear whether architect's plans were submitted and what, if any, action was initially taken on the application by the Building Department. However, on July 6, 2005, Jarro submitted an "application for amended building permit," stating that a building permit had been issued "in error" and requesting that a "denial letter for 1-story extension" be issued.[4] Plan Examiner Andrew Acierno marked the original application "Disapproved for Zoning" on the same date that the application for amended building permit was submitted. Nevertheless, a permit was issued and construction commenced.

On September 16, 2005, following a field inspection, Joseph Madden, Deputy Commissioner of the Building Department, issued a cease and desist order, stating that the permit was issued in error.[5] October 25, 2005, Acierno issued a notice of disapproval to Jarro, stating that the project called for a "proposed" side yard setback of 3.5 feet and "proposed" aggregate side yard setback of 8.3 feet.[6] Pursuant to § 70-51, each side yard was required to be 5 feet wide and, because the property was 50 feet wide, the aggregate width of the side yards was required to be 12.5 feet.

On November 1, 2005, Jarro applied to the Board of Zoning Appeals for a variance from the side yard and aggregate side yard requirements. A hearing was conducted by the Board on March 8,

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[2]Respondents' ex. D.

[3]Respondents' ex. F.

[4]Respondents' ex. M.

[5]Respondents' ex. S.

[6]Respondents' ex. T.

2006.[7] At the hearing, the applicant submitted plans drawn by architect John Stumpf showing a "proposed gross floor area" of 2,156 square feet.[8] The plans prepared by Stumpf called for a 1-story addition expanding the downstairs kitchen, a 2-story addition behind the existing attached garage, and another 2-story addition to the rear of the property.[9]

By decision dated April 26, 2006, the Board granted the application provided "the existing side addition shall be reconstructed to a maximum dimension of 3.0' x 14.6' leaving a minimum side yard setback of five feet."[10] The architect's plans called for a side yard set back of 5.1 feet on the side where the addition was to be located and a setback of 5.2 feet on the other side of the property. Thus, it appears that the Board's intent was to grant "Timothy Chou/Jarro Bldg." a variance from the aggregate side yard requirement. As additional conditions to granting the permit, the Board required the steps on the front porch to be replaced and six foot tall plantings to be installed to screen the side addition from the street. Following the board's decision, Jarro completed the construction project.

In December 2007, Petitioner contacted Jarro and requested a certificate of completion, but Jarro was unable to obtain the certificate.[11] On January 15, 2008, Jarro received a "notice of disapproval," stating that the "proposed" gross floor area was 2,747 square feet.[12] On July 28, 2008, Petitioner retained his present counsel, Brown & Altman, to attempt to obtain a certificate of completion for the project.[13]

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[7]Respondents' ex. N. While Petitioner was represented by his present counsel at the hearing before the Zoning Board, the transcript makes clear that Dr. Chou was not present when the matter was actually reached.

[8]Respondents' ex. 0 are architect's plans dated April 14, 2006. Respondent's ex. P are plans dated April 28, 2006. It appears that the latter amended plans were submitted after the Board's decision. In any event, there is no difference between the plans with regard to the proposed gross floor area or the side yard setbacks.

[9]Respondents' ex. O.

[10]Respondents' ex. N.

[11]Petition at ¶ 34.

[12]Respondents' ex. M.

[13]Petition at ¶ 35. As noted, it appears that a member of the firm, David N. Altman, Esq., had represented Petitioner at least since the sideyard variance hearing in March 2006.

On September 4, 2008, the Building Department issued a second notice of disapproval claiming that the "proposed" gross floor area was 2,908.62 square feet.[14] Following the second notice of disapproval, Petitioner requested Stumpf to prepare "as built" plans, showing the actual gross floor area of the residence.[15] When Stumpf refused to prepare the plans, Petitioner engaged a new architect, John Viscardi, who calculated the gross floor area, not counting certain space under the vaulted ceiling, to be 2,824.98 square feet.[16] On March 5, 2009, the Building Department issued yet a third notice of disapproval, claiming that the existing gross floor area was 2,899.98 square feet.[17] On March 25, 2009, Petitioner submitted an application to the Board of Zoning Appeals for a variance from the gross floor area requirement.[18] On May 6, 2009, the Board held a public hearing on Petitioner's application.

By decision dated July 15, 2009, the Board denied Petitioner's application for the variance.[19] By way of background to its decision, the Board noted that a number of "large box-like structures" had been constructed in the Town, some of which dated to the 1990's. The Board noted that these structures were derisively referred to as "McMansions" because they were not "in harmony with the existing character of the neighborhood." The Board further noted that in response to the construction of these larger homes, the Town had enacted zoning legislation, including more restrictive side yard setbacks and gross floor area requirements. The purpose of these regulations was to "preserve exposure to sun, natural light, and sky" enjoyed by the owners of the smaller and older residences. The Board noted that these regulations had been enacted before Petitioner acquired title to his property.

The Board noted that, notwithstanding these measures, homes which were not in compliance with the zoning regulations continued to be constructed. The Board stated that in a number of instances plans had been submitted to the Building Department which inaccurately calculated setbacks or gross

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[14]Respondents' ex. J. The second notice of disapproval shows David Altman, Esq. as the applicant.

[15]Petition at ¶ 40.

[16]Respondent's ex. I.

[17]Respondent's ex. J.

[18]Respondents' ex. K. Pursuant to General Municipal Law § 239-m, the Board referred the matter to the Nassau County Planning Commission. However, the Planning Commission recommended local determination of the application.

[19]Respondent's ex. A.

floor area, or simply omitted reference to these dimensional requirements. The Board stated that plans containing inaccurate information had been approved through "error, omission, or worse."

The Board noted that the plans submitted by Petitioner's architect at the hearing on his application for the setback variance indicated that the gross floor area was only 2,156 square feet. The Board stated that while it was "unfortunate" that the Building Department had not discovered the violation of the floor area requirement earlier, it was entitled to rely on calculations submitted by Petitioner's architect.

The Board found that a grant of the variance would impose a detriment upon the community that outweighed the benefit sought to be obtained by Petitioner. The Board further found that Petitioner's property would create an undesirable change in the character of the neighborhood. While Petitioner's appraiser, John Breslin, testified that the property was in character with several other dwellings located on the block, the Board determined that there was no evidence that any of those properties exceeded the gross floor area requirement. Additionally, the Board noted that two of the properties cited by Petitioner were situated on oversized lots. The Board found that Petitioner's property created a "crowded appearance" in relation to the other properties in the neighborhood.

Based upon testimony of Viscardi that Stumpf had omitted the floor area of the rear porch, the garage, and the portion of the second floor which was over the garage, the Board concluded that Stumpf had understated the gross floor area by 468.32 square feet. The Board found that the requested variance was substantial, given that the ratio of gross floor area to lot area was approximately 58%. Finally, the Board found that the difficulty faced by Petitioner was self-created because he purchased the property after the floor area restriction had taken effect and he could have constructed the premises in compliance with the regulation.

This proceeding seeking to review the Board's decision denying the variance was commenced on August 13, 2009. Petitioner argues that the Board's decision is arbitrary and capricious because it fails to consider the benefit to Petitioner as opposed to the detriment to the neighboring community. Petitioner argues the Board failed to consider the testimony of his appraiser, John Breslin, that the improvement to Petitioner's property comports with the character of the neighborhood. Petitioner asserts that because the additions to his home are located near the rear of the dwelling, they are not visible from the street. Petitioner asserts that the variance sought is not substantial. Petitioner argues that the difficulty is not self-created and responsibility should be assigned to architect Stumpf as well as

the inspector of the Building Department. Finally, Petitioner argues that the Board was biased because it had predetermined to deny his application regardless of the evidence presented. Respondent asserts that it properly considered all of the factors required by Town Law § 267-b(3) and that its decision to deny the variance was not irrational.

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(*Ifrah v Utschig*, 98 NY 2d 304, 308 [2002]). 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, 613 [2004]). The rationale for this rule is that "Local officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community" (Id).

In making a determination whether to grant an area variance, the zoning board shall take into consideration "the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant" (Town Law § 267-b[3]). The board shall consider 1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created, 2) whether the benefit sought by the applicant can be achieved by a feasible method, other than an area variance, 3) whether the requested variance is substantial, 4) whether the proposed variance will have an adverse impact on the physical or environmental conditions in the neighborhood, and 5) whether the alleged difficulty was self-created, which consideration shall be relevant but shall not necessarily preclude the granting of an area variance (Id).

Although no single statutory consideration is determinative, the effect of a requested variance on the character of the neighborhood is a critical aspect of a zoning board's determination (Supplementary practice commentary in 2009 pocket part at 114). The conformity or dissimilarity of the property in question to the prevailing conditions in the neighborhood with respect to bulk and area is a highly significant consideration (Id). However, a zoning board is not required to determine that a property conforms with prevailing conditions merely because some properties in the neighborhood are not in compliance with the area requirement (*Sakrel, Ltd v Roth*, 176 AD2d 732, 735-36 [2d Dept 1991]).

In weighing the benefit to the applicant as against the detriment to the community, the zoning board must consider the economic cost to the applicant of correcting the zoning violation (*Rosewood*

Home Builders v Zoning Board of Appeals, 17 AD3d 962 [3d Dept 2005]). Nevertheless, the Board is not required to grant a variance simply because demolition and reconstruction are the sole means of compliance, even where the cost of these measures is substantial (Id). In considering whether a difficulty is self-created, an error on the part of the architect may be attributed to the applicant (*Johnson v Zoning Board of Appeals*, 8 AD3d 741 [3d Dept 2004]).

Because the standards set forth in Town Law § 267-b(3) are exclusive, a zoning board is precluded from considering any factors not recited in the statute (*Caspian Realty v Zoning Board of Appeals*, 886 N.Y.S.2d 442, 449 [2d Dept 2009]). However, the Board may consider a misrepresentation by the applicant as bearing upon both detriment to the community and whether the applicant's difficulty was self-created (Id at 450-51). In *Caspian Realty*, the applicant's misrepresentation pertained to the intended use of the property. A zoning board may similarly consider an applicant's misrepresentation with respect to the property's area or dimensions.

Petitioner argues that his difficulty was not self-created because the departure from the gross floor area requirement was caused by Stumpf and Jarro. Since Jarro controlled the dealings with the Building Department and Stumpf was retained by Jarro, it may be that Petitioner was not even aware of the gross floor area issue until he retained Brown & Altman in July 2008. The ominous statement in the Board's decision concerning lax enforcement of zoning regulations, and Acierno's unexplained departure from the Building Department, also suggest that Petitioner may have been duped by his architect and contractor. Nevertheless, because it may also be inferred that Petitioner was aware that his home exceeded the gross floor area restriction, the Board was entitled to attribute Stumpf's misrepresentation to the owner and conclude that the difficulty was self-created.

In its decision, the Board incorrectly stated that "The economic impact of compliance is not a factor this Board is required to consider under the Town Law."[20] Nevertheless, the Board recognized that, "the fact that the dwelling exists" was a "factor mitigating in favor of granting the variance." Although "no specific evidence of cost" was offered, the Board recognized that "There would naturally be some cost associated with making the dwelling compliant."

Although no evidence as to the cost of correction was offered, the court concludes that the Board considered this factor and properly balanced it against the burden on adjoining neighbors and detriment to the community. "[T]he zoning board is not required to justify its determination with

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[20]Respondents' ex. A at 9, footnote 4.

supporting evidence for each of the five factors, so long as its ultimate determination balancing the relevant considerations was rational" (*Genser v Board of Zoning & Appeals*, 65 AD3d 1144, 1147 [2d Dept 2009]). In view of the evidence that Petitioner's home was out of character in the community and the lack of evidence as to the cost of compliance, the Board's decision to deny the requested area variance was supported by substantial evidence and was not irrational.

Zoning hearings may be quite informal (*Von Kohorn v Morrell*, 9 NY2d 27 [1961]). Because a zoning board's actions are entitled to a presumption of regularity, the board's determination will be upheld absent clear evidence that it failed to exercise independent judgment (*Kontogiannis v Fritts*, 144 AD2d 850 [3d Dept 1988]). Petitioner's unsubstantiated allegation that the Board's action was predetermined is insufficient to rebut the presumption that the Board exercised independent judgment in denying his application for an area variance. The petition is **dismissed** and the decision of the Board of Zoning Appeals of the Town of North Hempstead denying Petitioner's application for a gross floor area variance is confirmed.

Settle judgment on notice.

DATED: February 1, 2010
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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