DelliBovi v Giannadeo

2010 NY Slip Op 30735(U)

April 1, 2010

Supreme Court, Suffolk County

Docket Number: 0027615/2009

Judge: John J.J. Jones

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

[* 1]

MEMORANDUM

I.A.S. TERM
PART 10

BY: HON. JOHN J.J. JONES, JR.
Justice

SUPREME COURT, SUFFOLK COUNTY

STEPHEN DELLIBOVI, Petitioner,	DATE: 1 April 2010
-against-	SUBMIT DATE: 1/6/2010
ADRIENNE GIANNADEO, Chairperson, DOMINICK SALERNO, ANTHONY TANZI, JR., EDWARD BENZ and WILLIAM VALENTINE, Constituting the Board of Zoning Appeals of the Town of Smithtown, County of Suffolk, State of New York and the BOARD OF ZONING APPEALS OF THE TOWN OF SMITHTOWN, Respondents.	INDEX NO.: 0027615/2009 MOTION DATE: 9/15/2009 MOTION NO: MD;CASEDISP

In this Article 78 proceeding, petitioner Stephen DelliBovi seeks a judgment annulling and reversing a determination by respondent Board of Zoning Appeals of the Town of Smithtown (Board) to the extent it denied petitioner's application for several variances on the ground that the Board acted in an arbitrary and capricious manner, that its determination is confiscatory since it imposes unreasonable restrictions on petitioner's property, and that it was made without substantial evidence. Respondent Board has filed an answer to the petition and return. Although petitioner requested the opportunity to present oral argument, the record before this Court is clear and substantial, and oral argument is not necessary to aid in the Court in making its determination. For the reasons set forth herein, it is

ORDERED and ***ADJUDGED*** that the petition is denied, the determination of

the Board is confirmed and the proceeding is dismissed.

Petitioner is the owner of certain real property located at 130 Ledgewood Drive, Smithtown, New York, on which a 4,600 square foot single family dwelling with attached garage and certain improvements were constructed subsequent to the purchase of the property in 2006 and the demolition of an existing dwelling. Petitioner alleges that he was advised that variances and building permits were needed for paving, retaining walls and fencing after the improvements were substantially completed. On or about March 11, 2009, petitioner applied to the Board of Zoning Appeals for a total of 7 variances: to reduce the minimum front yard setback from 50 feet to 6 feet for a proposed set of 6-foot high front gates attached to 6-foot brick posts; to reduce the minimum front yard setback from 50 feet to 43 feet for an existing 5-foot retaining wall; to increase the maximum height of an existing fence from 6 feet to 8 feet; to reduce the minimum distance from the existing retaining wall to lot line from 3.7 feet to 0 feet for an existing 3.7 foot retaining wall to an existing 8 foot fence; to reduce the minimum distance from 3.7 feet to 0 feet between the existing retaining wall to the existing 8-foot fence; to increase the maximum existing front yard paved surface from 25 per cent to 38 per cent; and to increase the maximum existing paved surface in the side yard from 25 per cent to 45 per cent.

Petitioner seeks an increase in the allowable percentage of paved surface to enable access to the existing three car garage, to provide safe ingress and egress from the property, and to provide sufficient parking on the property. The fencing is requested to enclose the front yard for their two children. Front gates are to be placed twenty feet back from the roadway so that there will be no blocking of the roadway before a vehicle gains access onto the property. The existing retaining wall is actually a block-constructed planter which allegedly prevents drainage from petitioner's property onto adjoining properties in the area, which is hilly. On the other sides of the retaining wall are 8-foot fencing on the south side and 6-foot fencing elsewhere.

At the hearing held before the respondent Board of Zoning Appeals, Chris Ballerini, 23 Holly Drive, Smithtown, New York, appeared in opposition to the application. He indicated that one portion of petitioner's 8-foot fence was placed adjacent to the property line in front of newly-erected 4-foot retaining walls, and that the actual height of petitioner's fence post is 10 feet in height. Approximately 2 to 3 feet of the fence and retaining walls are partially covered by backfill to hide the actual height of the fence and retaining wall. Ballerini complained that the 8-foot fence obscures his view of the surrounding neighborhood, and it does not conform with "the standard fences in the surrounding community." In addition, Ballerini complained that a 50-foot section of the fence has a 2-foot gap at the bottom, which poses a safety risk to people on adjacent properties, and he alleged that the petitioner added soil to his property to make it higher than the adjoining property. Ballerini also complained that the petitioner added backfill approximately 2 feet deep to Ballerini's property without

[* 3]

his consent, allegedly either to hide the actual 4-foot height, not 3.7 feet, of the retaining wall because a 4-foot retaining wall involves a more detailed approval process through the Town engineering department, or to provide support for the wall. In addition, Ballerini claimed that the Town Engineer informed the petitioner that he needed to correct the excavation of some of Ballerini's property that was dug to build petitioner's driveway, and that the retaining wall needed to be set back according to Code. It was Ballerini's assertion that the petitioner created his own difficulty by ignoring the advice of the Town Engineer.

Petitioner testified that the fence he erected is 6 inches into his property and that the backfill on the outside of the retaining wall is on that 6 inches of his property. Petitioner asserted that the wall was erected because the property is elevated and he was told by the Town Engineer that he needed to control runoff, and because there was a 3-foot difference in height from the northwest corner to the southeast corner of his property. Petitioner also claimed that the only reason that a portion of the wall is on the property line is because if he had brought the fence in by 3 feet, the dirt in the 3-foot area 'would be consistently running off onto his property." While the petitioner also testified that the fence that he erected "is not on top of the retaining wall", the photographs that the petitioner submitted to the Board show that the fence posts and fencing are adjacent or very close to the retaining wall.

At a later meeting of the Board on July 14, 2009, respondent Giannedeo, as Chair of the Board, stated that she had visited the property and saw that petitioner's retaining walls and fences "create a very undesirable change in the character of the neighborhood," which she described as "rustic." The Board also considered the "substantial" request to change the 50-foot front yard setback to 6 feet for the front gate, and noted that a reasonable alternative would be to erect 4-foot brick posts with a 4-foot gate. It also questioned the "substantial" request for limiting the setback requirement from 50 feet to 43 feet for petitioner's 5-foot retaining wall, which was allegedly erected for privacy and to even out the property, and it also questioned whether the 5-foot retaining wall was needed, since the Chair "didn't see any retaining walls in that neighborhood at all." It was noted that the Planning Board recommended denial of the variance request for the 8-foot fence, denial of the variance request for the existing 5-foot retaining wall, denial of the variance request to reduce the front yard setback for the gate, denial of the variance request to reduce the minimum distance between the retaining wall and the lot line, and a denial of the request to reduce the minimum distance from the retaining wall to the fence. The request to increase the paving on the side yard from 25 per cent to 45 per cent was recommended for approval by the Planning Board because petitioner's house has a 3-car side entry garage and a 35-foot minimum area for turning is required, and there are no other alternatives other than paving the side yard. It was also recommended, however, that the circular driveway in the front yard be a width of 12 feet rather than the proposed 20 feet.

The Board made detailed findings of fact on the record. It noted that the proposed 6-foot front gate and fence was substantial and would create an undesirable change in the character of the neighborhood in that there are currently no such walls in the neighborhood, the significant height increase would not be harmonious with the existing character of the neighborhood, and the petitioner's lot is not unique. A 4-foot gate and fence, it was asserted, would not require variances. The request for the variance to erect a 6-foot front gate and post arrangement was denied.

The area variance requests to reduce the minimum front yard setback from 50 feet to 43 feet for an existing 5 foot retaining wall, to increase the maximum fence height to 8 feet, to reduce the minimum distance from the retaining wall to the lot line from 3.7 feet to 0 feet for an existing 3.7 foot retaining wall to an existing 8 foot fence, and to reduce the minimum distance from the retaining wall to the 8 foot fence from 3.7 feet to 0 feet were denied. Each of the requests was for existing improvements built without permits, and it was noted that there are no walls or fences 8 feet in height in the neighborhood, and the significant height increase is not harmonious with the existing character of the neighborhood and results in aesthetic degradation. It was determined that the added dimension offered by the improvements was not necessary since the rear yard is approximately 121 feet deep and could be enjoyed without the improvements. Each of the requested variances represented a substantial deviation, and it was felt that they impacted the physical condition of the neighborhood by generating "visual pollution." The requests were denied.

While it was noted that the variance for the maximum side yard paved surface was needed to accommodate the petitioner's 3-car garage, the front yard variance request would create an undesirable change in the character of the neighborhood, result in aesthetic degradation to nearby properties, and represented a request for an increase of 52 per cent in the front yard. An alternative feasible method to achieve the objective of enabling appropriate vehicle ingress and egress could be achieved through a 12-foot wide driveway instead of an "excessive" 20-foot wide driveway, which creates an urban look in a suburban neighborhood. The Board voted to approve an increase of the maximum paved surface in the front yard from 25 per cent to 38 per cent with the condition that the circular driveway be 12 feet wide, and it approved an increase of the maximum paved surface in the side yard from 25 per cent to 45 per cent. The vote of the Board was unanimous.

After the Board issued its July 14, 2009 determination, petitioner requested a rehearing but his request was denied.

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

[* 5]

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, 774 NE2d 732, 746 NYS2d 667 [2002]).

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 (***Inlet Homes Corp. v Zoning Board of Appeals of the Town of Hempstead***, 304 AD2d 758, 757 NYS2d 784 [2d Dept 2003], *aff'd* 2 NY3d 769, 812 NE2d 1246, 780 NYS2d 298 [2004]). Accordingly, the determination of a local zoning board will be sustained if it has a rational basis and is supported by substantial evidence in the record (***Ceballos v Zoning Board of Appeals of the Town of Mount Pleasant***, 304 AD2d 575, 758 NYS2d 139 [2d Dept 2003]; ***Witzl v Zoning Board of Appeals of the Town of Berne***, 256 AD2d 775, 681 NYS2d 634 [3d Dept 1998]; ***Krouner v City of Albany***, 192 AD2d 930, 596 NYS2d 891 [3d Dept 1993] *app den* 82 NY2d 656, 602 NYS2d 805).

Here, the record establishes that the Board properly applied Town Law § 267-b[3][b] in considering petitioner's application. Testimony from petitioner and one neighbor was heard, three of the members of the Board made a site visit, the survey and other documents were reviewed, and the recommendations of the Planning Board were considered. The Board concluded that petitioner's proposal was not in conformity with the general character of the neighborhood and would have an adverse impact on the physical condition of other properties in the neighborhood. 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***, 285 AD2d 553, 728 NYS2d 73 [2d Dept 2001]). The Board also properly considered whether petitioner's hardship was self-created and whether the petitioner had feasible alternatives to pursue. Furthermore, its determination to the extent it denied certain requests for area variances and imposed conditions was not arbitrary and capricious, was supported by substantial evidence and had a rational basis (***David Park Estates v Trotta***, 283 AD2d 429, 723 NYS2d 885 [2d Dept 2001]; ***Budget Estates v Roth***, 203 AD2d 287, 610 NYS2d 69 [2d Dept 1994]). Moreover, the effect of the Board's determination is not confiscatory. The requested variances are unquestionably substantial (***Inguant v Board of Zoning Appeals of the Town of Brookhaven***, 304 AD2d 831, 757 NYS2d 860 [2d Dept 2003]), and the Board's conclusion that the variance requests were substantial was rationally based. In light of the substantial nature of the multiple variances requested

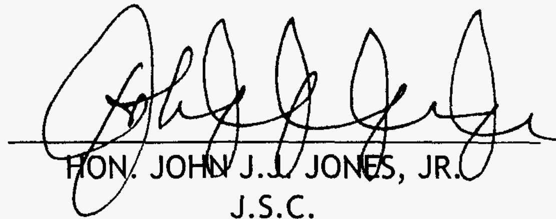
[* 6]

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 [2d Dept 1998]; ***Becvar v Scheyer***, 250 AD2d 842, 673 NYS2d 210 [2d Dept 1998]; ***Sakrel, Ltd. v Roth***, 182 AD2d 763, 582 NYS2d 492 [2d Dept 1992]).

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 (***Matter of Merlotto v Town of Patterson Zoning Bd. of Appeals***, 43 AD3d 926, 841 NYS2d 650 [2d Dept 2007], citing ***Matter of Pecoraro v Board of Appeals of Town of Hempstead***, 2 NY3d 608, 613, 814 NE2d 404, 781 NYS2d 234 [2004]; ***Matter of Ifrah v Utschig***, 98 NY2d 304, 308, 774 NE2d 732, 746 NYS2d 667 [2002]; ***Matter of Sasso v Osgood***, 86 NY2d 374, 384, 657 NE2d 254, 633 NYS2d 259 [1995]; ***Matter of Mattiaccio v Zoning Bd. of Appeals of Vil. of Pleasantville***, 22 AD3d 758, 759, 804 NYS2d 385 [2005]). To the extent that petitioner seeks to refute the findings of fact made by the Board through the submission of photographs which were not before the Board, such photographs must be disregarded (*see* ***Matter of Merlotto v Town of Patterson Zoning Bd. of Appeals***, *supra*).

Based upon the entire record before it, and balancing all the factors established, the Board could rationally conclude that the detriment posed to the neighborhood by the proposed development outweighed the benefit sought by the petitioner, and its determination denying the requested variances was neither arbitrary nor capricious (*see* ***Ifrah v Utschig***, 98 NY2d 304, 774 NE2d 732, 746 NYS2d 667 [2002]).

The foregoing shall constitute the Decision, Order and Judgment of this Court.



HON. JOHN J.J. JONES, JR.
J.S.C.

CHECK ONE: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

TO:

LAW OFFICES OF VINCENT J. TRIMARCO
By: Vincent J. Trimarco, Esq.
Atty. for Petitioner
1038 West Jericho Turnpike
Smithtown, NY 11787

VALERIE S. MANZO, ESQ.
Atty. for Respondents
16 DeMont Street
Smithtown, NY 11787

YVONNE LEIFFRIG, ESQ.
Smithtown Town Attorney
99 West Main Street
Smithtown, NY 11787

VINCENT PULEO
Smithown Town Clerk
99 West Main Street
Smithtown, NY 11787