SHORT FORM ORDER INDEX NO. 31480/2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

In the Matter of the Application of MICHAEL SARTORETTI and PATRICIA SARTORETTI,

Petitioners,

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

-against-

THOMAS C. YOUNG, Chairman, GWENDOLYN BROWN, JOHN C. FARRELL, MICHAEL KANE, DENISE KRETZ, BURTON KOZA and THOMAS H. WEINSCHENK, constituting the ZONING BOARD OF APPEALS OF THE TOWN OF BABYLON,

Respondent.

ORIG. RETURN DATE: SEPTEMBER 25, 2009
FINAL SUBMISSION DATE: NOVEMBER 19, 2009
MTN. SEQ. #: 001
MOTION: MD

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Upon the following papers numbered 1 to 11 read on this petition FOR A JUDGMENT PURSUANT TO ARTICLE 78.
Notice of Petition and supporting papers 1-3; Petitioners' Memorandum of Law 4; Verified Answer 5; Respondent's Return 6; Respondent's Memorandum of Law 7; Audio Transcription of Public Hearing 8; Reply Affirmation 9; Supplemental Reply Affirmation and supporting papers 10, 11; it is,

ORDERED that this verified petition for a judgment, pursuant to Article 78 of the CPLR, annulling and reversing the decision of respondent ZONING BOARD OF APPEALS OF THE TOWN OF BABYLON ("respondent") and directing respondent to approve petitioners' application in its entirety and without conditions, restrictions, modifications or covenants and restrictions, is hereby **DENIED** for the reasons set forth hereinafter.

Petitioners MICHAEL SARTORETTI and PATRICIA SARTORETTI ("petitioners") are the owners in fee of the property commonly known as 25 Grant Avenue West, in the Town of Babylon, County of Suffolk, State of New York ("property"). Petitioners inform the Court that the property is improved with a one-family residence with a detached garage facing Grant Avenue West, maintains approximately 80 feet of frontage along Grant Avenue West, and abuts Jackson Inlet at the rear. Petitioners indicate that the property has only two bordering neighbors, one on the east side and one on the west side. The property has a lot area of approximately 8,000 square feet and is located in a Residence B zoning district. Petitioners allege that the area surrounding the property is "overwhelmingly developed" with little or no vacant land left for development, and many of the homes are converted summer bungalows. Petitioners further allege that the area is predominantly composed of a variety of parcels with substandard street frontages and side yards.

Petitioners further inform the Court that the footprints of the existing residence and garage on the property were approved in 1961, when respondent granted variances for the rear and side yards for the garage and diminished lot area for the residence. A certificate of occupancy was issued by the Town of Babylon for the residence and the garage also in 1961.

In petitioners' underlying application to respondent, petitioners sought to legalize an existing second story on their detached garage with two existing amateur radio antennae thereupon, and to legalize two utility sheds on the west side of the property, as well as a hot tub and a patio roof. Petitioners allege that the second floor of the garage is utilized for an amateur radio station. Petitioners contend that no new construction was proposed which would change the footprints of the buildings. In particular, petitioners sought the following variances for permission to:

(1) increase building height from 30 feet maximum to 55 feet, for the existing second story on the garage with two existing antennae;

(2) diminish the east side yard from 12 feet to 1 foot 10 inches;

(3) diminish the rear yard setback from 25 feet to 5 feet for the existing second story on the garage and to build a breezeway connecting the garage to the house;

(4) exceed maximum building area by 363 square feet, for a total of 24.5% of lot area (20% maximum), including the proposed breezeway and existing second-story addition, patio roof, and hot tub; and

(5) diminish the distance to the west lot line from 2 feet to .75 feet for two existing sheds.

Petitioners contend that the neighbors abutting the property on the east and west sides submitted written acknowledgments to respondent that they had no objection to petitioners' application being granted in all respects. In addition, petitioners allege that the residence adjoining the property to the west is 3.1 feet from petitioners' property line and has a rear yard of approximately 5 feet. As such, petitioners argue that the neighborhood contains numerous properties that are substandard and not developed to Residence B requirements. Further, petitioners allege that their house is in character with the surrounding community. as many homes have attached two-story garages.

On April 16, 2009, a hearing was held before respondent, at which petitioners appeared with counsel. Petitioners argued that none of their proposals would bring any portion of the structures any closer to any property line, and that the Babylon Town Code permits petitioners to attach a detached garage to the main dwelling and to construct a garage which meets the same building height as the height requirement for a dwelling in a Residence B zone, to wit: 30 feet or 2½ stories (*see* Babylon Town Code § 213-78). Petitioners also argued that pursuant to the Town Code, the radio antennae should not be considered when determining building height.

Moreover, petitioners inform the Court that petitioner MICHAEL SARTORETTI is a federally licensed amateur radio operator and is a member of the Town of Babylon Amateur Radio Emergency Services, whose purpose is to provide communications in the event of an emergency if regular channels of communication fail due to weather or other disasters. Petitioners allege that respondent ignored Mr. Sartoretti's involvement with this agency and failed to even decide the radio antenna portion of the application in its written denial dated July 16, 2009.

In opposition, respondent initially alerts the Court that a Town Planning Division memorandum submitted to respondent indicates that the

property had been granted several prior variances for short rear and side yards, as well as for building and lot area. The memorandum further indicates that the second story on the garage makes the height of the structure 18 feet, which is the tallest accessory building in the neighborhood, even before taking into account the antennae, which bring the total height of the structure to 55 feet. In addition, the memorandum states that the proposed breezeway would make the detached garage an attached garage, potentially converting the garage into habitable space. The Planning Division "strongly objected" to petitioners' application and urged a denial thereof.

Respondent alleges that it properly balanced and weighed the factors set forth in Town Law § 267-b and the holding of the Court of Appeals in *Sasso v Osgood*, 86 NY2d 374 (1995) when reaching its determination, and therefore the denial cannot be deemed arbitrary or capricious. Specifically, respondent found that it had consistently denied applications for detached garages with heights above 14 feet, and found no basis which would warrant a different outcome herein. Further, respondent found that the "so-called breezeway is a narrow bit of roofing running from a blank wall of the house to a blank wall of the garage, creating no real connection between the two buildings. This is a transparent attempt to get around and avoid the height requirements of the zoning code for accessory buildings and, as such, will not be countenanced by this Board." In addition, respondents found that, contrary to petitioners' contention, the benefit sought could be achieved by other means, as petitioners could have applied for a building permit prior to commencing construction, thereby conforming the construction to the Town Code requirements.

Moreover, respondent found that the area variance relief requested was substantial, to wit: an 85% reduction of the east side yard; an 80% reduction of the rear yard setback; a more than 50% reduction of the west side setback; and almost a 29% increase in the roof height of the accessory garage. Respondent stated that such increase in height and reduction in setbacks "would bring a crowded and congested feel to the neighborhood." Finally, respondent found that the difficulty was self-created, as petitioners constructed the second story of the garage without a building permit, and placed the sheds almost on top of the property line.

Thus, respondent concluded, based upon the testimony and evidence presented, that the variances requested were substantial in nature; the requested relief would create an undesirable change in the character of the

neighborhood; the relief would have an adverse impact on the physical conditions of the neighborhood; petitioners had other feasible alternatives; the difficulty was self-created; and that the benefits to petitioners were clearly outweighed by the by the detriment to the community. Accordingly, respondent voted to deny petitioners' application. However, respondent denied that portion of petitioners' application for variance relief for the two existing antennae without prejudice to petitioners reapplying for this relief with plans to attach the antennae to a structure in conformance with the zoning code.

In a proceeding under CPLR article 78 when reviewing a determination of an administrative tribunal, courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence (*Pell v Board of Education*, 34 NY2d 222 [1974]; *Matter of Isaksson-Wilder v New York State Div. of Human Rights*, 2007 NY Slip Op 6681 [2d Dept]; *Allen v Bane*, 208 AD2d 721 [1994]). This approach is the same when the issue concerns the exercise of discretion by the administrative tribunal (*Pell v Board of Education*, 34 NY2d 222, *supra*). The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious (*Gilman v N.Y. State Div. of Hous. & Cmty. Renewal*, 99 NY2d 144 [2002]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 2007 NY Slip Op 6879 [2d Dept]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact (*Pell v Board of Education*, 34 NY2d 222, *supra*). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Pell v Board of Education*, 34 NY2d 222, *supra*). Where a hearing is held, the determination must be supported by substantial evidence (CPLR 7803[4]).

Moreover, local zoning boards have broad discretion in considering applications for area variances and the judicial function in reviewing such decisions is a limited one (*Pecoraro v Bd. of Appeals*, 2 NY3d 608 [2004]). Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure (*Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*). 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, *supra*; *Matter of Hannett v Scheyer*, 37 AD3d 603 [2007]; *Matter of B.Z.V. Enter. Corp. v Srinivasan*, 35 AD3d 732 [2006]).

Pursuant to Town Law § 267-b (3), when determining whether to grant an area variance, a zoning board of appeals must weigh the benefit of the grant 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 [2002]; *Matter of Sasso v Osgood*, 86 NY2d 374, *supra*). The zoning board is also required to consider whether: (1) granting the area variance will produce an undesirable change in the character of the neighborhood or a detriment to nearby properties; (2) the benefit sought by the applicant can be achieved by some method, feasible to the applicant, other than a variance; (3) the requested area variance is substantial; (4) granting the proposed variance would have an adverse effect or impact on physical or environmental conditions in the neighborhood or district; and (5) the alleged difficulty is self-created. While the last factor is not dispositive, it is also not irrelevant (*see Matter of Ifrah v Utschig*, 98 NY2d 304, *supra*; *Matter of Sasso v Osgood*, 86 NY2d 374, *supra*).

Here, the Court finds that the denial by respondent had a rational basis and was supported by the evidence presented. After conducting a hearing on the matter in which petitioners appeared by counsel, respondent properly considered the benefit to petitioners as weighed against the detriment to the surrounding community. Respondent also weighed and applied the five aforementioned factors, in compliance with Town Law § 267-b (3) (b) and controlling case law, when reaching its decision on petitioners' application. Respondent's determination was based upon, among other things, the finding that the requested area variances were substantial, would have an adverse impact on the surrounding neighborhood, and that the difficulty was self-created as petitioners undertook this construction prior to obtaining the requisite permits. Furthermore, the Court finds that any issues with respect to the placement and height of the antennae are not properly before the Court, as respondent denied that branch of petitioners' application without prejudice to a subsequent application for this relief with plans to attach the antennae to a structure in conformance with the zoning code. Therefore, petitioners have not yet exhausted their administrative remedies regarding the antennae (*see e.g. Matter of Brunjes v Nocella*, 40 AD3d 1088 [2007]).

Finally, the fact that respondent may have granted similar variances in the past does not suffice to establish that respondent's action was arbitrary, as a zoning board "may refuse to duplicate previous error; . . . change its views as to what is for the best interests of the [Town]; [or] . . . give weight to slight differences which are not easily discernible" (*Matter of Cowan v Kern*, 41 NY2d

591, 595 [1977]; *see Ifrah v Utschig*, 98 NY2d 304, *supra*; *Josato, Inc. v Wright*, 35 AD3d 470 [2006]; *Matter of Spandorf v Board of Appeals of Vil. of E. Hills*, 167 AD2d 546 [1990]).

In view of the foregoing, the Court finds that respondent's denial had a rational basis in fact and law, was supported by the evidence presented, and cannot be deemed arbitrary or capricious. Accordingly, the instant petition is **DENIED** and this special proceeding is dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: June 23, 2010

HON. JOSEPH FARNETI
Acting Justice Supreme Court