

**Matter of Lopez v Zoning Bd. of Appeals of the Inc.
Vil. of Hempstead**

2010 NY Slip Op 31732(U)

July 1, 2010

Sup Ct, Nassau County

Docket Number: 6409/10

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 3
NASSAU COUNTY

In the Matter of the Application of

ALVARO LOPEZ and RELAX BILLIARDS, LTD.,

Petitioners,

ORIGINAL RETURN DATE:04/15/10

SUBMISSION DATE: 06/03/10

For a Judgment Under Article 78 of the Civil
Practice Laws and Rules

INDEX No.: 6409/10

-against-

THE ZONING BOARD OF APPEALS OF THE
INCORPORATED VILLAGE OF HEMPSTEAD,

MOTION SEQUENCE #1

Respondent.

The following papers read on this motion:

Notice of Petition.....	1
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Application by petitioner pursuant to CPLR Article 78 to annul the determination of the respondent Zoning Board of Appeals of the Incorporated Village of Hempstead (Zoning Board) dated March 4, 2010, which, after a hearing held on November 9, 2009, and completed on January 7, 2010, denied petitioner's request for an area variance is denied, and the petition is dismissed.

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Petitioner, Alvaro Lopez, the owner of Relax Billiards, Ltd., is the lessee of property known as 50 Fulton Street [units 3 and 4]*, Hempstead, New York. After his application for permission to operate a bar/restaurant, with accessory use of eight coin-operated pool tables, was denied by the Village Building Department pursuant to §§ 139-6, 139-40 and 86-40 of the Code of the Village of Hempstead, petitioner applied to respondent Zoning Board to obtain the required variance(s) which request was denied by decision dated March 4, 2010.

Local zoning boards have broad discretion in considering applications for variances (*Matter of Gallo v Rosell*, 52 AD3d 514, 515 [2d Dept. 2008]) and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion (*Hurley v Zoning Bd. of Appeals of Village of Amityville*, 69 AD3d 940, 941 [2d Dept. 2010]; *Matter of Filipowski v Zoning Bd. of Appeals of Village of Greenwood Lake*, 38 AD3d 545 [2d Dept. 2007]; *La Motta v Zieglev*, 28 AD3d 769, 770 [2d Dept. 2006]). A determination will therefore be upheld if it has a rational basis and is supported by substantial evidence (*Blattner v Zoning Bd. of Appeals of Town of Mount Pleasant, N.Y.*, 17 AD3d 360 [2d Dept. 2005]). The court will consider substantial evidence only to the extent necessary to determine whether the record contains sufficient evidence to support the rationality of the zoning board's decision (*Halperin v City of New Rochelle*, 24 AD3d 768, 777 [2d Dept. 2005]).

In considering an area variance, the zoning board is required by Village Law § 7-712-b[b] to engage in a balancing test weighing the benefits to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted (*Tsunis v Zoning Bd. of Appeals of Inc. Village of Poquott*, 59 AD3d 726, 734 [2d Dept. 2009]).

The zoning board must also consider whether:

an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will result if the area variance is granted;

the benefit sought by applicant can be achieved by some method, feasible to the applicant, other than an area variance;

*Petitioner originally leased the store identified as unit 4 for use as a billiard parlor and bar. Prior to the date of the lease, permission had been granted to a previous applicant to operate two coin operated billiard tables on the premises. After petitioner leased the store identified as unit 3, he removed a wall separating the two units without a permit from the Building Department.

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the required variance is substantial;

the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district if it is granted; and

the alleged difficulty was self-created, which consideration shall be relevant to the decision of the zoning board but will necessarily preclude granting of the area variance.

(Kaufman v Incorporated Village of Kings Point, 52 AD3d 604, 608 [2d Dept. 2008]).

A zoning board is not required to justify its determination with supporting evidence as to each of the five factors as long as its determination balances the relevant considerations in a way that is rational (*Matter of Merlotto v Town of Patterson Zoning Bd. of Appeals, 43 AD3d 926, 929 [2d Dept. 2007]*).

Although no single statutory consideration is determinative in assessing an area variance application, the effect of the requested variance on the neighborhood and community is a critical aspect of a zoning board's responsibility in balancing the relief requested against the interests of the residents of the municipality (*Verdeland Homes, Inc. v Board of Appeals of the Town of Hempstead, 13 Misc 3d 1227(A) [Sup. Ct. Nassau Co. 2006]* (citing McKinney's Practice Commentaries, Town Law § 267-b, p. 56 (supp. 2005))).

In the decision at issue, respondent Zoning Board noted that petitioner, under the company name "AD Design/Alvaro Lopez," made a prior application before the Board under case number 1749 to increase the number of billiard/pool tables at the location. At the time of that application, petitioner testified that, without approval of the Zoning Board, he had been operating a billiard/bar containing more than two pool tables at the location in violation of § 86-24(C)(1) and (2) of the Code of the Village of Hempstead**. Despite denial of that

** §§ 86-24(C)(1) and (C)(2) of the Code of the Village of Hempstead provide respectively as follows: "No pool table or billiard table, whether coin-operated or otherwise, shall be permitted anywhere in the Village of Hempstead in any premises open to the public. Except as may be otherwise authorized by the Village Board of Zoning Appeals, no public premises in the Village of Hempstead shall be used for the operation, maintenance or exhibition of any amusement device unless such amusement device is an accessory use customarily incidental to a business use permitted on such premises.

Except as may be otherwise authorized by the Village Board of Zoning Appeals, there shall be no more than two amusement devices on any public premises."

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application, petitioner continued to operate his expanded billiard/pool table/bar at the premises where he now currently serves food brought in from the outside.

Notwithstanding petitioner's arguments to the contrary, under the circumstances extant, the decision to deny petitioner's application for variance/special permit is rationally based and neither arbitrary or capricious. The record establishes that the respondent Zoning Board engaged in the required balancing test and considered the relevant statutory factors whereupon it concluded that the benefit to the petitioner of granting his application did not outweigh the detriment to the health, safety and welfare of the community in so doing. In this regard, it is significant that § 86-24(C)(4) of the Code of the Village of Hempstead provides that:

“[n]o amusement device may be located on any premises if such premises is located within 500 feet of the property line of any lot or parcel upon which a public or private school is located.”

The distance between petitioner's leased premises [the eastern boarder of unit 3] and the western border of Fulton Elementary School is 155 feet.

As noted by the court in *Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 78 [2d Dept. 2009]:

“While an applicant's deceit toward municipal boards with respect to prior or current applications may not, standing along, warrant the denial of an area variance under Town Law § 267-b(3), that factor can be considered significant and compelling to the extent it inextricably relates to certain of the enumerated statutory factors such as whether the benefit of a requested variance is outweighed by the adverse impact which may inure to the Town and its ability to enforce the law in future cases if it were to grant an area variance to an applicant who has misled municipal authorities throughout the application process.”

Here, as in *Caspian Realty, Inc.*, the petitioner has misled municipal authorities throughout the application process and the Zoning Board has determined, based on the record, that, if petitioner's application were granted, the benefit to the petitioner would be outweighed by the

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adverse impact on the community.*** Petitioner is presumed to have had knowledge of the applicable zoning restrictions in effect when he leased the property which he has flagrantly disregarded. Any difficulty he now encounters were entirely self created (*Monroe Beach, Inc. v Zoning Bd. of Appeals of City of Long Beach*, 71 AD3d 1150, 1151 [2d Dept. 2010]). While the existence of self-created difficulty is alone insufficient to deny an area variance, a self-created difficulty coupled with the finding of a detrimental effect upon the health, safety, welfare and character of a neighborhood tips the balance in favor of upholding the respondent Zoning Board's determination to deny an area variance.

The record establishes that petitioner disregarded recommendations made by various municipal agencies (the building department and the planning and zoning boards), which apparently attempted to assist him during a pre-submission conference vis-a-vis correct procedures to be followed, which he disregarded at his own peril.

The court has reviewed the record in its entirety with careful consideration and finds that the challenged decision has support in the record and the respondent Zoning Board did not err in denying petitioner's application.

This decision constitutes the order of the court.

Dated: 7-1-10

HON THOMAS P. PHELAN

J.S.C.

ENTERED

JUL 06 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

*** § 86-24(A) of the Code of the Village of Hempstead provides as follows: "The Board of Trustees of the Village of Hempstead hereby finds that the unrestricted establishment of commercial game rooms and arcades, the unrestricted proliferation of amusement devices as incidental uses to permitted business and the existence of pool tables and billiard tables in places open to the public in particular pose a substantial hazard to the peace, comfort, health, safety and general welfare of the Village of Hempstead residents. Therefore, as an exercise of its police power, to protect the economic and social welfare and to preserve the peace, comfort, health, safety and good order of the Village of Hempstead, the Board of Trustees has adopted this section regulating amusement devices."

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Attorneys of Record

White, Cirrito & Nally, LLP
Attn: Michael L. Cirrito, Esq.
Attorneys for Petitioners
58 Hilton Avenue
Hempstead, NY 11550

Debra Urbano-Disalvo, Village Attorney
Attn: Herbert J. Tamres, Deputy Village Attorney
Attorney for Incorporated Village of Hempstead
99 Nichols Court
P. O. Box 32
Hempstead, NY 11551-0032