

**Matter of Braunstein v Zoning Bd. of Appeals of the
Inc. Vil. of Massapequa Park**

2010 NY Slip Op 32448(U)

August 12, 2010

Sup Ct, Nassau County

Docket Number: 24318/09

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ **x**

In the Matter of an Article 78 Proceeding

**THOMAS BRAUNSTEIN and PATRICIA
BRAUNSTEIN,**

Index No. 24318/09

**Motion Submitted: 5/20/10
Motion Sequence: 001**

Petitioner(s),

-against-

**ZONING BOARD OF APPEALS of the
INCORPORATED VILLAGE OF MASSAPEQUA
PARK,**

Respondent(s).

_____ **x**

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Petitioners move this Court by order to show cause for an Order pursuant to CPLR § 7801, et. seq., annulling the October 2009 decision made by the respondent, the Zoning Board of Appeals for the Incorporated Village of Massapequa Park ("ZBA"), denying petitioners' application for a variance. Respondent opposes the requested relief.

In June 2009, petitioners applied for a building permit to construct a two-story side and front addition to their home, and a front portico. The two-story addition included a larger garage with the second story to be situated above it. The building permit was denied, and the petitioners then applied to the ZBA for a variance because the proposed addition to their home would be located only three feet, five inches (3' 5") from their property line. Town zoning ordinances require a distance of five feet (5') from the outside of the structure to the property line.

On August 26, 2009, a hearing was held on petitioners' variance case, which was assigned case # 3709. At that hearing, petitioner Thomas Braunstein told the ZBA that he wanted to expand his garage because he intended to install a bathroom on the second story. When ZBA members expressed concern that the proposed construction would result in a "fairly tight" side yard, they asked petitioner if there was any other way he could accomplish the same use of the property without the shortened distance to the property line. Mr. Braunstein explained that he had considered a cantilever of the second story over the garage, leaving the required five feet between the outside of the garage and the property line. Mr. Braunstein continued his explanation to the ZBA, reasoning that, since he would still need a variance for the second-story cantilever, he "might as well do the whole thing," "for the two stories," in one variance. Mr. Braunstein advised the ZBA that he intended to install a 14' x 9' bathroom and a 9' x 10' walk-in closet in the proposed second story. During the same hearing, Mr. Braunstein also claimed that he needed to expand the garage in order that he could exit his car inside the garage. Mr. Braunstein told the ZBA that it would be safer for his small children if he could park his car in the garage before letting them out of his vehicle.

Petitioners' variance application was denied following the hearing. The ZBA members pointed out that, although petitioners' hardship reason for the variance was to get his children in and out of the car inside the garage, petitioners considered foregoing additional space in the garage as long as they could cantilever the full second story containing the large bathroom and walk-in closet. Based on Mr. Braunstein's statements, the ZBA concluded that petitioners did not really have a hardship supporting the granting of the variance. As one ZBA member put it, Mr. Braunstein "just wants a giant bathroom."

On or about September 15, 2009, petitioners filed a second application for a variance, which was assigned variance case # 3726. This time, petitioners proposed the same construction, but with a slightly larger side yard set back of four feet, one inch (4' 1").

On October 28, 2009, the ZBA held a hearing on petitioners' second application, which the ZBA denied on October 29, 2009. At the hearing, the ZBA asked petitioners what the difference was between what petitioners had previously planned to construct and their

current plans. Petitioners noted that they were asking only for a 4' 1" side yard and not the narrower 3' 5" previously requested. Petitioners re-submitted letters of consent from their neighbors, most of which had previously been submitted with their first application. The ZBA once again expressed concern about the "tight fit," and Mr. Braunstein claimed that he needed to expand the garage for the safety of his children. When asked what was being put in the proposed second story, Mrs. Braunstein stated that what "initially started the whole thing is [that] we want[ed] to raise the roof" in order to put in an attic. Mrs. Braunstein further explained to the ZBA that, as long as they were raising the roof, they intended "to do the whole thing in one shot as opposed to just doing the roof." Mr. Braunstein added that there would be a closet and a bathroom in the proposed second story, as part of the master bedroom.

In reaching its decision, the ZBA expressed the view that petitioners did not have a hardship, that the ZBA granted smaller set backs for living quarters rather than for garages, and that there was a safety concern with the narrow passageway into the backyard in case "there were a fire or something." Furthermore, the ZBA considered that there were other bedrooms on the second floor, which might be used for the master suite without having to seek the area variance and that the closet and bathroom could have been made smaller to conform to the code. Indeed, reference was made to the 1950's style house and that the proposed 9' x 10' closet was the size of a bedroom. They also considered that the neighbors' house, which "he's building up on" had a living space with windows facing the proposed construction and that it was not merely a garage, thus it was "just too close" and "not necessary" (T 8/26/09 p 24). Additionally, the ZBA specifically asked "Is there any other way you could put and obtain the same use? You've got a decent size lot. Storage doesn't seem like it should be a problem in other places" (T 8/26/009 p11). Petitioner failed to propose or consider any alternative other than seeking a 4' 1" side set back rather than the 3' set back first proposed.

Petitioners now claim that the ZBA's October 2009 denial of their petition should be annulled because the ZBA acted in an arbitrary and capricious manner, and failed to engage in the required balancing test by weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood. Petitioners further seek to limit this Court's consideration of the record to the October 2009 variance hearing, claiming that it would be improper for the Court to consider the August 2009 hearing testimony.

In an Article 78 proceeding, such as the one presently before this Court, the only questions that may be raised are whether or not a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed. (*CPLR § 7803[3]*).

The Court recognizes that zoning boards have broad discretion in considering applications for variances, and the fact that a zoning board approves a similar application does not, in itself, establish that the zoning board acted arbitrarily or capriciously (*see Hurley v. Zoning Board of Appeals of Village of Amityville*, 69 A.D.3d 940, 893 N.Y.S.2d 277 [2d Dept., 2010]). Herein, Petitioner failed to establish that in essentially similar situations the ZBA granted variances to others (*Estate of Gravino v. Young*, 75 A.D.3d 601, 904 N.Y.S.2d 667 [2d Dept., 2010]).

Furthermore, a zoning board may deny a petitioner permission to apply for a variance on the ground that the subsequent application is essentially identical to the first and lacks changed facts or circumstances warranting a rehearing. Moreover, it is for the board to determine if changed facts or circumstances are presented (*see Lee v. Zoning Board of Appeals of Town of Putnam Valley*, 1 A.D.3d 600, 768 N.Y.S.2d 26 (2d Dept., 2003); *ELN Realty Corporation v. Zoning Board of Appeals of the Town of Greenburgh*, 261 A.D.2d 619, 690 N.Y.S.2d 700 (2d Dept., 1999); *Petit v. Board of Appeals of the Town of Islip*, 160 A.D.2d 1006, 554 N.Y.S.2d 723 (2d Dept., 1990); *Freeman v. Town of Ithaca Zoning Board of Appeals*, 61 A.D.2d 1070, 403 N.Y.S.2d 142 [3d Dept., 1978]).

In the instant matter, petitioners do not present any persuasive authority for the proposition that this Court cannot consider the evidence resulting in the denial of their first application for a variance made only two months prior to their second application. The ZBA, in effect, granted petitioners a rehearing on their identical application from August 2009. In their October application, petitioners were seeking essentially the same construction, and they continued to be in violation of the Town's five-foot set back requirement. Once again during the October hearing, the petitioners demonstrated, by their own statements to the ZBA, that their principal reason for seeking the variance was to install their bathroom, closet and attic. It appears from their statements that the expansion of the garage was incidental to the aforementioned construction, but that the petitioners attempted to manufacture a hardship reason related to the garage because some such hardship applications had been successful. Simply put, the record supports a finding that there was no material difference between the first and second applications.

A zoning board need not justify its determination with supporting evidence as to each of the factors to be considered when reviewing an application for an area variance so long as its determination balances the relevant considerations in a way that is rational (*Matter of Merlotto v. Town of Patterson Zoning Board of Appeals*, 43 A.D.3d 926, 929, 841 N.Y.S.2d 650 [2d Dept., 2007]).

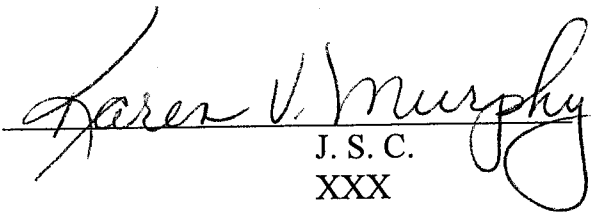
Based on the foregoing, this Court finds that the complete record related to petitioners' application for a variance amply supports the ZBA's October 29, 2009 decision denying said variance. Thus, the ZBA's denial of petitioners' variance application cannot

be said to be arbitrary and capricious nor an abuse of discretion.

Petitioners' application is denied and the proceeding is dismissed.

The foregoing constitutes the Order of this Court.

Dated: August 12, 2010
Mineola, N.Y.


J. S. C.
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