| **Matter of Daneri v Zoning Bd. of Appeals of the Town of Southold** |
| --- |
| 2010 NY Slip Op 32876(U) |
| October 13, 2010 |
| Supreme Court, Suffolk County |
| Docket Number: 2007-33656 |
| Judge: Jeffrey Arlen Spinner |
|  |
|  |

**SUPREME COURT OF THE STATE OF NEW YORK**
**IAS PART XXI - COUNTY OF SUFFOLK**

PRESENT:

**HON. JEFFREY ARLEN SPINNER**
Justice of the Supreme Court

In the Matter of an Article78 Proceeding,
**EUGENE L. DANERI,**
Petitioner,

- against -

**ZONING BOARD OF APPEALS OF THE TOWN OF SOUTHOLD,**
Respondent.

**INDEX NO.:** **2007-33656**

MOTION SEQ. NO.: 003 - MG
ORIG. MOTION DATE: 12/12/07

FINAL SUBMIT DATE: 10/13/10

UPON the following papers numbered 1 to 16 read on this Motion:
- Petition (Papers 1-2);
- Respondent's Answer and Return (Papers 3-6);
- Petitioner's Support (Papers 7-8);
- Petitioner's Memorandum of Law (Papers 9-10);
- Respondent's Memorandum of Law (Papers 11-12);
- Intervenor's Memorandum of Law (Papers 13-14);
- Petitioner's Reply Memorandum of Law (Papers 15-16);

it is,

ORDERED, that the application of Petitioner is hereby granted to the extent set forth herein below.

Petitioner moves this Court for an Order, pursuant to Article 78 of the CPLR, granting the relief demanded in the Petition, that relief more specifically being an Order of this Court directing:
1. That the Decision of Respondent be found arbitrary, capricious and not in keeping with the evidence;
2. That the Decision of Respondent be annulled and set aside;
3. That the application of Petition before the Respondent be approved.

Petitioner owns the parcel of property known as Section 123, Block 6, Lot 14, on the Suffolk County Tax Map, situated at 200 Terry Path in the hamlet of Mattituck, Town of Southold, County of Suffolk, State of New York ("premises"). The premises is approximately 623 feet deep and varies in width from 62 to 67 feet, with one 67 foot border fronting Peconic Bay. The premises is currently improved, most notably with a 1,142 square foot single family residence situated 10 feet from the bulkhead, 27.3 feet from the easterly property line and 8.9 feet from the westerly property line. The surrounding lots are similar in width with varying depths. The majority of the homes in the immediate area are pre-existing, non-conforming two story dwellings with average single side yard setbacks of 14.23 feet, total side yard setbacks of 28.47 and bulkhead setbacks of 24.02 feet.

In 2006, Petitioner began the application process to demolish all existing structures on the premises and construct a new 3,537 square foot two-story single family dwelling along with an accessory garage. In August 23, 2006 a Public Hearing was held before the Board of Trustees of the Town of Southold in which the Board unanimously agreed that Petitioners application should be approved, stating that it was consistent with the Town's Local Waterfront Revitalization Program ("LWRP").

On October 26, 2006, an application was submitted to the Town of Southold Building Department on behalf of Petitioner, which was denied on the grounds that the proposed construction was not in compliance with the minimum side yard setbacks of 15 feet minimum per side, 35 feet total, or the minimum bulkhead setback of 75 feet. It should be noted that the side yard setbacks required in the Zoning Code also require the lot to be a minimum of 150 feet wide, rendering the existing parcel and the surrounding parcels, non-conforming.

On May 9, 2006, Respondent herein granted variances to the application of a neighbor (LONG) whose dwelling is eight houses to the west of Petitioner's premises, ZBA Decision #5841, of 10 foot individual side yard setbacks, 20 foot total side yard setback and 28.3 foot bulkhead setback, in addition to 21% lot coverage for their two-story 3,247 square foot home.

On August 2, 2007 a Public Hearing was held before Respondent to consider Petitioners requested variances. Following the Public Hearing, but prior to Respondent's determination, Petitioner amended his application to finalize his variance requests as an easterly single side yard setback of 12 feet, a westerly single side yard setback of 12 feet, a total side yard setback of 24 feet, and a bulkhead setback a 30 feet for the proposed two-story dwelling; in addition to a 10 foot single side yard setback for the accessory garage. Respondent denied Petitioner's requests for all variances for the two-story dwelling, while granting the variance for the accessory garage.

It is well settled law in the State of New York that a Court may not substitute its own judgment for that of the reviewing board (*see:* ***Janiak v Planning Board of the Town of Greenville***, 159 AD2d 574 [2 Dept], *appeal denied*, 76 NY2d 707 [1990]; ***Mascony Transport and Ferry Service v Richmond***, 71 AD2d 896 [2 Dept 1979], *aff'd*, 49 NY2d 969 [1980]). Therefore, if the decision rendered by the reviewing board is within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is arbitrary, capricious or unlawful (*see:* ***Castle Properties Co v Ackerson***, 163 AD2d 785 [3 Dept 1990]; ***Pecoraro v. Board of Appeals of Town of Hempstead***, 814 NE2d 404 [2004]). It is, therefore, indisputable that the standard of review for determinations of Respondents, as the Town Zoning Board of Appeals, is whether the decision rendered is arbitrary, capricious and/or unlawful.

In determining whether to grant an application for an area variance, a zoning board must 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. The zoning board is also required to consider: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties if the area variance is granted, (2) whether the benefit sought by the applicant can be achieved by some method, feasible to the applicant, other than an area variance, (3) whether the requested area variance is substantial, (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district if the

variance is granted, and (5) whether the alleged difficulty was self-created. (***Schumacher v Town of East Hampton, New York Zoning Board of Appeals***, 46 AD3d 691 [2 Dept 2007], *internal citations omitted*).

Additionally, the law is well settled that the mere fact that one property owner is denied a variance while others similarly situated are granted variances does not, in itself, suffice to establish that the difference in result is due either to impermissible discrimination or to arbitrary action (***Matter of Cowan v Kern***, 41 NY2d 591). However, a decision of an administrative agency which neither adheres to its own precedent, nor indicates its reason for reaching a different result on essentially the same facts, is arbitrary and capricious (***Pesek v Hitchcock***, 549 NYS2d 164 [2 Dept 1989]). If the determination under review has no rational basis and tends to disregard the facts, it is arbitrary and capricious (*See*: ***Matter of Cowan v Kern***, 41 NY2d 591; ***Matter of Pell v Board of Education***, 34 NY2d 222).

Here, although Petitioner's difficulty arguably was self-created, there was no evidence in the Return that the grant of the variances would have an undesirable effect on the character of the neighborhood, adversely impact physical and environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community (*see:* ***Gonzalez v Zoning Board of Appeals of Town of Putnam Valley***, 771 NYS2d 142 [2 Dept 2004]; ***Easy Home Program v Trotta***, 714 NYS2d 509 [2 Dept 2000]). Generally, when an applicant is seeking variances to conform to that which is prevalent in the neighborhood, absent other overriding considerations, a denial of relief is likely to be found arbitrary (*see*: ***Buckley v Amityville Village Clerk***, 694 NYS2d 739 [2 Dept 1999]; ***Cassano v Zoning Board of Appeals of the Village of Bayville***, 693 NYS2d 621 [2 Dept 1999]; ***Goldsmith v Bishop***, 695 NYS2d 381 [2 Dept 1999]; ***Baker v Brownlie***, 670 NYS2d 216 [2 Dept 1998]).

Respondent argues perpetuating the non-conformity of the setbacks, instead of phasing them out over time, would result in an undesirable effect on the neighborhood and community. When considering an application, the ZBA may not rely on merely conclusory statements as to the detrimental effects which would result from a grant of petitioner's application (*see:* ***T J R Enterprises Inc v Town Board of Town of Southeast***, 376 NYS2d 586 [2 Dept 1975]; ***Salierno v Briggs***, 141 AD2d 547 [2 Dept 1988]). The Return contains no evidence to support the conclusion that perpetuating the non-conformities would result in an undesirable effect on the neighborhood in community. Respondent contends that its determination will protect the community from being transformed from a cottage community into a large-home community. The Return clearly indicates that the transformation from cottage to large-home community has already taken place, as 24 of the 29 homes in the surrounding waterfront neighborhood can be classified as large two-story homes, including LONG's, whose application was approved in 2006.

Respondent further argues that perpetuating non-conformities over time is not the intended goal of the Town Zoning Codes, rather, that the code aims to phase out non-conformities over time. Simply stated, this argument ignores the balancing test required by law, and in effect merely restates the statutory requirements, in a circular argument, as a rationale for denying Petitioner's application without setting forth a factual basis to support their decision (*see*: ***Marrone v Bennett***, 164 AD2d 887 [2 Dept 1990]; ***Leibring v Planning Board***, 144 AD2d 903; ***Matter of Greene v Johnson***, 121

AD2d 632; ***Matter of Farrell v Board of Zoning & Appeals,*** 77 AD2d 875; ***Matter of Kadish v Simpson***, 55 AD2d 911).

The Return contains no evidence that the granting of the requested variances would result in an undesirable change in the character of the community. Respondent contends that granting the requested variances would create a precedent for other landowners to overbuild their parcels. The Return indicates that this speculation is not based on any evidence. Presently, the community consists of non-conforming properties that are situated on non-conforming lots, according to Town Zoning. The average lot is narrower than 150 feet, the average single side yard setback is less than 15 feet, the average total side yard setback is less than 35 feet, and the average bulkhead setback is less than 75 feet. Petitioner's application would result in single side yard setbacks at 84% of the community average, total side yard setback at 85% of the community average, and bulkhead setback at 124% of the community average. Simply stated, there is no evidence in the record to suggest that the granted variances would produce an undesirable effect on the community. Similarly, in ***Schumacher v The Town of East Hampton, New York Zoning Board of Appeals***, *supra*, the court found that new construction, that was in line the community standards would not produce an undesirable effect on the community, and as such, the ZBA's denial of the application for requested variances was arbitrary and capricious (*see*: **Buckley *v Amityville Village Clerk***,*supra*; ***Cassano v Zoning Board of Appeals of the Village of Bayville***, *supra*; ***Goldsmith v Bishop***, *supra*; ***Baker v Brownlie***, *supra*).

Respondent relies on a report from LWRP coordinator Mark Terry which found the proposed action to be inconsistent with the LWRP. Respondent's reliance on this report is misplaced, as Mark Terry had previously submitted a report on the same application prior to the Town Board Public Hearing. At said hearing, while taking Mark Terry's previously submitted report into consideration, the Town Board unanimously decided that Petitioner's application was NOT inconsistent with the LWRP. Respondent's disregard of the Town Board's Resolution without any explanation is clearly arbitrary and not supported by the evidence in the Return.

Respondent attempts to distinguish its granting of LONG's application for variances from Petitioner's by misrepresenting the material differences between LONG's property and Petitioner's. In its memorandum of law, Respondent misrepresents the size of LONG's constructed two story home by miscalculating the total square footage of the home to make it appear more modest compared to Petitioner's proposed plan. Respondent contends that the variances were necessary because even when they were granted, LONG was only able to construct a 1,500 square foot home. In actuality, LONG constructed a 3,247 square foot home, approximately 91% the size of Petitioner's proposed home. Further, Respondent contends that because LONG's property is only 23% the size of Petitioner's, they had difficulty placing their home in a conforming location. This figure is misleading as LONG's property is only 23% the size of Petitioner's because its depth is much shallower than Petitioner's.

The most important measurement, the width of the property and thus the amount of waterfront property, is approximately the same. Respondent contends that Petitioner has more than enough space to construct a home within the zoning regulations due to the sheer size of his lot; however, Respondent ignores the impracticality of constructing a waterfront home hundreds of feet away from

the waterfront, especially when the average setback from the bulkhead in the community is 24 feet. Simply stated, the useable property, in terms of home construction, consists of the space each landowner is afforded on the water; ie, the width of their property. That portion of Petitioner's property that causes his lot to be larger than LONG's is that which is located between the dwelling and the roadway, If Petitioner's dwelling were to be constructed in this area, it would be in all the neighbors' front yards, which would extensively and negatively impact the character of the neighborhood.

Additionally, this rationale flies in the face of Respondent's justification for why Petitioner was denied his application for variances. Respondent contends that Petition's request for variances should be denied so that a precedence for overbuilding is not set; however, in attempting to distinguish Petition's application from LONG's, Respondent contends that LONG's variances needed to be granted because his lot was 23% the size of Petition's. If both houses are approximately the same size, with approximately the same variances, how can Respondent deny Petition's application for overbuilding while granting LONG's, whose lot is 23% the size of Petition's, as necessary to allow him to build an adequately sized home. In this regard, Respondent failed to adequately explain why LONG's variances were granted but Petitioner's were not, as such, Respondent's decision was arbitrary and capricious.

Intervenor SMITH, an adjoining neighbor of Petitioner, also mischaracterizes LONG's lot and home size in a similar manner as Respondent. Additionally, Intervenor asserts that LONG's lot is approximately 25% narrower than Petitioners. Surveys indicate that Petitioner's lot is 67.18 feet wide and LONG's lot is 59.31 feet wide. The Court's math indicates that LONG's lot is 11.7% narrower than Petitioners. Intervenor suggests that in regard to the Petitioner's requested side yard variances, it is more appropriate to compare Petitioner's application for requested variance to his westerly neighbor, TOPPER, ZBA #6248. Respondent made a determination on TOPPER's application in March of 2009, a year and a half after it returned a determination on Petitioner's application. As such, it is inappropriate to consider the TOPPER determination when discussing whether Respondent acted arbitrarily and capriciously in reaching its determination in the present proceeding.

Because the benefit to the applicant is great, because the Return is devoid of any evidence of detriment to the health, safety, and welfare of the neighborhood or community, and because Respondent failed to adequately explain why it denied Petitioner's request while having granted a similar request in the near past; the Court concludes that Respondent acted arbitrarily, capriciously and not in keeping with the evidence, in failing to grant the requested variances.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

**ORDERED,** that the above referenced application of Petitioner is hereby granted to the extent that the decision of Respondent is hereby found to be arbitrary, capricious and not in keeping with the evidence, and the matter is hereby remanded to Respondent for proper review and determination in compliance with the Laws of the State of New York, as set forth herein above, and it is further

**ORDERED,** that Part 21 hereby retains jurisdiction over this proceeding, for all purposes; and it is further

**ORDERED,** that Counsel for Petitioner is hereby directed to serve a copy of this Order, with Notice of Entry, upon Counsel for all remaining parties, the Calendar Clerk of this Court and the Suffolk County Clerk within 20 days of entry of this Order by the Suffolk County Clerk

**Dated:** **Riverhead, New York**
**October 13, 2010**

**HON. JEFFREY ARLEN SPINNER, JSC**

| | |
|---|---|
| ✓ FINAL DISPOSITION | NON-FINAL DISPOSITION |
| ✓ SCAN | DO NOT SCAN |

TO:

Eugene L Daneri
PO Box 917
Mattituck, New York 11952

Wickham Bressler Gordon & Geasa PC
13015 Main Road, PO Box 1424
Mattituck, New York 11952

Smith Finklestein Lundberg Isler & Yakaboski LLP
456 Griffing Avenue, PO Box 389
Riverhead, New York 11901