SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

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In the Matter of the Application of SIMON DAVYDOV,

Plaintiff,

-against-

DAVID MAMMINA, Chairman, and DONAL McCARTHY, PAUL ALOE, CHRISTOPHER MURRAY and LESLIE FRANCIS, constituting the Board of Zoning Appeals of the Town of North Hempstead,

Defendants.

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TRIAL TERM PART: 45

INDEX NO.: 010314/10

MOTION DATE:7-12-10
SUBMIT DATE: 9-16-10
SEQ. NUMBER - 001

The following papers have been read on this motion:

Notice of Motion, dated 5-27-10.....1
Affirmation in Opposition, dated 9-2-10.....2

Application pursuant to CPLR Article 78 to annul the determination of respondent Board of Zoning Appeals of the Town of North Hempstead (Zoning Board) dated April 28, 2010 which, after a hearing conducted on January 13, 2010, denied petitioner's application for certain area variances is denied and the petition is dismissed.

FACTUAL BACKGROUND

The petitioner is the owner of a single family dwelling located at 25 Horseshoe Lane, Roslyn Heights, New York situated in a residence AA zoning district. It is a

rectangular piece of property having an overall lot area of 16,980 feet and is part of a residential subdivision constructed in the late 1940's known as "Roslyn Country Club."

By Notice of Disapproval dated October 7, 2009, the Department of Building Safety, Inspection and Enforcement disapproved petitioner's application for a permit to maintain a garage structure which is contrary to the Code in that maintenance of the residence, together with the two-car garage conversion, as a whole, exceeds the maximum permitted gross floor area in residence AA zoning district by approximately 542 square feet and exceeds the permitted lot area coverage – i.e., 33% as opposed to 31%.

In this proceeding, petitioner challenges the respondent Zoning Board's denial of its application for variances from §§ 70-19(B) [floor area ratio][1] and 70-19(C) [gross floor area][2] of the Code of the Town of North Hempstead ("Code") in order to maintain the conversion of a carport into a two-car garage exceeding the permitted gross floor area.

Petitioner's challenge is predicated on the grounds, *inter alia*, that the requested variances are not substantial; the two walls erected to enclose the carport are not visible from the street; petitioner's three abutting neighbors do not object to the garage structure

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[1]Floor area ratio is comprised of the total floor area within a building divided by the total area of the lot containing the building. Since, residential areas have a lower floor area ratio, more lot is required to build larger buildings. Such concerns restrict physical development within a neighborhood. *Raritan Development Corp. v Silva*, 91 NY2d 98, 105 (1997).

[2]§70-3.17 defines gross floor areas as: "[t]he sum of the gross horizontal area of all floors of all structures on a site, as measured to the outside surfaces of exterior walls. Gross floor area shall include attached garages, enclosed porches, and roofed porches having more than 50% of the perimeter enclosed or screened. Gross floor area shall also include finished basements as defined in this section. Gross floor area in dwellings for areas exceeding ten feet in height shall be equal to 1.5 times the actual floor area.

and urge granting petitioner's request; and the ability to maintain an enclosed garage, rather than a carport, benefits petitioner, saving him unnecessary financial hardship, while hurting no one.

ANALYSIS

A local zoning board has broad discretion in considering an application for an area variance. *Zaniewski v Zoning Bd. of Appeals of Town of Riverhead*, 64 AD3d 720, 722 (2nd Dept. 2009). Judicial review is limited to determining whether the action taken by the board is illegal, arbitrary and capricious or an abuse of discretion. *Aliano v Oliva*, 72 AD3d 944, 947 (2nd Dept. 2010). Where there is a rational basis for the determination, a court may not substitute its own judgment for that of the board, even if such a contrary determination is supported by the record. *Retail Property Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 196 (2002).

In considering whether to grant an application for an area variance, a town zoning board is required 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 as required by Town Law § 267-b[3][b]. *Roberts v Wright*, 70 AD3d 1041, 1042-1043 (2nd Dept. 2010). The zoning board must also consider:

1) 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;

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 required variance is substantial;

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

5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the zoning board, but shall not necessarily preclude granting of the area variance.

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 by a property owner and the interests of the residents of a municipality. In particular, the conformity or dissimilarity of a property, as compared to the prevailing

conditions in the neighborhood, with respect to bulk and area, is a highly significant consideration. Further, in assessing the substantiality of a variance, the overall effect of granting the relief and not the percentage deviation from the mandated requirements of a zoning regulation, is the relevant inquiry. Rice, Supplementary Practice Commentaries, McKinney's Cons. Laws of N.Y. Book 61, Town Law § 267-b, 2010 Pocket Part at p. 114-115.

The zoning board is not required to justify its determination with supporting evidence with regard to each of the five factors, as long as its ultimate determination reflects a balancing of the relevant considerations and is rationally based. *Kaiser v Town of Islip Zoning Bd. of Appeals*, 74 AD3d 1203, 1204 (2nd Dept. 2010). The court must give deferences to the findings of a zoning board whose exclusive province it is to resolve conflicts in the evidence and to evaluate the credibility of witnesses. *Kessler v Town of Shelter Island Planning Bd.*, 40 AD2d 1005 (2nd Dept. 1972). A determination is rational if it has some objective factual basis as opposed to resting entirely on subjective consideration such as general community opposition. *Halperin v City of New Rochelle*, 24 AD3d 768, 772 (2nd Dept. 2005), *lv to app dismissed* 7 NY3d 708 (2006).

As the court stated in *Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 (2004), quoting *Matter of Cowan v Kern*, 41 NY2d 591, 599 (1977); " '[t]he crux of the matter is that responsibility for making zoning decisions has been committed primarily to quasi-legislative, quasi-administrative boards composed of representatives from the local community. Local officials, generally, possess the

familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community. Absent arbitrariness, it is for locally selected and locally responsible officials to determine where the public interest in zoning lies.' "

Here the respondent Zoning Board's determination, based on its application of the balancing test, and consideration of the relevant factors set forth in Town Law § 267-b[3][b], has a rational basis and is neither arbitrary nor capricious. The evidence before the respondent Zoning Board supports the rational conclusion that the variances sought were substantial and, if they were granted, the detriment to the community outweighed the benefit sought to be obtained by the applicant. In its Findings of Fact, the respondent Zoning Board references the character of the "Roslyn Country Club" subdivision and notes that, although there are some other larger dwellings in the area, which petitioner points to, no evidence was proffered showing that these dwellings exceed the maximum permissable floor area or that variances were granted to allow their construction. In this regard, the respondent Zoning Board opines that the wedging of an additional 542 square feet of structure onto petitioner's property creates a crowded appearance inconsistent with the character of the neighborhood. Some of the larger dwellings cited by petitioner were, according to respondent Zoning Board, the subject of cease and desist notices or revocations of certificates of occupancy.

According to the Findings of Fact, the applicable zoning regulations were in effect when petitioner purchased the premises on or about May 7, 2008 for $2.4 million. At that

time, the two-car attached carport was open on two sides and fully covered by a roof.[3] Subsequently, without a permit, petitioner installed two garage doors on the east and west sides of the structure thereby converting the carport into a two-car garage for which he now seeks variances. Although petitioner's obvious preference is for a garage rather than a carport to accommodate his vehicles, he is presumed to have knowledge of the applicable zoning restrictions in effect when he purchased the property. As such, any hardship was self-created. *FNR Home Const. Corp. v Downs,* 57 AD3d 540, 542 (2nd Dept. 2008); *Rivero v Voelker*, 38 AD3d 784, 786 (2nd Dept. 2007).

In its Finding of Fact the respondent Zoning Board also referenced legislative attempts by the Town of North Hempstead in both 1999 and 2003 to reign in incongruous development in order to preserve the character of existing neighborhoods such as "Roslyn Country Club," which are threatened when purported "tear-downs" are replaced by structures which are not contextually in harmony with the existing character of the particular neighborhood. To accomplish this end, they enacted restrictions on gross floor area, side yard and sky exposure plane requirements.

CONCLUSION

Notwithstanding petitioner's attempt to characterize the requested variances as "minor," the record establishes that the respondent Zoning Board appropriately considered the gross floor area overage, compounded by an additional floor area ratio

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[3]The certificate of occupancy states that the premises is a "New Single Family Dwelling With No Garage."

considered the gross floor area overage, compounded by an additional floor area ratio overage, engaged in the statutorily required balancing test and reached a determination based on the relevant factors on the record before it. It is entirely reasonable for the respondent Zoning Board to consider less intrusive means to accomplish a proposed project in light of prevailing zoning regulations. *Evans v Zoning Bd. of Appeals of the Village of Buchanan*, 15 Misc3d 1102(A), 836 NYS 2d 498 (N.Y. Sup. Mar 13, 2007).

Contrary to petitioner's contention, there is no basis to conclude that respondent Zoning Board failed to adhere to its own prior precedent requiring it to indicate a reason for reaching a different result in this matter. The decisions in the two appeals cited by petition are based on facts distinguishable from those in the present case i.e., the properties involved are located in different zoning district – having different character, history and restrictions – from petitioner's property. *Clinton Mews Owners Corp. v New York City Water Bd.*, 62 AD3d 872, 874 (2nd Dept. 2009).

Accordingly, petitioner's application to annul the determination of the respondent Zoning Board denying its request for two area variances is denied and the petition is hereby dismissed.

This shall constitute the Decision and Order of this Court

ENTER

DATED: October 29, 2010

ENTERED

NOV 04 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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