# MEMORANDUM

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SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 24

In the Matter of the Application of Thomas Boletti;

Petitioner,

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

- against -

ADRIENNE GIANNADEO, Chairperson, DOMINICK SALERNO, ANTHONY TANZI, JR., EDWARD BENZ And WILLIAM VALENTINE Constituting the Board of Zoning Appeals of The Town of Smithtown, County of Suffolk, State of new York and the BOARD OF ZONING APPEALS OF THE TOWN OF SMITHTOWN,

Respondent.

By: Cohalan, J.S.C.
Dated: April 21, 2011

Index No. 03712-10

Mot. Seq. #001 -CDISPSUBJ

Return Date: February 11, 2010
Calendar Date: July 28, 2010

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This is an Article 78 special proceeding brought by the petitioner seeking to reverse, annul and set aside a determination and denial by the respondents, Board of Zoning Appeals of the Town of Smithtown (hereinafter ZBA) of an application for relaxation of minimum lot area, a side yard variance and total side yard variance as well as a requested maximum floor area ratio variance from 25% to 40% for a proposed one family dwelling on a 40' x 100' parcel measuring only 4,000 square feet.

Petitioner, Thomas Boletti, is the owner of a residential parcel of real estate originally owned by his parents Leopold and Concetta Boletti and located on Birch Road just south of Washington Drive in Kings Park, Suffolk County on Long Island, New York. Leopold and Concetta Boletti purchased a conforming lot #15 measuring 100' x 100' in 1961 which was subsequently improved with a one family home and at the same time in the same deed acquired the rear non-conforming piece measuring 40' x 100' which is the subject of this dispute and consists of two (2) 20' x 100' filed map lots created in 1926 and joined in the

conveyance to the Bolettis. The Bolettis sold the improved lot #15 in 1971 without the non-conforming rear lot measuring 40' x 100' and in 2009 their son, Thomas Boletti (hereinafter petitioner), who acquired the piece from his parents made application to the Town of Smithtown (hereinafter Town) for a building permit to erect a one family home which was denied. He appealed the denial of the building permit to the ZBA seeking the variances and on January 12, 2010 the ZBA denied the requested relief.

The petitioner's application sought a minimum lot variance from 10,000 square feet (100' x 100') to 4,000 square feet in lot area, a variance in the side yard minimum from 12 feet to 8 feet, a variance in the total side yard minimums from 28 feet to 16 feet and sought to increase the maximum gross floor area of the residence on the lot from 25% to 40% in order to accommodate the structure. A public hearing was conducted on September 22, 2009 and the ZBA in a six (6) page decision, dated January 13, 2010, containing four (4) pages of findings of fact denied the petitioner's request for the variances. The ZBA noted that the petitioner's request for variance relief would not only require a 60% relaxation of lot area reduction, but also a 53% relaxation of lot frontage and the ZBA considered these variances substantial in nature. The ZBA also noted that the petitioner was deeded the property by his mother in March 2009 to develop the property and thus the hardship was self-created and that the proposed variances would impact on the general development and adversely effect the character of the neighborhood.

The petitioner thereafter instituted the present Article 78 proceeding appealing the ZBA's denial of his application as arbitrary, capricious, against the weight of the substantial evidence presented and legally without merit. In particular, the petitioner argues that the substandard and non-conforming lot was held in single and separate ownership and therefore the variances should have been granted. The ZBA noted that the opposition of neighbors was based upon environmental concerns and drainage issues and that the Town Department of Environment and Waterways in a report, dated October 19, 2009, stated that the variance for maximum gross floor area should be denied based upon "potential drainage issues." The ZBA then concluded that the "single and separate ownership" did not automatically require the variances be granted and the four (4) variances represented an "undesirable change in the neighborhood" as well as having an impact on the environmental conditions of the neighborhood.

For the following reasons, the petitioner's Article 78 special proceeding is dismissed.

Initially, the Court notes that the ZBA in its findings of fact and conclusions of law pointed out that the proposed substandard lot of 40' x 100' to be developed was actually two (2) 20' x 100' pieces (lot #616 & 617) created in 1926 and joined in the original deed of sale in 1961 between the original owners, Leonard and Vincenza Heinrichs, and Leopold and Concetta Boletti. The Bolettis sold the 8,000 square feet with the residence fronting on Cedar Street in 1971 to Robert P. McKeever and his son and retained the 40' x 100' in the rear which fronts on Birch Street in the San Remo area of Kings Park, New York. The ZBA also took note that at the time of the conveyance of the Boletti lot with the residence in 1971, the local zoning code which had been adopted in 1950 required 10,000 square feet area lots, thus recognizing

that at the time of the conveyance in 1971, the non-conveyed 40' x 100' rear lot fronting on Birch Street was not only non-conforming and substandard but could not conform to the zoning code in existence at that time, making it, as the ZBA stated, "a non buildable lot." The ZBA finding was that "the lot was split from the adjacent lot 21 years after the subject lot was no longer a 'buildable' lot under the then-applicable zoning ordinance. This was a decision made by the owners at that time."

The petitioner's argument that because the substandard lot was held in "single and separate ownership", this conferred some right to automatically entitle the petitioner to develop the lot is misplaced. In ***Khan v. Zoning Board of Appeals of the Village of Irvington***, 87 NY2d 344, 639 NYS2d 302 (1996) rehearing den. 87 NY2d 1056, 644 NYS2d 148, the Court of Appeals recognized there is no common law or inherent right to develop an undersized lot if proper protections are provided by the municipality, so the petitioner's claim of a vested right to develop this substandard self created undersized lot is without merit. See, ***Bialla v Zoning Bd of Appeals of Village of Northport***, 271 AD2d 685, 706 NYS2d 472 (2nd Dept. 2000). The impetus of "single and separate" was to prevent conforming lots becoming non-conforming after adoption of a zoning ordinance. Here, in the case at bar, the substandard and non-conforming "single and separate" 40' x 100' lot [comprising two (2) 20' x 100' lots] was always non-conforming and thus the lot was never able to comply with the zoning code. The Town Code §322-74 recognized "single and separate" with conditions imposed by this section, inter alia, the non-conforming lot "does not or did not adjoin any lot or land in the same ownership" and or the substandard lot was under the same practical or effective ownership.

The ZBA in its findings and conclusions discussed the practical effects and legal determination of "single and separate" and found:

> "Accordingly, we cannot conclude the lot is, in fact, held in 'single and separate' ownership at this or at any other time. This renders moot and inapplicable the applicant's second argument that the 'five considerations' are not to be relied upon by the Board."

The Court finds the ZBA's conclusions are proper based on the evidence presented and the interpretation of the Town Code §322-74 on single and separate ownership and its finding that the petitioner failed to meet its burden of establishing "single and separate" ownership to qualify under the Town Code. ***Rogers v. Baum***, 234 AD2d 685, 650 NYS2d 452 (3rd Dept. 1996). Thereafter, the ZBA consided the variances requested by the petitioner. In this regard, ***Snyder v. Scheyer***, 152 AD2d 630, 544 NYS2d 853 (2nd Dept. 1989) is instructive. The ZBA in its decision examined the impact of the proposed development and the four (4) variances requested by the petitioner and concluded in a fact based analysis that the proposed residence on this substandard lot would be intensive, quite substantial and would result in an undesirable change in the character of the neighborhood, impact negatively on the environmental resources with inadequate parking, would effect the spacing of a driveway hampering municipal access for street sweeping, snow removal, school buses, fire operations

and would cause drainage issues and flooding. The ZBA noted that this undersized substandard lot was self-created by the petitioner and his parents in failing to convey the substandard lot during the sale to the McKeevers and since the "lot transfer was a non sale transaction" to the petitioner, he did not pay for the property.

The proper standard for a reviewing court is whether the challenged administrative ruling lacked a rational basis for the action taken and was arbitrary and capricious. As set forth by the court in ***Matter of Halpern v. City of New Rochelle***, 24 AD3d 768, 809 NYS2 98 (2nd Dept. 2005),

> "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis. Under this standard, a determination should not be disturbed unless the record shows that the agency's action was 'arbitrary, unreasonable, irrational or indicative of bad faith' (***Matter of Cowan v. Kern***, 41 NY2d 591, 599; *see* ***Matter of Pell v. Board of Educ.***, 34 NY2d 222, 231 ["Arbitrary action is without sound basis in reason and is generally taken without regard to the facts"]).

The ***Halpern*** Court, *supra*, went on to state

> "The Court of Appeals has long recognized the 'settled rule' that 'in reviewing board actions as to variances or special exceptions the courts...restrict themselves to ascertaining whether there has been illegality, arbitrariness, or abuse of discretion' (***Matter of Lemir Realty Corp. v. Larkin***, 11 NY2d 20, 24 [collecting cases]; see ***People ex rel. Hudson-Harlem Val. Tit. & Mtgw. Co. v. Walker***, 282 NY 400, 405 [determination of zoning board of appeals 'may not be set aside unless it appears to be arbitrary or contrary to law'][collecting cases]). The Court of Appeals has continued to articulate the CPLR 7803 (3) standard of review in zoning cases, emphasizing the deference that must be afforded to local officials in making judgments concerning land use in their community (*see* ***Matter of Pecoraro v. Board of Appeals of Town of Hempstead***, 2 NY3d 608, 613 ['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'] ***Matter of Ifrah v. Utschig***, 98 NY2d 304, 308 ['Local zoning boards have broad discretion in considering applications for variances and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion']; ***Matter of Cowan v. Kern***, supra at 599 ['Where there is a rational basis for the local decision, that decision should be sustained']).

The Court may not substitute its judgment for that of the ZBA and the ZBA's determination

must be upheld if it is rational, and supported by substantial evidence. ***Khan v. Zoning Board of Appeals of Village of Irvington***, *supra*. The consideration of "substantial evidence" is limited to determining "whether the record contains sufficient evidence to support the rationality of the [Respondent's] determination." ***Sasso v. Osgood***, 86 NY2d 374, 633 NYS2d 259 (1995).

There is more than sufficient support within the record of the proceedings to substantiate the ZBA's decision to deny the petitioner's application for the four (4) variances involving substantial reductions in lot frontage, area reduction and maximum gross floor area. The ZBA found that the size and configuration of the subject parcel of 4000 square feet would not support development of a dwelling that conformed with the rest of the neighborhood , finding the average lot size in lot area in San Remo was 9400 square feet. In this regard, the ZBA had the benefit of a Town Planning Department San Remo Report issued in 2000 which noted, inter alia, that the "neighborhood is substandard with respect to street width;" all.. stormwater is discharged [into] the Nissequogue River" and the area contained "poorly drained soils." Further, the fact that the hardship was self-created and the petitioner obtained the property in a non-sale transfer is also of some import. See, ***Weissman v. ZBA Village of Kensington***, 260 AD2d 487, 688 NYS2d 215 (2nd Dept. 1999). Single and separate ownership as to a substandard, non-conforming lot does not confer any development right when considerations of the impact to the neighborhood are taken into consideration and where such right was not proven. Finally the ZBA expressed its concerns about precedent in discussing and concluding that upon the adoption of Town Law §267b-3 its review of the ten (10) cases previously before it did not involve "back to back lots" and the one case in which it did involve a similar application in 2001, that application was denied.

In ***Matter of Campo Grandchildren Trust v. Colson, et. Al.***, AD3d , NYS2d (2nd Dept 2007) [WL 1149241] decided April 17, 2007, the Court held that

> " A determination of a zoning board of appeals that 'neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious' " (citations omitted).

Thus, the ZBA could take into account the precedential value of an approval of a substandard lot with such significant area, front and side yard variances would have on the future development of the area and the negative impact such a ruling would have in the future, especially where in a previous case it denied a similar application. This is a valid concern of the ZBA.

The ZBA in a four (4) page decision set forth its detailed findings of fact, its discussions about "single and separate" ownership and the considerations and impact of these requested variances and found the proposed requests by petitioner to be adversely substantial and unsupported in the record before it. The ZBA further found that the petitioner failed to explore or provide any information with regard to alternate uses such as selling the parcel to the

adjoining parcel owners. The evidence presented before the ZBA sufficiently set forth a reasoned and calculated review of the substandard lot and the surrounding area to substantiate its considered opinion that such a substantial relaxation of area, front and side yard requirements as well as gross floor area of the structure should be denied. There is nothing within the fact finding process of the ZBA's decision to suggest or find that its denial of the petitioner's application was arbitrary, capricious, an abuse of discretion or lacked support in the record presented before it. ***Cellco Partnership v. Bellows***, 262 AD2d 849, 692 NYS2d 203 (3rd Dept. 1999). This Court can not second guess or substitute its judgment for a well reasoned analysis by the ZBA as to the denial of the instant application. The Court finds the ZBA engaged in the required balancing test and found the petitioner's application for the substantial relaxation of area, maximum gross floor area, front and side yard requirements wanting and properly denied the application. ***Mattiacco v. Zoning Bd. of Appealsof Village of Pleasantville***, 22 AD3d 758, 804 NYS2d 385 (2nd Dept. 2005).

Based upon the entire record before it, and balancing all the factors stated, the ZBA could and did rationally conclude that the detrimental impact of the proposed construction of this residence on a non-conforming lot with the variances requested would have posed a negative impact to the character of the neighborhood and outweighed the benefit sought by the petitioner, and thus its determination denying the requested relief was not arbitrary or capricious. ***Picarelli v. Karl***, 51 AD3d 1028, 858 NYS2d 389 (2nd Dept. 2008). Accordingly, the petition is denied and the proceeding dismissed. ***Matter of Ifrah v. Utschig***, supra.

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**Settle Judgment**

The foregoing constitutes the decision of this Court.

Date: April 21, 2011

J.S.C.