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MEMORANDUM

COPY

SUPREME COURT - SUFFOLK COUNTY
PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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In the Matter of the Application of
TARA STEINSCHNEIDER, AS TRUSTEE OF
THE BARBARA L. STEINSCHNEIDER TRUST,

Petitioner,

-against-

ZONING BOARD OF APPEALS OF THE
VILLAGE OF WESTHAMPTON BEACH,

Respondent,

For Relief Pursuant to Article 78 of the
New York Civil Practice Law and Rules.

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I.A.S. PART 36

By: Baisley, J.S.C.

Dated: October 21, 2011

INDEX NO.: 10417/2010
MOT. NO.: 002 CDISPSUBJ

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In this Article 78 proceeding petitioner seeks a judgment annulling and reversing a determination by respondent Zoning Board of Appeals of the Village of Westhampton Beach denying The Barbara L. Steinschneider Trust permission to renovate and modify a house in the Village's Coastal Erosion Hazard Area as well as a variance from Chapter 74 of the Village Code, the Coastal Erosion Management Law, and area variances to maintain the reduced side and rear yard setbacks for the house.

The Barbara L. Steinschneider Trust (the "Trust") is the owner of property known as 143 Dune Road, Westhampton Beach, New York. The property is located in the R-3 Zoning District of the Incorporated Village of Westhampton Beach (Village). It has a lot area of approximately 18,629 square feet and is bounded on the north by Dune Road and on the south by the Atlantic Ocean. The property is developed with a two-story house measuring approximately 1,000 square feet that was constructed in 1977 through the addition of one story over an existing garage.[1] A certificate of occupancy was issued for the house by the Village Building Department on October 13, 1978. The Coastal Erosion Management Law (CEML), Chapter 74 of the Village Code, was enacted in 1988 pursuant to Article 34 of the New York State Environmental Conservation Law and the implementing regulations in 6 NYCRR Part 505. The house, located on a dune, is in the Coastal Erosion Hazard Area (CEHA) and is non-conforming with respect to front, side and rear yard setback requirements.

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[1] Hearing testimony from January 15, 2009 indicates that the family's main house is located on the adjacent parcel at 145 Dune Road and that both houses share a circular driveway to the north. Hearing testimony from April 16, 2009 reveals that the subject property is long and narrow.

The Trust applied for a building permit to renovate the existing structure of the house and to modify the "second floor"[2] to convert the existing bedroom and deck into a larger bedroom and bath, and to increase floor area by 450 feet, rendering the dwelling a 1,450-square-foot structure.[3] The Trust indicated that it was not seeking to expand the pre-existing nonconformity and that the additional square footage of the proposed second floor would all be located within the existing building's envelope or footprint. The Trust also applied for a Coastal Erosion Management permit pursuant to the CEML (Village Code §74-5).

By letter dated December 10, 2008, the Village Building and Zoning Administrator Paul Houlihan (Building Inspector) denied the Trust's application for a building permit based on setback violations and the substantial nature of the proposed construction. Specifically, the Building Inspector found that the proposed second floor addition is within 18.6 feet of the side property line with a total side yard of 39.6 feet and is less than 15 feet from the rear lot line in violation of Village Code §197-8(D), which prohibits a minimum side yard less than 20 feet, a total side yard less than 50 feet, and a rear yard less than 75 feet. He also determined that the proposed construction is substantial in nature, and that the $300,000 estimated cost is more than 50 percent of the replacement value of the existing building, constituting a "restoration" as defined in Village Code §74-3, which is prohibited within the CEHA by Village Code §74-8(C).

The Trust applied to respondent Zoning Board of Appeals of the Village of Westhampton Beach (ZBA) challenging the Building Inspector's denial of a building permit and the decision of the CEML Administrator (the Building Inspector pursuant to Village Code §74-14 [C]) that the project is a prohibited "restoration" as defined in Village Code §74-3 rather than a permitted "renovation" in the CEHA. As an alternative, the Trust sought a variance from the CEML, Chapter 74 of the Village Code, and area variances to maintain the reduced side and rear yard setbacks for the house. Public hearings were held on January 15, 2009, April 16, 2009, May 21, 2009, June 18, 2009, July 16, 2009, and August 20, 2009.

Restoration is defined in Village Code §74-3 as "[t]he construction, reconstruction, alteration or modification of a structure, the cost of which equals or exceeds 50% of the estimated full replacement cost of the structure at the time of filing the application for a coastal erosion hazard permit." A restoration is prohibited in the primary dune areas of the CEHA pursuant to Village Code §74-8 (A), (C).

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[2] The Building Inspector testified at the hearing on April 16, 2009 that the original plans filed with the Village show no second floor and no spiral staircase leading to the second floor, just one story above the garage level with a cathedral ceiling. He suspected that a second floor was created in the one story through the installation of a spiral staircase and other modifications after the original construction without a building permit or approval. The trustee Padraic Steinschneider contended at the hearing that the Building Inspector held revised plans amended prior to the issuance of the original building permit by the prior Building Inspector showing the dormer on the second floor, the loft above, the spiral staircase, and the deck facing the ocean, which the Building Inspector denied.

[3] The trustee Padraic Steinschneider explained at the hearing on January 15, 2009 that the spiral staircase from the first floor to the sleeping loft on the second floor is now impractical, that he wants to replace it with a traditional staircase, and that to do so requires renovation of the bathroom on the first floor and removal of the existing sauna and changing area. He also said that the belvedere (deck) area on the second floor is no longer needed and would be turned into a bedroom so as to have room on the second floor for a bathroom. At the July 16, 2009 hearing, the trustee further explained that he hoped to expand the approximately 200-square-foot second floor area to between 450 to 475 square feet and to replace rotting windows and doors.

A large portion of the public hearings involved the review of submitted appraisals of the house and the meaning of the term "replacement" as used in the definition of "restoration" in Village Code §74-3. The Trust submitted its builder's estimate of the replacement cost of the existing structure of $541,000 and estimate of the cost of the first story renovations and the second story additions of $243,700 to demonstrate that construction costs would be less than 50 percent of the replacement cost. However, the Building Inspector multiplied the $541 per square foot replacement cost by the 475-square-foot second floor addition for a result of $256,975, to which he added the Trust's estimate for the first floor renovation of $101,200, for a total cost of $358,175, which was more than 66 percent of the replacement cost. The Village submitted the appraisal of the Town of Southampton Assessor indicating that the "Replacement Cost New" (RCN) of the Trust's structure would be $219,000. The parties agreed to an independent appraisal and Hampton Appraisal Services Corp. (Hampton Appraisal), a certified appraiser in Southampton, performed an appraisal based on the survey, a full set of plans approved by the Village on April 5, 1977, and a visit to the premises, as well as Marshall and Swift cost standards. Their appraisal indicated a replacement cost of $220,000 (not including the large stained glass window in the west wall of the dwelling). Disagreements arose concerning whether replacement of the structure meant replacement with a structure in its current condition or with a structure in its original, new condition; whether the classification of the structure was category 3, average, or category 6, excellent, on the Marshall and Swift scale; what construction materials satisfied a "replacement"; and which was the most reliable replacement cost valuation method -- the builder's detailed inventory method used by the Trust's appraisers, the comparative method used by the Town of Southampton Assessor, or the unit cost in place method used by Hampton Appraisal (*see* 8 Am Jur Proof of Facts 2d, Valuation of Structure Based on Reproduction or Replacement Cost §§6,7,8, at 399; *see also* [American Institute of Real Estate Appraisers] The Appraisal of Real Estate [6th ed 1973], at 217, 220, 225–34).

The ZBA denied the Trust's application in a comprehensive and detailed 18-page determination dated February 18, 2010 filed in the Office of the Village Clerk on February 19, 2010. The denial was based on a finding that most of the areas of the house that the Trust is seeking to renovate and modify were illegally constructed and do not appear on the plans on file with the Village; that the entire dwelling and deck are substantially south of the Coastal Erosion Hazard Line with the deck and a portion of the dwelling located south of the rear lot line or crest of the dunes where a 75-foot setback is required; and that the proposed construction is a regulated activity under Village Code §74-8(A)(8)[4] and is substantial, involving the reconstruction and redesign of the entire roof, replacement of a minimum of 75 percent of all windows, doors, and sliding doors and a significant amount of interior renovations,[5] constituting a prohibited "restoration" in the CEHA.

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[4] Village Code §74-8(A)(8) was amended on April 7, 2011 by Local Law No. 3- 2011 and was subsequently designated as Village Code §74-8(A)(7) on July 5, 2011 by the adoption of Local Law No. 7-2011.

[5] The Building Inspector explained at the hearing on April 16, 2009 that the proposed house is comprised of three levels, the current lower garage level with breakaway walls where habitable space is prohibited, the current first floor which is being renovated, and a new second floor that does not currently exist. He characterized the project as a reconstruction rather than a renovation. The trustee Padraic Steinschneider insisted that the only floor space being replaced on the first floor was the area of the existing bathroom, through the removal of the sauna and bathroom. At the May 21, 2009 hearing, the trustee stated that he was not building an addition that would expand the existing house but was instead seeking to enclose a currently open area in the roof to make it part of the second floor and put a different type of dormer on the north side of the house to make room for a bathroom and stairs.

The ZBA explained that for the purposes of FEMA and coastal erosion, it has often relied on the Town of Southampton Assessor's appraisal to estimate replacement costs and noted the reliability of the Town of Southampton Assessor's figures, that they use a highly accepted national cost system called "Marshall and Swift" and apply state and local multipliers to make sure that the stated costs clearly reflect actual costs in the area of the dwelling. The ZBA found the estimate of $541,000 submitted by the Trust's builder to be "at extreme variance" with the $219,000 replacement cost proffered by the Town of Southampton Assessor, and difficult to reconcile. The ZBA determined that with over 10 replacement cost estimates submitted by the Trust ranging from $738,980 to $300,000, the only consistent estimates were from the Town of Southampton Assessor and Hampton Appraisal.[6] The ZBA also found that except for the skylights, stained glass window, and a few other windows, the subject dwelling is no different than any of the other beach bungalows built in the 1970's on Dune Road, and is average in nature, a Category 3 on the Marshall and Swift scale, as applied by Hampton Appraisal. After weighing the evidence and the credibility of the testimony and witnesses, the ZBA determined that there was no basis to set aside the determination of the CEML Administrator that the proposed project is a "restoration" as provided for in Village Code §74-3.

With respect to the request for a variance from the CEML and the area variances, the ZBA found that the Trust had not submitted any testimony or evidence to support the variances permitted under Village Code §74-13, had failed to show how the refusal of the variances would cause practical difficulty or unnecessary hardship, and had failed to establish that there was no reasonable, prudent, alternate site available (*see* Village Code §74-13[A][1][a], [d]). The ZBA suggested that the Trust could merely move the dwelling north of the Coastal Erosion Hazard Line and that there was ample room on the parcel for such a move. The ZBA also found that the Trust refused to discuss whether all responsible means and measures to mitigate any adverse impact on the natural systems and their functions and values had been incorporated into the project's design and that the Trust failed to address whether or not the structure would be reasonably safe from flood and erosion damage (*see* Village Code §74-13[A][1][b],[c]). The ZBA determined that the request for area variances must be denied as a matter of law inasmuch as the Trust failed to establish that the requested variances are the minimum necessary to overcome the practical difficulty or hardship that would be the basis for the requested variances (*see* Village Code §74-13[A][1][d]). The ZBA indicated that, in making its determination, it took into consideration the benefit to the Trust if the variances were granted as weighed against the detriment to the health, safety and welfare of the neighborhood or community if granted. The ZBA found that an undesirable change would be produced in the character of the neighborhood and a detriment to nearby properties would be created by the granting of the area variances.

In addition, the ZBA denied the request for variances as consistent with the purpose of the CEML to move nonconforming dwellings in the CEHA to prevent damage to property and human life, indicating that the benefit sought by the Trust could be achieved by an alternate feasible method of moving the dwelling northward and could be substantially expanded without causing an impact on the surrounding neighborhood and community. The ZBA determined that the area variances sought are

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[6] Chapter 74 of the Village Code was amended on April 7, 2011 by Local Law No. 3-2011 adding to the definition of restoration under §74-3 the following: "The estimated full replacement cost of the structure at the time of filing the application for a coastal erosion hazard permit not already issued shall be determined by the greater of the 'Replacement Cost New' or 'RCN' set forth in the Town of Southampton Assessor's Office appraisal of the subject structure, or the replacement cost determined by an independent certified appraiser chosen by the Village of Westhampton Beach for such purpose, the cost of which shall be paid by the applicant in advance."

substantial, a 96 percent variance from the rear yard setback, a 36 percent variance from the total side yard requirement, and a 7 percent variance from the side yard requirements, and that their cumulative effect was large particularly for a dwelling directly on top of the main dune in a highly protected area. The ZBA further determined that the proposed variances would have an adverse impact on the physical and extremely environmentally sensitive conditions of the neighborhood, noting that the Village relies on the dunes for protection from ocean breakthroughs and coastal erosion. It added that the alleged difficulty was clearly brought on by the petitioner who was aware of the substantially nonconforming structure in the prohibited CEHA.

Petitioner subsequently commenced this CPLR Article 78 proceeding on March 18, 2010 seeking a judgment setting aside and annulling the ZBA's February 18, 2010 determination on the grounds that it is arbitrary and capricious, erroneous as a matter of law, and an abuse of discretion. Petitioner asserts that the property is improved with a custom designed house, with all the amenities, fully insulated, heated and air conditioned with a sauna, a built-in draft beer system, a 13-foot-tall antique stained glass window, a kitchen with stainless steel appliances including a SubZero refrigerator/freezer, custom built cabinets that are faced with actual weathered wood from the exterior of a 100-year-old tobacco barn in Ballardsville, Kentucky, and honed carrara marble countertops, and that the house was in full compliance with all zoning regulations at the time of its construction. Petitioner asserts that the ZBA consistently attempted to use nonrepresentative plans from 1977 rather than the current structure that received a certificate of occupancy to establish replacement costs, resulting in the erroneous conclusion that the project is a "restoration" rather than a "renovation" under the CEML. According to petitioner, to replace the existing structure would require new construction that would not be category 3, average, but rather category 6, excellent, on the Marshall and Swift guide, and all of the Trust's valuations from different sources indicate that the structure's replacement cost exceeds $500,000. In addition, petitioner asserts that the Building Inspector misrepresented to the ZBA that petitioner was claiming that the replacement cost of the dwelling was $541 per square foot inasmuch as there is much more square footage than the 1,000-square-foot first floor area. Petitioner argues that the ZBA's complete and total reliance on the Town of Southampton Assessor's valuation is arbitrary, capricious and illegal inasmuch as the Town of Southampton Assessor's appraisals establish the value of the existing dwelling by taking into consideration its age, condition, and extent of deterioration for the purpose of taxing the dwelling in its "as is" condition, which appraisal figure is vastly different from the cost of replacing or reproducing a more than 30-year-old residence. According to petitioner, the Building Inspector's characterization of the renovation as "gutting the house and building a new one" was inconsistent with the plans submitted by the Trust.

Petitioner further asserts that the ZBA arbitrarily and capriciously refused to follow the area variance test of Village Law §7-712-b(3)(b), ignored the evidence, and did not properly utilize the statutory balancing test in determining the appeal. She argues that the Trust demonstrated that the three dimensional setbacks were already in existence so that there would be no change to the character of the neighborhood nor any detrimental impact on the environment. In addition, petitioner argues that the hardships were not self-created inasmuch as the setbacks were all in compliance with the zoning at the time of the dwelling's construction and were rendered nonconforming with the passage of new zoning regulations. She also argues that the Trust demonstrated that the benefit to it clearly outweighed any detriment to the neighborhood inasmuch as the structure has been standing for over 30 years. Petitioner further argues that if the Trust moves the house north of the CEHA, as the ZBA desires, it would violate the intent of the CEML by damaging existing natural protective features, that is, the dune would be

weakened by the removal of the existing house and efforts to restore the dune would never replicate its current stability. She adds that the construction of a new house would necessitate the removal of trees and ground cover that help stabilize the sand north of the existing house.

Respondent ZBA served an answer and submitted a verified return. The ZBA asserts affirmative defenses that the petitioner does not state facts sufficient to constitute a cause of action; the actions of the ZBA were at all times reasonable, proper and in compliance with all applicable ordinances, statutes and regulations in all respects; and petitioner failed to set forth any facts or evidence in the record that would justify or warrant the granting of the application.

Generally, "[i]n a proceeding pursuant to CPLR article 78 to review a determination of a zoning board of appeals, judicial review is limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion [*citations omitted*]" (*Ferraris v Zoning Bd. of Appeals of Vil. of Southampton*, 7 AD3d 710, 711, 776 NYS2d 820 [2d Dept 2004]; *see Rossney v Zoning Bd. of Appeals of Inc. Vil. of Ossining*, 79 AD3d 894, 895, 914 NYS2d 190 [2d Dept 2010]). The scope of judicial review of the Board's determination is limited to an examination of whether it has a rational basis and is supported by substantial evidence (*New Venture Realty v Fennell*, 210 AD2d 412, 620 NYS2d 99 [2d Dept 1994]). A determination is rational "if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition" (*Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 67, 886 NYS2d 442 [2d Dept 2009], quoting *Halperin v City of New Rochelle*, 24 AD3d 768, 772, 809 NYS2d 98 [2d Dept 2005]). The consideration of "substantial evidence" is limited to determining "whether the record contains sufficient evidence to support the rationality of the [Zoning Board's] determination" (*Sasso v Osgood*, 86 NY2d 374, 384, 633 NYS2d 259 [1995]; *see DiPaolo v Zoning Bd. of Appeals of Town/Vil. of Harrison*, 62 AD3d 792, 879 NYS2d 507 [2d Dept 2009]). This Court may not substitute its discretion for that of the Board unless its determination is arbitrary or contrary to law (*Smith v Board of Appeals of the Town of Islip*, 202 AD2d 674, 675, 609 NYS2d 912 [2d Dept 1994]). Nor may the court weigh the evidence or reject the choice made by the zoning board where the evidence is conflicting and room for choice exists (*Calvi v Zoning Bd. of Appeals of City of Yonkers*, 238 AD2d 417, 656 NYS2d 313 [2d Dept 1997]; *see Toys R Us v Silva*, 89 NY2d 411, 654 NYS2d 100 [1996]; *Stork Rest. v Boland*, 282 NY 256 [1940]).

Initially, the Court finds unavailing petitioner's argument that the ZBA improperly relied on the 1977 plans filed with the Village and the 1,000-square-foot size of the dwelling because they were not representative of the current structure. When applying for a certificate of occupancy, the Trust filed with the Building Inspector an affidavit of the registered architect or licensed professional engineer who filed the original plans or supervised the construction of the work, or of the superintendent of construction who supervised the construction of the work, stating that the deponent had examined the approved plans of the structure for which a certificate of occupancy is sought, that the structure had been erected in accordance with approved plans, and as erected complied with the law governing building construction except as to legally authorized variations (*see* Village Code §70-23). The Court notes that the Trust never submitted to the ZBA during the public hearings a copy of the purported revised, amended plans on which the certificate of occupancy was based. Thus, the ZBA correctly relied on the 1977 plans approved by the Village as being representative of the current structure.

If, as the petitioner asserts, the 1977 plans on file do not represent either the current house or the house at the time of its construction in 1978, then the Trust has an invalid certificate of occupancy and a new certificate is required (*see* Village Code §70-22), and the second floor, the spiral staircase, and

the converted garage areas are illegal structures. In addition, the ZBA was correct in considering the size of the dwelling to be 1,000 square feet inasmuch as the Trust indicated in its application to the ZBA dated December 12, 2008 that,

> The applicant's property at 143 Dune Road was improved by a single family 1,000 square foot structure ...The applicant seeks to renovate the subject premises and increase the floor area on the 2nd floor by 450 feet rendering the house a 1,450 foot [sic] square foot structure which is obviously a minimal size dwelling.

The ZBA argues in its sur-reply memorandum of law dated April 4, 2011 that the then imminent amendment of the definition of "restoration" in Village Code §74-3 must be applied by the Court and renders further review of the ZBA determination moot. Chapter 74 of the Village Code was amended on April 7, 2011 by Local Law No. 3- 2011, adding to the definition of restoration under §74-3 the following:

> The estimated full replacement cost of the structure at the time of filing the application for a coastal erosion hazard permit not already issued shall be determined by the greater of the 'Replacement Cost New' or 'RCN' set forth in the Town of Southampton Assessor's Office appraisal of the subject structure, or the replacement cost determined by an independent certified appraiser chosen by the Village of Westhampton Beach for such purpose, the cost of which shall be paid by the applicant in advance.

It is well settled that where an appeal or other proceeding is pending and a relevant zoning amendment has been adopted, the reviewing agency or the court must apply the zoning code as amended as the governing law existing at the time of its decision (*see Lombardi v Habicht*, 293 AD2d 474, 475, 740 NYS2d 101 [2d Dept 2002]; *Marasco v Zoning Bd. of Appeals of Village of Westbury*, 242 AD2d 724, 725, 662 NYS2d 801 [2d Dept 1997]; *Semerjian v Vahradian*, 186 AD2d 202, 587 NYS2d 758 [2d Dept 1992], *lv denied* 81 NY2d 710, 599 NYS2d 804 [1993]). In addition, the protection of vested rights in a nonconforming structure existing at the time a prohibitory code is enacted does not extend to subsequent construction (*see Frisenda v Zoning Bd. of Appeals of Town of Islip*, 215 AD2d 479, 480, 626 NYS2d 263 [2d Dept 1995]; *Cucci v Zoning Bd. of Appeals of Town of Huntington*, 154 AD2d 372, 373, 545 NYS2d 850 [2d Dept 1989]; *see also Sterngass v Town Bd. of Town of Clarkstown*, 10 AD3d 402, 406, 781 NYS2d 131 [2d Dept 2004]).

Based on the foregoing, the definition of "restoration" in Village Code §74-3 as amended on April 7, 2011 by Local Law No. 3-2011 applies to this proceeding. Thus, the ZBA's decision to rely on the estimates of the Town of Southampton Assessor and Hampton Appraisal and to uphold the determination of the CEML Administrator that the proposed project is a "restoration" as provided for in Village Code §74-3 is rational and supported by substantial evidence. "Reproduction cost is the current cost of constructing a replica of the structure, using the same or closely similar materials. Replacement cost is the current cost necessary to construct an improvement of the same functional utility as the original one, but using current practices in construction design and choice of building materials" (8 Am Jur Proof of Facts 2d, Valuation of Structure Based on Reproduction or Replacement Cost, at 399; *see also* [American Institute of Real Estate Appraisers] The Appraisal of Real Estate [6th ed 1973], at 215). The petitioner challenges the appraisal calculations of the Town of Southampton Assessor and

Hampton Appraisal as depicting the depreciated value of the structure based on its age and current condition of deterioration. However, the challenge is baseless because the "replacement cost new" in the appraisals of both the Town of Southampton Assessor and Hampton Appraisal, submitted with the return, does not include a reduction for depreciation, as explained by the Building Inspector at the April 16, 2009 hearing. There is a separate calculation "RCNLD," replacement cost new less depreciation, provided in the Town of Southampton Appraisal. The finding of rationality would still hold even if the new law was not applied, based on the general rule that when conflicting expert reports are submitted, "deference must be given to the discretion and commonsense judgments of the board" *(Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 196, 746 NYS2d 662 [2002]; *Moy v Board of Town Trustees of Town of Southold*, 61 AD3d 763, 765, 877 NYS2d 186 [2d Dept 2009]). As a restoration, the proposed construction is prohibited in the primary dune area under Village Code §74-8 absent the granting of variances pursuant to Village Code §74-13. Contrary to the argument of the ZBA, the amendment of the definition of "restoration" in Village Code §74-3 does not render the review of the ZBA's determination moot inasmuch as the amendment did not affect the portion of the determination concerning the denial of the variances.

Local zoning boards have broad discretion in considering applications for variances (*see Matter of Ifrah v Utschig*, 98 NY2d 304, 308, 746 NYS2d 667 [2002]; *Matter of Gallo v Rosell*, 52 AD3d 514, 515, 859 NYS2d 675 [2d Dept 2008]; *see also Carrano v Modelewski*, 73 AD3d 767, 899 NYS2d 634 [2d Dept 2010]). Courts may set aside a zoning determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to the generalized community pressure. A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence (*see Pecoraro v Board of Appeals of the Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234 [2004]).

When making a determination on an application for an area variance pursuant to Village Law §7-712-b(3)(b), 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 community, and considering the statutory factors. The five statutory factors are: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance, (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance, (3) whether the requested area variance is substantial, (4) whether the proposed variance will have an adverse impact on the physical or environmental conditions in the neighborhood, and (5) whether the alleged difficulty was self-created (*see Rossney v Zoning Bd. of Appeals of Inc. Village of Ossining, supra*; *Alcantara v Zoning Bd. of Appeals, Vil. of Ossining, State of New York*, 64 AD3d 774, 775, 883 NYS2d 303 [2d Dept 2009]).

Pursuant to Village Code §74-13(A)(1),

> Strict application of the standards and restrictions of this chapter may cause practical difficulty or unnecessary hardship. When this can be shown, such standards and restrictions must be varied or modified, provided that the following criteria are met:
>
> (a) No reasonable, prudent, alternative site is available.

(b) All responsible means and measures to mitigate adverse impacts on natural systems and their functions and values have been incorporated into the activity's design at the property owner's expense.

(c) The development will be reasonably safe from flood and erosion damage.

(d) The variance requested is the minimum necessary to overcome the practical difficulty or hardship which was the basis for the requested variance.

The Court notes that although the original dwelling was not required to conform with the setback requirements of the current zoning ordinance, this protection did not extend to new construction (*see Hannett v Scheyer*, 37 AD3d 603, 830 NYS2d 292 [2d Dept 2007]; *Matter of Frisenda v Zoning Bd. of Appeals of Town of Islip*, 215 AD2d 479, 480, 626 NYS2d 263 [2d Dept 1995]; *Matter of Rembar v Board of Appeals of Vil. of E. Hampton*, 148 AD2d 619, 620, 539 NYS2d 81 [2d Dept 1989]).

Here, the record reveals that the ZBA engaged in the required balancing test and considered the relevant statutory factors (*see Muth v Scheyer*, 51 AD3d 799, 799-800, 857 NYS2d 706 [2d Dept 2008]). The determination of the ZBA to deny the area variances was neither illegal, arbitrary nor an abuse of discretion (*see Picarelli v Karl*, 51 AD3d 1028, 858 NYS2d 389 [2d Dept 2008]). In applying the statutory balancing test for the granting of area variances pursuant to Village Law § 7-712-b (3) (b), the ZBA was "not required to justify its determination with supporting evidence with respect to each of the five factors, so long as its ultimate determination balancing the relevant considerations was rational" (*see Merlotto v Town of Patterson Zoning Bd. of Appeals*, 43 AD3d 926, 929, 841 NYS2d 650 [2d Dept 2007]; *see also Friedman v Board of Appeals of Vil. of Quogue*, 84 AD3d 1083, 923 NYS2d 651 [2d Dept 2011]). The ZBA indicated that an alternate site north of the CEHA was available in which the benefit sought by the Trust and the benefit sought by the ZBA, in the form of demolition of nonconforming structures built on the dunes, could be achieved (*see Friedman v Board of Appeals of Village of Quogue*, 84 AD3d at 1085, 923 NYS2d 651). In addition, based on the substantial nature of the multiple variances requested and their cumulative effect, the Court cannot conclude that the ZBA acted irrationally or capriciously in denying the application (*see Tetra Bldrs., Inc. v Scheyer*, 251 AD2d 589, 674 NYS2d 764 [2d Dept 1998]; *Becvar v Scheyer*, 250 AD2d 842, 673 NYS2d 210 [2d Dept1998]). Moreover, although the Trust's situation was not self-created inasmuch as the CEML was adopted after the Trust constructed the house (*see Padwee v Bronnes*, 242 AD2d 334, 661 NYS2d 52 [2d Dept 1997]), the ZBA rationally concluded that the requested variances were substantial in light of the potential precedent they would establish in allowing substantial construction in such an environmentally sensitive area (*see Alfano v Zoning Bd. of Appeals of Vil. of Farmingdale*, 74 AD3d 961, 963, 902 NYS2d 662 [2d Dept 2010]).

Accordingly, the petition is denied and the proceeding is dismissed.

Submit judgment.

PAUL J. BAISLEY, JR.

J.S.C.