

**Matter of Laffey v Baranello**

2011 NY Slip Op 32958(U)

October 6, 2011

Sup Ct, Nassau County

Docket Number: 13940/10

Judge: F. Dana Winslow

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*SMAN*

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**TRIAL/IAS, PART 4  
NASSAU COUNTY**

**In the Matter of the Application of**

**MARK LAFFEY,**

**Petitioner,**

**For a Judgment Pursuant to CPLR Article 78**

**-against-**

**MOTION SEQ. NO.: 002  
MOTION DATE: 6/17/11**

**PATRICIA A. BARANELLO, Chairwoman,  
SCOTT F. GUARDINO, JACQUELINE A.  
WATTERS, SUSAN CLONINGER, JOSEPH  
BORDINO, JOHN F. FANNING and LOIS SCHMITT,  
constituting the Zoning Board of Appeals of the  
Town of Oyster Bay,**

**INDEX NO.: 13940/10**

**Defendants.**

**The following papers having been read on the motion (numbered 1-4):**

<b>Notice of Motion for Reargument.....</b>	<b>1</b>
<b>Memorandum of Law.....</b>	<b>2</b>
<b>Memorandum of Law.....</b>	<b>3</b>
<b>Verified Answer.....</b>	<b>4</b>

Motion by the attorney for the petitioner for an order pursuant to CPLR 2221 for reargument of this court's November 30, 2010 decision and order is determined as follows. In the within Article 78 proceeding, the petitioner seeks to annul and reverse the determination by the Zoning Board of Appeals of the Town of Oyster Bay (the Board) dated June 10, 2010 (the Determination). The Determination denied petitioner's application for a Special Use Permit to convert a one-family dwelling into a two-family dwelling.

The petitioner is the owner of the premises located at 135 East Main Street, Oyster Bay, New York (premises). It is improved with a 2-1/2 story frame dwelling which was constructed in 1908. In 1973 the Town approved the premises to be used as a residence and a medical office with a detached garage. A Certificate of Occupancy was not issued until 2002. The premises contains an overall lot area of 24,000 square feet. The premises

is currently zoned Residence R1-10 by the Town of Oyster Bay (Town). When the petitioner purchased the premises in August 2002, it was zoned Residence R1-6. The premises was upzoned by the Town in January 2007 (Local Law 2-2007), together with other neighboring premises from R1-6 to R1-10 (10,000 sq. ft. lot area, one-family dwelling). The permitted residential uses in the Residential Zoning District of the Town are set forth in Sec. 246-5.2. It provides that two-family dwellings are permitted only by Special Permit of the Board in the R1-6 and R1-7 Residence Districts. In 1973 the Board approved the conversion of a portion of the first floor of the premises to a medical office. The petitioner argues that the premises were entitled to the two-family Special Permit because prior to 2007 the premises was in an R1-6 zone before the upzoning. Petitioner is not claiming and the parties agree that the premises is not entitled to non-conforming status.

The petitioner applied to the Town Building Department in 2008 for permission to maintain a change from the doctor's office suite to a residential apartment for a two-family dwelling. The Town's records indicate that the application was initially approved, with an amendment made deleting the term "residential apartment" and inserting the term "2 family dwelling." Subsequently, the petitioner received a Notice of Disapproval and proceeded to seek a Special Use Permit to maintain the residential use of the medical office suite. The respondent drafted the official notice for the public hearing on the petitioner's application. This Notice was published in the newspaper, on the respondent's public calendar and in the notification which it prepared for dissemination to the surrounding property owners as:

Special Use permit to convert a one-family dwelling to a two-family dwelling

Sec. 246-5.2 Schedule of Use Regulations - Residence Districts provides that a two-family dwelling is permitted as a Special Permit in the R1-6 and R1-7 Residence Zoning Districts. However, the subject premises lie within an R1-10 Residence District having been upzoned from R1-6 in 2007. The Board was without authority or jurisdiction to entertain or grant a two-family use as a Special Permit to the petitioner. It was not a permitted or special use in the R1-10 Residence Zone. *Tobin v Bd. of Zoning Appeals*, 295 AD2d 524.

The granting of a Special Permit is not an exception to the ordinance but rather permits certain uses which the ordinance authorized under special conditions. *See Foland*

*v Zoning Board of Town of Bethlehem, Albany County*, 1960, 26 Misc2d 1093. The underlying condition precedent for the Board to entertain the petitioner's request for a two-family Special Permit required that the premises be in an R1-6 or R1-7 Residence Zone. The Board's denial of the requested Special Permit was proper and supported by the record.

The petitioner also requested the two family relief by way of making a case for a use variance. The statutory conditions required in Sec. 267-b(2) of the Town Law for use variances are as follows:

- (1) The applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;
- (2) That the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district neighborhood;
- (3) That the requested use variance, if granted, will not alter the essential character of the neighborhood; and,
- (4) That the alleged hardship has not been self-created.

The salient argument made by the petitioner is that since under the upzoning of his property he may have sufficient land to erect two new single-family dwellings, the fact that he desires to retain the existing house structure and convert the existing office space to an accessory apartment actually benefits both himself and the community by maintaining the open space and minimal lot coverage that presently exists. In reaching its decision, the Board heard and rejected petitioner's assertion that should he choose to do so, he could demolish the existing dwelling and erect two new larger dwellings that he asserts would have a detrimental yet legal impact on the surrounding community.

In reviewing a determination of a zoning board, courts should presume that the decision was correct (*see*, 2 Anderson, *New York Zoning Law and Practice*, § 26.17 [3d ed.]). However, a determination of a zoning board will be set aside if it is arbitrary and capricious. *Preston v Board of Zoning Appeals of Town of North Hempstead*, 229 AD2d 585. A zoning board's determination "must be sustained if it has a rational basis and is supported by substantial evidence" (*Matter of Toys "R" Us v Silva*,

89 NY2d 411). The court in *Cowan v Kern*, 41 NY2d 591, 599 stated:

“The crux of the matter is that the 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.”

Even where a contrary determination would be reasonable and sustainable, a reviewing court may not substitute its judgment for that of the agency if the determination is supported by substantial evidence. *Matter of Consolidated Edison Co. of N.Y. v New York State Div. of Human Rights (Easton)*, 77 NY2d 411. Substantial evidence has been defined as “such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact” *300 Gramatan Ave. Assoc, v State Div. of Human Rights*, 45 NY2d 176.

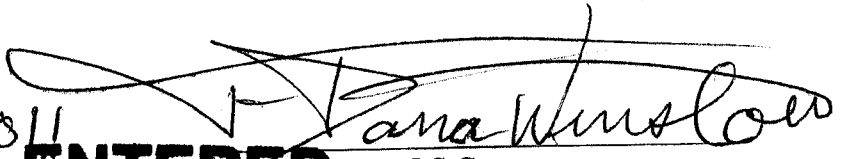
The Board found that no economic proof was offered that the petitioner could not realize a reasonable return. Petitioner failed to submit sufficient dollars and cents proof to justify the granting of the variance. *See Matter of Village Bd. v Jarrold*, 53 NY2d 254. No real estate testimony or proof was offered that the requested relief would not alter the essential character of the neighborhood.

Merely upzoning by itself does not create a hardship. Petitioner failed to demonstrate that the alleged hardship from the upzoning was not self-created. *See In the Matter of 194 Main Inc. v Bd. of Zoning Appeals Town of North Hempstead*, 71 AD3d 1028.

The Zoning Board’s determination is soundly based on the evidence and parallels the criteria required by the statute.

The motion to vacate the Board’s determination is **denied**. This decision terminates all proceedings under index no. 013940/10.

This constitutes the Order of the Court.

Dated: October 6, 2011  
  
**ENTERED** J.S.C.  
NOV 01 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE