

Matter of Haas v Wexler
2012 NY Slip Op 33151(U)
February 27, 2012
Supreme Court, Suffolk County
Docket Number: 11-32792
Judge: Jeffrey Arlen Spinner
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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 32

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In the Matter of the Application of

LEESA HAAS,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil
Practice Law & Rules,

- against -

WILLIAM D. WEXLER, MICHAEL GAJDOS,
JAMES BOWERS, ANNMARIE LEROSA and
JOSEPH FRITZ constituting the Board of Zoning
Appeals of the Town of Islip,

Respondents.

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By: JEFFREY ARLEN SPINNER, J.S.C.
Dated: February 27, 2012

Index No. 11-32792
Mot. Seq. # 001 - MotD;CDISPSUBJ

Return Date: 11-15-11
Adjourned: 1-9-13

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This Article 78 proceeding seeks a judgment annulling and setting aside a determination of respondent Board of Zoning Appeals of the Town of Islip, which denied petitioner Leesa Haas's application for certain area variances. For the reasons set forth herein, the petition is granted only to the extent set forth herein, and is otherwise denied.

Petitioner Leesa Haas is the owner of a parcel of residential property in the Town of Islip known as 8 Pine Street, Sayville. Zoned Residence B, the property abuts Pine Street and Foster Avenue, and is improved with a single family residence, a detached garage and a shed. Attached to the residence is a one-bedroom accessory apartment, which allegedly existed on the property before petitioner and her husband took title in 1985. The detached garage, which measures 22.3 feet by 46.5 feet, was constructed without a building permit, allegedly to replace a deteriorating garage that was on the property when it was purchased by petitioner and her husband in 1985. Chain-link fencing measuring 4½ feet high runs along the front property lines of Haas's corner lot.

In December 2010, petitioner filed an application with respondent Board of Zoning Appeals for the Town of Islip (hereinafter Zoning Board) for variances which would permit her to maintain the existing accessory apartment, garage, shed, and fences on the front property lines. As to the detached garage, petitioner sought a variance increasing the maximum height for an accessory structure from 14 feet to 19 feet, and a variance reducing the minimum side yard from 10 feet to 1.4 feet. Petitioner requested a side yard variance of 3 feet rather than 4 feet for the shed, and a variance increasing the maximum height for fences not having the required setbacks from the front yard property lines from 4 feet to 4.5 feet. In July 2011, the Zoning Board held a public hearing on petitioner's variance applications. During the hearing, petitioner's counsel submitted photographs and a map of residential properties on Pine Street having detached garages exceeding 14 feet in height, as well as photographs of the prior garage and existing garage.

By decision dated September 20, 2011, the Board of Appeals denied petitioner's request for height and side yard variances for the detached garage, as well as her request for a variance from the height restriction for fences set back less than the required distance from the front property lines. Further, the Board granted the side yard variance for the shed, but denied, without prejudice, the request for a variance for the accessory apartment. The Board's determination states that petitioner may reapply for a variance for the accessory apartment when the other structures on the property "have been brought into compliance."

Subsequently, petitioner commenced the instant Article 78 proceeding for a judgment reversing and annulling the Zoning Board's September 2011 determination, and directing that her applications for variances for the accessory apartment, garage and fences be granted. Petitioner alleges that the Zoning Board's determination denying the variances for these structures was arbitrary, capricious and not supported by substantial evidence in the record. More specifically, pointing to statements in the determination that the detached garage has the appearance of a cottage, and that the Zoning Board, as well as a statement at the public hearing by the Chairman, William Wexler, that, according to the Department of Planning, the Town has not granted a variance of the ordinance limiting the height of accessory structures to 14 feet, petitioner alleges that the Board "failed to grasp the facts of the application," and that it "prejudged" her application and failed to consider the evidence presented at the hearing.

The court's role in reviewing an administrative decision is not to decide whether the agency's determination was correct or to substitute its judgment for that of the agency, but to ascertain whether there was a rational basis for the determination (*see Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 239 [1995]; *Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 626 NYS2d 1 [1995]; *Matter of Warder v Board of Regents of Univ. of State of N.Y.*, 53 NY2d 186, 440 NYS2d 875 [1981]). It is fundamental that when reviewing a determination that an administrative agency alone is authorized to make, the court must judge the propriety of such determination on the grounds invoked by the agency; if the reasons relied on by the agency do not support the determination, the administrative order must be overturned (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758, 570 NYS2d 474 [1991]; *see Matter of National Fuel Gas Distrib. Corp. v Public Serv. Commn. of the State of N.Y.*, 16 NY3d 360, 922 NYS2d 224 [2011]; *Matter of Filipowski v Zoning Bd. of Appeals of Vil. of Greenwood Lake*, 101 AD3d 1001, 956 NYS2d 183 [2d Dept 2012];

Matter of Alfano v Zoning Bd. of Appeals of Vil. of Farmingdale, 74 AD3d 961, 902 NYS2d 662 [2d Dept 2010]).

A local zoning board has broad discretion in considering applications for area variances (see *Matter of Pecorano v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234 [2004]; *Matter of Cowan v Kern*, 41 NY2d 591, 394 NYS2d 579 [1977]), and its interpretation of the local zoning ordinances is entitled to great deference (see *Matter of Toys “R” Us v Silva*, 89 NY2d 411, 654 NYS2d 100 [1996]; *Matter of Gjerlow v Graap*, 43 AD3d 1165, 842 NYS2d 580 [2d Dept 2007]; *Matter of Brancato v Zoning Bd. of Appeals of City of Yonkers, N.Y.*, 30 AD3d 515, 817 NYS2d 361 [2d Dept 2006]; *Matter of Ferraris v Zoning Bd. of Appeals of Vil. of Southampton*, 7 AD3d 710, 776 NYS2d 820 [2d Dept 2004]). A court, however, may set aside a zoning board’s determination if the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or succumbed to generalized community pressure (see *Matter of Pecorano v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234; *Matter of Cacsire v City of White Plains Zoning Bd. of Appeals*, 87 AD3d 1135, 930 NYS2d 54 [2d Dept], *lv denied* 18 NY3d 802, 938 NYS2d 859 [2011]). “In applying the arbitrary and capricious standard, a court inquires whether the determination under review had a rational basis . . . [A] determination will not be deemed rational if it rests entirely on subjective considerations, such as general community opposition, and lacks an objective factual basis” (*Matter of Kabro Assoc., LLC v Town of Islip Zoning Bd. of Appeals*, 95 AD3d 1118, 1119, 944 NYS2d 277 [2d Dept 2012]; see *Matter of Ifrah v Utschig*, 98 NY2d 304, 746 NYS2d 667 [2002]; *Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 886 NYS2d 442 [2d Dept 2009], *lv denied* 13 NY3d 716, 895 NYS2d 316 [2010]). The decision of an administrative agency “which neither adheres to its own prior precedent nor indicates a reason for reaching a different result on essentially the same facts is arbitrary and capricious” (*Matter of Charles A. Field Delivery Serv. (Roberts)*, 66 NY2d 516, 517, 498 NYS2d 111 [1985]; see *Matter of Knight v Amelkin*, 68 NY2d 975, 510 NYS2d 550 [1986]; *Matter of c/o Hamptons, LLC v Zoning Bd. of Appeals of Vil. of E. Hampton*, 98 AD3d 738, 950 NYS2d 386 [2d Dept 2012]; *Matter of Lucas v Board of Appeals of Vil. of Mamaroneck*, 57 AD3d 784, 870 NYS2d 78 [2d Dept 2008]).

Pursuant to Town Law §267-b(3)(b), a zoning board considering a request for an area variance must engage in a balancing test, weighing the benefit to the applicant if the variance is granted against the detriment to the health, safety and welfare of the surrounding neighborhood or community (see *Matter of Pecorano v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234; *Matter of Daneri v Zoning Bd. of Appeals of Town of Southold*, 98 AD3d 508, 949 NYS2d 180 [2d Dept], *lv denied* 20 NY3d 852, 956 NYS2d 485 [2012]). More particularly, the zoning board must consider whether the granting of an area variance will produce an undesirable change in the character of the neighborhood or a detriment to neighboring properties; whether the benefit sought by the applicant can be achieved by some other feasible method, rather than a variance; whether the requested variance is substantial; whether granting the variance will have an adverse impact on the physical or environmental conditions in the neighborhood; and whether the alleged difficulty is self-created (Town Law §267-b[3][b]; see *Matter of Pecorano v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234; *Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 239; *Matter of Davydov v Mammina*, 97 AD3d 678, 948 NYS2d 380 [2d Dept 2012]). Further, a zoning board is not required to justify its determinations with evidence as to each of the five statutory factors, as long as its determinations

Matter of Haas v Wexler

Index No. 11-32792

Page 4

“balance the relevant considerations in a way that is rational” (*Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 73, 886 NYS2d 442; see *Matter of Jacoby Real Prop., LLC v Malcarne*, 96 AD3d 747, 946 NYS2d 190 [2d Dept 2012]; *Matter of Merlotto v Town of Patterson Zoning Bd. of Appeals*, 43 AD3d 926, 841 NYS2d 650 [2d Dept 2007]).

The Zoning Board’s determination denying petitioner’s request for variances from the 14-foot height restriction and 10-foot side yard requirement for accessory structures was not arbitrary and capricious and was supported by substantial evidence in the record (see *Matter of Davydov v Mammina*, 97 AD3d 678, 948 NYS2d 380; *Matter of Qing Dong v Mammina*, 84 AD3d 820, 922 NYS2d 198 [2d Dept 2011]). Here, the Zoning Board reasonably determined that the detached garage at issue, constructed to replace the garage that had been on the premises when it was purchased by petitioner and her husband, was not in keeping with the character of the neighborhood, as documentary evidence shows most of the residential properties on Pine Street do not have nonconforming detached structures similar to the one existing on petitioner’s property (see *Matter of Pecorano v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234). It also reasonably determined that the need for a height variance and a side yard variance for the garage was a self-created hardship, as petitioner constructed the garage without first seeking a building permit from the Town, and that the requested variances were substantial (see *Matter of Pecorano v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234; *Matter of Davydov v Mammina*, 97 AD3d 678, 948 NYS2d 380; *Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 73, 886 NYS2d 442; see also *Matter of Switzgabel v Board of Zoning Appeals of Town of Brookhaven*, 78 AD3d 842, 911 NYS2d 391 [2d Dept 2010]). Moreover, the Zoning Board properly considered the fact that no variances of the height restrictions imposed by the Code of the Town of Islip § 68-109 (c) for accessory structures in Residence B districts have been granted since the enactment of such ordinance in 2003, and that granting the requested variance would establish a precedent for such oversized structures to the detriment of the character of the neighborhood (see *Matter of Pecorano v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234; *Matter of Ifrah v Utschig*, 98 NY2d 304, 746 NY2d 667; *Matter of Kearney v Village of Cold Spring Zoning Bd. of Appeals*, 83 AD3d 711, 920 NYS2d 379 [2d Dept 2011]; *Matter of Gallo v Rosell*, 52 AD3d 514, 859 NYS2d 675 [2d Dept 2008]; *Matter of Rodrigues v Zoning Bd. of Appeals of Vil. of Sleepy Hollow*, 21 AD3d 1108, 801 NYS2d 413 [2d Dept 2005]). While petitioner presented evidence at the hearing that other properties on Pine Street have detached garages exceeding the 14-foot height restriction, it is undisputed that such structures were built before Section 68-109 (c) of the Town Code was enacted. In addition, petitioner failed to present evidence at the public hearing addressing the issue of whether the detached garage would have any impact on the physical and environmental conditions of the neighborhood.

The Zoning Board, however, failed to set forth in its written determination the bases for its denial of petitioner’s requests for a variance from the 4-foot height restriction for fences set back less than the required distance from the front property lines and for the accessory apartment variance. A review of the minutes from the hearing also shows that no evidence was presented as to the requests for variances for the fences and the apartment. Accordingly, the petition is granted to the extent that the portions of the September 20, 2011 determination relating to the requests for variances for the fences running along the front property lines of petitioner’s property and for the accessory apartment are annulled, and is

Matter of Haas v Wexler
Index No. 11-32792
Page 5

otherwise denied. The matter is remitted back to the Zoning Board to conduct a further public hearing and to make a new determination on such requests.

Submit judgment.



J.S.C.
JEFFREY ARLEN SPINNER