

**Matter of Goodman v Zoning Bd. of Appeals of the
Vil. of E. Hills**

2013 NY Slip Op 30315(U)

February 5, 2013

Sup Ct, Suffolk County

Docket Number: 18244/12

Judge: Paul J. Baisley

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M E M O R A N D U M

SUPREME COURT - SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

I.A.S. PART 36

By: Baisley, J.S.C.

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 In the Matter of the Application of
 ALVIN GOODMAN and DAVID FERDINAND
 for a Judgment pursuant to CPLR Article 78,

Dated: February 5, 2013

INDEX NO.: 18244/12

MOT. NO.: 003 CDISPSUBJ

Petitioners,

-against-

THE ZONING BOARD OF APPEALS OF THE
 VILLAGE OF EAST HILLS and THE VILLAGE OF
 EAST HILLS,

PETITIONERS' ATTORNEY:

CHRISTOPHER MODELEWSKI, P.C.

44 Elm Street, Suite 18

Huntington, New York 11743

RESPONDENTS' ATTORNEY:

WECHSLER & COHEN, LLP

17 State Street, 15th Floor

New York, New York 10004

Respondents.

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The petition in this Article 78 proceeding seeks a judgment annulling and setting aside a determination of respondent Zoning Board of Appeals ("ZBA") of the Incorporated Village of East Hills (the "Village") denying the application of petitioners Alvin Goodman and David Ferdinand for an area variance. For the reasons set forth herein, the petition is denied and the proceeding is dismissed.

Petitioner Alvin Goodman and his wife, Rhea Goodman, are the owners of a parcel of property located in the Incorporated Village of East Hills in an area zoned as a Residence R-1 District. Known as 42 Tara Drive, East Hills, the property at issue is a pie-shaped parcel consisting of 1.29 acres of land which is improved with a single-family residence and an in-ground swimming pool. In April 2010, petitioner David Ferdinand and nonparty Susan Ferdinand entered into an agreement with Alvin and Rhea Goodman to develop the subject property. Subsequently, Alvin Goodman, anticipating approval for a subdivision of the subject property into two lots, filed an application with the Village of East Hills for permission to construct a new single-family residence on the second unimproved lot. More particularly, Goodman seeks to divide the property by creating a second lot behind the existing residence and to build a two-story residence on the newly created lot. The rear lot would not have any street frontage and would be accessed by a common driveway for which an easement for ingress and egress would be granted.

Goodman's application for a building permit was denied by the Village's Building Department on the ground that the proposed new lot would not meet a zoning ordinance requiring at least 110 feet of street frontage in the R-1 District (*see* Code of the Village of East Hills §271-33). Thereafter, an application for a variance permitting the proposed new lot to have no frontage on the street was filed with the ZBA. At a public hearing on the variance application conducted by the ZBA on June 28, 2011,

the attorney representing the Goodmans, Christopher Modelewski, Esq. stated that, as an alternative to the request for a 100% variance from the street frontage requirement, his clients would be willing to create a flag lot accessible from Tara Drive by a 25-foot- wide driveway and to grant easement rights over the driveway to the front lot. An expert testifying in support of the application asserted that the same relief requested on the Goodman application had previously been granted by the Zoning Board for a nearby residential development referred to as Swan Court. Various issues arose during the public hearing, including whether the subject property, which borders the Village of Brookville, was encumbered by a restrictive covenant created in 1961 under an agreement between the Village of East Hills and the Village of Brookville.

By correspondence dated February 3, 2012, Mr. Modelewski supplemented the record on the variance application with submissions indicating that the subject property is burdened by a restrictive covenant that limits development of real property, including the Goodman property, that had been transferred by the Village of Brookville to the Village of East Hills. A further public hearing was conducted by the ZBA on April 24, 2012. No additional evidence was submitted and no further arguments were presented in support of the application at the April 2012 hearing.

The Zoning Board denied Goodman's variance application by decision dated May 15, 2012, finding, among other things, that both the original and alternative proposals for development of the proposed lot involved substantial variance requests. It found that Goodman failed to present evidence showing how he would comply with Chapter 186 of the Village Code, which governs the removal of trees having a trunk of 5 inches or greater and a height of four feet or more above the base of the tree (*see* Code of the Village of East Hills §186-2). It further found that the proposed subdivision and development were not in keeping with the character of the neighborhood, and that any hardship claimed by Goodman was self-created.

Thereafter, Goodman and Ferdinand commenced the instant Article 78 proceeding for a judgment reversing and annulling the Zoning Board's determination, and directing that Goodman's application for a variance from the street frontage requirement be granted. Petitioners allege that the ZBA's determination was arbitrary, capricious and not supported by substantial evidence in the record. Specifically, petitioners assert that the Village failed to adhere to two of its precedents in denying the application for a street frontage variance, one which allegedly permitted street access by a single driveway to the four-residence development known as Swan Court, and the other which allegedly permitted street access by a single driveway to a six-residence development known as Town Path. Respondents oppose the petition, arguing, among other things, that the proceeding must be dismissed since petitioners have not obtained a release from the restrictive covenant held by the Village of Brookville. Respondents further contend that, contrary to the allegations by petitioners' counsel, the applications for street frontage variances granted for the Swan Court and Town Path developments involved materially different situations. In particular, respondents assert the Swan Court and Town Path developments involved undeveloped parcels of property and the construction of private roads to provide street frontage to such properties, not, as in this case, the construction of a new residence in the backyard of an existing residence in an already established neighborhood.

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 Scherbryn 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*, 77 AD3d 831, 909 NYS2d 530 [2d Dept 2010]; see *Matter of Alfano v Zoning Bd. of Appeals of Vil. of Farmingdale*, 74 AD3d 961, 902 NYS2d 662 [2d Dept 2010]; *Matter of Stone Landing Corp. v Board of Appeals of Vil. of Amityville*, 5 AD3d 496, 773 NYS2d 103 [2d Dept 2004]).

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]). Nevertheless, a court may set aside a zoning board's determination if the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or simply 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]). Further, 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 Village Law §7-712-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 Pinnetti v Zoning Bd. of Appeals of Vil. of Mt. Kisco*, 101 AD3d 1124 [2d Dept 2012]; *Matter of Jonas v Stackler*, 95 AD3d 1325, 945 NYS2d 405 [2d Dept], *lv denied* 20 NY3d 852 [2012]; see also *Matter of Pecorano v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234; *Matter of Ifrach v Utschig*, 98 NY2d 304, 746 NYS2d 667; *Matter of Sasso v Osgood*, 86 NY2d 374,

633 NYS2d 259). A zoning board also 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 (Village Law §7-712-b [3][b]; see *Matter of Pinnetti*, supra, 101 AD3d 1124; *Matter of Alfano v Zoning Bd. of Appeals of Vil. of Farmingdale*, 74 AD3d 961, 902 NYS2d 662; see also *Matter of Danieri v Zoning Bd. of Appeals of Town of Southold*, 98 AD3d 508, 949 NYS2d 180 [2d Dept], lv denied 20 NY3d 852, 2012 NY Slip Op 91377 [2012]; *Matter of Schumacher v Town of E. Hampton, N.Y. Zoning Bd. of Appeals*, 46 AD3d 691, 849 NYS2d 72 [2d Dept 2007]). However, 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 “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 Merlotto v Town of Patterson Zoning Bd. of Appeals*, 43 AD3d 926, 841 NYS2d 650 [2d Dept 2007]).

The Court finds that the Zoning Board’s determination denying the application for a variance from the street frontage requirement was not arbitrary and capricious and was supported by substantial evidence in the record (see *Matter of Alfano v Zoning Bd. of Appeals of Vil. of Farmingdale*, 74 AD3d 961, 902 NYS2d 662; *Matter of Kraut v Board of Appeals of Vil. of Scarsdale*, 43 AD3d 923, 841 NYS2d 369 [2d Dept 2007]). Here, the ZBA properly considered that there are few, if any, undeveloped parcels remaining in the Village, that there are few flag lots in the Village, and that many homes in the Village exist on parcels exceeding the lot-size requirements of the zoning law. The record contains no evidence that parcels of property in the subject neighborhood do not conform with the street frontage requirement for R-1 residential districts. The Court, therefore, finds the Zoning Board rationally concluded that permission for the creation of a flag lot for the development of a new residence situated behind an existing, “significant” home, which would establish a precedent for front-back subdivisions of oversized properties, would have a detrimental effect on 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).

Furthermore, the requested 100% variance from the street frontage requirement clearly is substantial, as is the alternative proposed by petitioners’ counsel at the public hearing for 25 feet of street frontage (see *Matter of Pecorano v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234; *Matter of Nathan v Zoning Bd. of Appeals of Vil. of Russell Gardens*, 95 AD3d 1018, 943 NYS2d 615 [2d Dept 2012]; *Matter of Inguant v Board of Zoning Appeals of Town of Brookhaven*, 304 AD2d 831, 757 NYS2d 860 [2d Dept 2003]). Contrary to the assertions by petitioners’ counsel, the record does not establish that the Village previously approved applications for either a 100% variance or 75% variance from the street frontage requirement (see *Matter of Kaiser v Town of Islip Zoning Bd. of Appeals*, 74 AD3d 1203, 904 NYS2d 166 [2d Dept 2010]; cf. *Matter of Daneri v Zoning Bd. of Appeals of Town of Southold*, 98 AD3d 508, 949 NYS2d 180). Rather, the evidence shows that the Swan Court and the Town Path developments each involved, not the use of a driveway to provide street access, but the construction of a private road to provide street frontage for each of the residential lots that were created. Although there is no evidence the proposed development of the unimproved lot would, as stated in the Zoning Board’s decision, involve “denuding the premises of existing trees,” petitioners failed to present testimony addressing the impact of the proposed development of the rear portion of the subject

property on the physical and environmental conditions of the neighborhood or to set forth a plan for complying with the Village's tree preservation ordinance. In addition, petitioners failed to offer evidence showing street access to the proposed lot could not be achieved by some other method, and their alleged difficulty, namely an inability to realize the potential profit from a subdivision and development of an oversized residential parcel in the Village, is self-created (*see Matter of Ifrah v Utschig*, 98 NY2d 304, 746 NY2d 667; *Matter of Merlotto v Town of Patterson Zoning Bd. of Appeals*, 43 AD3d 926, 841 NYS2d 650).

Thus, under the circumstances and in view of the evidence presented, the ZBA's determination that the detriment to the community outweighs the potential benefit that would accrue to Goodman if the application for a street frontage variance was granted was rational, and its decision to deny the application for a street frontage variance was not illegal or arbitrary. Accordingly, the petition is denied and the proceeding is dismissed.

Submit judgment.

Dated: February 5, 2013

PAUL J. BAISLEY, JR.

J.S.C.