

**John Realty Group, LLC v Board of Appeals of
Vil. of Amityville**

2014 NY Slip Op 30901(U)

March 28, 2014

Supreme Court, Suffolk County

Docket Number: 11870/10

Judge: Joseph C. Pastoressa

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY**

COPY

PRESENT:

HON. JOSEPH C. PASTORESSA
JUSTICE OF THE SUPREME COURT

Mot Seq: #001- MD

JOHN REALTY GROUP, LLC AND
CHRISTOPHER CERIELLO,

Petitioner(s),

ATTY FOR PETITIONER(S):
RICHARD G. HANDLER, ESQ.
50 BROADWAY
P.O. BOX 427
AMITYVILLE, NY 11701

-against-

ATTY FOR RESPONDENT(S):
BRUCE KENNEDY, P.C.
31 GREENE AVENUE
AMITYVILLE, NY 11701

Respondent(s).

BOARD OF APPEALS OF THE VILLAGE OF
AMITYVILLE AND JOHN J. LAURIA, AS
BUILDING INSPECTOR OF THE VILLAGE OF
AMITYVILLE.

_____x

Pages Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and Affidavits (Affirmations) Annexed 1
Opposing Affidavits (Affirmations) 2, 3,
Reply Affidavits (Affirmations) 5
Affidavit (Affirmation) _____
Other Papers 4 (Return)

Upon the foregoing papers, the petitioners move for a judgment annulling, reversing, and setting aside a determination of the respondent Board of Zoning Appeals of the Incorporated Village of Amityville (hereinafter "BZA") for a parking variance in connection with the operation of an office products-storage business in the B-2 General Business District located at 3 John Street, Amityville, New York.

The subject premises is an irregular shaped parcel of 6044 square feet located on the southwest corner of John Street and West Oak Street and is improved with a four (4) unit multiple dwelling and a detached frame garage. John Realty Group LLC is the owner of the premises and Christopher Ceriello is a member of the LLC. The petitioners lease a portion of the subject premises to Christopher's Office Products, a business engaged in the telephone email retail sales of stationary supplies and office products.

The petitioners filed an application with the BZA seeking a parking variance for off-street

parking in connection with the use of a detached garage for office and storage at the subject premises. A public hearing was held on the application and the petitioners submitted testimony and documentary evidence in support of the application.

The petitioners claim that the BZA's denial of their requested relief was made without jurisdiction, in violation of lawful procedures, was effectuated by an error of law, was arbitrary, capricious, an abuse of discretion, and was unsupported by substantial evidence contained in the record.

It is well established that “[l]ocal zoning boards have broad discretion in considering applications for variances, and the judicial function in reviewing such decisions is a limited one. 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 Pecoraro v Board of Appeals of Town of Hempstead, 2 NY3d 608, 613; see, Inlet Homes Corp. v Zoning Bd. of Appeals of Town of Hempstead, 2 NY3d 769). “In making its determination whether to grant an area variance, a zoning board of appeals is required, pursuant to Village Law 7-712-b(3)(b), to engage in a balancing test, weighing the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted” (Matter of Ifrah v Utschig, 98 NY2d 304, 307). In considering the application, the zoning board is required to consider whether (1) 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) the benefit sought by the applicant can be achieved by some other method, feasible for the applicant to pursue, other than an area variance; (3) the requested area variance is substantial; (4) the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) the alleged difficulty was self-created (see, Village Law §7-712-b(3)(b); Matter of Sasso v Osgood, 86 NY2d 374, 384). The ZBA is not required to justify its determination with supporting evidence regarding each of the five factors, so long as its ultimate determination balancing the relevant considerations was rational (see, Matter of Sasso v Osgood, supra at 385).

Under these particular circumstances, the Court finds that the BZA's determination was supported by substantial evidence in the record, was not arbitrary, capricious, nor an abuse of discretion and had a rational basis (see Village Law §7-712-b(3)(b); Matter of Muth v Scheyer, 51 AD3d 799; Matter of Wolf Hill Props., Inc. v Modelewski, 19 AD3d 429; Matter of Inlet Homes Corp. v Zoning Board of Appeals of Town of Hempstead, supra; Matter of Merlotto v Town of Patterson Zoning Board of Appeals, 43 AD3d 926). The BZA's determination demonstrates that the BZA considered the relevant factors and engaged in a balancing test in denying the petitioners' requested relief.

The record demonstrates that the requested parking area variance was substantial considering the deviations from the Village Code requirements (see Matter of Cowan v Kern, 41 NY2d 591; Matter of Pecoraro v Board of Appeals of Town of Hempstead, supra; Matter of Inguant v Board of Appeals of Town of Brookhaven, 304 AD2d 831; Matter of Kraut v Board of Appeals of Vil. of Scarsdale, 43 AD3d 923; McNair v Board of Zoning Appeals, 285 AD2d 553; Ron Rose Group, Inc. v Baum, 275 AD2d 373; Feldi v Amster, 250 AD2d 612). Here, the magnitude of the requested parking area variance is substantial as noted in the BZA's determination since the request of three (3) parking spaces when twelve (12) is required represents a 400% reduction in the off-street parking mandated by the code.

Furthermore, Village Law §7-712-b(3)(b)(2) requires that the applicant consider feasible alternatives that may alleviate the need for the variance (see, Matter of Chandler Prop. Inc. v Trotta,

9 AD3d 408; Johnson v Town of Queensbury Zoning Bd. of Appeals, 8 AD3d 741). The BZA determination noted the applicant could use the garage for parking rather than for storage.

Moreover, “[a]lthough no single statutory consideration is determinative in assessing an area variance application, the effect of a requested variance on the neighborhood and community is a critical aspect of a zoning board of appeals’ responsibility in balancing the relief requested by a property owner and the interests of the residents of a municipality” (Rice, 2007 Supp. Practice Commentaries, Cons. Laws of NY Book 61, Village Law §7-712-b, Pocket Part at 157). Here, the record shows that the BZA considered the detrimental effect on the character of the neighborhood and the precedent it would set in approving the parking variance (see Matter of Gallo v Rosell, 52 AD3d 514; Matter of Pecoraro v Board of Appeals of Town of Hempstead, supra; Matter of Rodrigues v Zoning Bd. of Appeals of Vil. of Sleepy Hollow, 21 AD3d 1108; see Matter of Cowan v Kern, supra; Matter of Pecoraro v Board of Appeals of Town of Hempstead, supra; Matter of Inguant v Board of Appeals of Town of Brookhaven, supra; Matter of Kraut v Board of Appeals of Vil. of Scarsdale, 43 AD3d 923; McNair v Board of Zoning Appeals, supra; Ron Rose Group, Inc. v Baum, 275 AD2d 373; Feldi v Amster, supra). Specifically, the record and the BZA determination show that it was particularly concerned with the loading and unloading of vehicles in the street creating a “traffic hazard” at the subject premises (see, Matter of Pecoraro v Board of Appeals of Town of Hempstead, supra; Matter of Rodrigues v Zoning Bd. of Appeals of Vil. of Sleepy Hollow, supra).

Additionally, the BZA found that the instant matter was a self-imposed hardship in that the petitioners elected to use the garage for office and storage without permission. The petitioner failed to inquire into the applicable zoning restrictions, of which, they are presumed to have knowledge of in effect (see, Matter of Gallo v Rosell, 52 AD3d 514; Matter of Rivero v Voelker, 38 AD3d 784).

Furthermore, with regard to the BZA’s determination that the variances would have an adverse impact on the physical or environmental conditions in the neighborhood, the record and the BZA’s determination found that the proposed parking variance would not have an adverse environmental impact.

Contrary to the petitioners’ claim that the BZA did not have jurisdiction to hear the application since there was no denial from a building department official, the BZA had jurisdiction to hear and determine the petitioner’s application pursuant to 4-2 of the Village Code of the Village of Amityville for a parking variance at the subject premises. Section 7-712 a (4) of the Village Law states the following:

Hearing Appeals

“Unless otherwise provided by local law, the jurisdiction of the board of the Board of Appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation or determination made by the administrative official charged with enforcement of any local law adopted pursuant to this article. Such appeal may be taken by any person aggrieved, or by an officer, department, board or bureau of the Village.” (Emphasis supplied). Accordingly, Section 4-2 of the Village Code of the Village of Amityville states in pertinent part the following:

“The Zoning Board of Appeals shall have the following powers:

To authorize a modification of the frontage, front yard, side yard, rear yard, depth and lot area requirements in the A Residence, BB Residence, B Residence, C Residence, H Historical, B-1 Retail Business, B-2 General Business and B-3 Marine Districts.

To authorize a modification of the front yard, side yard and rear yard in the Industrial District.

To authorize the mixed use of a building in the H Historical, B-1 Retail Business, B-2 General Business, and B-3 Marine Business Districts for one or two family dwellings and for business purposes.

To authorize the erection or alteration of a building used or to be used in connection with a lawful nonconforming use upon the lot occupied by such use or building, except that no such permit shall be granted for uses allowed only in the Industrial District under this code.

To authorize a modification of the frontage, depth and lot area requirements in order to allow a division of a lot into two or more lots or parcels.

To authorize the construction or use of an accessory building on a lot, with or without the erection of the main building required on such lot.

To grant an area variance or use variance as authorized by the Village law.

To grant a use permit or a special exception wherever it is provided in this code that such action by the Zoning Board of Appeals is required.

Such other powers as shall specifically be given to the Zoning Board of Appeals in this Code, or otherwise provided by applicable law.” Emphasis supplied.

Here, the Village code provided the BZA original jurisdiction to hear the petitioners requested relief. In any event, the petitioners failed to show any authority for the proposition that a BZA lacks jurisdiction over an application when the applicant, such as the case bar, applied to the BZA seeking the requested relief. Furthermore, petitioners’ waived jurisdiction by filing the application, participating in the public hearing, and failing to raise the issue on the record before the BZA at the time of the public hearing.

In addition, the petitioner’s argument regarding the non-conforming mixed use of the subject premises dehors the record and is not part of the limited determination which the BZA had before it (see, Kaufman v Incorporated Village of Kings Point, 52 AD3d 604, 607 ; Kam Hampton I Realty Corp. v Board of Zoning Appeals of the Village of East Hampton, 273 AD2d 387). The petitioners did not request from the BZA a determination of a non-conforming use of the subject premises nor did it present any evidence to the BZA of the non-conformity of the subject premises at the time of the hearing.

The BZA properly denied the petitioners’ request for a continuance after the public hearing was closed and the determination reserved. Contrary to the petitioners’ contention, it was given a meaningful opportunity to be heard on its application, as no evidence was presented at the hearing that the petitioners were not given the opportunity to address any issues raised therein, and more importantly, the representative of the petitioner failed to request a continuance at the public hearing and only requested such relief approximately ten days after the close of the public hearing which the BZA denied (see, Matter of 31 Commerce Street v Darden, 50 AD3d 910).

Finally, petitioners claim that the BZA erred in its determination for stating that the petitioners failed to apply for a special exception for business use is unavailing. The BZA’s determination merely noted that the petitioners failed to request a special exception for business use and that one of the factors considered for such relief is parking. The BZA determination stated “[a]pplicant failed to request such relief in its application and even if it had, said application *would have* been denied because of the inability to provide adequate off-street parking and loading for

vehicles on site.” (Emphasis supplied). The court notes that the BZA raised the issue of the special exception to the petitioners at the public hearing. In any event, to the extent that the BZA may have sua sponte raised the issue of the need for a special exception, the court finds that it is a harmless error (see, Carlington Corp.v Siegel, 61 AD2d 813).

Accordingly, for all the foregoing reasons, the petition is denied and therefore, the petition is dismissed.

This shall constitute the decision and order of the court.

DATED: March 28, 2014



HON. JOSEPH C. PASTORESSA, J.S.C

FINAL DISPOSITION NON-FINAL DISPOSITION