

Ponticello v Zoning Bd. of Appeals of the Town of Islip

2014 NY Slip Op 30974(U)

April 9, 2014

Sup Ct, Suffolk County

Docket Number: 13-15583

Judge: Jerry Garguilo

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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 47

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ROSEANNA PONTICELLO,

Petitioner,

By: Garguilo, J.S.C.
Dated: April 9th, 2014

- against -

Index No. 13-15583
Mot. Seq. # 001 MD; CDISPSJ

ZONING BOARD OF APPEALS OF THE
TOWN OF ISLIP, JAMES H. BOWERS,
CHAIRMAN, MICHAEL A. GAJDOS, VICE
CHAIRMAN, JOSEPH L. FRITZ and DANIEL J.
SULLIVAN,

Return Date: 8-8-13
Adjourned: 11-6-13

Respondents.

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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 Roseanna Ponticello's application for an area variance. For the reasons set forth herein, the petition is denied.

Petitioner Roseanna Ponticello is an owner of a parcel of residential property in the Town of Islip known as 1137 Cassel Avenue, Bay Shore. Located in a district zoned Residence A, petitioner's property is improve with a single-family residence, an inground swimming pool, and a detached garage. The detached garage measures approximately 46 feet by 24 feet and is situated approximately 4.7 feet from the property's eastern boundary. In 2004, an application was filed with respondent Board of Zoning Appeals of the Town of Islip by Richard DeCanio and Brian DeCanio for permission to expand the size of the residence on the property and to construct a detached garage with a 4-foot side yard setback, rather than the required 10-foot side yard setback for accessory structures in a Residence A zone. The application was granted only as to the request to expand the residence. The applicants, however, were issued a permit to build a garage less than 500 square feet in size with a side yard setback of 4 feet, as allowed under Section 68-85 of the Town Code, and the Town Building Department later issued a certificate of occupancy for such garage. Thereafter, the garage was expanded in size to more than 1,100 square feet without obtaining a building permit from the Town.

Meanwhile, by deed dated February 13, 2008, ownership of the subject property was transferred from Richard DeCanio and Brian DeCanio to Richard DeCanio and petitioner as joint tenants. In February 2013, the Town issued a summons to petitioner and Richard DeCanio for expanding the size of

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the detached garage without a building permit. In March 2103, seeking to maintain the addition to the detached garage, petitioner filed an application with respondent Town of Islip Zoning Board of Appeals (hereinafter Zoning Board) for an area variance reducing the side yard setback for the structure from 10 feet to 4.66 feet. A public hearing on petitioner's application was conducted by the Zoning Board on April 9, 2013.

By decision dated May 14, 2013, the Zoning Board denied petitioner's request for an area variance. As part of its findings of fact, the Zoning Board determined that no other similarly-sized accessory structures in the neighborhood were located as close the side yard boundary as petitioner's detached garage, and that permitting such a large structure in such a location "is uncharacteristic of the neighborhood and would create a precedent contrary to the spirit and intent of the Town Code." It further determined that the garage could be moved to a new location on the property that would bring it into compliance with the zoning provisions, that petitioner's hardship was self-created, and that the requested variance was substantial, involving a 54% relaxation of the required side yard setback.

Subsequently, petitioner commenced the instant Article 78 proceeding for a judgment reversing and annulling the Zoning Board's May 2013 determination, and directing that her application for an area variance be granted. Petitioner alleges the Zoning Board's determination was arbitrary and capricious, affected by error of law, or made in violation of lawful procedure. More specifically, petitioner alleges that, when she attempted to explain that neighbors have the same or similar garages, she was "precluded from giving testimony and further from advising the Board as to the tremendous financial burden that would be incurred to change the structure." Petitioner's submissions in support of the petition include photocopies of photographs that she allegedly was prevented from introducing during the hearing to establish that other properties in her neighborhood were issued certificates of occupancy despite the lack of a 10-foot side yard setback.

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 259 [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

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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 Colin Realty, LLC v Town of Hempstead*, 107 AD3d 708, 966 NYS2d 501 [2d Dept 2013]; *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 Blandeburgo v Zoning Bd. of Appeals of Town of Islip*, 110 AD3d 876, 973 NYS2d 693 [2d Dept 2013]; *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 “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]).

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The Zoning Board's determination denying petitioner's request for a variance from the side yard setback requirement for accessory structures was not arbitrary and capricious, and was supported by substantial evidence in the record (*see Matter of Blandeburgo v Zoning Bd. of Appeals of Town of Islip*, 110 AD3d 876, 973 NYS2d 693; *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]). Pursuant to Islip Town Code § 68-75, in a Residence A district, an accessory building measuring 500 square feet or larger must have a side yard setback of 10 feet. It is undisputed that the requested variance for the detached garage is substantial, and that no documentary or testimonial evidence was submitted at the hearing demonstrating that similar variances have been granted for accessory buildings in petitioner's neighborhood (*see Matter of Kearney v Village of Cold Spring Zoning Bd. of Appeals*, 83 AD3d 711, 920 NYS2d 379 [2d Dept 2011]; *Matter of JSB Enters., LLC v Wright*, 81 AD3d 955, 917 NYS2d 302 [2d Dept 2011]; *Matter of Matejko v Board of Zoning Appeals of Town of Brookhaven*, 77 AD3d 949, 910 NYS2d 123 [2d Dept 2010]; *Matter of Gallo v Rosell*, 52 AD3d 514, 859 NYS2d 675 [2d Dept 2008]). The Court notes that photographs annexed to the petition, which were not submitted by petitioner at the hearing, were not considered in the Court's determination (*see L & M Bus Corp. v New York City Dept. of Educ.*, 71 AD3d 127, 892 NYS2d 60 [1st Dept 2009]; *Matter of Acevedo v New York State Div. of Hous. & Community Renewal*, 67 AD3d 785, 889 NYS2d 78 [2d Dept 2009]; *Matter of Mott v New York State Div. of Hous. & Community Renewal*, 287 AD2d 720, 732 NYS2d 347 [2d Dept 2001]). "Judicial review of administrative determinations is confined to the 'facts and record adduced before the agency'" (*Yarborough v Franco*, 95 NY2d 342, 347, 717 NYS2d 79 [2000], quoting *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756, 757, 455 NYS2d 814 [1st Dept 1982], *aff'd* 58 NY2d 952, 460 NYS2d 534 [1983]).

Further, the Zoning Board reasonably determined, based on the evidence in the record, that the detached garage, more than twice the size of the garage that was granted a certificate of occupancy, is not in keeping with the character of the neighborhood (*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 side yard variance was a self-created hardship, as the detached garage was enlarged without obtaining a building permit from the Town (*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, 886 NYS2d 442; *Matter of Grace v Palermo*, 182 AD2d 820, 582 NYS2d 284 [2d Dept 1992]). Moreover, the Zoning Board properly considered that granting the requested variance would establish a precedent for oversized accessory 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 Davydov v Mammina*, 97 AD3d 678, 948 NYS2d 380; *Matter of Kearney v Village of Cold Spring Zoning Bd. of Appeals*, 83 AD3d 711, 920 NYS2d 379; *Matter of Gallo v Rosell*, 52 AD3d 514, 859 NYS2d 675). The fact that petitioner will incur a financial hardship if the detached garage is relocated on the property is not a basis for granting the requested area variance (*see Matter of Grace v Palermo*, 182 AD2d 820, 582 NYS2d 284). Finally, as to the vague allegations that petitioner was precluded by the Zoning Board from submitting photographs depicting other nonconforming garages in her neighborhood, there is no indication in the transcript of the public hearing that petitioner was prevented in any way from presenting evidence in support of her application.

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Accordingly, as there is substantial evidence in the record supporting the Zoning Board's denial of the requested area variance, the petition is denied and the proceeding is dismissed.

Submit judgment.



J.S.C.
HON. JERRY GARGUILO 4/9/14