

McLoughlin v Zoning Bd. of Appeals of the Vil. of Amityville

2014 NY Slip Op 31146(U)

April 24, 2014

Supreme Court, Suffolk County

Docket Number: 13-19531

Judge: Arthur G. Pitts

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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 43

COPY

-----X
 GARY M. McLOUGHLIN, MARY J.
 McLOUGHLIN, STEPHEN W. KRETZ, DENISE
 M. KRETZ and MATTHEW KAPLER,

Petitioners,

- against -

ZONING BOARD OF APPEALS OF THE
 VILLAGE OF AMITYVILLE; JOHN J. LAURIA,
 as BUILDING INSPECTOR OF THE VILLAGE
 OF AMITYVILLE; BARBARA CEGLIO and
 ALFRED A. CEGLIO,

Respondents.
 -----X

By: Pitts, J.S.C.

Dated: April 24, 2014

Index No. 13-19531

Mot. Seq. # 001 -MG; CDISPSJ

Return Date: 8-26-13

Adjourned: 1-16-14

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Petitioners seek a judgment vacating and annulling the determination of the Zoning Board of Appeals of the Village of Amityville ("ZBA"), filed with the Village Clerk on June 24, 2013, which granted the application of the respondent Barbara Ceglio ("Ceglio") for a Special Exception for a Parent-Child Residence permitting respondent to install a kitchen in a separate accessory building and commence parent-child occupancy therein; vacating and annulling the determination the determination of the ZBA, which granted the application of the respondent Ceglio for "associated variances" permitting the conversion of an accessory building into a separate one-family dwelling, with an existing one-family dwelling on the same lot; for an injunction pendente-lite enjoining the respondent John Lauria, as Building Inspector for the Village of Amityville, from issuing a building permit authorizing the installation of, or otherwise permitting the maintenance of a kitchen in the accessory building per plans submitted by respondent Ceglio to the ZBA under the subject application, pending a determination of this Article 78 proceeding; and for an injunction pendente-lite enjoining the respondent Ceglio from maintaining and using the accessory building per plans submitted to the ZBA, as a separate residence, pending a determination of the subject proceeding.

The respondents Ceglio reside at the property which is the subject of this proceeding. The subject property lies on the north side of Perkins Avenue in the Village of Amityville. The property has an area of 16,500 sq. ft., frontage of 110' and a depth of 150'. There are residential lots to the north and west. The easterly side borders Dowsing Place. The subject property and adjacent parcels all are located in the A-Residence Zoning District, which is restricted to one-family detached dwellings and imposes the most restrictive use, area and setback requirements of all residential districts within the Village. The Certificate of Occupancy ("CO") for the subject property permits a "Residential One-Family' dwelling and a detached 1 1/2 story (18 ft. x 30 ft.) frame garage, 2nd fl. storage only". The CO was amended in 2002 to convert the first floor of the garage into a "recreation room", with the express limitation "[n]o dwelling unit permitted".

In 2011, Ceglio had previously applied to the ZBA for the relief that is the subject of this proceeding. The prior application sought a special exception to convert an existing one-family dwelling to parent-child residence pursuant to §183-9 (c)(4) of the Code of the Village of Amityville ("CVA"). That application was denied, with the following findings:

1. Applicants require an area variance for lot area and have failed to request or provide any evidence to justify such variances as required by §7-712-b of the Village Law.
2. Applicants require a use variance to allow the use of an accessory building as a second dwelling at the subject premises, and have failed to request or provide any evidence to justify such variance as required by §7-712-b of the Village Law.
3. The special exception for a parent-child residence must be denied because the applicants fail to meet the statutory criteria for such special exception without the necessary area and use variance.

By application dated July 20, 2012, respondent Barbara Ceglio applied, for a Special exception and variances to permit "occupancy of existing one and one-half (1 1/2) story recreation room, toilet, room, laundry room and second floor. To permit it to be occupied as a dwelling unit with less than 1200 sq. ft. of habitable floor space". The application specifically references two sections of the CVA, §183-11 and §183-9 (c)(4).

CVA §183-11 states:

In an A Residence District:

- A. No one-story dwelling shall contain less than 1,000 square feet of habitable floor space.
- B. No one-and-one-half-story dwelling shall contain less than 1,200 square feet of habitable floor space.
- C. A dwelling of two or more stories shall contain not less than 1,500 square feet of habitable floor space.
- D. No dwelling shall be less than 24 feet in width exclusive of unenclosed porches and bay windows.

McLoughlin v Amityville ZBA

Index No. 13-19531

Page No. 3

Section 183-9 (C)(4), setting forth permitted uses in a Residence A District contains the following definition of Parent-Child Residence:

One parent-child residence, with both dwelling units located in the main dwelling only, provided that the certificate of occupancy shall indicate that it is a one-family dwelling with a temporary second kitchen, and there shall be a recorded covenant confirming same. No dwelling unit for a parent-child residence shall be located in an accessory building. The minimum frontage for such residence shall be 100 feet and the minimum lot area shall be 30,000 square feet. The minimum side yard shall be 19 feet and the minimum aggregate side yards shall be 32 feet. The minimum rear yard shall be 40 feet.

This section, at the time of the ZBA's decision, read:

One parent-child residence, provided that the certificate of occupancy shall indicate that it is a one-family dwelling with a temporary second kitchen, and there shall be a recorded covenant confirming same. The minimum frontage for such residence shall be 90 feet and the minimum lot area shall be 25,000 square feet. The minimum side yard shall be 16 feet and the minimum aggregate side yards shall be 32 feet. The minimum rear yard shall be 40 feet.

A public hearing on the application was held before the ZBA on April 18, 2013. At the hearing, the attorney for the applicant stated that "we also seek a use variance in this application." He further stated "[t]he property currently meets all of the requirements set forth in section 183-9 (C)(4), except for one. And that is the lot area requirement." He also claimed that there was no express requirement in the code that the dwelling units be in the same structure. He also admitted that the applicant's daughter and family were already living in the accessory building. He further stated that four properties in the village, with similar uses, had previously been approved by the ZBA by special exception and area variances. Six neighboring property owners spoke in opposition to the application. At a meeting on May 16, 2013, the ZBA approved the application. Finding number "6" states that "[a]pplicant stated accessory building has been used as habitable space pursuant to a permit issued in 2002; so use variance should be already granted".

Unlike a use variance, a special exception allows a property owner to put his property to a use expressly permitted by the ordinance subject only to conditions attached to it to minimize the impact on the surrounding area. The significance of this distinction is that the inclusion of the permitted use in the ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood (*see Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 195, 746 NYS2d 662 [2002]; *Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238, 243, 331 NYS2d 645 [1972]; *Matter of G & P Investing Co. v Foley*, 61 AD3d 684, 684, 877 NYS2d 143 [2d Dept 2009]; *see also Matter of Navaretta v Town of Oyster Bay*, 72 AD3d 823, 825, 898 NYS2d 237 [2d Dept 2010]). The burden of proof is lighter than that on an owner seeking a variance, and an owner seeking a special exception permit is only required to show compliance with any legislatively imposed conditions on an otherwise permitted use (*Kabro Associates, LLC v Town of Islip Zoning Board of Appeals*, 95 AD3d 1118, 944 NYS2d 277 [2d Dept 2102]; *see also Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*,

McLoughlin v Amityville ZBA

Index No. 13-19531

Page No. 4

supra). While the reviewing board retains some discretion to evaluate each application for a special use permit, to determine whether the applicable criteria have been met and to make commonsense judgments in deciding whether a particular application should be granted, such determination must be supported by substantial evidence (*see Matter of Twin County Recycling Corp. v Yevoli*, 90 NY2d 1000, 665 NYS2d 627 [1997]). Although scientific or expert testimony is not required in every case to support a determination, the board may not base its decision solely on generalized community objections. Moreover, expert opinion regarding traffic patterns, when presented, may not be disregarded in favor of generalized community opposition (*Market Square Properties, LTD v Town of Guilderland Zoning Board of Appeals*, 66 NY 2d 893, 498 NYS2d 772 [1985]; *see also Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead, supra; Matter of Twin County Recycling Corp. v Yevoli, supra*). Generalized or unsubstantiated complaints from neighbors, unsupported by empirical or expert evidence are generally insufficient for a zoning board to base its decision (*Caspian Realty, Inc. v Zoning Board of Appeals of Town of Greenburgh*, 68 AD3d 62, 886 NYS2d 442 [2d Dept 2009]; *Market Square Properties, LTD v Town of Guilderland Zoning Board of Appeals, supra*). However, failure to meet any one of the conditions for a special use permit set forth in the zoning ordinance is sufficient basis on which the zoning authority may deny the permit application and a zoning board does not have the authority to waive or modify any conditions set forth in the ordinance (*Matter of Navaretta v Town of Oyster Bay, supra; Franklin Square Donut System, LLC v Wright*, 63 AD3d 927, 881 NYS2d 163 [2d Dept 2009]; *Dost v Chamberlin-Hellman*, 236 AD2d 471, 653 NYS2d 672 [2d Dept 1997]; *Wegman Enterprises, Inc v Lansing*, 72 NY2d 1000, 534 NYS2d 372 [1988]).

Here the application failed to meet the conditions set forth for a special exception, and the application should have been denied.

Section 183-1 of the CVA contains the following definition of Parent-Child Residence:

A one-family dwelling altered to include a second kitchen for the sole use by the father, mother, son or daughter by blood, marriage or legal adoption of the owner occupying said one-family dwelling.

Based on this definition, and contrary to the claims of the applicant, the special exception for a parent-child residence requires that all of the occupants reside in a one-family dwelling, this does not include an accessory structure. This is confirmed by Section 183-9 (C)(4), as it existed at the time of the ZBA's decision: "[o]ne parent-child residence, provided that the certificate of occupancy shall indicate that it is a one-family dwelling with a temporary second kitchen". Thus, the respondents Ceglio did not meet the basic requirement for the special exception which was sought. Additionally, the application also fails to meet two further requirements, the lot does not have an area of 25,000 square feet, it is only 16,500 square feet, and it does not have a 40 foot rear yard as required (pursuant to the application, the rear yard would be 4 foot). Counsel for the respondent Barbara Ceglio treated these requirements as if they were area variances, which they are not. These are requirements that must be met to obtain the requested special exception, and they cannot not be waived or modified by the ZBA (*see Matter of Navaretta v Town of Oyster Bay, supra; Dost v Chamberlin-Hellman, supra*). It is also noted that the four similar properties alluded to at the hearing were of no probative value. Each special exception application can only be decided on the specific facts of that individual application. In addition to this, the four properties alluded to were irrelevant since

two of them involved pre-existing non-conforming uses and two involved use variances. None involved a special exception for a parent-child residence. In light of the failure to meet at least three of the requirements for the special exception sought, the application should have been denied. As a result, the decision of the respondent ZBA must be vacated and annulled.

A local zoning board has broad discretion in considering applications for area variances and interpretations of local zoning codes (*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]; *Matter of Marino v Town of Smithtown*, 61 AD3d 761, 877 NYS2d 183 [2d Dept 2009]), and its interpretation of the local zoning ordinances is entitled to great deference (*see Matter of Toys "R" Us v Silva*, 89 NY2d 411, 418-419, 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 Cacsire v City of White Plains Zoning Bd. of Appeals*, 87 AD3d 1135, 930 NYS2d 54; *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]).

Herein the application requested one required area variance from section CVA §183-11(B) (No one-and-one-half-story dwelling shall contain less than 1,200 square feet of habitable floor space). However, the application failed to seek a required area variance under CVA §183-11(D) (No dwelling shall be less than 24 feet in width exclusive of unenclosed porches and bay windows).

Pursuant to Village Law § 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, 956 NYS2d 565 [2d Dept 2012]; *Matter of Jonas v Stackler*, 95 AD3d 1325, 945 NYS2d 405 [2d Dept 2012], *lv denied* 20 NY3d 852, 957 NYS2d 689 [2012]; *see also 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 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

McLoughlin v Amityville ZBA

Index No. 13-19531

Page No. 6

difficulty is self-created (Town Law § 267-b(3)(b); see *Matter of Pinnetti v Zoning Bd. of Appeals of Vil. of Mt. Kisco*, supra; *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]). As to whether the alleged difficulty was self-created, while this factor is not dispositive, neither is it irrelevant (*Matter of Ifrah v Utschig*, supra; see also *Crilly v Karl*, 67 AD3d 792, 888 NYS2d 189 [2d Dept 2009]; *Matter of Millennium Custom Homes, Inc. v Young*, 58 AD3d 740, 873 NYS2d 91 [2d Dept 2009]). 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 Steiert Enterprises v City of Glen Cove*, 90 AD3d 764, 767 [2d Dept 2011]; *Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 73, 886 NYS2d 442 [2d Dept 2009]; see *Matter of Merlotto v Town of Patterson Zoning Bd. of Appeals*, 43 AD3d 926, 841 NYS2d 650 [2d Dept 2007]).

The respondent ZBA herein only refers to “associated variances” and never discusses the fact that a necessary variance was never applied for. In fact, these variances are not discussed in the findings at all. Therefore, the respondent ZBA failed to engage in the required balancing test, and, as such, whatever area variances were granted must be vacated and annulled.

A use variance was requested by the applicant/respondent’s attorney at the hearing in this matter, even though it was never mentioned in the application. It is unclear whether the ZBA granted the use variance, the decision only refers to “associated variances. However, as indicated in the ZBA’s prior decision turning down the same application, a use variance is necessary because the subject property is in the A-Residence Zoning District, which is restricted to one-family detached dwellings and the second requested dwelling is not an allowed use.

An applicant for a use variance bears the burden of demonstrating that restrictions on the property have caused an unnecessary hardship, which requires a showing that (1) the property cannot yield a reasonable return if used for permitted purposes as it is currently zoned, (2) the hardship results from the unique characteristics of the property, (3) the proposed use will not alter the essential character of the neighborhood, and (4) the hardship has not been self-imposed (see Village Law 712–b[2][b]; *Jones v Zoning Bd. Of Town of Oneonta*, 90 AD3d 1280, 934 NYS2d 599 [3d Dept 2011]; *Matter of Sullivan v City of Albany Bd. of Zoning Appeals*, 20 AD3d 665, 666, 798 NYS2d 200 [3d Dept 2005], lv. denied 6 NY3d 701, 810 NYS2d 415[2005]; *Matter of Center Sq. Assn., Inc. v City of Albany Bd. of Zoning Appeals*, 19 AD3d 968, 970, 798 NYS2d 756 [3d Dept 2005]).

It is noted at the outset that respondent Ceglio’s claim that the accessory building has been used as habitable space pursuant to a permit issued in 2002, is simply false. Habitable space is defined in §183-1 of the CVA as “[a] space in a building for living, sleeping, eating or cooking, or used as a home occupation. Bathrooms, toilet rooms, closets, halls, storage or utility spaces and similar areas are not considered habitable spaces”. The CO issued in 2002 was amended to indicate the conversion of the first floor of the garage into a “recreation room”, with the express limitation that “[n]o dwelling unit permitted”. Thus,

McLoughlin v Amityville ZBA
Index No. 13-19531
Page No. 7


contrary to the representations indicated in the ZBA findings, no use variance actual or implied was ever granted for the property.

A landowner who seeks a use variance must demonstrate factually, by dollars and cents proof, an inability to realize a reasonable return under existing permissible uses (*Hejna v Board of Appeals of Village of Amityville*, 105 AD3d 843, 964 NYS2d 164 [2d Dept 2013]; *Matter of Village Bd. of Vil. of Fayetteville v. Jarrold*, 53 NY2d 254, 256, 440 NYS2d 908 [1981]; see *Matter of Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 287 AD2d 453, 456, 731 NYS2d 54 [2d Dept 2001]). Here, respondents failed to introduce any competent financial evidence and certainly no “dollars and cents” proof to demonstrate an inability to realize a reasonable return under existing permissible uses. Thus, if a use variance was, in fact, granted, it must be vacated and annulled in all respects.

Finally, a determination of a zoning board of appeals, that neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts, is arbitrary and capricious, and such determination must be annulled pursuant to an article 78 proceeding, even if there may otherwise be evidence in the record sufficient to support the determination (*Bout v Zoning Bd. Of Appeals of Town of Oyster Bay*, 71 AD3d 1014, 897 NYS2d 205 [2d Dept 2010]; *Waidler v Young*, 63 AD2d 953, 882 NYS2d 153 [2d Dept 2009]; see, also *Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 498 NYS2d 111 [1985]). However, where a zoning board provides a rational explanation for reaching a different result on similar facts in an allegedly similar application, the determination will not be viewed as either arbitrary or capricious (*Hurley v Zoning Bd. Of Appeals of Village of Amityville*, 69 AD3d 940, 893 NYS2d 277 [2d Dept 2010]; *Berk v McMahon*, 29 AD3d 902, 814 NYS2d 753 [2d Dept 2006]). Here, the ZBA provides no explanation as to why it approved the application after denying the same application, for the same relief, on the same property, little more than a year previously. As such, its decision is arbitrary and capricious, and its determination must be vacated and annulled.

Accordingly, the determination by respondent filed in the Village Clerk’s office on June 24, 2013, which granted the application of the respondent Barbara Ceglio (“Ceglio”) for a Special Exception for a Parent-Child Residence and for “associated variances” permitting the conversion of an accessory building into a separate one-family dwelling, with an existing one-family dwelling on the same lot, is vacated and annulled in all respects.

Submit judgment.



J.S.C.