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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 37

LAURA MICHAELS,

Petitioner,

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

- against -

ALEX WALTER, Chairperson, DONALD CIRILLO, BRYAN GOSMAN, DAVID LYS, LEE WHITE, Constituting the Zoning Board of Appeals of the Town of East Hampton, THOMAS PREIATO, Sr. Building Inspector of the Town of East Hampton, TIMOTHY TWIGGS and NOELLE TWIGGS,

Respondents.

By: Farneti, A.J.S.C.
Dated: October 3, 2014

Index No. 13-31530
Mot. Seq. #002 -MD; CDISPSJ

Return Date: 1-17-14
Adjourned: 7-17-14

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In this article 78 proceeding, the petitioner seeks a judgment annulling and vacating the determination of the Zoning Board of Appeals of the Town of East Hampton ("ZBA") dated October 29, 2013, which denied the respondents Timothy and Noelle Twiggs (hereinafter the "Twiggs") certain variances to construct a 2,952 square foot two-story residence with 984 square feet of decking, a sanitary system and driveway on a parcel of land adjacent to freshwater wetlands and located at 85 South Edgemere Street in Montauk, New York.

In the amended petition, petitioner seeks a judgment determining: on the first cause of action, that the respondent ZBA lacked jurisdiction to approve the application pursuant to General Municipal Law § 239-m; on the second cause of action, that the decision of the ZBA was arbitrary and capricious and an abuse of discretion and enacted in error of law; on the third cause of action, that the decision of the ZBA was vague and indefinite, arbitrary and capricious an abuse of discretion and enacted in error of

law; and on the fourth cause of action, that the ZBA failed to consider alternative reasonable uses for the property which did not require variances or a Natural Resources Special Permit ("NRSP").

On January 31, 2012, the ZBA granted the prior owner of the subject premises a NRSP pursuant to § 255-4-20 of the Town Code of the Town of East Hampton and variances from § 255-3-75 of the Town Code (Harbor Protection Overlay District) and § 255-4-30 of the Town Code (Minimum Wetland Setbacks). Prior to that vote, the ZBA, by letter dated November 18, 2011, had submitted the applications for the permit and variances to the Suffolk County Planning Commission for review, as required by General Municipal Law § 239-m. In response, by letter dated November 22, 2011, the ZBA was informed by the Planning Commission that "[p]ursuant to the requirements of § A14-14 thru § A14-25 of the Suffolk County Administrative Code, the . . . [applications] submitted to the Suffolk County Planning Commission are to be a matter for local determination as there appears to be no significant county-wide or inter-community impacts." The ZBA approval dated January 31, 2012 was conditioned upon, among other things, the establishment of a conservation easement 50 feet landward of the wetland boundary, and land clearing was approved to be no closer than (approximately) 85 feet from the wetlands for the proposed driveway and around the perimeter of the residence. This approval allowed for the construction of a 2,437 square foot residence, a 410 square foot carport, 1,195 square feet of decking, a sanitary system and a driveway.

Thereafter, the prior owner sold the property to the Twiggs who filed an application to modify the previously approved application "in order to reflect a change in design of the residence for aesthetic reasons." The modification was approved by the ZBA on October 9, 2012 allowing construction of a 2,437 square foot residence, 1,225 square feet of decking, a sanitary system, a retaining wall and a driveway. The approval also allowed the carport to be incorporated into the square footage of the residence and altered the roof line of the residence. The ZBA found that "the proposed amendments are minor and do not change the overall aspects of the approved project."

After the Twiggs complied with the conditions of approval, including the filing of a Scenic and Conservation Easement and a Declaration of Covenants and Restrictions, a building permit was issued by the chief building official. Petitioner thereafter initiated a proceeding, with the same caption as herein, under Suffolk County Supreme Court Index No. 13-10497 challenging the prior approvals of the ZBA dated January 31, 2012 and October 9, 2012. Of import to this proceeding is the fact that the chief building inspector determined that three area variances, north and east setbacks and a "pyramid" height variance would be necessary prior to the proper issuance of a building permit and by letter dated May 7, 2013 revoked the building permit and informed the Twiggs of the variances that were needed.

The Twiggs thereafter submitted a second application for "modification" of the prior approvals for an additional 5 foot side yard setback and 8.4 foot rear yard setback variances. In the interim, the house had been redesigned to eliminate the need for the "pyramid" variance. A public hearing was held on the application on June 18, 2013. At the hearing, Alex Walter, chairman of the ZBA, stated that the focus of the ZBA was on the two requested area variances and representatives of the Twiggs spoke in favor of the application. The petitioner herein, her attorney and others spoke in opposition to the application

The ZBA, upon review of the application for the 2.5 foot side yard and 8.4 foot rear yard variances, found that: (1) approval would produce an undesirable change in the character of the neighborhood and was not the minimum necessary to enable the applicant to build a two-story residence; (2) that the benefit sought could be achieved by some other method; (3) that the requested variances were numerically small but large in relationship to the required setbacks and would entail variances of 12% and 40% respectively; and (4) the proposed variances would have an adverse impact on the general health, safety and welfare of the neighborhood and the Town. As a result of these findings, the respondent ZBA denied the two requested area variances by decision dated October 29, 2013. The ZBA also reaffirmed the previous relief granted to the Twiggs in its determination dated January 31, 2012 and in the October 9, 2012 resolution amending that determination.

Petitioner first attacks the October 29, 2013 ZBA determination as void *ab initio* and *ultra vires*, alleging a lack of jurisdiction due to a failure to refer the application to the Suffolk County Planning Commission for review. Section A14-22 of the Suffolk County Administrative Code requires that certain applications for special permits must be referred to the Suffolk County Planning Commission, and Section A14-23 of the Suffolk County Administrative Code requires that certain applications for variances must be referred to the Suffolk County Planning Commission.

The provisions of Section A14-23 track those of General Municipal Law § 239-m. General Municipal Law § 239-m (2) provides:

> Referral of proposed planning and zoning actions. In any city, town or village which is located in a county which has a county planning agency, or, in the absence of a county planning agency, which is located within the jurisdiction of a regional planning council duly created pursuant to the provisions of law, each referring body shall, before taking final action on proposed actions included in subdivision three of this section, refer the same to such county planning agency or regional planning council.

General Municipal Law § 239-m (4) (a) provides, in pertinent part:

> County planning agency or regional planning council review of proposed actions; recommendation, report. (a) The county planning agency or regional planning council shall review any proposed action referred for inter-community or county-wide considerations, including but not limited to those considerations identified in section two thirty-nine-l of this article. Such county planning agency or regional planning council shall recommend approval, modification, or disapproval, of the proposed action, or report that the proposed action has no significant county-wide or inter-community impact.

However, General Municipal Law § 239-m (3) (c) provides:

> The county planning agency or regional planning council may enter into an agreement with the referring body of a city, town or village to provide that certain proposed actions set forth in this subdivision are of local, rather than inter-community or country-wide concern, and are not subject to referral under this section.

Such an agreement exists between the Town of East Hampton and the Suffolk County Planning Commission. This agreement, set forth in East Hampton Town Board Resolution 2009-674 to Authorize Intermunicipal Agreement between the Town of East Hampton and the Suffolk County Planning Commission, states in relevant part:

> Resolved, that pursuant to the above the Suffolk County Planning Commission considers the following list of actions to constitute matters of local determination which are NOT subject to the referral process:
>
> All area variances associated with single-family residences;
>
> Change of one permitted use to another with no changes in parking requirements (i.e. retail to office);
>
> Minor additions less than 1,000 square feet with no change to use or occupancy;
>
> Site plan applications proposing less than 5,000 square feet of new or renovated floor area or less than 10,000 square feet of land disturbance; and
>
> Applications for Administrative Lighting permits.

There are two exceptions, neither of which are applicable to this proceeding. Respondent ZBA also submitted a copy of a letter, dated December 28, 2008 from the Suffolk County Director of Planning to the Supervisor of the Town of East Hampton, which notes that, after the Intermunicipal Agreement goes into effect, "only those actions not covered by the agreement will continue to be required to be referred to the Commission."

As the application and the ZBA made clear at the public hearing on June 18, 2013, the only matters before the ZBA were the two requested setback variances. Since these were area variances associated with a single family residence, pursuant to the above agreement, referral to the Suffolk County Planning Commission was not required. The petition however alleges that the determination granting a NRSP and variances dated October 29, 2013 is *ultra vires* and void *ab initio*. No such determination was made by the ZBA on that date. Rather, the NRSP and related variances were granted

on January 31, 2012 and were merely reaffirmed by the ZBA in its vote on October 29, 2013. The statute of limitations governing the review of an administrative agency's determination runs from the initial determination unless the agency conducts a "fresh" and complete examination of the matter based on "fresh" and newly presented evidence (***Custom Topsoil, Inc. v City of Buffalo***, 63 AD3d 1511, 879 NYS2d 854 [4th Dept 2009] ***Finger Lakes Racing Association, Inc. v State of New York Racing and Wagering Board***, 34 AD3d 895, 823 NYS2d 585 [3d Dept 2006]; *see, also,* ***Mosher v Town of Southport Zoning Board of Appeals***, 5 AD3e 840, 772 NYS2d 640 [3d Dept 2004]; ***Young v Board of Trustees of the Village of Blasdell,*** 89 NY2d 846, 652 NYS2d *729* [1996]. Furthermore, references to or reaffirmations of a prior approval does not renew or revive the limitations period for the prior decision (***Green Harbour Homeowner's Association, Inc. v Town of Lake George Planning Board***, 1 AD3d 744, 766NYS2d 739 [3d Dept 2003]; *see* ***Palm Management Corporation v Goldstein***, 8 NY3d 337, 833 NYS2d 423 [2007]; ***Save The Pine Bush Inc. v Town Board of the Town of Guilderland***, 272 AD2d 689, 707 NYS2d 698 [3d Dept 2000]). The ZBA was clear at the June 18, 2013 public hearing that the only matter before it was the application for the two area variances, which it later denied. The reaffirmation of the previously granted relief did not renew or restart the statute of limitations with regard to that relief (*see* ***Finger Lakes Racing Association, Inc. v State of New York Racing and Wagering Board***, *supra;* ***Young v Board of Trustees of the Village of Blasdell***, *supra*). Thus, any challenge to the NRSP and related variances granted on October 9, 2012 is time-barred by the 30-day statute of limitations set forth in Town law § 267-c.

It is further noted that the NRSP and related variances granted on January 31, 2012 were properly submitted to the Suffolk County Planning Commission for review, as required by General Municipal Law § 239-m. The Planning Commission determined that "[p]ursuant to the requirements of § A14-14 thru § A14-25 of the Suffolk County Administrative Code, the following applications submitted to the Suffolk County Planning Commission are to be a matter for local determination as there appears to be no significant county-wide or inter-community impacts." Thus, the ZBA, in each of the determinations rendered in this matter, was at all times in compliance with Section A14-23 of the Suffolk County Administrative Code and General Municipal Law § 239-m. At no time was it required to submit any area variance associated with the single-family residence proposed in this matter. Thus, contrary to the claims of the petitioner, the ZBA had jurisdiction to act, and its actions were not void *ab initio* or *ultra vires*. Therefore, petitioner's first cause of action must be dismissed.

"A court reviewing a CPLR article 78 petition may not disturb the decision of a municipal body charged with determining land use questions unless that body's decision is arbitrary and capricious, lacks a rational basis, or is an abuse of discretion" (***Matter of Lucas v Bd. of Appeals of Vil. of Mamaroneck***, 109 AD3d 925, 974 NYS2d 464 [2d Dept 2013]; ***Matter of Fuentes v Planning Bd. of Vil. of Woodbury***, 82 AD3d 883, 918 NYS2d 213 [2d Dept 2011]). 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, 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]). A court, however, may set aside a zoning board's determination if the record reveals that the board acted illegally or arbitrarily, 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 2011], *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]; ***Matter of Cacsire v City of White Plains Zoning Bd. of Appeals***, *supra*.

The burden is on the petitioner to show that there is no rational basis for the board's determination (***Matter of Grossman v Rankin***, 43 NY2d 493, 402 NYS2d 373 [1977]). A court may not substitute its judgment for that of the board (***Matter of Ball v New York State Dept. of Envtl. Conservation,*** 35 AD3d 732, 826 NYS2d 698 [2006]; ***Smith v Board of Appeals of the Town of Islip***, 202 AD2d 674, 675, 609 NYS2d 912 [2d Dept 1994]). Nor may the court weigh the evidence or reject the choice made by the zoning board where the evidence is conflicting and room for choice exists (***Calvi v Zoning Bd. of Appeals of City of Yonkers***, 238 AD2d 417, 656 NYS2d 313 [2d Dept 1997]; *see* ***Toys R Us v Silva***, 89 NY2d 411, 654 NYS2d 100 [1996]).

In the second and third causes of action, petitioner argues that the decision of the ZBA was arbitrary and capricious, an abuse of discretion, vague and enacted in error of law. However, an examination of the pleadings shows petitioner's attack is on approvals allegedly granted by the ZBA. However, no approvals were granted by the ZBA pursuant to its October 29, 2013 vote. This again is merely an improper collateral attack on the time-barred prior approval of the NRSP and related variances that were granted on January 31, 2012.

In its October 29, 2013 determination, the ZBA reviewed the application for two area variances pursuant to the standards set forth in Town Law § 267-b (3) (b). A zoning board considering a request for an area variance is required 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 area variance is granted (Town Law § 267-b [3] [b]). The zoning board also 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 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* ***Matter of Margaritis v Zoning Bd. of Appeals of the Inc. Vil. of Flower Hill***, 32 AD3d 855, 821 NYS2d 611 [2d Dept 2006]). The ZBA rendered a decision on the application upon review of the these requirements, and found that: (1) approval would produce an undesirable change in the character of the neighborhood an are not the minimal necessary to enable the applicant to build a two-story residence; (2) that the benefit sought can be achieved by some other method; (3) that the

requested variances were numerically small but are large in relationship to the required setbacks and would entail variances of 12% and 40% respectively; and (4) the proposed variances would have an adverse impact on the general health, safety and welfare of the neighborhood and the Town. Based upon these findings, the application was denied. Respondent ZBA's decision was not arbitrary or capricious or an abuse of discretion, but was a well-reasoned decision based upon facts in the record and should not be disturbed (*see* ***Matter of Lucas v Bd. of Appeals of Vil. of Mamaroneck***, *supra*; ***Matter of Pecorano v Board of Appeals of Town of Hempstead***, *supra*).

Petitioner's fourth cause of action alleges that the ZBA in its consideration of applicant's request for a NRSP must determine that no alternative reasonable uses of the property exist. However, no such application was before the ZBA in its October 29, 2013 determination. This, once again, is an attempt to circumvent the time-barred prior approval of the NRSP and related variances which were granted on January 31, 2012. As such, it must be summarily dismissed.

Settle judgment.

Dated: October 3, 2014

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION