

**DiCostanzo v Zoning Bd. of Appeals of the Inc. Vil.
of Saltaire**

2015 NY Slip Op 30051(U)

January 14, 2015

Supreme Court, Suffolk County

Docket Number: 12-33910

Judge: W. Gerard Asher

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.

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 32

-----X

In the Matter of NICHOLAS M. DiCOSTANZO,
 PATRICIA A. HENNESSEY and CHERYL M.
 SHERMAN, as Trustee,

Petitioners,

- against -

ZONING BOARD OF APPEALS OF THE
 INCORPORATED VILLAGE OF SALTAIRE,
 MARTIN SEMEL, CHAIRMAN and SCOTT
 ROSENBLUM and JON LINDSEY, MEMBERS
 and SALTAIRE YACHT CLUB, INC.,

Respondents.

-----X

By: Asher, J.S.C
 Dated: January 14, 2015

Index No. 12-33910
 Mot. Seq. # 001 - MD; CDISPSUBJ

Return Date: 12-20-12
 Adjourned: 4-15-14

SHLIMBAUM and SHLIMBAUM
 Attorney for Petitioners
 320 Carlton Avenue, Suite 2500
 Central Islip, New York 11722

FARRELL FRITZ, P.C.
 Attorney for Respondents Saltaire and Members
 100 Motor Parkway, Suite 138
 Hauppauge, New York 11788

CERTILMAN, BALIN, ADLER & HYMAN
 Attorney for Respondent Saltaire Yacht Club
 100 Motor Parkway, Suite 156
 Hauppauge, New York 11788

In this proceeding, petitioners seek a judgment pursuant to CPLR article 78 reviewing and annulling a final determination dated October 3, 2012 by respondent Zoning Board of Appeals of the Incorporated Village of Saltaire, which granted an application by respondent Saltaire Yacht Club, Inc. for area variances permitting the repair and restoration of the club's deck, the relocation of its bar, and the construction of a second-story addition to its premises. Petitioners are the owners of neighboring residences located at 12 West Bay Promenade and 104 and 102 Marine Walk, in the Village of Saltaire. The subject property, known as 13 Bay Promenade, is owned by respondent Saltaire Yacht Club ("SYC"). The property is improved with a main building containing a dining facility, kitchen and bar area, several accessory structures, outdoor decking, and tennis courts. It is situated in a residential district, and the building's existing improvements and use are subject to pre-existing nonconforming use exceptions. On October 28, 2010, SYC, seeking, among other things, to renovate the main building by

DiCostanzo v ZBOA Saltaire
Index No. 12-33910
Page No. 2

adding a second-story storage area and changing the roof, submitted a building permit application to the Village of Saltaire. By letter dated October 29, 2010, the Village denied the building permit application on the basis the proposed changes sought to modify, without correcting, existing legal non-conformities in the building's structure in violation of section 55-16 of the Saltaire Village Code. The letter further advised SYC that it could seek variances from the ZBA for relief from the requirements of the Village Code. A hearing was conducted by the ZBA to consider SYC's application for an area variance on October 30, 2010.

By decision dated December 24, 2010, the ZBA granted a variance permitting SYC to repost, restore and repair the structural elements to its building. However, the ZBA denied SYC's application to the extent it sought to relocate its bar and construct a second story on the premises. Although the decision was filed with the Village Clerk, noting significant procedural irregularities, the ZBA re-opened the application and scheduled public hearings on SYC's proposal to make the structural changes to the building. After conducting public hearings on the proposed changes in February and April 2011, the ZBA affirmed its prior order. As a result, on July 7, 2011, SYC advised the Village Zoning Board that it was withdrawing its application for the remaining variances. However, citing an amendment to Village Code §55-16 which permitted alterations to pre-existing nonconforming structures that did not expand beyond the "existing building envelope," SYC re-submitted its application for building variances to the Village. In a letter dated October 21, 2011, the Village denied the second application on the basis the proposed second story addition would expand beyond the building's envelope and existing non-conformities would not be corrected. On November 22, 2011, SYC filed an appeal to the Village. However, by letter dated January 11, 2012, SYC notified the ZBA that it was suspending its appeal in light of proposed amendments to Chapter 55 of the Village Code. Subsequently, on March 1, 2012, Village Code §55-16 was amended in its entirety to define pre-existing nonconforming structures as lawful, and permitting the expansion of such premises providing the proposed expansion did not go beyond the building's existing lot foot print, or beyond its existing exterior floors, walls or roof, unless certain conditions were met.

Relying on these amendments, SYC submitted a letter, dated March 21, 2012, to the Village requesting that its application for the variances be resubmitted to the ZBA for review. In response, the Village Administrator issued an updated letter denying SYC's October 2011 building permit application under the newly amended Village Code. In the denial letter, the Village Administrator advised SYC that it may use such response to "proceed to seek a variance from the [ZBA] for relief from the requirements of §§55-10 and 55-16 of the Village Code." After the request to reactivate SYC's application was submitted to the ZBA, it conducted a public hearing on the matter on June 16, and July 22, 2012. At the time of the hearing, the ZBA considered public comments and arguments by counsel for both SYC and petitioners as to whether SYC's reactivated appeal was untimely or barred by the doctrine of res judicata. Following the public hearing, SYC submitted correspondence to the ZBA indicating that it was appealing the Village's updated denial letter. SYC and petitioners also were permitted to submit memoranda of law in support of their respective positions on the proposed renovation of the subject premises. On July 24, 2012, the Village notified both the ZBA and SYC that the proposed construction would be considered a substantial improvement to the subject premises, and would have to comply with elevation requirements promulgated by FEMA and New York State.

DiCostanzo v ZBOA Saltaire
Index No. 12-33910
Page No. 3

Thereafter, by decision dated October 3, 2012, the ZBA granted SYC's application in its entirety. The eleven page decision addressed, among other things, the timeliness of SYC's appeal, and whether it was barred by the doctrine of administrative res judicata. The decision was filed with the Saltaire Village Clerk on October 5, 2012.

By their amended petition, petitioners allege that the ZBA's October 3, 2012 decision granting SYC's appeal was an abuse of its discretion, and that it was arbitrary and capricious and affected by errors of law. More specifically, petitioners allege that SYC failed to appeal the March 22, 2012 denial of its application for the subject variances within the 90 days required by Village Code §55-15(b)(3), and, as such, the ZBA did not retain the requisite jurisdiction to grant the appeal. Petitioners also allege that the ZBA's decision to grant SYC's appeal is barred by the doctrine of administrative res judicata and should be vacated, since it inexplicably failed to adhere to the precedent set forth in its previous denials dated December 24, 2010 and June 11, 2011, which determined, among other things, that the proposed renovations to the subject building would have adverse effects on the character and environment of the surrounding neighborhood. Additionally, petitioners argue that the ZBA's decision to grant SYC's application in its entirety was erroneous, as it failed to consider an accurate and complete plan for the proposed renovation, and the impact of New York State and FEMA elevation requirements in assessing its effects on the neighborhood and nearby properties. Petitioners further contend that the ZBA's approval of SYC's application should be annulled, as it was based on the erroneous conclusion that SYC is a permitted use under Saltaire Village Code §55-6(A)(4), which only allows existing nonconforming properties to be used as private clubs if membership in such clubs are open to all Village residents on an equal basis.

SYC opposes the petition arguing, inter alia, that its appeal to the ZBA was timely, that the Village Administrator should have been joined as a necessary party, and that the doctrine of administrative res judicata is inapplicable where, as here, the applications submitted to the ZBA were factually distinguishable and amendments to the Saltaire Village Code preceded ZBA's consideration of such applications. In particular, SYC asserts that the November 2011 appeal of its variance application submitted to the ZBA was timely, since the appeal was submitted to the ZBA less than 60 days after it issued its denial on October 21, 2011. SYC further asserts that the ZBA retained jurisdiction over the appeal despite its temporary suspension, since, as noted by the Village Administrator's updated denial letter, the amendments to the Village Code did not substantively affect the already pending appeal. Accordingly, SYC claims it was not required to file any new or amended appeal, and that Village Code §55-15(b)(3) was inapplicable under such circumstances. SYC also argues that its use of the subject premises is permitted because it is located in the Village's residence zoning district which, pursuant to §55-6 (A) of the Village Code, permits structures in such zone to be used by private clubs if membership is open to all village residents. The ZBA opposes the petition on a similar basis, asserting, inter alia, that it had jurisdiction to hear and decide SYC's November 17, 2011 appeal, since the appeal, which was only temporarily suspended, was reactivated after amendments were made to the Village Code.

Initially, it is noted that the petitioners have submitted numerous documents in their "supplemental return," which were not placed in the record as part of the ZBA's hearing of this matter. This material being outside of the record, it will not be considered by this court (*see Featherstone v Franco*, 95 NY2d 550, 720 NYS2d 93 [2000]; *Matter of Rose v. Albany County Dist. Attorney's Off.*,

DiCostanzo v ZBOA Saltaire

Index No. 12-33910

Page No. 4

111 AD3d 1123, 975 NYS2d 258 [3d Dept 2013]; *Kaufman v Inc. Vil. of Kings Point*, 52 AD3d 604, 607, 860 NYS2d 573 [2d Dept 2008]; *Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 835 NYS2d 184 [1st Dept 2007]). Likewise, the court will not consider petitioners allegation that the use of the premises as a yacht club is not a permitted use under Saltaire Village Code §55-6 (A)(4) because membership is not open to all residents on an equal basis, as the issue was not raised before the ZBA, or addressed in its October 3, 2012 decision granting SYC's request for an area variance (*see Featherstone v Franco, supra; Matter of Rose v Albany County Dist. Attorney's Off., supra; Matter of Torres v New York City Hous. Auth., supra*). In any event, where, as here, the ZBA's decision expressly determined that "SYC is a permitted use under Section 55-6(A) of the Village Code," the court is required, in the absence of any irrationality or inconsistency, to defer to its interpretation of the local zoning law (*see Toys "R" Us v Silva*, 89 NY2d 411, 654 NYS2d 100 [1996]; *Kettaneh v Board of Stds. & Appeals of the City of N.Y.*, 85 AD3d 620, 925 NYS2d 494 [2d Dept 2011]). In addition, the court notes that it did not consider petitioner's unauthorized sur-reply in reaching its determination (*see CPLR 2214; BRP Constr. Group, LLC v Greenwich Ins. Co.*, 106 AD3d 680, 966 NYS2d 98 [2d Dept 2013]; *Flores v Stankiewicz*, 35 AD3d 804, 827 NYS2d 281 [2d Dept 2006]; *Mu Ying Zhu v Zhi Rong Lin*, 1 AD3d 416, 766 NYS2d 897 [2d Dept 2003]).

The ZBA's approval of SYC's area variance is not precluded by the doctrine of administrative res judicata, as the December 24, 2010 decision denying SYC's appeal of its initial building permit application became a nullity when the ZBA reopened the decision due to procedural irregularities and took no further action after SYC sent its July 2011 correspondence withdrawing such appeal. As for the purported June 11, 2011 decision by the ZBA, such decision is null and void, since, among other things, there was inadequate prior notice of the time and place of the board meeting, the minutes of the meeting were recorded in illegible handwriting, and the minutes failed to indicate whether a valid vote was conducted, and what, if any, evidence was considered (*see Village Law §7-712-[a][1]-[13]; see also Rendino's Truck & Auto Collision v Zoning Bd. of Appeals of City of Syracuse*, 159 AD2d 949, 552 NYS2d 791 [4th Dept 1990]). Even assuming, arguendo, that the June 11, 2011 decision denying SYC's request for a variance was valid, the doctrine of administrative res judicata does not apply to SYC's November 2011 appeal of the denial of the building permit application it sent to the Village following the amendment to Saltaire Code §55-16. Since the appeal was made pursuant to an amended version of the Saltaire Code, and involved updated construction plans distinguishable from those originally submitted by SYC for the proposed renovations to its building, the doctrine of administrative res judicata is inapplicable (*see Josato, Inc. v Wright*, 288 AD2d 384, 733 NYS2d 214 [2d Dept 2001]; *Peccoraro v Humenik*, 258 AD2d 465, 466, 684 NYS2d 588 [2d Dept 1999]; *cf Jensen v Zoning Bd. of Appeals*, 130 AD2d 549, 515 NYS2d 283 [2d Dept 1987]). Moreover, the November 2011 application by SYC for a variance was not untimely, as it was made well within 60 days after the Village denied SYC's application for a building permit pursuant to the newly amended Code (*see Village Law §7-712[a][5]*). Although SYC requested a temporary suspension of its application for a variance pending additional amendments to Saltaire Code §55-16, the ZBA did not lose jurisdiction of its review of the application, which it resumed on March 22, 2012.

Local zoning boards have broad discretion in considering applications for area variances and the judicial function in reviewing such decisions is a limited one. Courts may set aside a zoning determination only where the record reveals that the board acted illegally or arbitrarily, or abused its

discretion, or that it succumbed to generalized community pressure (*see Pecoraro v Board of Appeals of the Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234 [2004]; *Matter of Tsunis v Zoning Bd. of Appeals of Inc. Vil. of Poquott*, 59 AD3d 726, 873 NYS2d 733 [2d Dept 2009]). A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence (*Pecoraro v Board of Appeals of the Town of Hempstead, supra*). When reviewing the determinations of a Zoning Board, the Court considers substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination (*Matter of DiPaolo v Zoning Board of Appeals of the Town/Vil. of Harrison*, 62 AD3d 792, 879 NYS2d 506 [2d Dept 2009]; *Matter of Gallo v Rosell*, 52 AD3d 514, 859 NYS2d 675 [2d Dept 2009]).

In reviewing an application for an area variance, a zoning board is required to engage in a balancing test, "weigh[ing] the benefit of the grant to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted" (*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 612, 781 NYS2d 234 [2004]; *see Matter of Ifrah v Utschig*, 98 NY2d 304, 307, 746 NYS2d 667 [2002]; *Matter of Goldberg v Zoning Bd. of Appeals of City of Long Beach*, 79 AD3d 874, 876, 912 NYS2d 668 [2d Dept 2010]; *Matter of Jonas v Stackler*, 95 AD3d 1325, 1327, 945 NYS2d 405 [2d Dept 2012], *lv denied* 20 NY3d 852, 957 NYS2d 689 [2012]). A village zoning board must consider "(1) whether 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) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance" (Village Law §7-712-b[3][b]; *see Matter of Quintana v Board of Zoning Appeals of Inc. Vil. of Muttontown*, 120 AD3d 1248, 992 NYS2d 332 [2d Dept 2014]). A zoning board of appeals is not required to justify its determinations with supporting evidence as to each of the five factors so long as its determination balances the relevant considerations in a way that is rational (*see Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD2d 62, 886 NYS2d 442 [2d Dept 2009]).

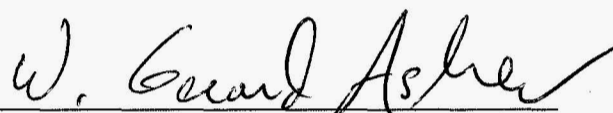
The ZBA's determination granting SYC's application for an area variance permitting it to repair and renovate its premises was not arbitrary or capricious and was supported by substantial evidence in the record (*see Matter of DiPaolo v Zoning Bd. of Appeal of the Town/Vil. of Harrison*, 62 AD3d 792, 879 NYS2d 507 [2d Dept 2009]; *Matter of Kraut v Board of Appeals of Vil. of Scarsdale*, 43 AD3d 923, 841 NYS2d 369 [2d Dept 2007]). Generally, an area variance involves no change in the essential character of the zoned district; thus, the neighborhood considerations are not as strong as in a use variance (*see Khan v Zoning Bd. of Appeals of Vil. of Irvington*, 87 NY2d 344, 639 NYS2d 302 [1996]; *Wilcox v Zoning Bd. of Appeals of City of Yonkers*, 17 NY2d 249, 270 NYS2d 569 [1966]). Here, SYC's application for variances permitting certain renovations and the construction of a second-story addition to the building seeks an area variance because the essential use of the land is not being changed (*see Wilcox v Zoning Bd. of Appeals of City of Yonkers, supra*; *Dawson v Zoning Bd. of Appeals of Town of Southold*, 12 AD3d 444, 785 NYS2d 84 [2d Dept 2004]). Moreover, the ZBA's eleven-page decision addresses each element

DiCostanzo v ZBOA Saltaire
Index No. 12-33910
Page No. 6

of the balancing test, and contains an extensive discussion of the evidentiary support and arguments set forth by SYC and by the opponents of the proposed renovations. After carefully evaluating whether the proposed renovations to the building would have detrimental effects, such as creating excessive noise or enabling SYC to use portions of the building for living space, the ZBA's decision conditioned its approval of the area variance on the execution of covenants providing that SYC would prohibit any use of the premises for habitation, and would utilize sound-attenuating construction materials. The ZBA determined that the proposed renovations were modest in nature, since, among other things, the proposed elevation of the roof above the second-story storage space will be three feet below the maximum building height set forth in Village Code §55-13. The ZBA also notes that the need for the proposed renovations was not self created, and that demolition of the existing structure to erect a new building that would comply with all the current zoning law regulations was not economically feasible. Thus, under the circumstances, the ZBA's determination had a rational basis and was not arbitrary and capricious (*see Pecoraro v Board of Appeals of the Town of Hempstead, supra*; *Matter of Petikas v Baranello*, 78 AD3d 713, 910 NYS2d 515 [2d Dept 2010]; *Matter of King v Town of Islip Zoning Bd. of Appeals*, 68 AD3d 1113, 892 NYS2d 174 [2d Dept 2009]).

The petition is denied and the proceeding is dismissed.

Submit judgment.



J.S.C.