Triple Crown Estates, LLC v Board of Zoning Appeals of the Town of Brookhaven
2015 NY Slip Op 30099(U)
January 20, 2015
Supreme Court, Suffolk County
Docket Number: 07486/14
Judge: Joseph C. Pastoressa
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Index No: 07486/14

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**

---x
TRIPLE CROWN ESTATES, LLC,

Petitioner(s),

-against-

BOARD OF ZONING APPEALS OF
THE TOWN OF BROOKHAVEN,

Respondent(s).
---x

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Upon the foregoing papers, the petitioner, Triple Crown Estates, LLC, moves for a judgment pursuant to Article 78 of the CPLR annulling, vacating, and setting aside the determination of the respondent Board of Zoning Appeals of the Town of Brookhaven (hereinafter "BZA") dated March 12, 2014 and filed with the Brookhaven Town Clerk's office on March 14, 2014. It is,

ORDERED, that this petition to annul and set aside the determination of the BZA denying the petitioner's application for area variances is denied and dismissed.

The petitioner, Triple Crown Estates, LLC, is the owner of a vacant parcel of land located on the east side of Risley Road, 195 feet South of Prince Street, Patchogue, New York. The subject parcel maintains frontage on Palace Brook, a tributary of Patchogue River and is encumbered with freshwater wetlands on site. The subject parcel is in an A-2 Residential Zoning District, requiring 80,000 square feet of lot area, 200 feet of lot frontage, 60 feet of front yard, 30 feet of side yard, and 80 feet of total side yard. The subject parcel measures 73,579 square feet in size and maintains approximately 240 linear feet of frontage on Risley Road. The applicant

sought to improve the parcel by subdividing the subject premises and constructing two single-family dwellings. The proposal was to erect a dwelling on lot '1' having a lot area of 33,379 square feet, 114 feet of lot frontage, 41 feet of front yard, 28 feet of side yard and 66 feet of total side yard and a dwelling on lot '2' having a lot area of 40,200 square feet, 114 feet of lot frontage, 41 feet of front yard, 28 feet of side yard and 66 feet of total side yard.

Petitioner applied to the BZA for area variances in connection with the subject premises on January 6, 2014. Specifically, petitioner sought the following variances from the BZA in connection with the subject premises:

> 1) Division of a parcel located on the East side of Risley Road, 195 feet South of Prince Street, Patchogue, NY into 2 plots, "1" and "2", requiring lot area, lot frontage, front yard setback, minimum side yard setback and total side yard setback variances for proposed one-family dwelling on plot "1";
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> 2) Lot area, lot frontage, front yard setback, minimum side yard setback and total side yard setback variances for proposed one-family dwelling on plot #2.

The respondent BZA held a public hearing regarding the petitioner's application for the proposed land division and applicable variances in connection with the subject premises on January 22, 2014. At the end of the hearing, BZA voted to reserve decision. The respondent BZA in a written decision dated March 12, 2014 denied the application. The petitioner avers that the BZA's denial of its requested variances was made 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.

The petitioner contends that the BZA in its deliberations did not consider all requisite statutory factors for granting area variances, failed to analyze or ignored the actual development pattern of the neighborhood, and that the BZA's findings are not supported by the record. In opposition, the BZA avers that petitioner's area variances are substantial and self-created, granting such variances would create bad precedent for surrounding parcels for the future and the proposed variances have potential to adversely effect the surrounding environment. The BZA further avers that this particular parcel was one that was purposefully rezoned from A-1 to A-2 in 1989 in order to protect the surrounding environment from pollution and the negative effects development may have on such an environmentally sensitive area.

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 pressure" (Matter of Pecoraro v Board of Appeals of Town of Hempstead, 2 NY3d 608, 613; see, Matter Inlet Homes Corp. v Zoning Board 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 Town Law 267-b(3), 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

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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 (Town Law 267-b(3); Matter of Sasso v Osgood, 86 NY2d 374, 384). The BZA 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, Town Law 267(b)3; 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 petitioner's relief for the area variances on the subject parcel.

The record demonstrates that the requested area variances were substantial considering the deviations from the Town Code requirements and when viewed in the totality of the circumstances (see, Matter of Ifrah v Utschig, supra; Matter of Inguant v Board of Appeals of Town of Brookhaven, supra). The BZA can also consider the "cumulative effect" of the requested variances on the present application (see, Matter of Millennium Custom Homes, Inc. v Thomas Young, et al., 58 AD3d 740; Matter of Josato, Inc. v Wright, 35 AD3d 470; Matter of Ron Rose Group v Baum, 275 AD2d 373; Matter of Tetra Bldrs v Scheyer, 251 AD2d 589; cf. Matter of Buckley v Amityville Vil. Clerk, 264 AD2d 732). Here, the BZA in its determination amply demonstrated that the multitude of variances needed (10), in addition to the deviation of the Town Code established that the requested area variances were in fact individually and collectively substantial when compared to Code requirements. The applicant, inter alia, proposed lot areas of 33,379 square feet for lot "1" and 40,200 square feet for lot "2", which represents a 58% and 50% relaxation for the lot requirements, respectively.

Area variance(s) may be denied based in part upon the self-created nature of the difficulty as viewed among other relevant factors (see, Matter of Springer v Zoning Board of Appeals of Town of Somers, 109 AD2d 888). The record supports the BZA's finding that the instant matter was a self-imposed hardship, whereby the petitioners concede that it purchased the subject premises in 2013 subject to the town code and the applicable zoning restrictions that were in place since 1989, of which, the petitioner is presumed to have knowledge of in effect (see, Matter of Gallo v Rosell, 52 AD3d 514; Matter of Rivero v Voelker, 38 AD3d 784; Carlucci v Board of Zoning Appeals of the Village of Scarsdale, 178 AD2d 478).

Town Law §267-b(3)(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 Board of Appeals, 8 AD3d 741). Here, the petitioner avers there are no feasible alternatives available which would allow it to subdivide the property and construct two single-family dwellings. However, while the BZA concedes there are no other alternatives that would eliminate the need for such variances, it concludes that there are feasible alternatives, such as developing the parcel of land in accordance with less substantial deviations of the requirements of the A-2 residence district. Thus, requiring only a minor variance for lot area (i.e. put a single-family house on the property in more compliance with the neighborhood and town code).

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Furthermore, "[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, 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 requested variances (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 Board of Appeals of Village of Sleepy Hollow, 21 AD3d 1108; see, Matter of Cowan v Kern, 41 NY2d 591; Matter of Pecoraro v Board of Apeals 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 Village of Scarsdale, 43AD3d923; McNair v Board of Zoning Appeals, 285 AD2d 553; Ron Rose Group, Inc. v Baum, 275 AD2d 373; Fedi v Amster, 250 AD2d 612). Specifically, the BZA determination states: "[t]he Board finds that the proposed land division would be precedent setting for the remaining vacant A-2 zoned lots in the neighborhood, most notably lots '60' and '61'. In this regard, the Board finds that the precedent resulting from the creation of substandard lots which fail to conform to the existing, established development pattern would set a negative precedent for similarly situated property owners" (see, paragraph 10). The court notes that lots 60 and 61 are commonly owned and total 1.13 acres. The BZA determination further states: "the Board finds that the established development pattern provides no precedent for the substantial lot area variances required by the proposal and, if granted, the land division would have zero (0%) conformity to lot area when compared to the surrounding developed A-2 parcels" (see, paragraph 11). The BZA "'was entitled to consider the effect its decision would have as precedent'"(Matter of Genser Board of Zoning & Appeals of Town of N. Hempstead, 65 AD3d 1144,1147, quoting Matter of Gallo v Rosell, 52 AD3d 514, 516; see, Matter of Pecoraro v Board of Appeals of Town of Hempstead, supra). Moreover, the BZA rationally concluded that granting the variances could set a negative precedent within the neighborhood, and serve as a catalyst for like applications on similarly situated lots, thereby vitiating the Town Board's upzoning to the A-2 zoning classification (see, Kearney v Village of Cold Spring Zoning Board of Appeals, 83 AD2d 711).

Finally, as to whether the variances would have an impact on the physical or environmental conditions in the neighborhood, the record shows that the BZA indicated that the relief requested has potential adverse effects on the surrounding environment. The BZA determination states: "[t]he endeavor would increase nitrogen loading to the onsite wetlands, and adjacent Palace Brook tributary and Patchogue River. As such, the Board finds that the subdivision proposed by the applicant will produce an adverse effect on the physical density and environmental conditions of the neighborhood." Contrary to the petitioner's contention, the BZA's determination of the impact on the environment was based on the documentary evidence contained in the record. The BZA had before it and which was read into the record a memoranda from Christopher Wrede, a planner from the Town of Brookhaven, which states: "[t]he parcel was upzoned to A-2 on the Town's own motion as part of the 1988 and 1989 rezonings of certain tracts of land with certain environmental characteristics, such as stream corridors. The subject parcel enjoys 279 ft. of frontage on Palace brook, a tributary of the Patchogue River and is encumbered with freshwater wetlands as delineated by Cramer Consulting on the land division plan. Due to the proximity to the wetlands, there is the potential for impacts on the environmental conditions in the locale in terms of increased nitrogen loading to groundwater and

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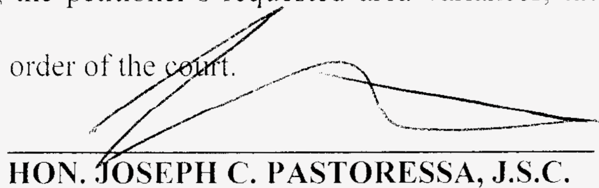
surface water from septic systems associated with two lots." In addition, the record reflects that the BZA considered the correspondence of the Town's Division of Environmental Protection which recommended that the application be denied (see. Matter of Millennium Custom Homes, Inc. v Young, 58 AD3d 740). Furthermore, the petitioner did not put forward any credible evidence or expert witness testimony at the hearing to refute the impact on the environment.

In conclusion, while it is arguable that the petitioner's proposed land division application creating two lots in this residential neighborhood presents no significant departure from the majority of the surrounding properties within 500 feet. the Court finds that the BZA had a legitimate interest and an overriding consideration in protecting the environment surrounding the neighborhood including tributaries, wetlands, and rivers in light of the Town Board's re-zoning of the subject parcel and other parcels to the A-2 Residential District in 1989. The record supports the BZA's conclusion that the substandard lots would contribute to the burdens placed on groundwater and surface water quality and the BZA was clearly within in its discretion to refuse to grant variances for the development of undersized parcels which will exacerbate the burden placed on the groundwater and surface water quality (see generally, Sakrel, Ltd. v Roth, 176 AD2d 732). A zoning board determination is not arbitrary "if, in light of apparent over development it puts a stop to all but those construction projects which are in conformity with the requirements of the zoning ordinance" (Sakrel, Ltd. v Roth, 176 AD2d 732, 736). Indeed, to grant petitioner's instant Article 78 proceeding would effectively vitiate in toto the Town Board's upzoning to the A-2 zoning classification for the subject parcel. Stated another way, it would brand the Town Board's decision to upzone the subject parcel as arbitrary and capricious for which the requisite proof petitioner clearly has not met.

Based upon the entire record before it, and balancing all the factors established, the BZA could rationally conclude that the detriment the proposed application posed to the neighborhood outweighed the benefit sought by the petitioner, and its determination denying the requested variances was not arbitrary or capricious (see, Matter of Ifrah v Utschig, supra; Matter of Ram v Town of Islip, 21 AD3d 493, Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead, 98 NY2d 190). Accordingly, for the foregoing reasons, the BZA did not act arbitrary, capricious or illegally in denying the petitioner's requested area variances, thus, the petition is denied and therefore dismissed.

This shall constitute the decision and order of the court.



DATED: January 20, 2015

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

FINAL DISPOSITION X NON-FINAL DISPOSITION ___

H: Article78 TRIPLECROWNESTATES.11.07.14