Matter of Joles v Board of Zoning Appeals of the Town of Brookhaven
2015 NY Slip Op 30115(U)
January 9, 2015
Supreme Court, Suffolk County
Docket Number: 05966/2014
Judge: William B. Rebolini

MEMORANDUM

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

In the Matter of the Application of
Bryan Joles and Melissa Joles,

Petitioners/Plaintiffs,

for a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

- against-

Board of Zoning Appeals of the
Town of Brookhaven and Town of Brookhaven

Respondents/Defendants.

Motion Sequence No.: 001; CD; DISP SUBJ
Motion Date: 4/18/14
Submitted: 7/2/14

Index No.: 05966/2014

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In this hybrid Article 78 proceeding and action for declaratory relief petitioners/plaintiffs Bryan Joles and Melissa Joles (hereinafter collectively referred to as "Petitioners") seek, among other things, a judgment annulling and reversing a determination of respondent/defendant Board of Zoning Appeals of the Town of Brookhaven (the "BZA") which denied their application for formal subdivision of their two parcels and for related area variances, declaring that the denial amounted to a violation of their rights to equal protection and injunctive relief.

Petitioners, since 1997, have been the owners of the residential property known 64 Inwood Avenue in Selden, New York, which is comprised of two contiguous lots used as one combined parcel on 26,250 square feet of land with 150' feet of lot frontage (the "Parcel"). The Parcel is improved with a single family, one story residence and an attached one-car garage on one lot ("Lot 1") and a 16'x32' in-ground swimming pool and shed on the second lot for which a Certificate of Zoning Compliance was issued in 1973 ("Lot 2"). The Parcel is located in an A-1

residential district ("A-1 District"). Pursuant to the Code of the Town of Brookhaven (the "Code"), section 85-56, parcels in an A-1 District must maintain forty thousand (40,000) square feet of lot area, 175' feet of lot frontage, a minimum side yard of 25' feet, and a total side yard of 75' feet. Thus, the subject Parcel which predates the changes to the Code[1], does not and cannot conform to the new requirement.

In February 2008, petitioners applied to the BZA to subdivide the Parcel which they had purchased as two separate tax lots each with a separate deed and separate tax bill, as well as for related area variances. Specifically, Petitioners' applications sought permission to form a lot of 17,500 square feet with 100 feet of lot frontage and maintain the existing single family dwelling on Lot 1, and to remove the pool and shed to construct a small house forming a 8,750 square foot lot with 50 square feet of lot frontage on Lot 2. Petitioners also sought variances to create a 20' foot side yard on Lot 1 and a 13' foot side yard on Lot 2.

After a public hearing in May 2011 (the "first hearing"), the BZA issued its determination dated July 13, 2011 (the "2011 BZA Determination"), denying the applications because the proposal was substandard insofar as it did not comply with the lot frontage and side yard requirements for the A-1 District. The denial prompted the Petitioners to commence this hybrid Article 78 proceeding and action for declaratory relief. By this court's decision dated September 20, 2013 (the "2013 Decision"), the 2011 BZA Determination was vacated and annulled as arbitrary and capricious because the BZA failed to adhere to prior precedent, without any explanation for reaching a different result on similar facts. The applications were remitted for a new hearing and findings which were to include a discussion regarding the BZA's approval of an almost identical prior application by **Albierti,** the owner of a neighboring property.

In compliance with this court's 2013 Decision, the BZA held a re-hearing on December 11, 2013 at which the Petitioners rested on the record from the first hearing. During the first hearing, the only testimony presented was that of the Petitioners' representative, who, among other things, testified that approvals for the proposed subdivision and variances had already been obtained from the Suffolk County Department of Health. Petitioners' representative also testified that none of the properties within a 500 to 1,000 foot radius of the Petitioners' property conformed to the A-1 District requirements, and that 78% of the lots on Inwood Avenue and 61% of lots within the aforementioned 500 foot radius fit within and conformed to the frontage that the Petitioners' application sought. During the first hearing the representative also pointed out that the BZA had previously denied the substantially similar application of the petitioners' neighbor, which denial, upon petitioning the court in an Article 78 proceeding, was vacated and the BZA ordered by judgment dated December 11, 2007 to grant the application [Costello, J.].

Following the re-hearing, by decision dated February 19, 2014 the BZA again denied the Petitioners' application, adopting and reasserting the original findings and conclusions set forth

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[1]As set forth in this court's 2013 Decision, the zoning for the area was changed in 1988 to one acre residential.

in its 2011 Determination (the "2014 Determination"). With regard to the neighbor's nearly identical application, the BZA explained that the grant of that application was "not ultimately resolved on the merits but settled as a result of litigation constraints, including litigation costs and/or the quality of the underlying record [and thus] does not constitute board action or precedent." The instant motion ensued which seeks an annulment of the 2014 Determination and a remand of the application to the BZA directing it to grant the applications.

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]).

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 [2004]; ***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***, *supra*; ***Matter of Sasso v Osgood***, *supra*; ***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]).

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***, *supra*; ***Matter of Cowan v Kern***, 41 NY2d 591, 394 NYS2d 579 [1977]), 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]; ***Matter of Ferraris v Zoning Bd. of Appeals of Vil. of Southampton***, 7 AD3d 710, 776 NYS2d 820 [2d Dept 2004]). However, "[a] decision of an administrative agency which 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" (***Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appears of Town of Huntington***, 97 NY2d 86, 93, 735 NYS2d 873 [2001]; ***Matter of Knight v Amelkin***, 68 NY2d 975, 977, 510 NYS2d 550 [1986]; ***Matter of Charles A. Field Delivery Serv., Inc.***, 66 NY2d 516, 517, 498 NYS2d 111 [1985]; ***Matter of Lucas v Board of Appeals of Vill. of Mamaroneck***, 57 AD3d 784, 785, 870 NYS2d 78 [2d Dept 2008]). "Thus, where, as here a zoning board is faced with an application that is substantially similar to a prior application that had been previously determined, the zoning board is required to provide a rational explanation for reaching a different result" (***Matter of Lucas v Board of Appeals of Vill. of Mamaroneck***, *supra*). "[T]o justify a departure from a prior determination, there must be a change of circumstances sufficient to justify the contrary result–i.e., that there were substantive differences between the applications or that there has been some other material change in circumstances (such as a change in the character of the neighborhood) to justify the different decision" (***Matter of Lucas v Board of Appeals of Vill. of Mamaroneck***, 14 Misc 3d 1214[a], *8, 836 NYS2d 486 [Sup Ct, Westchester County 2007], *affd* 57 AD3d 784, 870 NYS2d 78 [2d Dept 2008]).

The reason cited by the BZA to justify denying the Petitioners' application does not support that there was a material change in circumstances to warrant a different result from the neighbor's application. Indeed, the only explanations articulated for the difference between the Petitioners' application and the neighbor's previously granted application are that in the latter case the arguments and proffered papers were more persuasive and that the case was resolved by a judgment, which, the court notes, the BZA did not appeal.

Administrative due process prohibits inconsistent treatment of similarly situated parties (*see* ***Matter of Knight***, *supra*; ***Exxon Corp. v Board of Standards & Appeals of City of N.Y.***, 128 AD2d 289, 515 NYS2d 768 [1987], *lv denied* 70 NY2d 614, 524 NYS2d 676 [1988]). Moreover, there is no evidence that the grant of the requested subdivision and side yard variances would have an undesirable effect on the character of the neighborhood, adversely impact on physical and environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community (*see* Town Law § 267-b[3][b]). Indeed, the record reveals that the community average for frontage and side yards was nonconforming and similar in size and frontage to the Petitioners' proposal (*see* ***Matter of Daneri v Zoning Bd. of***

Appeals of the Town of Southold, 98 AD3d 508, 949 NYS2d 180 [2d Dept 2012]). Therefore, the BZA's 2014 Determination must be annulled as arbitrary and capricious.

Accordingly, the petition is granted to the extent that the application is remanded to the BZA with direction to grant the applications to subdivide the Parcel and for the related area variances. The remainder of the petition seeking declaratory and injunctive relief, and a refund of penalty and fees, is denied.

Submit judgment.

Dated: 1/9/2015

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

✓ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**