Raso v Zoning Bd. of Appeals of the Vil. of Belle Terre
2015 NY Slip Op 31592(U)
July 27, 2015
Supreme Court, Suffolk County
Docket Number: 00435/2015
Judge: Thomas F. Whelan
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.

MEMO DECISION & ORDER

INDEX No. 00435/2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATES: 02/27/15; 03/18/15
SUBMIT DATES: 06/05/15
Mot. Seq. # 003 - MG; Settle Judgment
Mot. Seq. # 004 - MD
CDISP YES

JEFFERY RASO AND GERI MARIE RASO, Petitioners, for a Judgment under CPLR Article 78, -against- ZONING BOARD OF APPEALS OF THE VILLAGE OF BELLE TERRE, AND THADDEUS PETER LUCKI, Respondents.	BRACKEN - MARGOLIN Attys. For Petitioners 1050 Old Nichols Road Suite 200 Islandia , NY 11749 O'BREIN & O'BRIEN Attys. For Respondent ZBA 168 Smithtown Blvd. Nesconset, NY 11767 LIEB AT LAW Attys. For Proposed Intervenor 376-A Main Street Center Moriches, NY 11934

Upon the following papers numbered 1 to 1-20 read on the petition and supporting papers numbered 1-3; , answer return and opposing papers numbered 4-5- and 6-7; and the replies thereto numbered 8-9 -10;11; and 12-13; and upon the separate Order to Show Cause dated March 3, 2015 of the proposed the intervenors and supporting papers: 14 -16; Opposing papers 17-18 ; Reply papers 19-20 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#004) by non-parties to this action, namely, George Wissman, Donna Wissman, Edmond Desmond and Sandra Lambert, is considered under CPLR 7802(d) and 104 and is denied; and it is further

ORDERED that the petition (#003) served and filed in this Article 78 proceeding is considered thereunder and the relevant provisions of the Village Law and is granted and the matter remitted back to the respondent ZBA for the issuance of the modified variances requested by the petitioners.

The petitioners commenced this Article 78 proceeding for a judgment annulling and setting aside the December 9, 2014 determination of the respondent, ZBA of the Village of Belle Terre [hereinafter ZBA] which denied the petitioners' request for a lot area variance and front and rear yard set back variances and a judgment granting said variances. The petitioners are contract vendees of a certain parcel of property located in the Village of Belle Terre, which is owned by respondent, Thaddeus Peter Lucki. The subject premises consists of an unimproved single lot of 32,497 square feet that is located in a residential district which requires a minimum lot size area of 40,000 square feet. The lot area variance sought is thus a 25% variant of the one acre requirement as measured above.

The petitioners contend that the subject lot is the only non-conforming lot in the Village that has not been developed with a single family residence. The petitioners attribute this circumstance to the development of some 26 substandard lots in the village by the grant of variances to other homeowners, eleven of which were greater than those sought by the petitioners and to the single but separate doctrine which was incorporated into the zoning code of the Village of Belle Terre some time after its enactment in 1952, under which numerous other substandard lots were developed with single family residences. The petitioners' premises do not, however, qualify for the statutory exception due to the prior joinder of the subject lot with an adjacent lot under the ownership tenure of a former property owner. This extinguishment of the single but separate character of the lot necessitated the need for the variances at issue in this proceeding.

The respondent ZBA conducted two public hearings on the variances application in October and December of 2014. Thereat, the petitioners modified their application from that originally advanced which called for the relocation of the garage under the dwelling thereby reducing the size of both the front and rear set back variances. The petitioners presented evidence of their needs and how they fit within the character of the surrounding neighborhood and other factors relevant to the application while neighbors spread their opposition to the application on the record. At a closed door session conducted by the respondent ZBA on December 9, 2014, the five member board voted to deny the application by a vote of 3 to 2.

In the petition served herein, the petitioners challenge the respondent's determination as arbitrary, capricious and without having support in the record. The answer, return and other opposing submissions of the respondent ZBA were filed on the petition's adjourned return date of March 13, 2015. Also returnable on that date, was a motion by four non-party neighbors who seek leave to intervene herein in an apparent attempt to aid the respondent ZBA to fend off the petitioner's challenges to its December 9, 2014 determination to deny the subject variances. One of the proposed intervenors, namely, George Wissman, is not only a neighbor but a ZBA member who voted to deny the application.

Without amending their petition, the petitioners' challenges to the December 9, 2014 determination to deny the requested variances dramatically changed based upon information contained in the moving papers of the Wissmans and the others seeking leave to intervene in this proceeding. This change in the position of the petitioners is reflected in the affirmation of their counsel dated April 14, 2015, and in a "memorandum of law in further support of the petition" which was filed on April 15, 2015

and in a "reply memorandum of law" dated June 4, 2015 which was filed with the court on June 8, 2015. Therein, the petitioners assert through their counsel that George Wissman's vote to deny the variances was a nullity because he failed to disclose his interest in the application which he now claims is pecuniary in nature due to his ownership of the lot across the street, and for other misconduct violative of laws and ordinances governing the conduct of board members. Although the respondent ZBA had the opportunity to respond to the petitioners' April 14 and April 15, 2015 submissions and did so by opposing papers dated May 8, 2015, it had no opportunity to respond to the petitioner's "reply memorandum" of June 4, 2015, which was received by the court on June 8, 2015, three days after the last adjourn date of the petition of June 5, 2015. The court declines to address all new matters raised therein, including the arguments challenging George Wissman's qualification and/or eligibility to vote on the subject application.

First considered is the motion, now numbered 004,[1] by the non-party neighbors for leave to intervene in this Article 78 proceeding in an effort to defeat the petitioners' claims for relief. For the reasons outlined below, the motion is denied.

The instant application to intervene is governed, procedurally, by CPLR 1014, which provides as follows: "[a] motion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought". Here, the moving papers are unaccompanied by a proposed pleading by the proposed intervenors thereby warranting a denial of the motion as violative of the mandate of CPLR 1014 (*see* ***Zehnder v State***, 266 AD2d 224, 697 NYS2d 347 [2d Dept 1999]).

Even if it were otherwise, the court finds no basis to grant the application on its merits. Such application is governed, substantively, by CPLR 7802(d), which provides simply that the Court may permit "other interested persons to intervene" in a proceeding pursuant to CPLR Article 78 and such application is a matter addressed to the sound discretion of the Court (*see* ***Matter of White v Plandome Manor***, 190 AD2d 854, 593 NYS2d 881 [2d Dept 1993]). While the discretion of the court is broader under CPLR 7802(d) than that employed under CPLR 1012 and 1013, the proposed intervenor must indeed be an "interested person" (*see* ***Elinor Homes Co. v St. Lawrence***, 113 AD2d 25, 494 NYS2d 889 [2d Dept 1985]). Here, the interests of the proposed intervenors are not sufficient to warrant their participation as respondents in this Article 78 proceeding which is now ripe for a summary determination of the type contemplated by CPLR 7804 and CPLR Article 4. None of the proposed intervenors have an ownership, use, possessory or other interest in the parcel for which the subject area variances are requested. The mere fact that the proposed intervenors own nearby parcels does not warrant their intervention as the subject matter of this action is area variances and not any type of use permit or variances (*see* ***Farfan v Rivera***, 33 AD3d 755, 823 NYS2d 199 [2d Dept 2006]; *cf.*, ***Doyle & Doyle, Inc. v Rush***, 241 AD2d 494, 661 NYS2d 523 [2d Dept 1997]).

---

[1] The Justice first assigned to this matter recused himself by order dated April 21, 2015 and the matter was thereafter re-assigned to the civil case inventory of this court. The petition was renumbered motion sequence 003 and the motion to intervene was renumbered 004. Both were marked submitted on June 5, 2015.

Next considered is the petition (#003) served in filed by the petitioners for relief pursuant to CPLR Article 78. Upon its review of the record adduced thereon, the relief requested is granted to the extent that the determination of December 9, 2014 is annulled and the matter remitted back to the respondent ZBA for the issuance of the modified variances requested, namely, the reduction of total lot acreage by 25% and a reduction of the rear yard setback from 90 feet to 60 feet.

It is well settled that "[t]he determination of a local zoning board is entitled to great deference, and will be set aside only if it is illegal, arbitrary and capricious, or irrational" (***Matter of Birch Tree Partners, LLC v Nature Conservancy***, 122 AD3d 841, 842, 996 NYS2d 693 [2d Dept 2014]; *see* CPLR 7803[3]; ***Matter of Pecoraro v Board of Appeals of Town of Hempstead***, 2 NY3d 608, 613, 781 NYS2d 234 [2004]). And while the determination of a local zoning board is entitled to great deference, and will be set aside only if it is illegal, arbitrary and capricious, or irrational, the procedural mandates imposed upon the board's determination must be observed (*see* ***Matter of Birch Tree Partners, LLC v Nature Conservancy***, 122 AD3d 841 *supra*). Nevertheless, "conclusory findings of fact are insufficient to support a determination by a zoning board of appeals, which is required to clearly set forth 'how' and 'in what manner' the granting of a variance would be improper" (*see* ***Cacsire v City of White Plains Zoning Bd. of Appeals***, 87 AD3d 1135, 930 NYS2d 54 [2d Dept 2011]; *quoting* ***Matter of Gabrielle Realty Corp. v Board of Zoning Appeals of Vil. of Freeport***, 24 AD3d 550, 550, 808 NYS2d 258 [2d Dept 2005]).

"When determining whether to grant an application for an area variance, a Village zoning board of appeals, pursuant to Village Law § 7–712–b(3), must 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" (***Affordable Homes of Long Island, LLC v Monteverde***, 128 AD3d 1060, 10 NYS3d 283 [2d Dept 2015]; *quoting* ***Matter of Allstate Props., LLC v Board of Zoning Appeals of Vil. of Hempstead***, 49 AD3d 636, 636–637, 856 NYS2d 130 [2d Dept 2008]; *see* ***Matter of Pecoraro v Board of Appeals of Town of Hempstead***, 2 NY3d 608, 612, *supra*; ***Matter of Rivero v Voelker***, 38 AD3d 784, 785, 832 NYS2d 616 [2d Dept 2007]). A Village board of zoning appeals must also 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 other method, other than an area variance, feasible for the applicant to pursue, (3) the required 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" (***Affordable Homes of Long Island, LLC v Monteverde***, 128 AD3d 1060, *supra*; *quoting* ***Matter of Rivero v Ferraro***, 23 AD3d 479, 480, 808 NYS2d 111 [2d Dept 2005]; *see* Village Law § 7–712–b[3]; ***Matter of Allstate Props., LLC v Board of Zoning Appeals of Vil. of Hempstead***, 49 AD3d 636, 637, *supra*).

Here, there is ample evidence that the respondent ZBA engaged in the necessary balancing test in arriving at its determination to deny the requested variances, as modified by the petitioners at the public hearing (*see* Exhibit 10 attached to the respondent's return) and that the five member board agreed only on the fact that the benefit sought by the applicant could not be achieved by some other available

and feasible method, other than an area variance, and that the variances were substantial (*see* Findings attached as Exhibit 1 to the respondent's return). With respect to the remaining statutory factors, the board indicated that the opinions of its members were split (*see id.*). The application was then denied upon a vote of the board's five members. The court however finds that the determination to deny the variance was arbitrary and capricious.

The record is devoid of evidence that undesirable change in the character of the neighbor or a detriment to nearby properties would be created by the granting of the area variance or that proposed variance would have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district. The record was likewise devoid of any evidence that the proposed variance would have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district. To the extent that the board determined the existence of undesirable changes and adverse physical or environmental impacts and relied thereon in its determination to deny the area variances, such reliance was arbitrary and capricious due to a lack of support in the record.

Similarly, the record is devoid of evidence that the finding of substantiality was predicated upon a consideration of the totality of the relevant circumstances including that the Village is comprised of but one zoning district, providing only for single family residences on lots with a minimum lot area of 40,000 square feet, that the petitioners' lot is the sole remaining undeveloped lot and that many of the existing homes fail to meet the minimum lot area and/or set back requirements due to the prior grant of variances or the application of the single but separate ordinance exception (*see* ***Daneri v Zoning Bd. of Appeals of Town of Southold***, 98 AD3d 508, 949 NYS2d 180 [2d Dept 2012]). Also rejected as arbitrary and capricious is the respondent's use of an enlarged measure of the minimum square foot acreage requirements from 40,000 square feet (a builder's acre) to 43,650 which enlarged the size of the requested variances so as to justify the substantiality finding (*see* Village Zoning Code §170-1; §170-7; *see also* Table 1 attached to Village Code §99-4). In addition, the respondent ZBA's failure to expressly distinguish prior relevant determinations to grant area variances of the type sought here further renders its finding of substantiality arbitrary and capricious (*see* ***Campo Grandchildren Trust v Colson***, 39 AD3d 746, 834 NYS2d 295 [2d Dept 2007]; *see also* ***Olson v Scheyer***, 67 AD3d 914, 889 NYS2d 245 [2d Dept 2009]). Finally, it appears that the determination to deny the variances rested not upon the evidence adduced at the hearing, but instead, upon the subjective considerations of generalized community opposition (*see* ***Matter of Quintana v Board of Zoning Appeals of Inc. Vil. of Muttontown***, 120 AD3d 1248, 992 NYS2d 332 [2d Dept 2014]). In sum, the board's determination was predicated upon conclusory findings which did not set forth the "how" and "in what manner" the granting of the variances would be improper (*see* ***Cacsire v City of White Plains Zoning Bd. of Appeals***, 87 AD3d 1135, *supra*).

The court, however, rejects the petitioners' contentions that the petition should be granted due the existence of disqualifying conflicts of interest and certain conduct engaged in by board member George Wissman for the reasons advanced in the opposing papers dated May 8, 2015 and because these claims were not advanced in the petitioners' pleading.

In view of the foregoing, the petition is granted and the matter is remitted to the respondent ZBA for the issuance of the modified variances requested by the petitioners at the proceedings conducted before the board.

Settle judgment.

DATED: 7/27/15

THOMAS F. WHELAN, J.S.C.