

Matter of Kuhbier v Town of Carmel Zoning Bd. of Appeals

2017 NY Slip Op 33137(U)

March 2, 2017

Supreme Court, Putnam County

Docket Number: 1320-2016

Judge: Paul I. Marx

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF PUTNAM
HON. PAUL I. MARX, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

-----X
In the Matter of the Application of
ANDREAS KUHBIER and DENISE KUHBIER,

ORDER AND JUDGMENT

Petitioners,

Index No: 1320-2016

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

-against-

THE TOWN OF CARMEL ZONING BOARD OF APPEALS and RAED AUDAH,

Respondents.
-----X

PUTNAM COUNTY
CLERK
2017 MAR -6 AM 9:02

The following papers numbered 1 through 10 and the attached exhibits were read in this Article 78 proceeding seeking an order and judgment annulling the Decision and Order of Respondent Town of Carmel Zoning Board of Appeals ("Zoning Board") granting variances to Respondent Raed Audah:

Notice of Petition/Petition/Affirmation of John Gifford Molloy, Esq. ¹ /Exhibits A-C	1-3
Verified Answer of Respondent Raed Audah ²	4
Affirmation of William A. Shilling, Jr., Esq. in Opposition/Exhibits A-C	5
Answer of Respondent Town of Carmel Zoning Board of Appeals	6
Affidavit of Michael Carnazza, Building Inspector and Director of Code Enforcement	7
Respondent Town of Carmel Zoning Board of Appeals' Memorandum of Law in Opposition	8
Certified Return of Respondent Zoning Board of Appeals/Exhibits A-O	9
Affirmation of John Gifford Molloy, Esq. in Support in Reply to Opposition/Exhibit A	10

Upon reading the foregoing papers it is ORDERED that the Petition is denied for the reasons which follow.

¹ Petitioners' counsel's affirmation will not be considered because it is not signed.

² Counsel for Respondent Raed Audah included a signature line for his signature on the last page of the Verified Answer, but counsel did not sign the document. Counsel's failure to sign does not render the Verified Answer defective because it was properly verified by Respondent Raed Audah.

BACKGROUND

Petitioners Andres Kubhier and Denise Kubhier brought this Article 78 proceeding to challenge the Decision and Order issued by the Zoning Board, which granted a side-yard setback variance to Petitioners' neighbor Respondent Raed Audah in connection with his proposed construction of a second floor addition to his single family home in Mahopac, New York. Audah's application also sought area variances from maximum building coverage requirements, maximum fence height requirements and rear yard setback requirements. The additional variances sought by Audah were denied by the Zoning Board. The side yard variance granted by the Zoning Board permits Audah to construct a second story addition 9 feet 6 inches from the side property line instead of the required 15 feet in the Town's Zoning Code.

DISCUSSION

Petitioners allege in their Petition that the Zoning Board's Decision and Order, to the extent that it granted the side yard variance and second story addition, was arbitrary and capricious and in violation of Carmel Town Zoning Code §§ 156.47 and 156.48.

Petitioners' arguments rely principally upon their contention that Respondent Audah's property qualifies as a nonconforming use. Petitioners assert that Audah's house, which was built in 1950 before the Town Code was enacted in 1955, is 2 feet 3 inches from the side yard boundary, whereas the Code requires a 15 foot setback. Petitioners contend that this makes the property a nonconforming use. Petitioners have not pointed to anything in the record to show that the property was identified by the Town as a nonconforming use.

The Town Code defines "nonconforming use" as "[a] use of a building or of land that does not conform to the regulations as to use in the district in which it is situated." *Id.* The Town Code defines "use, principal" as "[t]he primary purpose for which land, water or building or structure is used, designed, arranged, intended or for which it is or may be occupied or maintained." Carmel Town Code § 156-40.

The Building Inspector states in his affidavit in opposition that Respondent Audah's property does not qualify as a nonconforming use because it is being used as single family residential, which conforms to the "R" zone designation where it is located. The Building Inspector further attests that Audah did not seek permission to change the permitted "use" of the property; his application sought an area variance.

Building upon their erroneous contention that Audah's property is a nonconforming use, Petitioners assert in their Petition that §§ 156-47 and 156-48 of Article V of the Town Code, entitled "Nonconforming Uses", render the Zoning Board's Decision and Order null and void.

Section 156-47 of the Town of Carmel Code, which is entitled "Continuation", reads as follows:

A. Except as provided in § 156-50 hereinafter,³ any type of nonconforming use of buildings or land may be continued indefinitely, but shall not be:

(1) Enlarged or structurally altered, extended or placed on a different portion of the lot or parcel of land occupied by such use on the effective date of this chapter or of any applicable amendment thereof, nor shall any external evidence of such use be increased by any means whatsoever, except whereby, through such alteration, it is changed to a conforming use.

(2) Changed to another nonconforming use without approval from the Board of Appeals and then only to a use which, in the opinion of said Board, is of a more restricted nature.

(3) Reestablished after the physical operation thereof has ceased for a period of one year for any reason. Intent to resume active operation of nonconforming use after cessation thereof shall not confer the right to do so.

B. The lot area of any nonconforming use shall not be reduced if it is nonconforming. If the lot is of conforming area and dimensions, it shall not be reduced to a nonconforming area or dimensions.

Petitioners "concede [in their Reply papers] that Carmel Town Code § 156-48 only applies to buildings which house a non-conforming use ...", but they continue to assert that § 156-47 applies to Audah's application. Reply Affirmation of John G. Molloy at ¶ 33.

Petitioners' convoluted argument as to why § 156-47 would apply while § 156-48 does not apply is much too tortured to bear repeating. Simply put, Petitioners have not presented anything to refute the Building Inspector's statement that Audah's property does not qualify as a nonconforming use, therefore, the provisions of the Town Code relating to nonconforming uses have no application to the instant matter. Accordingly, the Zoning Board's decision not to apply § 156-47 to Audah's area variance application was not arbitrary and capricious

³ Section 156-50 provides an exception for maintenance and repair.

Criteria for Area Variance

Petitioners argue, in the alternative, that the Zoning Board failed to properly evaluate Audah's application under Town Law § 267-b(3)(b), using the five criteria applicable to area variances. Specifically, Petitioners contend that the length of the discussion at the hearing concerning the second story addition shows that the Zoning Board did not give the matter a "hard look".⁴

Petitioners' argument that the Zoning Board did not give adequate consideration to Audah's application is without merit. Town Law § 267-b(3)(b) enumerates five criteria which "the board shall consider" in determining whether to grant a variance. That section reads as follows:

In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also 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.

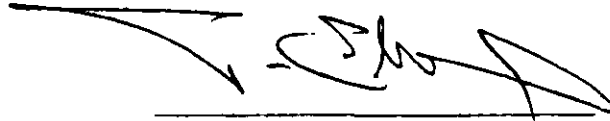
The record shows that the Zoning Board combined its discussion of the second story addition with the related side yard setback, which the applicant had reduced to a variance of 5 feet 6 inches, and determined that the reduction in the set back and the fact that other houses in the neighborhood had second floors warranted granting the variance. All of Petitioners' arguments have been considered and determined to be without merit. The Court finds no basis for annulling the Zoning Board's Decision and Order.

⁴ Petitioners complaint that the Zoning Board did not provide a certified transcript of its proceedings has no merit. The Zoning Board filed a Certified Return, which the Secretary certified as the record of the proceedings.

Accordingly, the Petition is denied.

ENTER,

Dated: Carmel, New York
March 2, 2017



HON. PAUL I. MARX, J.S.C.

Matter of Andres Kubhier and Denise Kubhier v Town of Carmel Zoning Board of Appeals and Raed Audah, Index No. 1320/2016

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