

Matter of De Francesco v Perlmutter
2018 NY Slip Op 31128(U)
May 4, 2018
Supreme Court, Richmond County
Docket Number: 80076/17
Judge: Jr., Orlando Marrazzo
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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In the Matter of the Application of
JAMES DE FRANCESCO

Petitioner,

For An Order and Judgment
Pursuant to Article 78 of the Civil Practice
Laws and Rules

-against-

MARGERY PERLMUTTER, Chairperson,
SHAMPA CHANDA, Vice-Chairperson,
DARA OTTLEY-BROWN and EILEEN MONTANEZ,
Commissioners, constituting the BOARD OF STANDARDS
AND APPEALS OF THE CITY OF NEW YORK,
And the DEPARTMENT OF BUILDINGS OF THE
CITY OF NEW YORK,

Respondents.

DCM Part 21
Present:
Hon. Orlando Marrazzo

DECISION AND ORDER

Index No. 80076/17

Motion No. 3391-001

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The following papers numbered 1 to 4 were marked submitted on the 16th day of January, 2018:
Pages Numbered

Order to Show Cause
By Petitioner, with Supporting Papers and Exhibits
(dated August 18, 2017)1

Verified Answer
(dated January 12, 2018).....2

Respondents’ Memorandum of Law in Opposition to the Petition
(dated January 15, 2018).....3

Hearing Exhibits (Volume I) and Transcripts of Hearings (Volume II)
(dated January 15, 2018).....4

Upon the foregoing papers, petitioner's application pursuant to CPLR article 78 is granted and the respondent's final determination dated April 4, 2017 and filed on July 25, 2017 is hereby annulled.

As alleged in the Verified Petition, petitioner James DeFrancesco seeks permission to build a new one-family home on an undersized lot (*see* Verified Petition, para 1).

In June of 2016, petitioner applied to the Board of Standards and Appeals (hereinafter "BSA") for a zoning variance to permit the erection of a one-family home on a vacant lot having 3,400 square feet while the applicable zoning resolution¹ sets forth a minimum lot area of 3,800 square feet (*id.* at 1, 11). In support of his application, petitioner provided,² *inter alia*, that (1) the subject premises previously had a detached one-family home, which was destroyed by a fire in 1979³; (2) under the applicable zoning law⁴ effective prior to December 8, 2005, the home being proposed could have been built "as-of-right" without any variance; and (3) the December 8, 2005 change to the zoning resolution was promulgated to prevent developers from subdividing zoning lots to erect multiple buildings on small lots, and therefore, it was never intended to burden lots such as those owned by the petitioner (*id.* at 14-20). Finally, petitioner contends that absent a variance, the subject premises, being 400 square feet too small, is undevelopable. The only alternative is to combine the subject premises with the neighboring lot owned by petitioner, and create an oversized

¹ The subject premises is located in an R3-1 residential zoning district (*see* Verified Petition, para 6). Pursuant to §107-42 of the New York City Zoning Resolution, the minimum lot size needed to erect a one-family home on the subject premises is 3,800 square feet (*id.*).

² Petitioner also referenced prior BSA decisions in which a variance was granted with similar facts, *i.e.*, variance permitting development of single-family detached residence on undersized lots (*see* Verified Petition, para 22-23).

³ The subject premises was formerly occupied by a residence from 1937 until 1979, when it was destroyed by fire and subsequently demolished (*see* Petitioner's Exhibit "A").

⁴ ZR §107-42

home “completely out of character” with the neighborhood (*id.* at 20). According to petitioner, he owns the vacant lot and the neighboring lot separately and individually (*id.* at 1). While the variance application was pending, the local community board voted 37-0 in favor of granting the variance after a public hearing held on September 27, 2016 (*id.* at 24). The BSA held public hearings on the petitioner’s application on December 6, 2016, February 14, 2017 and April 4, 2017.

On or about April 4, 2017, the BSA voted 2-2, which resulted in a denial of the variance application.⁵ Petitioner now makes the instant application pursuant to Article 78 to annul the denial of the variance application.

Local zoning boards have broad discretion in considering variance applications, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary and capricious, or an abuse of discretion. Thus, a determination of a zoning board should be sustained upon judicial review if it has a rational basis and is supported by substantial evidence. A determination is rational if it has some objective factual basis, and courts consider “substantial evidence” only to determine whether the record contains sufficient evidence to support the rationality of the determination being questioned (*see Matter of Harn Food, LLC v. DeChance*, 159 AD3d 819, *2 [2nd Dept 2018]).

⁵ On the disputed issue regarding the required BSA voting quorum, the Court takes note of §659 of the New York City Charter, which provides that the BSA “shall consist of five members to be termed commissioners to be appointed by the mayor each for a term of six years”. However, §663 of the New York City Charter provides that, “All hearings before the board shall be open to the public and shall be before at least three members of the board, and a concurring vote of at least three members shall be necessary to a decision to grant an application”. Therefore, under §663, the denial of an application for variance, held to require three concurring votes, just as does the grant of a variance, and hence where the board was divided 2-2 on the instant application, no relief could be granted (*see New York City Charter §663, Annotations; see generally Tall Trees Constr Corp v. Zoning Bd of Appeals of Town of Huntington*, 97 NY2d 86, FN4 [2001]; *Matter of Jonas v Stackler*, 95 AD3d 1325, 1326-1327 [2nd Dept 2012]).

In considering an application for area variances, a zoning board is required to engage in a balancing test, weighing the benefit to the petitioner against the detriment to the health, safety, and welfare of the neighborhood or community if the area variances are granted. In particular, a zoning board must consider: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to a 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 (*see* Town Law §267-b[3][b]; *see also* New York City Zoning Resolution §72-21; *see Matter of Harn Food, LLC v. DeChance*, 159 AD3d 819, *4 [2nd Dept 2018]); *Matter of Caspian Realty, Inc v. Zoning Bd of Appeals of Town of Greenburgh*, 68 AD3d 62, 72-73 [2nd Dept 2009]).

Here, petitioner maintains that the subject premises has unique physical conditions resulting in practical difficulties, as it is the only vacant undersized lot in the area which cannot be developed as-of-right, and that there was formerly a house on the subject premises which had been destroyed by a fire (*see* New York City Zoning Resolution §§72-21[a],[b]). On the issue of self-created hardship, petitioner argues that it was not self-created since he purchased the lot in 1987, prior to the 2005 zoning amendment (*see* New York City Zoning Resolution §72-21[d]). Despite petitioner's contentions, the respondents used the hearing to emphasize feasible alternative uses of the land that

did not require a variance, i.e., petitioner's option to enlarge his existing home onto the adjoining vacant lot, or build an attached home, and have two semi-attached homes on the lots (*see* Town Law §267-b[3][b][2]).

In any event, the hearing transcripts were devoid of any indication of the respondents' consideration of the elements of the necessary balancing test. There was no evidence that the grant of the variance would have an undesirable effect on the character of the neighborhood or adversely impact on physical and environmental conditions (*see* New York City Zoning Resolution §72-21[c]; Town Law §267-b[3][b][1], [4]), or otherwise result in a detriment to the health, safety, and welfare of the neighborhood (*see Matter of Daneri v. Zoning Bd of Appeals of the Town of Southold*, 98 AD3d 508, 510 [2nd Dept 2012]; *Matter of Hannett v. Scheyer*, 37 AD3d 603, 604-605 [2nd Dept 2007]).

Based on the foregoing, the Court finds the BSA's determination denying the variance to be arbitrary and unsupported by substantial evidence. The respondents failed to demonstrate that the determination was grounded upon a rational basis due to its failure to consider the elements of the necessary balancing test (*compare Matter of Harn Food, LLC v. DeChance*, 159 AD3d 819, *2).

Accordingly, it is hereby

ORDERED that the Verified Petition pursuant to Article 78 is granted; and it is further

ORDERED that the Respondents' final determination dated April 4, 2017 and filed on July

25, 2017 is hereby vacated and annulled; and it is further

ORDERED that the petitioner's application for a variance is hereby granted; and it is further

ORDERED that the Clerk enter judgment in accordance herewith.

ENTER,

/s/ Orlando Marrazzo, Jr.

J.S.C.

DATED: May 4, 2018