Propper v Zoning Bd. of Appeals of the Vil. of Westhampton Beach
2020 NY Slip Op 30069(U)
January 8, 2020
Supreme Court, Suffolk County
Docket Number: 03055/2019
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Ginger Propper,

Petitioner,

-against-

Zoning Board of Appeals of the Village of Westhampton Beach, Brad Hammond, as Building Inspector of the Village of Westhampton Beach, and Schlusselberg Family Limited Partnership,

Respondents.

Motion Sequence No.: 001; MD; CD
Motion Date: 6/28/19
Submitted: 8/28/19

Index No.: 03055/2019

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Clerk of the Court

Upon the following papers read on this application by petitioner to vacate and annul a determination of respondent Zoning Board of Appeals of the Village of Westhampton Beach: Notice of Article 78 petition dated June 7, 2019, Verified Petition dated June 7, 2019 and Exhibit A annexed thereto; Verified Answer of respondents Zoning Board of Appeals of the Village of Westhampton Beach and Building Inspector of the Village of Westhampton Beach dated June 20, 2019, Administrative Return dated June 20, 2019, Memorandum of Law of respondents Zoning Board of Appeals of the Village of Westhampton Beach and Building Inspector of the Village of Westhampton Beach dated July 23, 2019; Memorandum of Law of respondent Schlusselberg Family Limited Partnership dated July 24, 2019; Memorandum of Law of Petitioner dated July 23, 2019; it is

ORDERED that the petition is dismissed.

In this Article 78 proceeding, petitioner Ginger Propper ("Propper" or "petitioner"), the owner of real property located at 16 East Division Street, Westhampton Beach, New York, seeks an order vacating and annulling the determination of respondent Zoning Board of Appeals of the Village of Westhampton Beach ("ZBA") dated January 17, 2019, adopted May 16, 2019, and filed with the Village Clerk on May 17, 2019 ("the determination"), which granted area variances to the property located at 24 East Division Street, Westhampton Beach (the "subject property"). The subject property is owned by the Schlusselberg Family Limited Partnership ("the SFLP"), is contiguous to petitioner's property, and is located in an R-1 zoning district. The determination granted area variances reducing the required side yard from thirty feet to twenty feet along the SFLP's northerly lot line separating petitioner's and the SFLP's property, when the Village Code §197-6.D requires a minimum side yard width of thirty feet, authorizing the placement of more than 6 inches of fill within five feet of the northerly and westerly lot lines adjacent to petitioner's property, when Village Code §197-27.D does not permit fill of more than six inches to be within ten feet of any property line, and allowing a terrace to be located in a side yard, when Village Code §197-35.A only permits accessory structures in the rear yard. Petitioner alleges herein that the granting of the area variances for the subject property constitute violations of Village Law §7-712-b [2] and §7-712-b [3] and Westhampton Beach Village Code ("Village Code") §197-6.D, §197-27.D and §195-35.A. Petitioner further alleges the construction and use of the proposed one-family dwelling on the subject property will cause injury to petitioner's property and negatively impact petitioner's quality of life. Petitioner also seeks an injunction *pendente lite* enjoining respondent Building Inspector of the Village of Westhampton Beach ("village inspector") from issuing a building permit authorizing the construction of a single family dwelling pursuant to the plans submitted by the SFLP and approved by the ZBA, pending a determination herein.

The subject property was purchased by the SFLP from Michael Rosen on May 22, 2018. The easterly boundary of the subject property abuts the Moneybogue Canal, and one percent or 176 square feet of the subject property is part of the Moneybogue-Moriches Bay Wetlands Complex regulated by the New York Department of Environmental Conservation ("NYSDEC"). The subject property was a pre-existing non-conforming structure in that the residence was set back only 41.8 feet from the wetlands, while the NYSDEC requires a minimum setback distance of 75 feet. On May 4, 2018, the prior owner of the subject property received a NYSDEC title wetlands permit to demolish the existing one story single-family dwelling and construct a new dwelling, entry deck, covered deck, and sanitary system, all within the same footprint as the pre-existing nonconforming structure. The SFLP alleges that the new NYSDEC permit required the SFLP to set the new home and pool further back from the tidal wetlands area but closer to the property line shared by petitioner. According to the SFLP, the NYSDEC would not allow the proposed home to remain in its prior location, which was a pre-existing nonconforming residence. Petitioner alleges that the NYSDEC approval complied with all existing village zoning setbacks and NYSDEC approved wetland setbacks.

The SFLP alleges that it applied for the variances in order to set the proposed home as far back from the wetlands as possible, while still providing a suitable setback from petitioner's property line. It is claimed that the NYSDEC wetland setbacks from the south required the new house to be located as far to the north of the property as possible while the Village Code's side-yard setback from the northern side lot line required a thirty foot setback south of that lot line. The SFLP proposed a compromise whereby the residence would be constructed further from the wetlands and within twenty feet from the northern lot line, with a terrace partially on the south side of the house in a side yard, and a proposed sanitary system on the northwestern portion of the lot with placement of fill within five feet of the northern and western lot lines. The SFLP amended its original plans to locate the pool to a conforming location within the rear yard.

By decision dated January 17, 2019, the ZBA adopted a decision purporting to grant SFLP's variance application pursuant to Village Law §7-712-b and Village Code §197-75. The January 17, 2019 decision was superceded by a new decision adopted four months later on May 16, 2019[1] by the ZBA, which new decision reiterated the conclusions of the ZBA January 17, 2019 decision. The ZBA determined that "on balance, the Board finds that the benefits to the applicants (and to the Village as a whole) outweigh the detriments, if any, to the community." Specifically, the ZBA noted that given "the property's constraints, in particular the wetlands to the south, the applicant has made an effort to locate a relatively modest-sized home in the most suitable location, by orienting the house lengthwise from wet to east (and keeping it to a narrow 22.7-foot width), and as far north, away from the wetlands, as practicable. The result, however, is the need for a 10-foot variance from the 30-foot setback requirement from the northern lot line...the Board has in the past found it appropriate to relax required setbacks in order to maximize environmental setbacks, such as setbacks from wetlands, waterways, or dunelands. In this case, the 10-foot relaxation of the northerly setback, combined with the east-west orientation of the road, allows the applicant to achieve a 62.8-foot setback from the wetlands, a setback which the NYSDEC has approved under its wetlands jurisdiction."

The ZBA further found that the fill variance would not negatively impact the character of the surrounding neighborhood and that the "placement of the fill is necessary to accommodate a modern sanitary system in the most environmentally-sensitive location of the property." The ZBA further found that the terrace variance "will not have any noticeable impacts on the character of the community. That small area is actually located on the portion of the property that will be least visible to neighbors." The ZBA further found that the SFLP demonstrated that "there are no practical alternatives to achieve the benefits sought without the need for the required variances. Locating the home with a conforming setback to the northern lot line would require an even larger variance from the NYSDEC's wetlands setbacks and would not achieve the added benefit of maximizing wetland protection...such measures will thus result in environmental benefits that inure to the Village as a

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[1]The ZBA did not make a General Municipal Law §239-m referral to the Suffolk County Planning Commission, which nullified the January 17, 2019 determination. Thereafter, the ZBA referred the application to the Suffolk County Planning Commission and after receiving a response that the application was a matter of local determination, it reconsidered the application and adopted a new determination on May 16, 2019.

whole." The ZBA noted that the variances substantiality were "mitigated somewhat by the context of the applications' improvement of certain pre-existing conditions, such as improvement of wetlands compliance and sanitary design." The ZBA acknowledged, however, that the "difficulty is self-created." In sum, the ZBA found that considering the five factors to be weighed, "on balance the Board finds that the benefits to the applicants (and to the Village as a whole) outweigh the detriments, if any, to the community." In reaching its determination, the ZBA considered the arguments raised by the petitioner herein, but did not "find them convincing or sufficient to warrant a denial of the application." Petitioner now challenges the ZBA's determination as arbitrary, irrational, and capricious. Respondents oppose the petition and petitioner replies.

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,*** 2 NY3d 608, 781 NYS2d 234 [2004]; ***Matter of Cowan v. Kern,*** 41 NY2d 591, 394 NYS2d 579 [1977]); ***Matter of Inlet Homes Corp. v. Zoning Board of Appeals of the Town of Hempstead***, 304 AD2d 758, 757 NYS2d 784 [2d Dept. 2003], and its interpretation of its 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 Village of Southampton,*** 7 AD3d 710, 776 NYS2d 820 [2d Dept. 2004]). The court's role in reviewing an administrative decision is limited and the court is not to decide whether the agency's determination was correct or to substitute its own judgment for that of the agency (*see* ***Matter of Sasso v. Osgood,*** 86 NY2d 374, 633 NYS2d 239 [1995]; ***Matter of Chemical Specialities 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] In reviewing an administrative determination, the court's role is to ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious (*see* ***Matter of Peckham v. Calogero***, 12 NY3d 424, 863 NYS2d 751[2009]; ***Matter of Sasso v. Osgood***, 86 NY2d 374, 384-85, 633 NYS2d 259 [1995]; ***Matter of Deerpark Farms v. Agricultural and Farmland Prot. Bd.***, 70 AD3d 1037, 896 NYS2d 126 [2d Dept 2010];*see* ***Matter of Bassano v. Town of Carmel Zoning Bd. of Appeals***, 56 AD3d 665, 868 NYS2d 677 [2d Dept 2008]). A determination is rational "if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition" (***Matter of Halperin v. City of New Rochelle***, 24 AD3d 768, 772, 809 NYS2d 98 [2005]; *see* ***Matter of Ifrah v. Utschig***, 98 NY2d 304, 308, 746 NYS2d 667 [2002]). "When reviewing the determinations of a Zoning Board, courts consider 'substantial evidence' only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination" (***Matter of Sasso v. Osgood***, 86 NY2d 374, 384 n. 2, 633 NYS2d 259 [1995]; *see* ***Matter of Matejko v. Board of Zoning Appeals of Town of Brookhaven***, 77 AD3d 949, 949, 910 NYS2d 123 [2d Dept 2010]; *see also* ***Matter of Campbell v. Town of Mount Pleasant Zoning Bd. of Appeals***, 84 AD3d 1230, 1231, 923 NYS2d 699 [2d Dept 2011])."In applying the arbitrary and capricious standard, a court inquires whether the determination under review had a rational basis...[a] determination will not be deemed rational if it rests on entirely subjective considerations...and lacks an objective factual basis" (***Matter of Kabro Assoc., LLC v. Town of Islip Zoning Bd. of Appeals,*** 95 AD3d 1118, 1119, 944 NYS2d 277 [2d Dept. 2012]; *see also* ***Matter of Abbatiello v. Town of***

North Hempstead Board of Zoning Appeals, 164 AD3d 785, 84 NYS3d 250 [2d Dept. 2018]; ***Matter of Ifrah v. Utschig,*** 98 NY2d 304, 746 NYS2d 667 [2002]; ***Matter of Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburg,*** 68 AD 3d 62, 73, 886 NYS2d 442 [2d Dept. 2009]. It so follows that the determination of a zoning board should be sustained upon judicial review if it is not illegal or arbitrary and capricious, and it has a rational basis (*see* ***Matter of Sasso v. Osgood***, 86 NY2d at 384, 633 NYS2d 259; ***Matter of Carrano v. Modelewski***, 73 AD3d 767, 899 NYS2d 634 [2d Dept 2010]). So long as a rational basis exists, a court may not substitute its own judgment for that of a Zoning Board, even though a contrary determination may be supported by the record, the court would have decided the matter differently, or there are some factors weighing in favor of a different result (*see* ***Matter of Pecorano v. Board of Appeals of Town of Hempstead,*** 2 NY3d 608, 781 NYS2d 234 [2004]; ***Matter of Toys "R" Us v. Silva,*** 89 NY2d 411, 654 NYS2d 100 [1996]; ***Matter of Ferraris v. Zoning Bd. of Appeals of Village of Southampton,*** 7 AD3d 710, 776 NYS2d 820 [2d Dept. 2004]). Further, the court "may not weigh the evidence or reject the choice made by the zoning board 'where the evidence is conflicting and room for choice exists'" (***Matter of Calvi v. Zoning Bd. of Appeals of City of Yonkers***, 238 AD2d 417, 418, 656 NYS2d 313 [2d Dept 1997]).

A zoning board considering a request for an area variance is required 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 area variance is granted (*see* Village Law 7-712-b [3][b]; ***Matter of Pinnetti v. Zoning Bd. of Appeals of Village of Mt. Kisco,*** 101 AD3d 1124, 956 NYS2d 565 [2d Dept. 2012]; ***Matter of Jonas v. Stackler,*** 95 AD3d 1325, 945 NYS2d 405 [2d Dept. 2012]; ***Matter of Colin Realty, LLC v. Town of Hempstead,*** 107 AD3d 708, 966 NYS2d 501 [2d Dept. 2013]***; Matter of Pecorano v. Board of Appeals of Town of Hempstead,*** 2 NY3d 608, 781 NYS2d 234 [2004]; ***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]. A zoning board also must 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 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 (*see* Town Law §267-b [3] [b]; ***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]). While the last factor is not dispositive, neither is it irrelevant (***Ifrah v Utschig***, 98 NY2d 304, 746 NYS2d 667 [2002]). However, 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 Greenburg,*** 68 AD 3d 62, 73, 886 NYS2d 442 [2d Dept. 2009]; ***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]).

Under the circumstances presented, the Court finds that the ZBA's determination was not arbitrary, capricious, nor an abuse of discretion, and had a rational basis (*see* Village Law §7-712-b[3][b]; ***Matter of Merlotto v. Town of Patterson Zoning Bd. of Appeals,*** 43 AD3d 926, 841 NYS2d 650 [2d Dept. 2007]***; Matter of Inlet Homes Corp. v Zoning Board of Appeals of the Town of Hempstead***, 304 AD2d 758, 757 NYS2d 784 [2d Dept. 2003]). The ZBA's determination reveals that it considered the relevant five factors and engaged in the proper balancing test in granting the SFLP's application. The ZBA acknowledged that the variances requested were substantial and self-created, yet when balanced with the remaining factors, the ZBA found that the variances were warranted. Petitioner argues that the ZBA should have denied the application because the hardship was self-created and because the proposed dwelling would cast a shadow over petitioner's trees, "cause thinning of the Cryptomeria screen, law and garden, and result in reduced growth and the potential decline of the trees, causing them to become susceptible to disease and insects." Here, there is no evidence that the granting of the variances would have an undesirable impact on the character of the neighborhood, adversely impact the existing physical and environmental conditions, or be a detriment to the health, safety, and welfare of the neighborhood or community (*see* ***Matter of Wambold v. Village of Southampton Zoning Bd. of Appeals,*** 140 AD3d 891, 32 NYS3d 628 [2d Dept. 2016]; *see also* ***Matter of deBordenave v. Village of Tuxedo Park Bd. of Zoning Appeals,*** 168 AD3d 838 [2d Dept. 2019]). In ***Wambold,*** *supra,* the Second Department affirmed the lower court's dismissal of an Article 78 proceeding commenced by a neighbor of the applicants and agreed with the Zoning Board, finding that "the proposed variance would have a beneficial impact on the environment by eliminating wetlands set-back nonconformities and removing the existing septic system, which is located within the wetlands regulated area" (***Id.*** at 893). The same result is warranted here and supports the ZBA's stated benefits to the environmental and surrounding community.

Petitioner's argument that there were feasible alternatives that might alleviate the need for a variance was rejected by the ZBA in its determination. The ZBA concluded that "locating the home with a conforming setback to the northern lot line would require an even larger variance from NYSDEC's wetlands setbacks and would not achieve the added benefit of maximizing wetland protection. The application demonstrated that there is no viable alternative location or design for the sanitary system that would not require placement of fill within the sanitary system's retaining wall." As expressed by the Second Department in ***Matter of Wambold***, *supra*, a local zoning board can consider the environmental benefit in the balancing test required by Village Law §7-712-b. Further, petitioner's claim that the NYSDEC had approved of the construction of the new home on the same footprint as the existing home, which would not require a side yard variance from the ZBA, was a practical alternative requiring a denial of this variance. However, the ZBA's determination that significant environmental benefits would inure to the Village as a whole by increasing the setback from the wetlands had a rational basis (*see* ***Matter of Schumacher v. Town of E. Hampton, N.Y. Zoning Bd. of Appeals,*** 46 AD3d 691, 849 NYS2d 72 [2d Dept. 2007])(grant of applicant's proposal that would decrease the setbacks from the wetlands was irrational); ***Mann v. Zoning Bd. of Appeals of Town of East Hampton,*** 34 AD3d 588, 825 NYS2d 91 [2d Dept. 2006]). The case ***Matter of Heitzman v. Town of Lake George Zoning Bd. of Appeals,*** 309 AD2d 1126, 766 NYS2d 452 [3d

Dept. 2003] cited by petitioner on this point, is factually distinguishable and moreover, does not involve the environmental issues considered herein by the ZBA.

As to petitioner's claims regarding the pool, the SFLP indicates and insists that the application was amended to move the pool to an area where no variance relief is necessary. The variance on the south side of the subject property was only required for the portion of the terrace that was not within the required setback. Indeed, the ZBA determination grants a variance for the terrace to be located partially in a side yard. In any event, the determination that the location of the pool did not require a variance was made by the building inspector for the Village, to which petitioner did not appeal to the ZBA (*see* ***Matter of Lucas v. Village of Mamaroneck,*** 57 AD3d 786, 871 NYS2d 207 [2d Dept. 2008]; *see also* ***Village of Westhampton Beach v. Cayea,*** 83 AD3d 692, 919 NYS2d 913 [2d Dept. 2011]).

Lastly, petitioner argues that when the ZBA adopted the May 16, 2019 determination, after the January 17, 2019 determination was nullified for the ZBA's failure to refer the application to the Suffolk County Planning Commission under General Municipal Law §239-m, it was required to provide a separate public notice and hold a new public hearing. However, petitioner cites to no statute or case law that requires the ZBA to re-notice the application and conduct a new hearing under the circumstances presented (*cf.* ***Zagoreos v. Conklin,*** 109 AD2d 281, 491 NYS2d 358 [2d Dept. 1985]). The court has considered the remaining arguments of petitioner and finds that they lack merit.

Accordingly, the petition is dismissed.

The foregoing constitutes the ***Decision*** and ***Order*** of this Court.

Dated: 1/8/2020

William B. Rebolini

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

____X____ FINAL DISPOSITION_____ NON-FINAL DISPOSITION