

Matter of Badala v DeChance
2020 NY Slip Op 31964(U)
May 13, 2020
Supreme Court, Suffolk County
Docket Number: 03227/2019
Judge: William G. Ford
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SHORT FORM ORDER

INDEX NO.: 03227-2019

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Submit Date: 08/08/19
Motion Seq: 001 - MD

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DECISION & ORDER

In the Matter of the Application of

SALVATORE BADALA

Petitioner,

PETITIONER'S COUNSEL:
SCHEYER & STERN
Patricia A. Stern, Esq.
110 Lake Avenue South, Suite 46
Nesconset, NY 11767

-against-

PAUL M. DECHANCE, as Chairman,
JAMES WISDOM as Vice Chairman,
CHARLES LAZAROU, HOWARD
BERGSON, RONALD LINDSAY, RICK
CUHNA, and WAYNE ROGERS,
Constituting the Zoning Board of Appeals
of the Town of Brookhaven, the ZONING
BOARD OF APPEALS OF THE TOWN OF
BROOKHAVEN, AND THE TOWN OF
BROOKHAVEN

RESPONDENTS' COUNSEL:
ANNETTE EADERESTO,
Brookhaven Town Attorney
By: Diedre Cicciaro, Esq
1 Independence Hill
Farmingville, NY 11738

Respondent.

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Upon the Notice of Petition, the Verified Petition, ; the Affirmation of Patricia A. Stern, Esq. in Support, the Verified Answer and Objections in Point of Law, the Affirmation of Patricia A. Stern, Esq.in Further Support, and the Respondent's Return; it is hereby

ORDERED that this petition for a judgment pursuant to CPLR Article 78 annulling and reversing the decision of the respondent Zoning Board of Appeals, which denied petitioner's letter request for a rehearing of an application for area variances, is denied and the proceeding is dismissed;

FACTUAL BACKGROUND AND PROCEDURAL POSTURE

The Petitioner is the owner of a sub-standard sized parcel of land in Mastic, upon which he wants to build a one family dwelling. Because the parcel does not meet the zoning requirements for that area, he

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needs several area variance s from the town of Brookhaven Zoning Board of Appeals (the Board). The Petitioner previously applied for those variances in 2005 and was denied. There also was a prior application for the same relief in 2002 by a prior owner which was also denied. No judicial review of those denials was sought. He is now seeking a rehearing of the 2005 denial claiming that there has been a change in circumstances. The Petitioner applied to the Board by a single paged letter dated April 1, 2019 for a rehearing in which he points to a nearby lot of the same size for which a variance was granted to construct a single-family dwelling in 2009. The application for the rehearing was denied at the Board meeting on May 8, 2019 by virtue of there being no vote to approve the application. That decision was formally memorialized in the Board's written decision dated May 13, 2019.

In its denial dated October 30, 2002 for the requested area variances the Board found that the subject parcel is in an A-1 Residence zone where the required square footage is 40,000 square feet. The subject parcel is only 8,750. Additionally, the required frontage is 175 feet whereas the subject parcel is only 50 feet. Because of the large disparity between the required parcel dimensions and the actual dimensions of the subject parcel the Board concluded among other things that the requested variances were substantial and the "granting of this application will cause an undesirable change in the character of the neighborhood..." In reaching that conclusion the Board considered all parcels within a 200 foot radius of the subject parcel as required by the Town Code at the time. Additionally, the Board found that there is an adjacent parcel of the same dimensions to the subject parcel which is vacant and if acquired by the petitioner could be merged with the subject parcel thereby creating a single lot which would be more in conformity to the lots in the immediate area.

In its decision dated August 24, 2005, the Board essentially made the same finding with the exception that they considered parcels within a 500' radius of the subject parcel. Notwithstanding that, the Board still reached the same conclusion that development of this parcel would create an undesirable change in the neighborhood and that the adjacent parcel was still vacant and potentially available to be acquired and merged with the subject parcel.

The Petitioner asserts that he has not been able to acquire the vacant parcel adjacent to his. More importantly, however, the Petitioner asserts that since his prior application the Zoning Board has granted a variance in 2009 for a parcel of the same size nearby which allowed the construction of a single-family dwelling, thus establishing a precedent requiring a rehearing and approval of a variance for the subject parcel. The Respondent asserts that closer inspection of the two applications reveal that the surrounding circumstances are not the same, and that the other parcel is outside the 500' radius from the subject parcel. Additionally, all lots adjacent to the other parcel were improved with single family dwellings, there being no adjacent parcel with which it could merge and create a single larger parcel, thereby distinguishing it from the subject parcel. The remainder of the surrounding area remains the same but for that one parcel for which a variance was granted.

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STANDARD OF REVIEW

Town Law 8 267-a (12) sets forth the procedure for the Board of Appeals on an application for a rehearing and states:

Rehearing. A motion for the zoning board of appeals to hold a rehearing to review any order, decision or determination of the board not previously reheard may be made by any member of the board. A unanimous vote of all members of the board then present is required for such rehearing to occur

At a public hearing held on May 8, 2019, the Board did not entertain the petitioner's request for a re-hearing as none of the board members present made a motion to grant a re-hearing. Petitioner now appeals from the Board's action.

"[W]hile a zoning board of appeals may entertain an application for a rehearing when new facts are presented changing the aspects of the case * * * the board is not required to entertain or grant the application for a rehearing" (*Hoerner v Tormey*, 24 AD2d 597 [2d Dept 1965])). In addition, "[i]t is settled law that there can be a new application and determination by a zoning board when "new plans materially change the aspects of the case" (*Pettit v. Board of Appeals*, 160 A.D.2d 1006,1007-1 008 [2d Dep't, 1990]). It is for the Board to determine whether there are changed circumstances sufficient to warrant a rehearing. Id. "While the determination to rehear an application is within the discretion of a zoning board, and a zoning board may refuse to rehear an application in the absence of new facts or a change of circumstances (citations omitted), even when the second application is brought by a different applicant (citation omitted), a zoning board may not refuse to consider an application with respect to which there has been a substantial change of circumstances since the prior denial." (*Matter of Moore v Town of Islip Zoning Bd. of Appeals*, 28 AD3d 772 [2d Dept 2006])

Whether or not changed facts or circumstances are presented the scope of judicial review of zoning board determinations is limited. (see *Matter of Falco v Town of Islip Bd. of Appeals*, 283 AD2d 576 [2d Dept 20001; *ELN Realty Corp. v Zoning Bd. of Appeals*, 261 AD2d 619 [2d Dept 19991; *Pettit v Board of Appeals of the Tn. of Islip*, 160 AD2d 1006, [2d Dep't, 1990]; *Matter of Freeman v Town of Ithaca Zoning Bd. of Appeals*, 61 AD2d 1070, [3d Dept 1978 In reviewing zoning board actions, a court does not make or substitute its judgment but restricts itself to ascertaining whether there has been any illegality, arbitrariness, capriciousness or an abuse of discretion (see *Inlet Homes Corp. v Zoning Bd. of Appeals Tn. Of Hempstead* , 304 AD2d 758, [2d Dept 2003]; *Matter of Lemir Realty Corp. v Larkin*, 22 NY2d 20, [1962]). It is within the province of the Board to conclude that the petitioner's application did not present changed circumstances (see *Kreisberg v Scheyer*, AD3d 7 808 NYS2d 889 [2d Dept 20061; *Summartino v Scheyer*, 24 AD2d 681, [2d Dept 20051; *Lee v Zoning Bd. of Appeals of Tn. of Putnam Valley*, 1 AD3d 600, [2d Dept 2003]; *ELN Realty Corp. v Zoning Bd. of Appeals*, 261 AD2d 619, [2d Dept 1999]).

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DISCUSSION

The Court cannot substitute its judgment for that of the Board where, as in the instant matter, there was ample evidence in the record to support the denial of the rehearing application (see *Linzenburg v Sumner*, 277 AD2d 316, [2d Dept 2000]). The application for a rehearing indicated that a variance was granted for a nearby parcel similar in size to the subject parcel. The Petitioner argues that that single grant, constitutes a significant change in circumstance warranting the granting of area variances which were twice denied. Although there may be factors weighing in favor of granting the variances, the Court cannot substitute its judgment for that of the ZBA where, as here, there is substantial evidence in the record from two prior applications to support the denial of the instant application (*Linzenberg v Sumner*, 277 AD2d 316, [2d Dept 2000]).

It is the responsibility of this Court to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them. (*Cowan v Kern*, 41 NY2d 591, 599 [1977]; *Matter of Magid Setauket Assoc., LLC v The Town of Brookhaven Bd. of Zoning Appeals*, 2019 NY Slip Op 33659[U] [Sup Ct, Suffolk County 2019]).

The Town of Brookhaven encourages the merger of adjacent substandard lots so as to create larger lots which more closely conform to the zoning requirements. [See Town of Brookhaven Town Code §85-883D(4).] The Board has in this case held to its prior decisions denying the several area variances requested for the subject parcel, and did so in accordance with the Brookhaven Town Code as stated in its findings that the subject parcel could be merged with an adjacent vacant parcel to form a larger parcel which would more closely conform to the zoning requirements.

In 2009 case there was no alternative but to grant the variances for a substandard parcel within the vicinity of the subject parcel because the other parcel was surrounded with developed land. To state that that is now the precedent for all other substandard parcels in the area including those which could be merged with adjacent substandard parcels would run contrary to Brookhaven Town Code §85-883D (4) as well as the prior decisions regarding the subject parcel. The cases are in fact distinguishable.

To state it another way, the variances were denied in this case because there is undeveloped land adjacent to it with which it can be merged to form a single lot which better conforms to the zoning code. The other parcel which had variances granted in 2009 has no undeveloped land adjacent to it.

Thus, the Court finds that there was a rational basis for the Board's action and that the Board did not act arbitrarily or capriciously in denying the application for a rehearing.

ORDERED that Respondent shall settle judgment on notice consistent with the above decision.

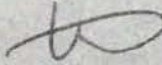
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Accordingly, the petition is denied, and the proceeding is dismissed.

ORDERED that Respondent shall settle judgment on notice consistent with the above decision.

This constitutes the decision and judgment of the Court.

Dated: May 13, 2020
Riverhead, New York



WILLIAM G. FORD, J.S.C.

Non Final Disposition

Final Disposition