

Papaj v Town of Boston Zoning Bd. of Appeals
2025 NY Slip Op 35574(U)
February 10, 2025
Supreme Court, Erie County
Docket Number: Index No. 815548/2023
Judge: Daniel J. Furlong
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

BRYAN PAPAJ

Plaintiff,

v

Decision

Hon. Daniel J. Furlong, J.S.C.

Index No.815548/2023

TOWN OF BOSTON ZONING BOARD
OF APPEALS,

Defendant.

Furlong, J.

Petitioner commenced this Article 78 Proceeding challenging the determination by the Town of Boston Zoning Board of Appeals (“ZBA”) denying Petitioner’s request for a variance from Boston Town Code Section 123-122 (Lot frontage on a street required for dwellings); directing the ZBA to grant the variance; or, alternatively, remanding the matter to the ZBA for further proceedings.

Decisions by local zoning boards are entitled to broad discretion and great deference from the courts (*see, e.g., Ifrah v. Utschig*, 98 NY2d 304, 308 [2002]). “Judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion” (*Id.*). “A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence” (*Pecoraro v. Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 [2004]; *Ifrah*, 98 NY2d at 304). The Court of Appeals has defined substantial evidence as “sufficient evidence to support the rationality of the Board’s decision” (*Sasso v. Osgood*, 86 NY2d 374, 385 [1995]). The Fourth Department has recognized that determinations by a zoning board of appeals “are entitled to ‘great deference’ and will be sustained even if the reviewing court might have decided the matter differently” (*Cerame Irrevocable Family Trust v. Town of Perinton Zoning Board of Appeals*, 6 AD3d 1091, 1092 [4th Dept. 2004]) (citations omitted); *Matter of Campaign for Buffalo History*

Architecture & Culture, Inc. v. Zoning Bd. of Appeals of City of Buffalo, 174 AD3d 1304, 1306 [4th Dept. 2019]).

Town Law § 267-b(3)(b) requires an applicant seeking an area variance to prove that the benefit to the applicant if the variance is granted outweighs detriment to health, safety, and welfare of the neighborhood or community. In making such determination, the ZBA must analyze the petitioner's request using the following factors: (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 (Town Law § 267-b(3)(b); *see also*, *Ifrah*, 98 NY2d at 307).

A ZBA decision will be annulled if “the record does not reflect that [the ZBA] weighed the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood in the event that the variance was granted” (*Matter of Nye v. Zoning Bd. of Appeals of The Town of Grand Is.*, 81 AD3d 1455, 1456 [4th Dept. 2011]). A ZBA decision must be affirmed where the ZBA “rendered its determination after considering the appropriate factors and properly weighed the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance was granted” (*Matter of Davis v. Zoning Bd. of Appeals of City of Buffalo*, 177 AD3d 1331, 1332 [4th Dept. 2019]). “In rendering its determination, the personal observations of members of the Zoning Board may be considered” (*Matter of Genser v. Bd. of Zoning & Appeals of Town of N. Hempstead*, 65 AD3d 1144, 1147 [2d Dept. 2009]).

Here, the ZBA appropriately analyzed and weighed the five area variance criteria, finding that the balance mandated the variance be denied. It considered the evidence presented to it by Petitioner and his agents, as well as the ZBA members' firsthand observations of the private driveway and knowledge of community services (Rood Aff. [Doc. 15] at ¶ 5). The detailed minutes of the ZBA's proceedings relative to Petitioner's variance (Doc. 16) show the careful, deliberate,

and reasoned application of the factors and balancing test.

Petitioner's requested variance implicates the character of the neighborhood and detriment to nearby properties in part because granting it would be contrary to the purpose of zoning regulations and at odds with the Town Code and Town Law. The purpose of Town Law § 263 is (among others) is "to secure safety from fire, flood, panic and other dangers; to promote health and general welfare." Town Code § 123-122, from which Petitioner sought a variance, prohibits dwellings without frontage on a street. "The underlying basis for enactment of local zoning ordinance frontage requirements stems from Town Law § 280-a (1) and (5), which provide, in relevant part, that all improved lots must have sufficient frontage and direct abutment on an existing state, county or town highway or street, so as to allow access for the ingress and egress of emergency vehicles" (*Novak v. Planning Bd. of La Grange*, 136 AD2d 610, 611 [2d Dept. 1988]). Boston Town Code § 123-122 provides that "[n]o dwelling shall be erected on any lot which does not have immediate frontage on a street held by the owner thereof in fee simple, subject to easements of record, as defined in this chapter." The Town Code provision restates in abbreviated form the requirements of Town Law § 280-a (Permits for buildings not on improved mapped streets). That statute requires access to a street or highway because of the necessity to "allow the ingress and egress of fire trucks, ambulances, police cars and other emergency vehicles" (Town Law § 280-a(5)).

The minutes of the meetings where Petitioner's variance was reviewed reflect that as the ZBA deliberated, it returned multiple times to the issue of access to the property for emergency vehicles if the variance were granted (*see, e.g.*, ZBA Record [Doc. 16], at p. 28). Petitioner offered no plan for maintenance of access. While Petitioner referenced snow removal by a neighboring property owner, there was no agreement by that property owner to maintain access to Petitioner's property. The ZBA determined that, under the circumstances, constructing a new residential dwelling on a lot that lacks street frontage would be an undesirable change from the safe neighborhood conditions intended by the zoning code. It made further relevant findings regarding mail, trash, and school bus services.

The benefit Petitioner sought could be achieved by other feasible methods. Petitioner's agents advised the ZBA that Petitioner's neighbor expressed interest in buying Petitioner's property, such that "the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area

variance” (Town Law § 267-b(3)(b)(2); ZBA Record at p. 28). Other options were also discussed by the ZBA, including obtaining an easement from a neighbor or purchasing a portion of a neighbor’s property (ZBA Record at p. 28; *see also ELN Realty Corp. v. Zoning Bd. of Appeals*, 261 AD2d 619, 620 [2d Dept. 1999] (“ . . . Board properly determined that, *inter alia*, the petitioner could either build a road or arrange with the other homeowner to re-grade the entire existing driveway, and that any alleged difficulty encountered by the petitioner was **self-created** in that the lot was purchased **with the knowledge that there was no public access available.**”) (emphasis added).

The requested variance was substantial. What constitutes a substantial variance is specific to each area variance request; a pure mathematical formula cannot be the basis of a determination whether a variance is considered substantial (*see, e.g., Four M Constr. Corp. v. Fritts*, 151 AD2d 938, 940 [3d Dept. 1989]). Here, Petitioner’s parcel has no frontage on a public street; the requested variance was 100%. Petitioner’s property is landlocked, located in a wooded area hundreds of feet from the nearest public street (Doc. No. 9 at p. 7; *see also* Rood Aff. at Exhibit B).

The ZBA discussed potential damage to the exiting private driveway during construction of a residential dwelling, as well as an inability to conduct snow removal, and potential flooding. Likewise, it considered the effect of lack of mail and garbage service, and no school bus access. There is substantial evidence in the record for the ZBA’s determination that granting the variance would have an adverse effect and impact on the physical and environmental conditions in the neighborhood.

The need for the variance was self-created, and “this factor is a significant element militating against the application” (*Carlucci v. Bd. of Zoning Appeals*, 205 AD2d 688, 688 [2d Dept. 1994]). Petitioner purchased the parcel at issue as a seasonal-use property with a cabin (ZBA Record at p. 29). Petitioner decided to remove the cabin and is now attempting to sell the parcel as a lot for a dwelling – a self-created situation. Not every lot can – or should – be developed with a single-family home, especially when there is a question of access in the event of an emergency. There is no right to issuance of a variance of the street frontage requirement to permit construction of a dwelling (*see, e.g., Kellner v. Town of Wappinger*, 145 AD3d 676, 677 [2d Dept. 2016]) (“The plaintiff also failed to make a *prima facie* showing that the application of Town Law § 280-a, which took

effect in 1938, to the proposed construction on his property deprived him of a vested right to construct the new house”).

A ZBA, “in applying the balancing test, is not required to justify its determination with supporting evidence for each of the five statutory factors as long as its determination balancing the relevant considerations is rational” (*Matter of Muller v. Zoning Bd. of Appeals Town of Lewisboro*, 192 AD3d 805, 807-808 [2d Dept. 2021]). Here, the ZBA considered relevant information and each of the five factors before denying the variance.

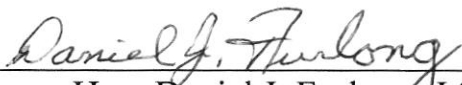
Petitioner relies upon a prior variance granted to a neighboring property owner in 2001 (Nolan). However, the record may contain facts showing how a different conclusion was reached despite similarities in a variance request (*see, e.g., Matter of 153 Mulford Assoc., LLC v. Zoning Bd. of Appeals of the Town of E. Hampton*, 205 AD3d 1019, 1022 [2d Dept. 2022]) (ZBA properly denied variance despite granting same one requested for neighboring property where the record showed the neighbor proposed to perform work not contemplated by the applicant). Moreover, a ZBA need not even explain a departure from prior applications for area variances that do not bear sufficient factual similarity to the subject application (*see Matter of Traendly v. Zoning Bd. of Appeals of Town of Southold*, 127 AD3d 1218, 1219 [2d Dept. 2015]); *see also Matter of Kramer v. Zoning Bd. of Appeals of Town of Southampton*, 131 AD3d 1170, 1172 [2d Dept. 2015]) (“Contrary to the petitioners’ contention, the three prior ZBA determinations that it submitted in support of its application did not constitute precedent from which the ZBA was required to explain a departure, as the petitioners failed to establish that the applications that led to those determinations bore sufficient factual similarity to the subject application”).

In the Nolan matter, there was an easement to cross the road on the adjoining (Czora) property (Doc. 7 at p. 27). Equally important, there was a binding agreement that all property owners would be responsible for maintenance of the road (*Id.*). In this case, Petitioner produced neither an easement, nor any agreement for maintaining the private driveway. Far from showing that the ZBA acted arbitrarily in this matter, the Nolan variance highlights the stark differences between a variance from the street frontage requirement and Petitioner’s application. Petitioner set forth has no plan to maintain access to his parcel. He simply would rely on neighbors to do it (ZBA Record at p. 7). Moreover, the ZBA explicitly discussed conditions in the Town that had changed since prior variances were granted, including changes in refuse collection that make parcels without frontage even more problematic than in the past (Rood Aff. at ¶ 63).

Substantial evidence in the record supports the ZBA's findings and determinations.

The relief requested in the Petition is hereby denied, and the Petition shall be dismissed.

Respondent's counsel shall upload a proposed order attaching and incorporating this Decision.

A handwritten signature in cursive script, reading "Daniel J. Furlong", is written over a horizontal line.

Hon. Daniel J. Furlong, J.S.C.

Dated: February 10, 2025
Buffalo, New York