MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 48

In the Matter of the Application of

ROBERT TORTORA,

Petitioner,

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

- against -

PAUL M. DeCHANCE, Chairman, KERI PERAGINE, Vice-Chairman, TERRY KARL, JAMES WISDOM, KEVIN McCORMICK, GEORGE PRIOS, and JOHN WOODS, constituting the Zoning Board of Appeals of the Town of Brookhaven, and the ZONING BOARD OF APPEALS of the Town of Brookhaven, and the TOWN OF BROOKHAVEN,

Respondents.

By: HECTOR D. LaSALLE, J.S.C.
Dated: August 6, 2012

Index No. 11-17100
Mot. Seq. # 002 - MD; CDISPSUBJ

Return Date: 7-20-11
Adjourned: 5-15-12

SCHEYER & JELLENIK
Attorney for Petitioner
110 Lake Avenue South, Suite 46
Nesconset, New York 11767

ROBERT QUINLAN, ESQ.
BROOKHAVEN TOWN ATTORNEY
By: Daniel Belano, Assistant Town Attorney
Attorney for Respondent Town of Brookhaven
One Independence Hill
Farmingville, New York 11738

In this article 78 proceeding, the petitioner seeks to set aside the determination of the respondent Zoning Board of Appeals of the Town of Brookhaven ("ZBA") dated May 18, 2011 to the extent that it required the petitioner to reduce his lot coverage from 60.8% to 45%.

The petitioner is the owner of residential real property located at 4 Ocean Walk, Fire Island Pines, New York in the Town of Brookhaven ("the Town"). The property, which the petitioner acquired in 2010, is located within the boundaries of the Fire Island National Seashore ("the Seashore") and is nonconforming pursuant to the Federal Zoning Standards for Fire Island National Seashore, 36 CFR Part 28, and the Town of Brookhaven Zoning Code, Chapter 85, Article XVI, "Great South Beach in Fire Island National Seashore." The property is improved with a two-story residence, front and rear decking, and other structures including a swimming pool and a hot tub. All of the existing structures, which together account for a lot occupancy of 60.8%, are recognized under a certificate of occupancy or certificate of compliance except for the first floor residence addition which was constructed in 1981.

In 2011, the petitioner sought to legalize the existing one-story residence addition, construct two residence additions, which did not require variance relief, reconstruct a set of stairs in the front yard and relocate a fence/wall to the property line. The petitioner intended to eliminate approximately 250 square feet of decking or 3% of the lot coverage, bringing the existing lot coverage of 60.8% down to 57.3%. Both the Federal Zoning Standards and the Brookhaven Town Code ("the Code") applicable to the Seashore prohibit any alteration or expansion of a nonconforming use other than to bring it into conformity with the current zoning requirements (*see* 36 CFR § 28.11 [b]; Brookhaven Town Code §§ 85-166 [A], 166 [C] [1]). Thus, the petitioner applied to the ZBA for a front yard setback variance for the proposed relocation of the wood steps, a total side yard variance for the existing one-story residence addition, and for permission to relocate the existing six-foot high wood wall and fence beyond the principal structure, located in the front yard and along the side yard. In addition, the petitioner applied for permission for the proposed 57.3% lot occupancy. The zoning regulations permit a lot occupancy of 35% (*see* 36 CFR § 28.12 [d]).

After a public hearing held before the ZBA on March 23, 2011, at which the petitioner's agent testified in support of the application, the ZBA issued a determination that granted the requested variances and permitted the re-location of the existing six-foot high wood wall and fence, subject to a reduction of the lot occupancy to 45%.

In its findings of fact, the ZBA noted that the existing two-story dwelling measures 1,100 square feet and accounts for approximately 15% of the lot occupancy. In addition, the ZBA noted that the existing accessory amenities account for approximately 3,300 square feet or 46% of the lot occupancy for a total of 60.8% lot coverage. Thus, the accessory structures alone accounted for more than the 35% lot occupancy permitted by the zoning regulations.

With respect to the petitioner's request for a variance to expand the nonconforming front yard setback from five feet to eight feet from the property line, the ZBA found that although the requested relief was substantial as the Code required a 20-foot setback, the reconstruction of the stairs would increase the petitioner's conformity with the Code, would not have an undesirable change in the nature and character of the community or create a detriment to neighboring property owners or have a negative effect on physical and environmental conditions in the area. Moreover, the ZBA noted that the petitioner could not feasibly meet the front yard setback requirements as the dwelling was located 20.3 feet from the front property line and the petitioner could not construct stairs accessing the first floor deck and the front door of the dwelling in the remaining 0.3 feet. In approving the request for the variance, the ZBA concluded that any hardship claimed was not self-created in nature, that the front yard variance relief requested was the minimum relief necessary, and that it would not create a detriment to the health, safety or welfare of the surrounding community.

As to the petitioner's request for a variance to maintain the nonconforming total side yard setback at 12.2 feet where 30 feet is required by the Code, the ZBA found that even though the requested relief was substantial, it was mitigated by evidence presented by the petitioner that it conformed with other side yard setbacks in the community, and noted that it would not have an undesirable impact on the nature and character of the community or create a detriment to neighboring property owners. Moreover, the ZBA noted that the petitioner could not feasibly meet the total side yard setback requirements because in order to do so, the petitioner would have to remove substantial portions of the existing and established dwelling. The ZBA also found that since the construction of the residence addition in 1981 had yet to produce a negative impact on the physical or environmental conditions of the neighborhood, it would not do so in the future. In

approving the request for the variance, the ZBA concluded that any hardship suffered by the petitioner was self-created in nature as the structure was constructed without the benefit of a permit from the Town, that the front yard variance relief requested was the minimum relief necessary, and that it would not create a detriment to the health, safety or welfare of the surrounding community.

Turning to the petitioner's request to re-locate a six foot fence/wall forward of the front foundation line, the ZBA noted that even though the requested relief was substantial since the Code permitted only a four-foot fence, it was mitigated by evidence presented by the petitioner that it conformed with other fences/walls in the community and by the fact that the existing fence/wall encroached in places on the Town's property as well as on the property of adjoining landowners. The ZBA further noted that the reconstruction of the fence/wall would not have an undesirable impact on the nature and character of the community or create a detriment to neighboring property owners. The ZBA found that while the petitioner could construct a four-foot fence forward of the front foundation line as permitted under the Code, this would not achieve the privacy sought by the petitioner, and concluded in granting the requested variance that any hardship suffered by the petitioner was not self-created in nature since the petitioner's privacy goals could not be achieved in conformance with the Code, that the variance relief requested was the minimum relief necessary, and that it would not create a detriment to the health, safety or welfare of the surrounding community.

As to the petitioner's lot occupancy request, the ZBA noted that the petitioner proposed to eliminate only 250 square feet of decking, bringing the lot occupancy down 3% to 57.3%. Although the petitioner's agent submitted documentation purporting to establish 12 previous requests relating to lot occupancy, the ZBA rejected petitioner's documentation, finding that only two of the prior grants involved minimal lot coverage relief (*i.e.*, to maintain a 39.6% lot occupancy and a 43% lot occupancy). The ZBA found that the maintenance of a 57.3% lot occupancy on the subject parcel would have an undesirable effect on the nature and character of the community and create a detriment to neighboring properties, and that if it granted the petitioner's lot occupancy request, it would set an extreme and negative precedent which would essentially allow for the circumvention of the lot occupancy requirements set forth in the zoning regulations. The ZBA found that this detriment could be mitigated by the removal of some of the excessive accessory structures, thereby reducing the lot coverage to 45%. The ZBA noted that the petitioner could feasibly reduce its accessory structures to maintain a 45% lot occupancy and still have adequate space for accessory activities. The ZBA found that the continued existence of a 60.8% or 57.3% lot coverage would have a negative effect on the existing sensitive environmental conditions. Thus, the ZBA concluded that any hardship suffered by the petitioner was self-created in nature since the petitioner sought to make improvements to the parcel without making any significant effort to meet the lot coverage requirements of the regulations, that the lot coverage requested of 57.3% was not the minimum relief necessary, and that it would create a detriment to the health, safety or welfare of the surrounding community. In addition, the ZBA concluded that the restriction of lot coverage to 45%, although still significantly larger than what is permitted by the regulations, would bring the subject parcel into closer conformity with the regulations, and thus mitigate the detriment to the health, safety, and welfare of the community caused by the excessive lot occupancy.

It is well settled that local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion (*see* ***Matter of Ifrah v Utschig***, 98 NY2d 304 [2002], 746 NYS2d 667; ***Matter of Fuhst v Foley***, 45 NY2d 441, 410 NYS2d 56 [1978]; ***Matter of Miller v Town of Brookhaven***

Zoning Bd. of Appeals, 74 AD3d 1343, 904 NYS2d 199 [2d Dept 2010]). Thus, the determination of a zoning board will be upheld if it is rational and not arbitrary and capricious (*see* ***Matter of Sasso v Osgood***, 86 NY2d 374, 633 NYS2d 259 [1995]; ***Matter of JSB Enters., LLC v Wright***, 81 AD3d 955, 917 NYS2d 302 [2d Dept 2011]; ***Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh***, 68 AD3d 62, 886 NYS2d 442 [2d Dept 2009]). 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 Caspian v Zoning Bd. of Appeals***, *supra, quoting* ***Matter of Halperin v City of New Rochelle***, 24 AD3d 768, 772, 809 NYS2d 98, 105 [2d Dept 2005]; *see* ***Matter of JSB Enters., LLC v Wright***, *supra*).

In making its determination whether to grant an area variance, a zoning board of appeals is required, pursuant to Town Law § 267-b (3), 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 variance is granted (*see* ***Matter of Pecoraro v Board of Appeals of Town of Hempstead***, 2 NY3d 608, 781 NYS2d 234 [2004]; ***Matter of Ifrah v Utschig***, *supra*; ***Matter of Sasso v Osgood***, *supra*). The board 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 granting the area variance; (2) the benefit sought by the applicant can be achieved by some other method, feasible for the applicant to pursue, other than an area variance; (3) the requested variance is substantial; (4) the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood; and (5) the alleged difficulty was self-created *(see* ***Matter of Pecoraro v Board of Appeals***, *supra* at 613, 781 NYS2d at 236-237; ***Matter of Ifrah v Utschig***, *supra* at 307-308, 746 NYS2d at 668-669). A zoning board is "not required to justify its determination with supporting evidence with respect to each of the five factors, so long as its ultimate determination balancing the relevant considerations was rational" (***Matter of Steiert Enters. v City of Glen Cove***, 90 AD3d 764, 767, 934 NYS2d 475, 478 [2d Dept 2011] *quoting* ***Matter of Merlotto v Town of Patterson Zoning Bd. of Appeals***, 43 AD3d 926, 929, 841 NYS2d 650, 652-653 [2d Dept 2007]).

Here, the Court finds that the ZBA's determination was rational, and was not arbitrary and capricious. In making its determination, the ZBA considered all of the statutory factors and used the requisite balancing test. Even though the front yard and side yard setback variances and the relocation of the fence would not result in an increase in lot occupancy or substantially alter the existing nonconforming setbacks, both the Federal Zoning Standards and the Brookhaven Town Code applicable to the Seashore prohibit any alteration or expansion of a nonconforming use other than to bring it into conformity with the current zoning requirements (36 CFR § 28.11; Brookhaven Town Code §§ 85-166 [A], 166 [C] [1]). In granting the petitioner's application, the ZBA noted that the zoning regulations only permit a total lot occupancy of 35% and that the petitioner's existing lot occupancy was 60.8%. While the petitioner's dwelling took up 15% of the total existing lot occupancy, the ZBA noted that the "excessive accessory structures" took up 46% of the lot occupancy by themselves. The ZBA also reasonably recognized the "existing sensitive environmental conditions," implicitly reflecting the location of the petitioner's property within the environmentally sensitive Fire Island National Seashore (36 CFR Part 28; Brookhaven Town Code Chapter 85, Article XVI). Both the Code and the Federal Zoning Standards are intended to protect and conserve the Fire Island barrier beach and its natural resources (*id.*). Therefore, the ZBA's action in requiring a reduction of the overall lot occupancy to 45% in conjunction with its decision to grant the requested variance relief and re-location of the fence/wall on the property was rational, reasoned, and balanced the interest of the petitioner with those of the Fire Island National Seashore community (*see* ***Matter***

of Switzgable v Board of Zoning Appeals of Town of Brookhaven, 78 AD3d 842, 911 NYS2d 391 [2d Dept 2010]).

Contrary to the petitioner's claims, the ZBA's determination did not revoke his current certificates of occupancy and compliance with respect to the existing buildings and structures on his property, thereby effecting an unconstitutional taking of his property and violating his due process right to a hearing in the process, since the ZBA's determination did not affect the petitioner's right to continue to live on his property with all of the buildings and structures thereon as is. The ZBA merely determined that in the event that the petitioner was to make his proposed alterations on the property, he had to bring his lot occupancy into closer conformity with the current zoning requirements.

To the extent that the petitioner argues that his current certificates of occupancy and compliance in certain structures on the property establish his vested right in those structures, it has been held that a landowner's "vested right[] in a nonconforming structure existing at the time a prohibitory code provision is enacted, does not extend to subsequent construction" (***Matter of Rembar v Board of Appeals of Vil. of E. Hampton***, 148 AD2d 619, 620, 539 NYS2d 81, 83 [2d Dept 1989]). Brookhaven Town Code § 85-166 (A) clearly states that "no building or land shall be used and no building shall be erected or structurally altered except in conformity with the provisions of this article." In addition, a zoning board of appeals "c[an] properly decide that additional variances would impose too great a burden and strain on the existing community" or "find that previous awards had been a mistake that should not be again repeated," as a board is "not bound to perpetuate earlier error" (***Cowan v Kern***, 41 NY2d 591, 394 NYS2d 579 [1977]). Furthermore, "[a] zoning board may, where appropriate, impose reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property, and aimed at minimizing the adverse impact to an area that might result from the grant of a variance or special permit" (***Matter of Gentile v Village of Tuckahoe Zoning Bd. of Appeals***, 87 AD3d 695, 696, 929 NYS2d 167, 169 [2d Dept 2011] [internal quotation marks omitted]). In light of the foregoing, the Court finds that the portion of the ZBA's determination requiring the petitioner to reduce his lot coverage from 60.8% to 45% was not arbitrary and capricious or an abuse of discretion and was amply supported by the record.

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

Submit judgment.

The foregoing constitutes the Order of this Court.

Dated: August 6, 2012
Central Islip, NY

Hector D. LaSalle

HON. HECTOR D. LASALLE, J.S.C.