MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 48

In the Matter of the Application of

MICHAEL DEFALCO,

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: September 4, 2012

Index No. 11-17102
Mot. Seq. # 002 - MD; CDISPSUBJ

Return Date: 7-20-11
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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 16, 2011, to the extent that it required the petitioner to reduce his lot coverage from 42.6% to 37% and to increase the side yard set back to 16 feet.

The petitioner is the owner of residential real property located at 401 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 one-story residence, front, side and rear decking, and an above-

ground swimming pool. All of the existing structures together account for a lot occupancy of 42.6%,

In 2011, the petitioner proposed to expand the existing residence by adding a second-story addition with decks. He also sought to maintain the balconies the same distance as those that exist on the first floor, and an 8-foot high fence on both sides of the property. After a public hearing held before the ZBA on May 12, 2011, at which the petitioner's agent testified in support of the application, the ZBA issued a determination that granted the requested second-story addition, second-story balconies on the north and south, a 6-foot high fence and wall on both side yards, 37% lot occupancy, and the proposed deck addition approved at 6 feet with total side yards of 16 feet.

In its findings of fact, the ZBA states that the existing one-story dwelling measures 1,224 square feet and accounts for approximately 19% of the lot occupancy. In addition, the ZBA notes that the existing accessory amenities account for 23.6% of the lot occupancy for a total of 42.6% lot coverage. Thus, the accessory structures alone accounted for more than the 35% lot occupancy permitted by the zoning regulations. The ZBA further states that petitioner no longer enjoys the protection of the Certificates of Compliance, as he is seeking to significantly alter the existing dwelling, the non-conforming and existing setbacks and lot occupancy.

As to petitioner's request for a variance to build second-story balconies, the ZBA found that there was significant evidence of conformity and it would not have any undesirable change in the character of the community. Moreover, the ZBA indicated that the front yard and total side yard setbacks would not have a negative impact on the nature and character of the community or be a detriment to neighboring properties. In approving the request for a variance, the ZBA concluded that the proposed second-story balconies on the north side and south side of the structure would not create a detriment to the health safety or welfare of the community. With respect to petitioner's proposal for the second story addition, the ZBA found that the proposed structure would not have an undesirable change to the nature and character of the community. It states that while the request for a 15.4 foot front yard setback, 6.7 foot minimum side yard setback and 16.9 foot total side yard setback would result in a 23%, 44% and 44% relaxation, respectively, the impact of this would be significantly mitigated by the fact that these set backs are already established by the existing dwelling.

However, as to petitioner's request for permission to construct two additions to the existing deck on the south side of the existing dwelling, the ZBA found that the request to maintain 0.5 foot and 1.5 foot minimum side yards for a total of 2 feet would have an undesirable impact on the nature and character of the community. It stated that the 2 feet of total side yard where 30 feet is required would result in a 94% relaxation of the Codes requirements. It further stated that the proposed decking would essentially consume the entire width of the property, extending from the eastern to western property line for 58 consecutive feet on a lot that maintains 60 feet in width. The ZBA concluded that the size of this decking and its configuration would have a negative impact on the fragile environmental and physical conditions of the area.

As to the petitioner's lot occupancy, the ZBA noted that petitioner proposed to remove decking on the east and west side of the dwelling and replace it with the proposed decking on the south side of the dwelling, therefore proposing to maintain 42.6% lot occupancy where 35% lot coverage is permitted. The

ZBA found that as petitioner is seeking to significantly alter the existing dwelling, the lot occupancy that currently exists on the subject lot is no longer protected by the Town of Brookhaven certificates. The ZBA noted that while petitioner is seeking to maintain the same lot coverage as presently exists on the parcel, any hardship suffered by petitioner was self-created in nature since the proposed structural alterations to the dwelling did not return the parcel to the Code required lot coverage of 35%. The ZBA concluded that petitioner's request to maintain 42.6% lot coverage is not the minimum relief necessary and would have a negative effect on the health, safety and welfare of the community. In addition, the ZBA found that the detriment would be mitigated by the granting of 37% lot coverage as an alternative to petitioner's request.

With respect to petitioner's proposal to construct an 8-foot fence where a 6-foot fence is permitted, the ZBA found that while petitioner submitted four prior grants to prove conformity, only one case involved a grant for an 8-foot fence. The ZBA stated that one grant from 2009 provides insufficient precedent to prove conformity and that the 8-foot fence was situated along the road side of the parcel, whereas the subject request would run along the side property lines towards the ocean front. The ZBA concluded that this request would have a negative impact on the nature and character of the community and create a detriment to neighboring property owners.

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, 746 NYS2d 667 [2002]; ***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 ZBA's determination was not arbitrary and capricious. In making its determination, the ZBA considered all of the statutory factors and used the requisite balancing test. 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 petitioner's application, the ZBA noted that the zoning regulations only permit a total lot occupancy of 35% and that petitioner's existing lot occupancy was 42.6%. While petitioner's dwelling took up 19% of the total existing lot occupancy, the ZBA noted that the "excessive accessory structures" took up 23.6% of the lot occupancy by themselves. With regard to the side yard setback, the ZBA noted that the zoning regulations require 30 feet, while petitioner currently maintains 2 feet of total side yard. The ZBA also reasonably recognized "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.*). Thus, the ZBA's action in requiring a reduction of the overall lot occupancy to 37%, second-story addition with balcony, deck additions with total side yards of 16 feet was rational and balanced the interest of 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]).

Petitioner contends that the ZBA's determination revoked his current certificates of occupancy and compliance with respect to the existing dwelling 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. However, as the ZBA's determination did not affect petitioner's right to continue to live on his property with the dwelling and structures thereon as is, petitioner's argument is rejected. The ZBA merely determined that if petitioner decided to make his proposed alterations on the property, he would have to bring his lot occupancy and side yard setbacks into closer conformity with the current zoning requirements.

To the extent that 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, 596, 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]). Accordingly, the ZBA's determination requiring petitioner to reduce his lot coverage from 42.6% to 37% and to increase the side yard setbacks to a total of 16 feet was not arbitrary and capricious 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: September 4, 2012
Central Islip, NY

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

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION