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Index No.: 2160-16

SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:
Hon. **DENISE F. MOLIA,**
Justice

BELLRIDGE, LLC, PAUL F. BUTLER, and PATRICIA C. BUTLER,

Petitioners,

For a Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules,

- against -

THE ZONING BOARD OF APPEALS OF THE INCORPORATED VILLAGE OF BELLPORT, HOWARD BRICKNER and TRACY MAKOW BRICKNER,

Respondents.

CASE DISPOSED: YES
MOTION R/D: 3/31/16
SUBMISSION DATE: 2/3/17
MOTION SEQUENCE NO.: 001 MD

ATTORNEY FOR PETITIONER
Egan & Golden, LLP
96 South Ocean Avenue
Patchogue, New York 11772

ATTORNEYS FOR RESPONDENT
David J. Moran, Esq.
96 South Ocean Avenue
Patchogue, New York 11772

Garrett W. Swenson, Jr.
76 Bay Road
Brookhaven, New York 11719

Upon the following papers filed and considered relative to this matter:

Notice of Petition and Verified Petition dated February 26, 2016; Exhibits A through C annexed thereto; Verified Answer dated July 20, 2016; Exhibit A annexed thereto; Verified Answer dated July 19, 2016; Respondents' Return; Exhibits A through U annexed thereto; Petitioners' Reply Memorandum of Law; and upon due deliberation; it is

ORDERED, that the petition of Bellridge, LLC, Paul F. Butler, and Patricia C. Butler, pursuant to CPLR Article 78, for an Order annulling and setting aside the decision filed by the respondent Zoning Board of Appeals of the Incorporated Village of Bellport on February 12, 2016, is denied.

The petitioners seek to review and annul the decision of the respondent Zoning Board of Appeals, which granted the variance application of respondents, Howard Brickner and Tracy Makow Brickner, for the construction of a 696 foot addition to the rear of their residence located at 30 Academy Lane, Bellport, New York.

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Petitioner Bellridge, LLC ("Bellridge") is the owner of record for the real property known as 32 Academy Lane, Bellport, New York, where petitioners Paul F. Butler and Patricia C. Butler reside. The respondents, Howard Brickner and Tracy Makow Brickner, are the adjoining neighbors of the petitioners, and reside at the subject premises located at 30 Academy Lane. The subject premises is a single family dwelling located in an "A" Residence Zoning District.

During the Summer 2015, the respondents submitted an application to the Village of Bellport Building Department for the approval of a 696 foot addition to their house. The application was referred to the Zoning Board of Appeals ("ZBA") for variance relief since the proposed addition would exceed the side yard setback requirements of the Village Code. Section 21-221 of the Bellport Village Code requires a total combined side yard of 60 feet and that no one side yard shall be less than 20 feet in width. The proposed addition would maintain a 14 foot 10 inch single side yard and a 39 foot 9 inch total of both yards.

Public hearings were held before the Zoning Board of Appeals on October 15, 2015 and December 17, 2015. Testimony was offered both in support of, and in opposition to the subject application. By Decision dated February 12, 2016, the ZBA granted the application of the respondents.

The petitioners contend that the subject dwelling constitutes a nonconforming building under the Bellport Village Code ("Code"), where §21-1 defines a building as "a structure with a roof supported by columns and/or walls." The same section defines a structure as "a combination of materials erected on, under the ground, or upon another building and/or structure. A structure shall include, but not limited to, fences, decks, patios, arbors, pergolas, pavilions, terraces, canopies, and tents larger than 100 square feet, platforms, signs, athletic courts, hot tubs, spas and swimming pools. A deck, patio, terrace or platform having an elevation of seven and one half inches from the ground shall not be considered a structure." The Village Code defines "dwelling, single family" as a "detached house consisting or intended to be occupied as a residence by one family only, as 'family.'"

It is noted that the subject property was issued a Certificate of Occupancy ("CO") as a single family dwelling as defined by §21-1 of the Code. The respondents submit that the terms "building" and "structure" refer to designations that appear on CO's issued in Commercial or Business Districts, while "dwelling" is used to designate residences in residential districts. The Brickner's premises constitutes a residential dwelling in a Residence "A" zoning district, which is inhabited only for residential purposes. There is no evidence to suggest that the premises are being utilized for a nonconforming use within a Residence "A" district.

If the subject dwelling were to be considered a building for zoning purposes, the petitioners further contend that such dwelling constitutes a nonconforming building under §21-1 of the Code, since the side yards are of less footage than that permitted under §21-221 of the Code. As such, petitioners alleged that §21-86(c) of the Code prohibits the enlargement of nonconforming buildings unless two specific conditions are met, and therefore the ZBA only possesses limited authority to grant area variances for nonconforming structures. Petitioners

further maintain that the published legal notice improperly only identified the subject application as one for side yard setback relief under §21-221, and failed to identify the dwelling as a nonconforming structure requiring consideration under Code §21-86.

Section 21-86 of the Bellport Village Code provides as follows:

> Nonconforming buildings and structures; nonconforming uses.
>
> (a) A nonconforming building or structure that legally exists may continue except as provided herein. A nonconforming building or structure shall be considered legally existing if the entire building or structure, as presently configured and used, has a valid certificate of occupancy (CO) and/or, certificate of zoning compliance (CZC and/or a certificate of existing use (CEU) for it. No unlawful existing nonconforming building or structure shall be used or occupied.
>
> (b) The building inspector may issue a CEU for a nonconforming building or structure constructed prior to the enactment of the law or laws that render it nonconforming, so long as the present use of the building or structure is permitted in the zoning district at the time of the application. If the current use of the building or structure is not permitted then the building inspector shall refer the matter to the zoning board of appeals for a ruling as to the validity of the application before the building inspector may issue a CEU for the nonconforming use.
>
> (c) A legally existing nonconforming building or structure shall not be enlarged, expanded or altered except as follows:
>
> (1) The use of the building or structure is permitted and conforms with the requirements of this chapter, and
>
> (2) The proposed enlargement, expansion or alteration of the building or structure conforms with all area requirements of this chapter, excepting minimum lot area and street frontage requirements. In no event shall the degree of nonconformity be increased.
>
> (d) No building, structure or lot used for a nonconforming use shall be enlarged, expanded or altered. A nonconforming use may be changed to a conforming use. Immediately, upon said change, the nonconforming use shall be deemed abandoned.
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> (e) A building, structure or lot used for a nonconforming use shall be deemed abandoned when such use has been discontinued for a period

> of twelve (12) consecutive months. A nonconforming use that has been abandoned shall not be thereafter reinstated.

On the basis of the language of the above statute, the petitioners allege that §21-86(d) constitutes an absolute prohibition on the alteration of a lot on which there exists a nonconforming use. The petitioners further contend that §21-86(c) bars the expansion of a nonconforming building unless the two stated criteria of that section are met.

The petitioners maintain that the title associated with Code §21-86, "Nonconforming buildings and structures; nonconforming uses", demonstrates an applicability of that section to both nonconforming buildings and nonconforming uses. The respondents suggest that the punctuation of that title demonstrates the intention of the code provision to address issues concerning nonconforming buildings and structures with the larger context of nonconforming uses, and is therefore not applicable under the instant circumstances in which the subject dwelling does not constitute a nonconforming use. As such, the respondents contend that the ZBA properly treated the Brickner application as one for typical area variance relief. The Court agrees with the interpretation of the respondents and finds that, petitioners' contentions to the contrary, Code §21-86 governs nonconforming buildings and structures that also constitute nonconforming uses, which is not the circumstance in this matter. Accordingly, the ZBA was correct to consider the subject application without affording deference to Section 21-86 of the Code.

By decision dated February 11, 2016, the ZBA approved the subject application for area variances.

In making determinations on area variance applications, Town Law §267-b(3)(B) requires a Zoning Board of Appeals to consider whether:

> 1. an undesirable change will be produced in 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 other, feasible method;
>
> 3. whether the requested area variance is substantial;
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> 4. the requested variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood; and
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> 5. the alleged difficulty was self created, which consideration shall be relevant to the decision of the Zoning Board, but shall not necessarily preclude the granting of the area variance.

In its decision dated February 11, 2016, the ZBA stated the facts as set forth in the application and presented at the hearing by the applicant, and notes the objections expressed by

the petitioners. The ZBA then made the following conclusions:

A: That there will not be an undesirable change in the nature and character of the neighborhood, a detriment to nearby properties, and the granting of the variance would not create nor have an adverse impact on the physical and environmental conditions in the neighborhood. The Board finds that the applicant met his burden by presenting this Board with credible evidence attesting to similar properties maintaining similar side yard setbacks.

B: The Board concludes that the requested relief is not substantial, especially when considering what actually exists on the ground in the surrounding community and the prior grants of this Board which created more substantial side yard setbacks than that requested herein.

C: The Board concludes that the benefit sought by the applicant cannot be achieved by some method, feasible for the applicant to pursue, other than seeking such a variance from this Board.

D. The Board finds that any hardship suffered by the applicant is not self-created in nature, as the applicant has proven that no other suitable location exists for the proposed addition.

The instant proceeding was subsequently commenced by the petitioners, alleging that the aforesaid decision of the respondent Board was irrational, arbitrary and capricious, and not supported by the evidence submitted and the record before it.

The Court of Appeals has reaffirmed the limited role of the courts in the review of decisions issued by local land use boards as follows:

> "As with board determinations on variances, a reviewing court is bound to examine only whether substantial evidence supports the determination of the board. Where substantial evidence exists, a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record."

Retail Property Trust v. Bd. of Zoning Appeals of Town of Hempstead, 98 N.Y.2d 190, 196. (See also, Matter of P.M.S. Ltd. v. Zoning Board, 98 N.Y.2d 683; Matter of Ifrah v. Utschig, 98 N.Y.2d 304)

The reason for the limited scope of judicial review was set forth by the Court of Appeals in Cowan v. Kern, 41 N.Y. 2d 591 at 599, as follows:

> "The crux of the matter is that the responsibility for making zoning decisions has been committed primarily

> to quasi-legislative, quasi-administrative boards composed of representatives from the local community. Local officials generally possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community. Absent arbitrariness, it is for the locally selected and locally responsible officials to determine where the public interest in zoning lies. (McGowan v. Cohalan, 41 N.Y.2d 434, 438, supra.) Judicial review of local zoning decision is limited; not only in our court but in all courts. Where there is a rational basis for the local decision, that decision should be sustained."

Under the circumstances presented, the Court finds that the findings of the respondent Board are rational and supported by the substantial evidence on the record, and are not found to be ultra vires, arbitrary, capricious, erroneous as a matter of law, or an abuse of discretion. Accordingly, the petition is dismissed.

The foregoing constitutes the Order of this Court.

Dated: May 30, 2017

Hon. Denise F. Molia

HON. DENISE F. MOLIA A.J.S.C.