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# MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 24

In the Matter of the Application of Eugene Kuchner and Joan Kuchner

Petitioners,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

- against -

ZONING BOARD OF APPEALS OF THE TOWN OF SOUTHOLD, JOHN E. WREN AND SHARON L. WREN,

Respondents

By: Cohalan, J.S.C.

Dated: 2011

Index No. 01108-11

Mot. Seq. # 001 - CDISPSUBJ

Return Date: February 14, 2011
Calendar Date: August 3, 2011

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This is an Article 78 proceeding brought by the petitioners, Eugene Kuchner and Joan Kuchner (hereinafter Kuchners), seeking to reverse, annul and set aside a determination and decision by the respondent, Zoning Board of Appeals of the Town of Southold, New York (hereinafter ZBA), which granted an application by the additional respondents, John E. Wren and Sharon I. Wren (hereafter Wrens), for an area variance to construct an addition to their single family residence.

The Kuchners are the owners of a residential parcel of real estate located at 1726 Arshamomaque Avenue, Southold, Suffolk County on Long Island, New York. The Wrens own a single family residence on 225 Hippodrome Drive in Southold which property is contiguous to and shares a common boundary line with the Kuchners' back yard. The Wrens' residence is built on a 10,944 square feet odd shaped parcel which measures 144 feet in lot width with a depth of only 76 feet. The property is zoned R-40 requiring 40,000 square feet but is pre-existing and non-conforming as to both lot size and a rear yard setback that measured only 9.3 feet whereas the Zoning Code requires 35 feet. The area itself was initially a seasonal beach community improved with cottages in the 1920's and 1930's and the majority of the lots in this area were rendered non-conforming upon adoption of the Zoning Code. The area gradually transformed from seasonal to year round homes. On April 6, 2010 the Wrens made application to the ZBA to renovate and expand their existing two story single family residence along the width of the property requiring an additional rear yard setback variance of 25.7 feet to allow the additional construction of a 32 foot addition/extension to the existing house along the 9.3 foot line of the rear property line when 35 feet are required, a lot coverage variance of .5% to 20.5% where only 20% is allowed with the extension of the house along its existing line. Thus the new construction would increase the footprint of the house from 1246 square feet to 2189 square feet.

The ZBA held hearings on the Wrens' application on July 29, 2010, August 26, 2010 and September 23, 2010 and, in its decision rendered on December 2, 2010 and written and dated December 7, 2010, the ZBA granted the Wrens' application finding that the variances granted would not produce an undesirable change in the neighborhood, nor have an adverse impact on the physical or environmental conditions of the neighborhood. The ZBA also imposed certain conditions allowing for construction which would extend the Wrens' home an additional 32 feet along the present back yard line of 9.3 feet but close to the Kuchners' back yard area by requiring the Wrens to maintain evergreen screening that would grow to a height of 20 feet along the entire rear and westerly property line; require the west facing dormer window to be fabricated with obscure glass and all exterior mechanical equipment to be located on the easterly side of the new addition away from the common property line with the Kuchners' property. These conditions were imposed as a result of the Kuchners' complaints that the Wrens' structure would loom over their home and result in a lack of privacy, among other things.

The Kuchners thereafter instituted the present Article 78 proceeding and appeal from the ZBA's grant of this application as arbitrary, capricious, against the weight of the substantial evidence presented and legally without merit. The Kuchners argue that the proposed variance was "enormous" and that the Wrens' proposed plans for their residence would result in a doubling of the size of the non-conformity and, of most concern to them, the resultant close proximity to the rear yard lines and their privacy.

For the following reasons, the Kuchners' Article 78 proceeding seeking to vacate and annul the ZBA's December 7, 2010 decision is dismissed.

It is well settled law "that in a proceeding seeking judicial review of administrative action the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary or capricious." ***Flacke v. Onondaga Landfill Systems, Inc.***, 69 NY2d 355, 363, 514 NYS2d 689,693 (1987).

The proper standard for a reviewing Court is whether the challenged administrative ruling lacked a rational basis for the action taken and was arbitrary and capricious. As stated forth by the Court in ***Matter of Halpern v. City of New Rochelle***, 24 AD3d 768, 809 NYS2 98 (2nd Dept. 2005),

> "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis. Under this standard, a determination should not be disturbed unless the record shows that the agency's action was 'arbitrary, unreasonable, irrational or indicative of bad faith' (***Matter of Cowan v. Kern***, 41 NY2d 591, 599; *see* ***Matter of Pell v. Board of Educ.***, 34 NY2d 222, 231 ["Arbitrary action is without sound basis in reason and is generally taken without regard to the facts"]).

The Court, in the ***Halpern*** case, *supra,* further stated:

> "The Court of Appeals has long recognized the 'settled rule' that 'in reviewing board actions as to variances or special exceptions the courts...restrict themselves to ascertaining whether there has been illegality, arbitrariness, or abuse of discretion' (***Matter of Lemir Realty Corp. v. Larkin***, 11 NY2d 20, 24 [collecting cases]; see ***People ex rel. Hudson-Harlem Val. Tit. & Mtgw. Co. v. Walker***, 282 NY 400, 405 [determination of zoning board of appeals 'may not be set aside unless it appears to be arbitrary or contrary to law'][collecting cases]). The Court of Appeals has continued to articulate the CPLR 7803 (3) standard of review in zoning cases, emphasizing the deference that must be afforded to local officials in making judgments concerning land use in their community (*see* ***Matter of Pecoraro v. Board of Appeals of Town of Hempstead***, 2 NY3d 608, 613 ['courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure'] ***Matter of Ifrah v. Utschig***, 98 NY2d 304, 308 ['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']; ***Matter of Cowan v. Kern***, supra at 599 ['Where there is a rational basis for the local decision, that decision should be sustained']).

Thus the ZBA's determination must be upheld if it is rational, and supported by substantial evidence. ***Khan v. Zoning Board of Appeals of Village of Irvington***, 87 NY2nd 344, 639 NYS2d 302(1996). The consideration of "substantial evidence" is limited to determining "whether the record contains sufficient evidence to support the rationality of the [Respondent's] determination." ***Sasso v. Osgood***, 86 NY2d 374, 633 NYS2d 259 (1995). Here, in the case at bar, the ZBA in weighing the competing interests between the proposed requested variances from the Wrens and Kuchners' opposition to the variances noted in its 4 page decision that the area was a pre-existing beach community and "Of the eight homes surrounding the property, only one had not been remodeled or rebuilt." and that many of the redesigned homes "required variances for these additions and alterations." In this regard, the ZBA took notice that the Wrens in seeking to renovate and increase the square footage of their home from 1246 square feet to a first floor footprint of 2189 square feet with the proposed addition and garage were not out of line with the other homes in the area.

The ZBA noted that the Pinto house across the street from the Wren house was 2523 square feet, the Libassi house next door was 3653 square feet, the Stein house on the other side of the Wren house was 1988 square feet, the Ball house was 2513 square feet and the Kuchner house which abuts the Wren house in the back was 2542 square feet with an additional 785 square feet of decking and a 400 square feet swimming pool. Further, the ZBA found that no adverse impact would affect the area or impact in a negative way the physical or environmental conditions in the neighborhood. In reviewing the Wren application, the ZBA noted that while the lot sizes in the area varied greatly and many of the lots were larger than the Wren parcel, conformity to the near 20% lot coverage was an overriding concern so the mere .5% lot coverage variance from 20% to 20.5% was tolerable and acceptable. The Court should not intervene on such a judgment, nor does it find such a minimal variance to be of such significance to warrant a finding of arbitrariness. ***Zaniewski v Zoning Board of Appeals of Town of Riverhead***, 64 AD3d 720, 883 NYS2 279 (2nd Dept 2009).

The ZBA did what it was charged by law with doing i.e., it rendered a decision on variances for the Wrens' residence after hearing all the testimony from both the Wrens and the Kuchners and others in opposition and came to a conclusion that was not arbitrary, capricious or that used a strained interpretation of the facts involved in its granting of the Wrens' application. The ZBA also took into account the Wrens' odd shaped lot requiring a variance in the rear yard setbacks and imposed reasonable conditions to protect the Kuchners' privacy by requiring obscure glass on the dormer windows facing west towards the Kuchners' property with the shortest operating windows the Zoning Code allows, requiring any mechanical equipment to be located on the easterly side of the addition to the house away from the Kuchners' property and requiring evergreen screening material such as Leyland Cypress with heights of 20 feet or more to screen the Kuchners' back yard from the Wrens' backyard to ensure a privacy screen for the Kuchners' property.

A review of the record presented establishes more than sufficient support to substantiate the ZBA's decision to grant the Wrens' application for the minimal lot coverage and the substantial rear yard set back variance requested. The Kuchners' claims that the ZBA failed to perform a detailed analysis of the substantial building construction and increase in total square footage of the house is belied by the record and the ZBA's analysis

of the houses both adjoining the Wrens' parcel and in the area including the Kuchners' house. ***Halperin v. City of New Rochelle***, *supra.*

Finally, the ZBA must also take into account the precedential nature of the request. In ***Matter of Campo Grandchildren Trust v. Colson, et. Al.***, 39 AD3d 746, 834 NYS2d 295 (2nd Dept 2007), the Court held that

> " A determination of a zoning board of appeals that 'neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious' " (citations omitted).

This is a valid concern of the ZBA. It is not this Court's duty to second guess or substitute its judgment for a well reasoned analysis by the ZBA as to the granting of the Wrens' application to increase the square footage of their home to bring it into conformity with other homes in the area, including the Kuchners. The Court finds that the ZBA engaged in the required balancing test and found the Wrens' application for the relaxation of rear yard set back requirements and the minor lot coverage variance proper. ***Zaniewski v Zoning Board of Appeals of Town of Riverhead*** , *supra.*

There is nothing within the fact finding process or the ZBA's decision to suggest or find that its granting of the Wrens' application for a variance was arbitrary, capricious, an abuse of discretion or lacked support in the record presented before it. ***Cellco Partnership v. Bellows***, 262 AD2d 849, 692 NYS2d 203 (3rd Dept. 1999). The Court finds that the ZBA properly engaged in the required balancing test in finding the Wrens' application for the substantial relaxation of the rear yard set back and the more minimal .5% from 20% allowance to 20.5% lot coverage for the proposed residence and properly granted the Wrens' application. ***Birch Tree Partners LLC v. Town of East Hampton***, 78 AD3d 693, 910 NYS2d 178 (2nd Dept. 2010).

Based upon the entire record before it, and balancing all the factors stated, the ZBA did rationally conclude that Wrens' application for the rear yard set back variance along the addition to be added to the existing residence as well as the minimal lot coverage variance was in keeping with the area and its own precedential decisions in this area and thus, its determination granting the requested relief was not arbitrary, capricious, an abuse of discretion or unsupported by a rational basis. ***Picarelli v. Karl***, 51 AD3d 1028, 858 NYS2d 389 (2nd Dept. 2008). Accordingly, the Kuchners' petition is denied and the proceeding dismissed. ***Matter of Ifrah v. Utschig***, supra.

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**Settle Judgment**

The foregoing constitutes the decision of this Court.

Date: September 14, 2011

J.S.C.