MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 24

In the Matter of the Application of Mohammed Sahat-Adat Hossain

Petitioner,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules, For an Order that the Determination of the Respondent be Annulled and Vacated

- against -

The Brookhaven Board Of Zoning Appeals,

Respondent.

By: Cohalan, J.S.C.

Dated: November 30, 2011

Index No. 44759-10

Mot. Seq. # 001 - CDISPSUBJ

Return Date: January 7, 2011
Calendar Date: July 6, 2011

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This is an Article 78 special proceeding brought by the petitioner Mohammed Sahat-Adat Hossain seeking to reverse and annul a decision by the respondent, Brookhaven Board of Zoning Appeals (hereinafter ZBA), dated November 3, 2010, which denied his application for certain variances to legalize an illegal expansion on his residential property.

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The petitioner is the owner of a residential home described as a raised ranch in a residential neighborhood zoned A-1 measuring 112.50 feet in length and 80 feet in depth, of approximately 9,000 square feet in size, located at 36 Mallard Avenue in Selden, Suffolk County on Long Island, New York. The petitioner has owned the property for approximately 25 years and the property is presently rented without the issuance of a rental permit from the Town of Brookhaven, New York (hereinafter Town). The petitioner applied to the Town to legalize an illegal rental by seeking a variance of the rear yard setback from 60 feet to 34.1 feet for an existing addition and a variance for the deck on top of the addition from the side yard requirements of at least 15 feet to 10.7 feet. A certificate of occupancy issued by the Town to the prior owner, Robert Cascio, on November 12, 1986 permitted an attached shed 7.2 feet by 10.9 feet with an above ground deck 16 feet by 20 feet. This shed thereafter "morphed" into an 18.1 feet by 25 feet living space with a deck above it which is used as an illegal rental. The testimony at the ZBA hearing from the neighbors who opposed the petitioner's application for the variances as well as the Town's inspection showed what appeared to have been an illegal rooming house with some 12 unrelated adult males, at a minimum, occupying the premises.

The ZBA conducted hearings on the petitioner's application on July 14, July 21, August 18 and September 8, 2010 and found that the premises were being rented as a multiple rooming house without the issuance of a rental permit, that the rear yard setback variance did not conform to the surrounding neighborhood, the flat roof deck was "unusual" and not common to the area and the petitioner provided no reason for the requested addition, except that which can be determined from the papers that the petitioner wished to continue the illegal rentals of the residence. The ZBA in a decision, dated November 3, 2010, denied the application noting that the petitioner's request seeking variances from the required rear yard setback and side yard setback of the premises was unusual in this residential neighborhood and that the premises could still be used as a rental property without the illegal addition. The ZBA concluded that the addition along with the second story deck would have an adverse impact on the neighborhood, even more so as the addition was renovated and expanded without a permit.

The petitioner thereafter instituted this proceeding claiming the ZBA's denial of his application was arbitrary, capricious, against the weight of the substantial evidence presented and legally without merit.

For the following reasons the petitioner's proceeding 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 by the Court in ***Matter of Halperin 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 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 NY2d 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 petitioner's requested variances and the opposition to them as well as the facts presented,

has demonstrated a rational basis to deny the application. The Court notes that while a legal addition for the shed was granted to the prior owner in 1986 it has been illegally extended, renovated and is now used as a rental residential space without the proper Town inspections, permits or adherence to the required legal processes. The ZBA properly refused to provide an imprimatur of legality to an illegal extension and use of a shed as a residential rental space by an absentee landlord.

Further, the ZBA found from the evidence presented that the granting of such variances would have an adverse and negative impact on the physical and/or environmental conditions in the neighborhood, that the structure as built did not conform to the structures in the surrounding community, that the hardship was self-created by the illegal conversion of a shed to living space and that the removal of the illegal and "un-permitted structures" would be feasible. The ZBA went on to conclude that with the removal of the structure, the petitioner could then seek a rental permit for the premises thereby legalizing an illegal rental and achieving the benefit he seeks without providing a variance for an illegal conversion of a shed to living space.

The Court should not intervene on such a judgment, nor does it find the denial of such requested variances to be of such significance to warrant a finding of arbitrariness or irrationality. Further, the petitioner in his petition admits to the "453 square foot addition was providing additional living space to house those tenants" and he merely seeks to legalize an illegal expansion of a shed to living space for economic purposes and to maximize his profit based upon an argument that this is a mere "technical legal approval to structures which stood just as they had for the prior 25 years, since I acquired title." The petitioner, without a valid rationale, argues that the failure to grant the variances requires him to expend monies to remove the structure, denies living space for his tenants and displaces them from this residence. The Court rejects these arguments as without legal merit. See, ***Woodmaster Homes, LTD v. Scheyer***, 171 AD2d 666, 567 NYS2d 148 (2nd Dept. 1991).

The ZBA, by reviewing the application before it within the legal framework required, recognized that the requested variances were both substantial and "unusual" in this neighborhood and would have a negative impact on it. A review of the record presented establishes more than sufficient support within the record of the proceedings to substantiate the ZBA's decision to deny the petitioner's application for the requested variances seeking to attempt to legalize an illegal addition and convert a legal shed to a rentable living space for tenants to provide an economic benefit to the petitioner at the expense of his neighbors and to the detriment of the neighborhood. The petitioner's arguments that the ZBA failed to perform a detailed analysis of the requested variances as well as the opposition presented to them is belied by the record and the analysis conducted by the ZBA of the premises, the Town's inspection of the premises showing that "the dwelling has all the appearances of being a rooming house", as well as the impact to the local area and the substantial nature of the requested variances. ***Matter of 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 denial of the instant application for zoning variances. The ZBA found that the petitioner's application for the requested variances substantial in nature and that the granting of the application would have an adverse and negative impact on the neighborhood. ***Matter of Halperin v. City of New Rochelle***, *supra*.

There is nothing within the fact finding process or the decision of the ZBA to suggest or find that its denial of the petitioner's application for variances was arbitrary, capricious, irrational, 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 conducted and engaged in the required balancing test and properly denied the 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 set forth, the ZBA acted rationally in concluding that the petitioner's application for the rear yard set back variance along with the side yard variance for permission to legitimize an illegal conversion was not in keeping with the area and its own precedential decisions in this area and thus its determination denying 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 petition is denied and the proceeding dismissed. ***Matter of Ifrah v. Utschig***, *supra*.

Settle Judgment

The foregoing constitutes the decision of this Court.

Date: November 30, 2011

Peter Fox Cohalan

J.S.C.

Hon. PETER FOX COHALAN