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SHORT FORM ORDER INDEX NO. 18209/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

In the Matter of the Application of

PATRICK LEHMAN and ADRIAN MILTON,

Petitioners,

for a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

BOARD OF ZONING APPEALS OF THE TOWN OF BROOKHAVEN,

Respondent.

ORIG. RETURN DATE: JULY 25, 2012
FINAL SUBMISSION DATE: OCTOBER 25, 2012
MTN. SEQ. #: 001
MOTION: MD

ORIG. RETURN DATE: AUGUST 27, 2012
FINAL SUBMISSION DATE: OCTOBER 25, 2012
MTN. SEQ. #: 002
MOTION: MD

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Upon the following papers numbered 1 to 13 read on this motion FOR A JUDGMENT PURSUANT TO ARTICLE 78 AND MOTION TO INTERVENE. Notice of Petition and supporting papers 1-3; Memorandum of Law in Support of Petition 4; Verified Answer with Objections in Point of Law 5; Respondent's Return 6; Notice of Motion to Intervene and supporting papers 7-9; Memorandum of Law of Proposed Intervenors 10; Affirmation in Opposition 11; Replying Affirmation and supporting papers 12, 13; it is,

ORDERED that this application by petitioners, PATRICK LEHMAN and ADRIAN MILTON ("petitioners"), for a judgment, pursuant to Article 78 of the CPLR, annulling and reversing the portion of respondent BOARD OF ZONING APPEALS OF THE TOWN OF BROOKHAVEN's ("ZBA") decision which denied part of petitioners' area variance application, and directing the ZBA to grant petitioners' application in its entirety, or, in the alternative, remanding the matter to the ZBA for a new hearing on the portion of the application that was denied, and awarding petitioners costs, is hereby **DENIED** in its entirety for the reasons set forth hereinafter; and it is further

ORDERED that this motion by proposed intervenors, JOSHUA DAVID and STEPHEN HIRSH, for an Order, pursuant to CPLR 7802 (d), permitting these movants to intervene and directing that the caption be amended accordingly, and further directing that all papers filed by parties to this proceeding be served upon these movants, and extending the time of the ZBA to answer or otherwise move until this motion is decided, is hereby **DENIED** as moot, in light of the Court's ruling on the instant petition.

The Court has received a Verified Answer and Return from the ZBA in response to the petition, as well as opposition to the motion to intervene from petitioners.

Petitioners are the owners of the real property commonly known as 93 Gerard Walk, Cherry Grove, New York ("Premises"), which is located within the Town of Brookhaven on Fire Island, and is zoned "Residential District." The Premises is situated on the northwest corner of Lewis Walk and Gerard Walk, and is improved with a two-story frame dwelling with decks, walks, and a framed shed. Petitioners inform the Court that the Premises was constructed prior to the adoption of the Town Code and was issued a Certificate of Existing Use in 1975. In addition, a Certificate of Occupancy was issued in 1969 for a 10' x 20' addition to the dwelling. Petitioners further inform the Court that the lot area of the Premises is oversized under the Town Code at 5,000 square feet; however, the lot coverage of the Premises is currently 55.7%, which exceeds the lot coverage allowance of 35% under the Code.

Petitioners allege that because of a "small fire" that occurred at the Premises, portions of the existing dwelling required repairs. As a result, petitioners applied to the ZBA for variances in connection with maintaining the existing dwelling, as well as variances for a proposed pool, deck and partial roofed portico.

Specifically, petitioners' application, dated December 19, 2011, sought the following relief:

(1) front yard setback variance for existing one-story residence addition (Gerard Walk);

(2) front yard setback variance for proposed roofed-over deck with pergola (Gerard Walk);

(3) front yard setback for proposed deck, pool and partial roofed-over portico (Lewis Walk);

(4) front yard setback variance for proposed second story residence addition with roof deck (both walks); and

(5) minimum side yard variance for existing two-story residence addition with proposed roof deck, pergola, and 6' high pool enclosure on deck beyond front foundation of dwelling.

After a public hearing on the application before the ZBA held on March 21, 2012, the ZBA issued a written decision, dated May 16, 2012, granting in part and denying in part petitioners' application. In particular, the ZBA granted the front yard setback variance for the proposed deck, pool and partial roofed-over portico (Lewis Walk); front yard setback variance for proposed second story residence addition with roof deck (both walks); and 6' high pool enclosure on deck beyond front foundation of dwelling. The ZBA denied the balance of the application. The ZBA set forth its determination in written Findings of Fact and Conclusions.

Petitioners argue that the ZBA improperly denied in part petitioners' area variance application, misconstruing the facts of the case and misapplying the applicable law with respect to area variances. Petitioners claim that contrary to the ZBA's finding that petitioners intend to utilize the dwelling on the Premises as a "multi-use rental," petitioners were seeking to convert the existing multiple-use rental dwelling to a single-family dwelling. Apparently, petitioners sought to legalize the parts of the dwelling that had been used illegally as a seven unit, multifamily rental property. However, the Court notes that petitioners testified at the hearing that the Premises would continue to be a utilized as a rental property, and that the proposed modifications included the provision of roof decks for each of the renters' bedrooms.

In opposition hereto, the ZBA alleges that it properly balanced and weighed the factors set forth in Town Law § 267-b and the holding of the Court of Appeals in *Sasso v Osgood*, 86 NY2d 374 (1995) when reaching its determination, and therefore the denial cannot be deemed arbitrary or capricious. The ZBA argues that the variances requested were substantial, and that the granting of the variances would have an adverse impact on the neighborhood and cause an undesirable change in the character of the neighborhood. Further, the ZBA indicates that any hardship of petitioners is self-created, as petitioners maintain existing additions located on the north and east side of the Premises without the benefit of a Town permit, and other feasible options are available to meet petitioners' needs.

In a proceeding under CPLR article 78 when reviewing a determination of an administrative tribunal, courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence (*Pell v Board of Education*, 34 NY2d 222 [1974]; *Allen v Bane*, 208 AD2d 721 [1994]). This approach is the same when the issue concerns the exercise of discretion by the administrative tribunal (*Pell v Board of Education*, 34 NY2d 222, *supra*). The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is illegal, arbitrary and capricious, or an abuse of discretion (*Gilman v N.Y. State Div. of Hous. & Cmty. Renewal*, 99 NY2d 144 [2002]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 43 AD3d 1057 [2007]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact (*Pell v Board of Education*, 34 NY2d 222, *supra*). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Pell v Board of Education*, 34 NY2d 222, *supra*). Where a hearing is held, the determination must be supported by substantial evidence (CPLR 7803 [4]). Although scientific or other expert testimony is not required in every case to support a determination with respect to zoning, a tribunal may not base its decision on generalized community objections or pressure (*see Ifrah v Utschig*, 98 NY2d 304 [2002]; *Matter of Grigoraki v Board of Appeals of the Town of Hempstead*, 52 AD3d 832 [2008]).

Moreover, local zoning boards have broad discretion in considering land use applications and the judicial function in reviewing such decisions is a limited one (*Pecoraro v Bd. of Appeals*, 2 NY3d 608 [2004]). 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 (*Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*). A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence (*Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*; *Matter of Hannett v Scheyer*, 37 AD3d 603 [2007]; *Matter of B.Z.V. Enter. Corp. v Srinivasan*, 35 AD3d 732 [2006]). Further, a reviewing court should refrain from substituting its own judgment for the reasoned judgment of the zoning board (*Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*).

Pursuant to Town Law § 267-b (3), when determining whether to grant an area variance, a zoning board of appeals must weigh the benefit of the grant 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 Ifrah v Utschig*, 98 NY2d 304 [2002]; *Matter of Sasso v Osgood*, 86 NY2d 374, *supra*). The zoning board is also required to consider whether: (1) granting the area variance will produce an undesirable change in the character of the neighborhood or a detriment to nearby properties; (2) the benefit sought by the applicant can be achieved by some method, feasible to the applicant, other than a variance; (3) the requested area variance is substantial; (4) granting the proposed variance would have an adverse effect or impact on physical or environmental conditions in the neighborhood or district; and (5) the alleged difficulty is self-created. While the last factor is not dispositive, it is also not irrelevant (*see Matter of Ifrah v Utschig*, 98 NY2d 304, *supra*; *Matter of Sasso v Osgood*, 86 NY2d 374, *supra*).

Here, the Court finds that the partial denial by the ZBA had a rational basis and was supported by the evidence presented. After conducting a hearing on the matter in which petitioners appeared along with a representative, the ZBA properly considered the benefit to petitioners as weighed against the detriment to the health, safety and welfare of the surrounding community. The ZBA also weighed and applied the five aforementioned factors, in compliance with Town Law § 267-b (3) (b) and controlling case law, when reaching its decision on petitioners' application. The ZBA's determination was based upon, among other things, the finding that the requested area variances were substantial and would have an adverse impact on the surrounding neighborhood, and that the proposed one-story addition on the east side and two-story addition on the north side, along with roof decks and pergolas, are contrary to the established development pattern. In addition, adjacent neighbors testified at the hearing against the part of petitioners' application concerning the addition on the northwest side of the Premises, alleging that the addition interferes with the use and enjoyment of their property and poses safety concerns, particularly in light of the recent fire at the Premises. While petitioners are correct that a zoning board may not merely

succumb to generalized community pressure (*see Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*), a zoning board may consider community testimony, among other factors, and may require that issues raised by such testimony be addressed by the applicant (*see Ifrah v Utschig*, 98 NY2d 304, *supra*; *Michelson v Warshavsky*, 236 AD2d 406 [1997]; *Matter of AHU Realty Corp. v Goodwin*, 81 AD2d 637 [1981]).

Finally, the fact that similar applications were granted to petitioners' neighbors does not suffice to establish that the ZBA's action was arbitrary, as a zoning board "may refuse to duplicate previous error; . . . change its views as to what is for the best interests of the [Town]; [or] . . . give weight to slight differences which are not easily discernible" (*Matter of Cowan v Kern*, 41 NY2d 591, 595 [1977]; *see Ifrah v Utschig*, 98 NY2d 304, *supra*; *Josato, Inc. v Wright*, 35 AD3d 470 [2006]; *Matter of Spandorf v Board of Appeals of Vil. of E. Hills*, 167 AD2d 546 [1990]).

In view of the foregoing, the Court finds that the ZBA's denial had a rational basis in fact and law, was supported by the evidence presented, and cannot be deemed an abuse of discretion. Accordingly, the instant petition is **DENIED** and this special proceeding is dismissed. As such, the motion by JOSHUA DAVID and STEPHEN HIRSH, seeking to intervene in this proceeding, is **DENIED** as moot.

The foregoing constitutes the decision and Order of the Court.

Dated: March 20, 2013

HON. JOSEPH FARNETI
Acting Justice Supreme Court

__X__ FINAL DISPOSITION **_____ NON-FINAL DISPOSITION**