Moore v Zoning Bd. of Appeals of the Town of Southampton
2015 NY Slip Op 32161(U)
August 7, 2015
Supreme Court, Suffolk County
Docket Number: 14-16900
Judge: Peter H. Mayer
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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 17

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THOMAS E. MOORE III,

Petitioner,

For a Judgment under Article 78 of the Civil Practice law and Rules,

- against -

ZONING BOARD OF APPEALS OF THE TOWN OF SOUTHAMPTON, HERBERT PHILLIPS, as Chairman, ADAM GROSSMAN, as Vice-Chairman, HELEN BURGESS, BRIAN DESESA, DENISE O'BRIEN, LAURA TOOMAN, and KEITH TUTHILL, as Members of the Zoning Board of Appeals of the Town of Southampton, MICHAEL BENICASA as Town of Southampton Chief Building Inspector; and CHRISTOPHER J. PELUSO,

Respondents.

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By: PETER H. MAYER, J.S.C.
Dated: August 7, 2015

Index No. 14-16900
Mot. Seq. # 001 - MD; CDISPSUBJ

Return Date: 9-24-14
Adjourned: 1-13-15

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In this proceeding, petitioners seek a judgment pursuant to CPLR article 78 annulling a determination adopted by respondent Village of Southampton Zoning Board of Appeals (ZBA) on August 7, 2014, which granted an application by respondent Christopher Peluso for a variance permitting him to construct a tennis court in his back yard. Petitioner is the owner of residential property located at 61 Summerfield Lane, Water Mill, New York, which abuts the Peluso property.

The subject premises is located in a R-80 residential zoning district, and is entitled to R-60 setbacks. The premises is also subject to Town Code §330-77 (D), which permits no more than 20% rear yard coverage in connection with the construction of accessory buildings or uses in residentially zoned premises. Peluso originally submitted an application for a variance permitting him to construct a 55 foot by 115 foot sunken tennis court in the rear of the premises, but he later reconfigured his plan and proposed a smaller tennis court measuring 50 feet by 110 feet, which would result in 32.2 % rear yard coverage.

On June 19, 2014, the ZBA held a public hearing to consider Peluso's application. At the hearing, Peluso's counsel offered testimony that, but for the requested variance for an increase in coverage, the plan for the reconfigured court complied with all other provisions of the Town Code, including the R-60 setback. Peluso's counsel further asserted that the Board regularly grants similar applications for relief in relation to tennis courts in the surrounding neighborhood, that the subject tennis court would be sunken and substantially screened, and that unlike adjacent properties, the subject property is not constrained by wetlands and is larger in size. Petitioner's counsel appeared at the hearing and argued, inter alia, that the application did not meet the criteria for the issuance of a variance, and that the construction of a tennis court on Peluso's property would adversely impact and change the character of the neighborhood.

By decision dated August 7, 2014, the ZBA granted the petition, subject to the proposed tennis court being surrounded by hedges on all sides. In its decision, the ZBA determined, inter alia, that the benefit of granting the variance outweighed any detriment to the surrounding neighborhood, and that the construction of the reconfigured tennis court would have no discernable impact, since the reduced size and screening would reduce noise, it complied with the setback provisions, and it would abut an existing horse farm. The ZBA also rejected the delineation of the neighborhood proposed by petitioner's counsel and found that the character of the neighborhood would not be changed, as there were several existing tennis courts already located in the community. In distinguishing Peluso's application from a variance request made in connection with another tennis court that was rejected in1985, the ZBA noted the earlier application was for a minimum side yard relief, whereas Peluso's request conforms to all existing setback regulations and will be bordered by shrubs to address the impact of noise on adjacent property owners. Additionally, the ZBA's decision stated that the benefit sought could not be achieved by some other feasible method, as further reconfiguration of the premises to accommodate alternative placement of the tennis court would incur significant costs. The ZBA also found that the granting of the variance was not substantial, and that the hardship was not self-created, as some of the coverage issues were related to the fact that the property was located on an existing flag lot.

Petitioner commenced the instant Article 78 proceeding challenging the ZBA's determination of Peluso's application for an area variance as arbitrary and capricious, and lacking a rational basis. Specifically, petitioner asserts that the variance would adversely impact and change the character of the neighborhood, that the only other request for a variance to construct a tennis court in the neighborhood was denied in 1985, and that any hardship Peluso incurs as a result of the denial of his application is self created, since Peluso's premises, almost quadruple the size of the surrounding homes, already is improved with a pool, a deck, and a pool house. In addition, petitioner argues that the ZBA failed to consider whether the benefit sought by Peluso could have been achieved by some other means, and whether his alleged difficulty was self-created, as he overbuilt his lot and then sought a variance, rather than initially pursuing a building plan which included a tennis court. Petitioner further contends that the ZBA failed to consider the portion of Peluso's application seeking a variance of Town Code §330-83 (C), known as the

"Open to the Sky Rear Yard" provision. According to petitioner, this provision was meant to prevent the build-out of the rear yard open space as a means of preserving the openness between properties and avoiding the over-intensification of the use and occupancy of residential properties.

Respondents oppose the petition, arguing that the ZBA's determination was not arbitrary and capricious, that it followed the required balancing test, and that it relied on substantial evidence in finding that the construction of the tennis court will not change the character of the neighborhood or have an adverse impact on its physical condition.

Initially, it is noted that the court will not consider petitioner's allegation that the ZBA failed to address Town Code §330-83 (C), as the issue was never raised at the June 2014 administrative hearing held before the ZBA or addressed in its August 7, 2014 decision granting the variance (*see* ***Matter of National Fuel Gas Distrib. Corp. v Public Serv. Commn. of the State of N.Y.***, 16 NY3d 360, 368, 922 NYS2d 224 [2011]; ***Matter of Loudon House LLC v Town of Colonie***, 123 AD3d 1409, 999 NYS2d 607 [3d Dept 2014]; ***Matter of Rose v Albany County Dist. Attorney's Off.***, 111 AD3d 1123, 975 NYS2d 258 [3d Dept 2013]; ***Matter of Torres v New York City Hous. Auth.***, 40 AD3d 328, 835 NYS2d 184 [1st Dept 2007]). In any event, the court notes that the proposed tennis court, which would be sunken three feet into the ground, meets all the setback provisions and would remain uncovered and open to the sky.

The court's role in reviewing an administrative decision is not to decide whether the agency's determination was correct or to substitute its judgment for that of the agency, but to ascertain whether there was a rational basis for the determination (*see* ***Matter of Sasso v Osgood***, 86 NY2d 374, 633 NYS2d 239 [1995]; ***Matter of Chemical Specialties Mfrs. Assn. v Jorling***, 85 NY2d 382, 626 NYS2d 1 [1995]; ***Matter of Warder v Board of Regents of Univ. of State of N.Y.***, 53 NY2d 186, 440 NYS2d 875 [1981]). It is fundamental that when reviewing a determination that an administrative agency alone is authorized to make, the court must judge the propriety of such determination on the grounds invoked by the agency; if the reasons relied on by the agency do not support the determination, the administrative order must be overturned (***Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.***, 77 NY2d 753, 758, 570 NYS2d 474 [1991]; *see* ***Matter of National Fuel Gas Distrib. Corp. v Public Serv. Commn. of the State of N.Y.***, 16 NY3d 360, 922 NYS2d 224 [2011]; ***Matter of Filipowski v Zoning Bd. of Appeals of Vil. of Greenwood Lake***, 77 AD3d 831, 909 NYS2d 530 [2d Dept 2010]).

A local zoning board has broad discretion in considering applications for area variances (*see* ***Matter of Pecorano v Board of Appeals of Town of Hempstead***, 2 NY3d 608, 781 NYS2d 234 [2004]; ***Matter of Cowan v Kern***, 41 NY2d 591, 394 NYS2d 579 [1977]), and its interpretation of the local zoning ordinances is entitled to great deference (*see* ***Matter of Toys "R" Us v Silva***, 89 NY2d 411, 654 NYS2d 100 [1996]; ***Matter of Gjerlow v Graap***, 43 AD3d 1165, 842 NYS2d 580 [2d Dept 2007]; ***Matter of Brancato v Zoning Bd. of Appeals of City of Yonkers, N.Y.***, 30 AD3d 515, 817 NYS2d 361 [2d Dept 2006]; ***Matter of Ferraris v Zoning Bd. of Appeals of Vil. of Southampton***, 7 AD3d 710, 776 NYS2d 820 [2d Dept 2004]). Nevertheless, a court may set aside a zoning board's determination if the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or simply succumbed to generalized community pressure (*see* ***Matter of Pecorano v Board of Appeals of Town of Hempstead***, *supra*; ***Matter of Cacsire v City of White Plains Zoning Bd. of Appeals***, 87 AD3d 1135, 930 NYS2d 54

[2d Dept], *lv denied* 18 NY3d 802, 938 NYS2d 859 [2011]). "In applying the arbitrary and capricious standard, a court inquires whether the determination under review had a rational basis . . . [a] determination will not be deemed rational if it rests entirely on subjective considerations, such as general community opposition, and lacks an objective factual basis" (***Matter of Kabro Assoc., LLC v Town of Islip Zoning Bd. of Appeals***, 95 AD3d 1118, 1119, 944 NYS2d 277 [2d Dept 2012]; *see* ***Matter of Ifrah v Utschig***, 98 NY2d 304, 746 NYS2d 667 [2002]; ***Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh***, 68 AD3d 62, 886 NYS2d 442 [2d Dept 2009], *lv denied* 13 NY3d 716, 895 NYS2d 316 [2010]). Further, the decision of an administrative agency "which neither adheres to its own prior precedent nor indicates a reason for reaching a different result on essentially the same facts is arbitrary and capricious" (***Matter of Charles A. Field Delivery Serv. (Roberts)***, 66 NY2d 516, 517, 498 NYS2d 111 [1985]; *see* ***Matter of Knight v Amelkin***, 68 NY2d 975, 510 NYS2d 550 [1986]; ***Matter of c/o Hamptons, LLC v Zoning Bd. of Appeals of Vil. of E. Hampton***, 98 AD3d 738, 950 NYS2d 386 [2d Dept 2012]; ***Matter of Lucas v Board of Appeals of Vil. of Mamaroneck***, 57 AD3d 784, 870 NYS2d 78 [2d Dept 2008]).

In determining whether to grant an area variance, a zoning board of appeals is required 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 Pinnetti v Zoning Bd. of Appeals of Vil. of Mt. Kisco***, 101 AD3d 1124, 956 NYS2d 565 [2d Dept 2012]; ***Matter of Jonas v Stackler***, 95 AD3d 1325, 945 NYS2d 405 [2d Dept 2012]; *see also* ***Matter of Pecorano v Board of Appeals of Town of Hempstead***, *supra*; ***Matter of Ifrach v Utschig***, *supra*). A zoning board also must consider whether the granting of an area variance will produce an undesirable change in the character of the neighborhood or a detriment to neighboring properties; whether the benefit sought by the applicant can be achieved by some other feasible method, rather than a variance; whether the requested variance is substantial; whether granting the variance will have an adverse impact on the physical or environmental conditions in the neighborhood; and whether the alleged difficulty is self-created (Village Law §7-712-b [3][b]; *see* ***Matter of Blandeburgo v Zoning Bd. of Appeals of Town of Islip***, 110 AD3d 876, 972 NYS2d 693 [2d Dept 2013]; ***Matter of Alfano v Zoning Bd. of Appeals of Vil. of Farmingdale***, *supra*; *see also* ***Matter of Schumacher v Town of E. Hampton, N.Y. Zoning Bd. of Appeals***, 46 AD3d 691, 849 NYS2d 72 [2d Dept 2007]). However, a zoning board is not required to justify its determinations with evidence as to each of the five statutory factors, as long as its determinations "balance the relevant considerations in a way that is rational" (*see* ***Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh***, *supra*; ***Matter of Merlotto v Town of Patterson Zoning Bd. of Appeals***, 43 AD3d 926, 841 NYS2d 650 [2d Dept 2007]).

The ZBA's determination granting the application for a variance permitting the construction of the proposed tennis court was not arbitrary or capricious and was supported by substantial evidence in the record (*see* ***Matter of DiPaolo v Zoning Bd. of Appeal of the Town/Village of Harrison***, 62 AD3d 792, 879 NYS2d 507 [2d Dept 2009]; ***Matter of Kraut v Board of Appeals of Vil. of Scarsdale***, 43 AD3d 923, 841 NYS2d 369 [2d Dept 2007]). Generally, an area variance involves no change in the essential character of the zoned district; thus, the neighborhood considerations are not as strong as in a use variance (*see* ***Khan v Zoning Bd. of Appeals of Vil. of Irvington***, 87 NY2d 344, 639 NYS2d 302 [1996]; ***Wilcox v Zoning Bd. of Appeals of City of Yonkers***, 17 NY2d 249, 270 NYS2d 569 [1966]). Here, Peluso's application for a variance permitting 32% back yard coverage seeks an area variance, as the essential use of the land is not being changed (*see* ***Wilcox v Zoning Bd. of Appeals of City of Yonkers***, *supra*, ***Dawson***

v Zoning Bd. of Appeals of Town of Southold, 12 AD3d 444, 785 NYS2d 84 [2d Dept 2004]). Moreover, the ZBA's decision addresses each element of the balancing test, and contains an extensive discussion of the evidentiary support and arguments set forth by both petitioner and respondent. The ZBA found that character of the neighborhood would not be changed, and specifically rejected the delineation of the neighborhood proposed by petitioner's counsel on the basis it appeared tailored to omit properties which had existing tennis courts. In addressing whether Peluso had an alternative means of obtaining the benefit, the ZBA noted that the cost of altering the premises to meet the 20% backyard coverage requirement would cost Peluso approximately $131,000. The ZBA further noted that Peluso met all the setback requirements, and that had he reduced the front yard setback in the manner suggested by respondent, the proposed tennis court would be even closer to his neighbors' properties.

The ZBA also distinguished Peluso's application from a previous variance request made in connection with another tennis court in1985, noting that unlike the earlier request, which was for a minimum side yard relief, Peluso's reconfigured proposal had met all existing setback regulations and would be bordered by mature shrubs to address the impact of noise on adjacent property owners. Further, the ZBA found that the granting of the variance was not substantial, as the initial request was reduced and will not have an adverse effect on the environment, as the subject property is not located in an environmentally sensitive area and no environmental review is required under SEQRA regulations. Additionally, the decision stated that the alleged difficulty was not self-created, as the premises is a flag lot created by a subdivision designed by the Town Planning Board in 1979. Thus, under the circumstances, the ZBA's determination had a rational basis and was not arbitrary and capricious (*see* ***Matter of King v Town of Islip Zoning Bd. of Appeals***, 68 AD3d 1113, 892 NYS2d 174 [2d Dept 2009]; ***Matter of Gomez v Zoning Bd. of Appeals of Town of Islip***, 293 AD2d 610, 740 NYS2d 139 [2d Dept 2002]; ***Matter of Brady v Town of Islip Zoning Bd. of Appeals***, 65 AD3d 1337, 886 NYS2d 465 [2d Dept 2009]).

Accordingly, the petition is denied and the proceeding is dismissed.

Submit judgment.

Peter H. Mayer
J.S.C.