Matter of O'Connor & Sons Home Improvement, LLC v Acevedo
2017 NY Slip Op 32840(U)
December 18, 2017
Supreme Court, Nassau County
Docket Number: 8019/16
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 27 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Justice of the Supreme Court

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Index No. 8019/16

In the Matter pf the Application of
O'CONNOR AND SONS HOME IMPROVEMENT, LLC,

Motion Seq. No.: 001
Motion Submitted: 10/30/17

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

Plaintiff(s),

-against-

ESTEBAN ACEVEDO, BARRY ALTON, STUART BANSCHICK, DAVID BYTHEWOOD, MARYELLEN FEILER, MICHAEL LEONETTI AND ROCCO MORELLI, ALL CONSTITUTING THE ZONING BOARD APPEALS OF THE CITY OF LONG BEACH,

Defendant(s).

_____x

The following papers read on this motion:

Notice of Petition/Supporting Exhibits.....X
Return/Memorandum of Law In Opposition.....X
Petitioner's Memorandum of Law.....X
Reply Memorandum of Law.....X

Petitioners, O'Connor and Sons Home Improvement LLC (O'Connor) petition this court pursuant to Article 78 of the CPLR for a judgment annulling the determination of Respondents, Esteban Acevedo, Barry Alton, Stuart Banschick, David Bythewood,

Maryellen Feiler, Michael Leonetti and Rocco Morelli, All Constituting The Zoning Board of Appeals of the City of Long Beach (collectively "the ZBA"), dated August 1, 2016 which denied their application for various variances. The ZBA opposes the petition.

Petitioners own property known as 49 Kirkwood Street, Long Beach, New York. The property is an 120' x 57 corner lot that consists of 6840 square feet. There is currently one dilapidated house on the property, which was there when O'Connor purchased the property in 2015. The Zoning District in which the property resides requires a minimum lot size of 80' x 57'. O'Connor seeks to raze the current structure and then build two new houses on the property. The new lots would each be 60' x 57', thus O'Connor's need for the variances. They applied for the variances and a public hearing was held on June 23, 2016.

At the hearing, O'Connor's counsel, Mr. Cohen, submitted legal and factual arguments, including testimony of a real estate expert. The evidence offered in support of the variances included: 1) O'Connor could build one structure up to 95 feet wide on the property, but that would be out of character for the neighborhood. Instead, they wish to build two smaller structures which would be more consistent with the majority of the homes in the neighborhood, 2) Of the 850 homes in the Zoning District, only 14 of them, or 1.5%, have dimensions similar to the subject plot of 120' x 57', 3) renovating the current structure is not an option as it has been determined by the City that it must be

razed, 4) one large house being built on the plot would be out of character for the street and neighborhood as opposed to two modest houses, 5) the variances sought are modest, in that they do not seek variances for the front, side or rear setbacks, 6) each home would have off street parking for four cars, lessening the impact on street parking, 7) one single structure would have a footprint of 3800 square feet, while two separate structures would only take up 2400 square feet, total, 8) the hardship is not self-created. The determination that the home had to be razed was made after O'Connor purchased the property, 9) in the immediate vicinity there are two lots that are smaller (40') and one that is equal (60') to the two lots O'Connor seeks to create, 10) the two new homes would be FEMA compliant, and 11) the properties immediately adjacent to the subject property submitted letters in support of the application.

Mr. Cohen then indicated that his co-counsel next intended to address the legal arguments, but was first met with immediate hostility and opposition from the Chairman and other members of the ZBA. The Chairman stated he had some questions, but instead attacked some of O'Connor's submissions without ever asking a question. Another board member accused O'Connor of "negligence" for not having an engineer inspect the property before closing on the deal. A third board member agreed other boardmembers that the hardship was self-created, but then allowed O'Connor's presentation to continue.

The legal argument largely centered on a property near the subject, with a similar

sized lot for which the ZBA granted variances to split into the two lots. The property, known as 83 Farrell Street, was in the same zoning district and, aside from not being a corner lot, was similar to the subject property herein. Further, of the 58 houses on Kirkwood Street, more than half have frontages of less than 60', meaning that two houses with 60' dimensions would not change the character of the neighborhood or street.

After ending their submissions and getting some more opposition from the board, members of the public were allowed to speak. Each one opposed the variances and the reasons given centered on: 1) the impact on the current paucity of on-street parking spaces , 2) home values decreasing, 3) the 83 Farrell Street construction that O'Connor cites to remains an unfinished construction site, with the finish being unknown, and it is an eyesore that collects garbage, 4) at the time the 83 Farrell variance was given, it was soon after Sandy and no one was sure if people would return to Long Beach. Because of that, construction of any kind was encouraged, and 5) it will change the character of the neighborhood. Some members of the public opined that the owner of this property had nefarious intentions and was only interested profit, and one member of the public said that the owner on whose behalf O'Connor was appearing was a felon. At the close of the hearing, the ZBA indicated that further submissions were allowed until voting on the application occurred.

Post-hearing, O'Connor submitted, *inter alia*, the report of Nelson Realty Group.

Barry Nelson, who signed the report, indicated the ZBA was familiar with him and his credentials, having appeared before them "on many similar matters over the past thirty plus years...". Mr. Nelson performed a study of six blocks, with the subject block included, and five other blocks in the adjacent or immediate vicinity. In the six blocks studied, 20 houses were 60' or less and 26 of them were less than 80'. Mr. Nelson opined that allowing the subdivision of the subject lot would "not alter or change the essential character and pattern of development..." in the Zoning District.

On August 1, 2016, the ZBA issued a one sentence decision: "NOW, THEREFORE, BE IT RESOLVED that the application is hereby DENIED; AND the Board may issue Findings of Fact and Conclusions of Law at a later date." (Capitals in original). This petition ensued.

" 'Local zoning boards have broad discretion in considering applications for area variances.' " *Matter of Goldberg v Zoning Bd. of Appeals of City of Long Beach*, 79 AD3d 874, 876 (2nd Dept 2010), quoting *Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 67 (2nd Dept 2009), *lv den.*, 13 NY3d 716 (2010), citing, *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 (2004); *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 771 (2nd Dept 2005), *lv den.*, 6 NY3d 890 (2006), *lv dism.*, 7 NY3d 708 (2006); *see also, DAG Laundry Corp. v Board of Zoning Appeals of Town of North Hempstead,* 98 AD3d 740

(2nd Dept 2012). "The judicial function in reviewing such determinations is limited and a reviewing court should refrain from substituting its own judgment for the judgment of the zoning board (citations omitted)." *Matter of Goldberg v Zoning Bd. of Appeals of City of Long Beach, supra*, at p. 877; *see, Matter of Pecoraro v Board of Appeals of Town of Hempstead, supra,* at p. 613; *Matter of Halperin v City of New Rochelle. supra*, at p. 772. "Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion" (*Matter of Pecoraro v Board of Appeals of Town of Hempstead, supra*, at p. 613) " 'or succumbed to generalized community opposition' " (*DAG Laundry Corp. v Board of Zoning Appeals of Town of North Hempstead, supra*, at p. 741, quoting *Matter of Ramundo v Pleasant Val. Zoning Bd. Of Appeals*, 41 AD3d 855 [2nd Dept 2007]).' " "The determinations will be sustained if they have a rational basis in the record." *DAG Laundry Corp. v Board of Zoning Appeals of the Town of North Hempstead, supra*, at p. 741, citing *Edwards v Davison*, 94 AD3d 883 (2nd Dept 2012).

"In reviewing an application for an area variance, a zoning board is required to engage in a balancing test 'weigh[ing] 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 (citations omitted)." *Jonas v Stackler*, 95 AD3d 1325 (2nd Dept 2012); *see* Village Law § 7-712-b(3)(a); *see also, Matter of Pecoraro v Board of Appeals of*

Town of Hempstead, supra, at p. 612; *Danieri v Zoning Board of Appeals of Town of Southold*, 98 AD3d 508 (2nd Dept 2012). "In making its determination, the zoning board must consider: '(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variances.' " *Danieri v Zoning Bd. of Appeals of Town of Southold, supra* at p. 509; Village Law § 7-712-b(3)(b).

" 'Conclusory findings of fact are insufficient to support a determination by a zoning board of appeals, which is required to clearly set forth 'how' and 'in what manner' the granting of a variance would be improper (citations omitted).' " *Matter of Gabrielle Realty Corp. v Board of Zoning Appeals of Vil. of Freeport,* 24 AD3d 550 (2005), quoting *Matter of Farrell v Board of Zoning & Appeals of In. Vil. of Old Westbury*, 77 AD2d 875, 876 (1980); *see also, Cacsire v City of White Plains Zoning Bd. of Appeals*, 87 AD3d 1135, 1136-1137 (2nd Dept 2011). "Likewise, 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." *Cacsire v City of White Plains Zoning Bd. of Appeals, supra*, at p. 1137, citing *Matter of Halperin v City of New Rochelle. supra*, at p. 772. Accordingly, "[c]ourts may set aside a zoning board determination where the record reveals that the 'board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure.' " *Cacsire v City of White Plains Zoning Bd. of Appeals, supra*, at p. 1137, citing *Matter of Pecoraro v Board of Appeals of Town of Hempstead, supra,* at p. 613. Substantiality alone should not be allowed to control. *Filipowski v Zoning Board of Appeals of Vil. of Greenwood Lake*, 38 AD3d 545 (2nd Dept 2007); *see also, Cacsire v City of White Plains Zoning Bd. of Appeals, supra*, at p. 1135; *Beyond Bldrs., Inc. v Pigott*, 20 AD3d 474 (2nd Dept 2005). In any event, it should not be viewed "in the abstract." Rather,

> "[t]he totality of the relevant circumstances must be evaluated in determining whether a deviation truly is substantial. The effect of the variance on the neighborhood, its true impact and the necessity for compliance with a regulation's mandate all are highly significant considerations in undertaking such an analysis. When presenting an application for a variance which might be considered substantial in purely mathematical terms, the applicant should relate the requirement to the foregoing considerations in order to place the matter in the proper context." *Rice, Practice Commentaries, McKinney's Cons. Laws of N.Y. Book 63, Village Law § 7-712-b at p. 610.*

Herein, O'Connor was not given the reasons for the denial. In fact, the ZBA did

not publish its findings for two months after the hearing, and one month after it was served with the subject petition. In the findings, the ZBA lists the numerous submissions made by O'Connor, including a memorandum of law from a prior matter, Mr. Nelson's report, records from Nassau County relating to other properties in Long Beach, and some City of Long Beach Building Department records. The ZBA also lists the submissions from all other interested persons which consists of letters from various members of the community and a ZBA resolution denying a subdivision of 40 Kirkwood Street from 1989.

In paragraph 15 of the findings, the ZBA notes: "While the Board does see that the Applicant intends to provide for off street parking for the two proposed structures, the Board takes note of the negative impact of the proposed curb cut on Kirkwood Street, as that curb cut will take away currently existing on-street parking spaces on that street." The court finds such reasoning arbitrary. While it is true that a curb cut will take away on-street parking, the ZBA neglects to consider that the one large structure that the ZBA acknowledges O'Connor would be allowed to build could house as many as four or five or more licensed drivers, some of whom would have to park on the street, which would add to the "dire" parking situation. Similarly, the two smaller proposed smaller structures could conceivably house one, or no licensed drivers in each, adding no additional stress to the parking issues. Assuming that one large structure would cause less parking problems

than two smaller ones is rank speculation. This logic similarly applies to the "increased traffic" fears. There is no support in the record, whatsoever, that one large structure would create less increased traffic than two smaller structures.

Next, the ZBA's findings take issue with O'Connor pointing out how many other structures exist in the vicinity that are less than 80'. Petitioners fail "to distinguish between how many of the frontages analyzed existed before the change in the Zoning Code in 1987." While that may be true, the ZBA fails to explain the relevance of such a distinction. One of the factors to be weighed is whether the proposed structures would change the character of the neighborhood. Regardless of how and why there are so many properties with frontages less than the currently-required 80', there appear to be many of them, and the ZBA does not explain how two more would change the character of the neighborhood.

Another arbitrary factor is the ZBA believing that two structures would cut down on "green spaces and view corridors". As O'Connor points out, there is no support for this assertion, and it is just as likely that two smaller structures, taking up less overall square footage, would create greater green space and greater view corridors.

Perhaps the only finding raised that might have contained merit is the assertion that the Zoning Code was changed "on or about 1986 or 1987" with the intent of preserving the larger lots. Even assuming this is true, and there is no support for the

assertion in the record other than statements by the public and board members, it does not explain the variance being granted to 83 Farrell, a similarly sized lot. The ZBA attempts to differentiate the two by explaining the concerns about people potentially not returning to Long Beach post-Sandy. By contrast, the ZBA states that Long Beach no longer has such concerns and that Long Beach is currently vibrant and has no further need for such incentives. First, this court is concerned with the manner in which the ZBA makes such proclamations but offers no proof, in the record, to support them. The only support, in the record, for these assertions are the opinions of the members of the ZBA and the members of the public who oppose the application1. Second, this court is not certain where the reported vibrancy of modern-day Long Beach fits into the factors that the ZBA was supposed to weigh. In other words, the factors require the ZBA to weigh the benefit to the application against the potential detriment to the community. Instead, the ZBA seems to be saying that since Long Beach as a whole is currently so healthy, applications such as the current one are not "needed". The court believes this is the wrong standard to apply.

In considering the determinative factors, the court finds the ZBA's reasoning arbitrary. In finding that granting the variances would create an undesirable change in

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[1]It is interesting to note that the transcript of the hearing on 83 Farrell, annexed to the Return, contains numerous members of the public making many of the same arguments that the members of the public herein have made, including dire parking, changing the character of the neighborhood and the owner's nefarious intent. Some members of the public were concerned that the owner of 83 Farrell was seeking to capitalize on the problems caused by Sandy, but a member of the board, who is also a member of the current board, stated it was "clear" that the application had nothing to do with Sandy.

the character of the neighborhood or a detriment to nearby properties, the court finds the only evidence relied upon by the ZBA were the generalized complaints of community members. (*Cacsire v City of White Plains Zoning Bd. of Appeals*, *supra*). To the contrary, the record supports the conclusion that the two proposed structures will be similar in size and nature to many of the existing homes on the same street and near-by streets. The issue of whether the benefit sought by the applicant could be achieved by some method other than an area variance appears to not have been addressed at all. While the ZBA found the requested area variance would be "substantial", the only support for that conclusion was the opinion of the ZBA and the generalized community opposition. The court finds there was no support for the conclusion that the proposed variance would have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district. While some of the community members expressed concern about environmental impacts and potential sewer issues, there was no evidence before the ZBA supporting such concerns.

Finally, there is the issue of whether the hardship was self-created. On the one hand, the determination by the City that the current structure needed to be razed was made after O'Connor purchased it. On the other hand, O'Connor is certainly savvy enough, as a "Home Improvement" concern, to have known upon purchasing the property that the current structure was unsound. In other words, the court finds merit to both sides

of the argument. Regardless, the "self-created" factor is not determinative on its own and is to be considered with all the other factors. "[A]lthough the petitioners' difficulty arguably was self-created, there [is] no evidence that the grant of the requested . . . variance will have an undesirable effect on the character of the neighborhood, adversely impact on physical and environmental conditions, or otherwise result in a detriment to the health, safety and welfare of the neighborhood or community" (*Danieri v Zoning Bd. Of Appeals of Town of Southold*, 98 AD3d 508, 510 (2nd Dept 2012), *lv den.*, 20 NY3d 852 (2012).

Accordingly, it is hereby

ORDERED, that the petition is GRANTED and the ZBAs determination denying O'Connor's application for an area variance is annulled; and it is further

ORDERED, that the ZBA is directed to issue the requested area variance.

The court has considered the other arguments raised by the parties and finds them to be without merit.

This constitutes the Decision and Order of the Court.

Dated: December 18, 2017
Mineola, N.Y.

Hon. James P. McCormack, J. S. C.