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SHORT FORM ORDER **INDEX NO.: 01115/2017**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Submit Date: 04/20/17
Motion Seq 001 MD; CASE DISP

PETITIONER'S COUNSEL:
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In the Matter of the Application of

EAST END INVESTORS, LLC.,

Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Law & Rules

-against-

PAUL M. DeCHANCE, Chairman, JAMES WISDOM, Vice-Chairman, HOWARD BERGSON, RONALD LINDSAY, RICK CUNHA & WAYNE ROGERS, constituting the ZONING BOARD OF APPEALS of the TOWN OF BROOKHAVE & the ZONING BOARD OF APPEALS of the TOWN OF BROOKHAVEN, & the TOWN OF BROOKHAVEN,

Respondents.

Upon the following papers read on the Verified Petition pursuant to CPLR Article 78; Notice of Petition & Verified Petition dated February 28, 2017 and supporting papers; Verified Answer dated March 23, 2017; Certified Administrative Return dated March 21, 2017; Reply Affirmation in Further Support of Petition dated April 18, 2017; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the Verified Petition pursuant to CPLR Article 78 seeking an order vacating, annulling or otherwise setting aside respondents determination denying petitioner's application for zoning variance is **denied** for the following reasons; and it is further

ORDERED that counsel for respondents are hereby directed to serve a copy of this decision and order with notice of entry on counsel for plaintiff.

Petitioner East End Investors, LLC. is a real estate holding and contracting company who is the owner of real property located at 460 6th Street, Selden, New York 11784 in the Town of

Brookhaven, County of Suffolk, Suffolk County Tax Map # 0200.368.00-07.00-023.001. Petitioner acquired the property by foreclosure sale. Its intent was to demolish the existing dwelling, and accordingly it applied for a variance from the Town of Brookhaven zoning regulations to allow it to subdivide its property, a 24,000-sq. ft. parcel, into two substandard sized parcels of 10,000 sq. ft. and 14,000 sq. ft. respectively, to build a separate 2,000 sq. ft. house on each parcel. By its application, petitioner sought variances seeking relaxation from zoning code requirements concerning lot size, lot frontage, side yard, rear yard and total side yard. That application was denied by the Town Board on July 22, 2016, which prompted petitioner's appeal to the Town's Zoning Board of Appeals.

The matter was heard before the ZBA at public hearing on November 30, 2016. At that hearing, the ZBA took testimony from petitioner's expediter Anthony Mitola, the Town Planner Christopher Wrede, as well as from members of the community and surrounding neighborhood affected by petitioner's proposal. The ZBA then resolved the matter denying petitioner's requested variance in a written decision with findings of fact and conclusions issued January 25, 2017.

This proceeding followed commenced by Notice of Petition and Verified Petition on March 1, 2017. By its Petition, petitioner seeks an order pursuant to CPLR Article 78 vacating, annulling or otherwise setting aside the ZBA's denial of its variance on the grounds that it was arbitrary, capricious, irrational, illegal or otherwise not supported by substantial evidence. Arguing in support of the Petition, petitioner claims that the ZBA cowed to neighborhood opposition and denied its application without the benefit for expert testimony concerning physical density, negative environmental impact or nature or character of the neighborhood. Petitioner additionally argues that its variance should have been granted because the majority of existing lots in a 500-ft. radius of comparison are not in compliance with prevailing zoning.

Respondents, represented by the Brookhaven Town Attorney, joined issued submitted a Verified Answer with Objections in Point of Law dated March 23, 2017, and a certified Administrative Return dated March 21, 2017, which *inter alia* has included the ZBA hearing minutes and written denial and petitioner's variance application.

The ZBA determination under review denied petitioner's application for several reasons which are taken in turn. Petitioner's parcel is located in an area zoned A1 residential since December 1989 when the Town *sua sponte* rezoned the area from prior B residential. The parcel situated in a residential neighborhood at the north side of Glenn Way and south side of 6th Street in Selden was determined to be split zone: 17% lying in B zone and the remaining 83% in A1 zone. Thus, the Board pursuant to its code determined that the most restrictive zone would apply since no more than 50% was situated in either zone. The Town's code for A1 residential zoning required that a lot be at least 40,000 sq. ft. In rendering its determination, the ZBA applied the factors of Town Law § 267-b finding that petitioner's proposal substantially did not comply with prevailing zoning regulation and was out of character with the nature to the existing neighborhood.

Specifically, respondents found that petitioner's proposal, which sought to create lots with 70ft wide frontage and limited setback compared favorably with only 20% of existing lots concerning lot size, and 23% of lots concerning lot frontage. Therefore, the ZBA reasoned that petitioner's application would have an undesirable effect and set bad precedent for the

neighborhood, as it sought substantial and significant relaxations from zoning regulation.

Moreover, the ZBA determined that petitioner had viable alternatives to variance relief and zoning relaxation since it could market the property as is. Lastly, respondents found that petitioner's problems were self-created because it acquired the property in 2016 subject to, and with the knowledge of, the A1 residential requirements.

This Court in reviewing the ZBA's determination is mindful that "[l]ocal 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 [and capricious], or an abuse of discretion." Accordingly, such a determination should be sustained if it is not illegal, is not arbitrary and capricious, and has a rational basis (***Harris v Zoning Bd. of Appeals of Town of Carmel***, 137 AD3d 1130, 1131, 27 NYS3d 660, 661 [2d Dept 2016]). The rationale for this rule is that " '[l]ocal officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community' " (***Monte Carlo 1, LLC v Weiss***, 142 AD3d 1173, 1175, 38 NYS3d 228, 231 [2d Dept 2016]).

Our courts define rational as having "some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition' " (***JSB Enterprises, LLC v Wright***, 81 AD3d 955, 956, 917 NYS2d 302, 303 [2d Dept 2011]). Courts consider "substantial evidence" only to determine whether the record contains sufficient evidence to support the rationality of the determination being questioned (***Harn Food, LLC v DeChance***, 2018 WL 1309927, at *1 [2d Dept Mar. 14, 2018]). Reviewing courts may not weigh the evidence or reject the choice made by the zoning board "where the evidence is conflicting and room for choice exists" (***Calvi v Zoning Bd. of Appeals of City of Yonkers***, 238 AD2d 417, 418, 656 NYS2d 313, 314 [2d Dept 1997]). Further, courts should refrain from substituting its own for the reasoned judgment of the zoning board, as it has been said that "[i]t matters not whether, in close cases, a court would have, or should have, decided the matter differently … [t]he judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them" (***Pecoraro v Bd. of Appeals of Town of Hempstead***, 2 NY3d 608, 613, 814 NE2d 404, 407 [2004]). Thus, the Appellate Division has accordingly ruled that a ZBA in determining whether to grant an area variance, "[s]cientific or other expert testimony is not necessarily required; objections based upon facts may be sufficient" (***Morando v Town of Carmel Zoning Bd. of Appeals***, 81 AD3d 959, 960, 917 NYS2d 672, 674 [2d Dept 2011]).

In determining whether to grant an area variance, a zoning board is required by Town Law § 267–b(3)(b) 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" (***Wallach v Wright***, 91 AD3d 881, 881, 936 NYS2d 685, 686 [2d Dept 2012]). A zoning board is "not required to justify its determination with supporting evidence with respect to each of the five factors, so long as its ultimate determination balancing the relevant considerations [is] rational" (***Cohen v Town of Ramapo Bldg., Planning & Zoning Dept.***, 150 AD3d 993, 994, 54 NYS3d 650, 651 [2d Dept 2017]).

Under Town Law § 267-b, when weighing an application for variance, the ZBA must consider: if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also 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 variance. (Town Law § 267-b [McKinney's 2018]).

After reviewing all of the papers and reviewing the ZBA minutes and decision, this Court determines that the Petition is **denied**. Ample record evidence exists supporting the ZBA's determination denying the use variance. Contrary to petitioner's claims, the ZBA's determination was neither arbitrary, capricious, illegal or irrational. While the Board took testimony from affected local neighborhood opponents, the record does not reflect that this opposition outweighed or unduly influenced the Board's rationale. To the contrary, the ZBA's Chairman made explicit reference that petitioner's predecessor in interest prior code violations and dereliction in maintaining the property was not properly before the Board in its review of the variance application.

Moreover, petitioner's predicament was, as the ZBA found, a creature of self-imposition. Although petitioner argues that it should benefit from prior zoning and have similar standing as preexisting owners, it presents no New York authority for the proposition that self-created harm or "notice" has been abrogated as a matter of constitutional law. Instead, the prevailing view within the Second Department remains that "a prospective purchaser of property is chargeable with knowledge of the applicable restrictions of the zoning law and is bound by them and by the facts and circumstances which can be learned by the exercise of reasonable diligence, even where there are harsh results" (***McGlasson Realty, Inc. v Town of Patterson Bd. of Appeals***, 234 AD2d 462, 463, 651 NYS2d 131, 132 [2d Dept 1996]; ***JSB Enterprises, LLC v Wright***, 81 AD3d 955, 957, 917 NYS2d 302, 304 [2d Dept 2011]). Thus, the ZBA's finding that petitioner was charged with notice that its parcel was zoned A1 residential, along with its lot size, frontage and yard size requirements. Here, petitioner acquired title to the property in 2016, decades after the last change in zone for the area in 1989 and accordingly was chargeable with knowledge of the prevailing zoning requirements. (*see e.g.*

More importantly, the ZBA's determination noted that it could not find any precedent for approving a use variance of the kind, quality or nature as petitioner has requested, particularly noting that it compared favorably with only 20-23% of existing properties concerning lot size and lot frontage. Where a ZBA as here determines that on balance that the variance as presented poses a substantial relaxation of prevailing zoning regulation, it is not an abuse of discretion for the reviewing Article 78 court to determine that the denial is supported by rationality and substantial evidence (***Pecoraro v Bd. of Appeals of Town of Hempstead***, 2 NY3d 608, 614 [2004][affirming denial of variance where ZBA concluded that requested variance was substantial in seeking a 33.3% deficiency in lot area and a 27.3% deficiency in frontage width]; *see also* ***DiPaolo v Zoning Bd. of Appeals of Town/Vil. of Harrison***, 62 AD3d 792, 793, 879 NYS2d 507, 509 [2d Dept 2009][affirming denial of variance premised upon ZBA's determination that requested variance was substantial and would produce an undesirable change in the character of the neighborhood, and that the hardship to the petitioner was self-created, supported by testimony of several local residents and objective]).

Therefore, since this Court is not persuaded that the ZBA's determination was infected by unjustified reliance on community opposition or otherwise lacking in reliance on substantial evidence, the Verified Petition is **denied**.

Accordingly, this matter is **dismissed.**

The foregoing constitutes the decision and order of this Court.

Dated: April 5, 2018
Riverhead, New York

WILLIAM G. FORD, J.S.C.

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