Matter of Dutt v Bowers
2018 NY Slip Op 32684(U)
October 17, 2018
Supreme Court, Suffolk County
Docket Number: 00055/2018
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

In the Matter of the Application of
Faisal Dutt,

Petitioner,

For an Order pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

James H. Bowers, Chairman,
Michael A. Gajdos, Vice Chairman,
William D. Wexler, John M. Lorenzo, and
Daniel J. Sullivan, constituting the Zoning Board
of Appeals of the Town of Islip, and the Zoning
Board of Appeals of the Town of Islip and The
Town of Islip,

Respondents.

Motion Sequence No.: 001; MG
Motion Date: 2/14/18
Submitted: 5/30/18

Index No.: 00055/2018

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Attorney for Respondents:

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Clerk of the Court

Upon the following papers filed and considered relative to this matter:

Notice of Petition and Verified Petition acknowledged on January 2, 2018, Supporting Affidavit sworn to on January 2, 2018, Attorney Affidavit sworn to on January 2, 2018; Exhibits A through F annexed thereto; Respondent's Affirmation in Opposition dated March 7, 2018; Exhibits A and B annexed thereto; Verified Answer dated March 7, 2018; Respondent's certified return consisting of 66 pages annexed thereto; Respondent's Memorandum of Law dated March 7, 2018; Petitioner's Attorney's Reply Affidavit sworn to on March 27, 2018; it is

ORDERED that the petition of Faisal Dutt, pursuant to Article 78, for an order annulling and setting aside the decision by the Respondent Zoning Board of Appeals of the Town of Islip dated December 5, 2017, is granted.

In this Article 78 proceeding, petitioner Faisal Dutt ("Dutt") seeks a judgment vacating and annulling a determination made by the Town of Islip Zoning Board of Appeals ("ZBA") rendered on December 5, 2017, which denied petitioner's application for an area variance for an in-ground freeform pool having at its narrowest point, a side yard of 6 feet rather than the required 14 feet and which denied petitioner's application for an area variance for a pool patio having less than the required setback of 6 feet from the property line for the premises located at 1432 East Forks Road, Bayshore, New York (the "subject property"). Petitioner advises herein that he does not object to the pool patio denial, as the cost to conform the pool patio to the required 6 foot setback has been or can be easily remedied. Petitioner contends that the only issue before this Court is with respect to the ZBA's denial of the area variance for the in-ground pool.

Petitioner is the owner of the subject property, which is improved with a one-family residential home and is zoned residential A. It is undisputed that residential A zoned lots in the Town of Islip are 75 by 100 feet with a minimum of 11,250 square feet. It is also undisputed that petitioner's lot is oversized inasmuch as it is 75 by 200 feet and comprises 15,000 square feet. It further is undisputed that petitioner hired Dunrite Pools ("Dunrite") to obtain building permits from the Town of Islip (the "Town") for the construction of an in-ground pool on the subject property. The building permits were issued, and after the in-ground pool was completed, an "as built" survey was required prior to the Town's issuance of a certificate of occupancy. Unbeknownst to petitioner and Dunrite, the excavator hired by Dunrite measured the required setback by using the fence as the property line, which was located north of the actual property line. While Dunrite was provided with a survey of the subject property, the actual property line was not delineated by any in-ground post or fencing. It was not until the "as built" survey was prepared in October of 2016, that it was discovered that the fence was located to the north of petitioner's actual property line and indeed was on his neighbor's property. As a result of the excavator's mistake in measuring the proper location for the in-ground pool, the pool was built approximately 6 feet from the petitioner's property line at its closest point, rather than 14 feet, as required by the Town code. Due to the pool being constructed within the 14 foot setback, the Town advised petitioner that a side yard variance was required for his in-ground pool to remain in its constructed location.

A public hearing was held on October 3, 2017 on petitioner's application for an area variance. At the hearing, petitioner appeared and offered testimony, petitioner's attorney presented the area variance application and offered the testimony of Peter Booth from Dunrite and Elizabeth Rowsell of Coach Realty, a licensed real estate broker ("Rowsell"). Petitioner also provided letters from two neighbors, who were both in favor of the area variance application. Also of relevance and included in the record were the property surveys dated October 18, 2016 and March 22, 2005, ten (10) site photographs, an aerial photograph depicting the site, and the Suffolk County Tax Map for the subject neighborhood. The photographs produced at the hearing show the existing freeform shaped in-ground pool, the paved patio, wooden fence, and a heavily wooded area behind the pool, blocking any view of the pool at the southerly property line where the in-ground pool is presently located. In support of the application, Ms. Rowsell presented that the in-ground pool would not have any adverse impact on the surrounding property values, that the immediate neighbors support the petitioner's application, that none of the neighbors can see the pool in the backyard due to the fence,

and that the in-ground pool is consistent with the nature and character of the neighborhood. Mr. Booth of Dunrite presented that to remove the pool and relocate it would cost "upward of $60,000." As to the concern raised by the ZBA that this area variance would establish a precedent, petitioner's attorney argued that the evidence revealed that the petitioner's lot measures at 75 by 200 feet, which is a deeper lot than almost all of the other surrounding lots and is considered oversized for residential A lots, which measure at 75 by 150. On the entire tax map being considered for the area variance, petitioner's attorney stated that only four lots were described as larger than 75 by 100, with petitioner's subject property being one such lot. It was presented that these four "long lots" also abut a school and a wooded area. It was argued by petitioner's attorney that a negative precedent would not be created where, as here, there are only three other lots that could possibly present this situation but that those lots would have the required lot size to locate an in-ground pool with the required setbacks. Based upon the oversized nature of petitioner's lot and the existence of only three other lots in the area that could sustain an in-ground pool under the Town's code, it was argued that the circumstances presented on this application were unique and would not be duplicated. It was claimed that should any of the three neighbors with oversized lots seek to install an in-ground pool, a variance would not be required, as the depth of those lots would allow such a pool to be located with the required setback.

By decision dated December 5, 2017, the ZBA denied petitioner's application for an area variance for the constructed in-ground pool. As part of its findings, the ZBA, citing to Town Law section 267-b(3)(b)(1), recognized that it must determine "whether an undesirable change in the character of the neighborhood or a detriment to nearby properties will be produced." In this regard, the ZBA determined that there was no evidence presented of any similarly located in-ground pools. The ZBA then acknowledged that it must determine pursuant to section 267-b(3)(b)(2) whether there are alternative, feasible options for the applicant to pursue other than a variance to achieve the desired benefit...[and] whether the proposed variances are significant", pursuant to section 267-b(3)(b)(3). The ZBA determined that a review of the property survey revealed that the applicant could have placed the pool in a location that conformed to the residence A zoning restrictions due to the oversized nature of the subject property. It also determined that the relaxations of the setback requirements are significant. The ZBA ultimately found that in light of the "significance of the variances, the fact that alternative locations exist, and that no evidence was submitted of any like pools in the area, it is the opinion of the Board that an undesirable change in the character of the neighborhood would be produced. Approval of a pool...with such a small side yard in a neighborhood where no similarly located structures exist would establish unwarranted precedent for future development of the area, which could result in a detriment to nearby properties..." The ZBA moreover found that pursuant to Town Law section 267-b(3)(b)(4), the pool at its current location is inconsistent with the nature and character of the surrounding area and approving the requested area variance "would establish unwarranted precedent for future development of the area...this would result in an adverse physical impact, as the side yard setback requirement of 14 feet is meant to protect the privacy and quiet enjoyment of adjacent residential properties." Lastly, the ZBA found pursuant to Town Law section 267-b(3)(b)(5) that the hardship presented by the petitioner "has been self-created."

After the denial of the ZBA, petitioner commenced this Article 78 proceeding challenging the ZBA's determination and seeking a judgment reversing and annulling the portion of the ZBA's December 5, 2017 determination denying him an area variance for his freeform in-ground pool and directing that the requested variance be granted. Petitioner alleges the ZBA's determination was arbitrary and capricious and that there was no rational basis for the denial based upon the evidence before the ZBA. Specifically, petitioner asserts that the competent evidence showed that the constructed in-ground pool is not an undesirable change in the character of the neighborhood, does not affect the petitioner's surrounding neighbors, does not negatively affect property values in the neighborhood, and is surrounded by fencing and woods "in all directions that make the backyard almost invisible." Petitioner argues that there are numerous above ground pools in the area and that while there is only one in-ground pool based upon aerial photographs, there are only four oversized lots in petitioner's neighborhood, including his own, that are large enough to sustain a pool. Petitioner asserts that the ZBA did not submit any evidence of similar lots with the same circumstances which would support a determination that the granting of the area variance for this constructed in-ground pool would create a precedent. Petitioner thus asserts that the granting of this variance does not create a precedent due to the uniqueness of petitioner's oversized lot, which is surrounded by woods that act as a natural buffer. Petitioner further argues that the hardship was created not by himself but was due to a mistake by the excavator and that removing the in-ground pool and locating it beyond the 14 foot setback would cost far in excess of the pool itself.

The court's role in reviewing an administrative decision is not to decide whether the agency's determination was correct or to substitute its own 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 Specialities 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, then the administrative order must be overturned (*see* ***Matter of Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.,*** 77 NY2d 753, 758, 570 NYS2d 474 [1991]; *see also* ***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 Village of Greenwood Lake,*** 77 AD3d 831, 909 NYS2d 530 [2d Dept. 2010]) *appeal after remand* 101 AD3d 1001, 956 NYS2d 183 [2d Dept. 2012]; ***Matter of Alfano v. Zoning Bd. of Appeals of Vil. of Farmingdale***, 74 AD3d 961, 902 NYS2d 662 [2d Dept. 2010]). Further, the court "may not weigh the evidence or reject the choice made by the zoning board 'where the evidence is conflicting and room for choice exists'" (***Matter of Calvi v Zoning Bd. of Appeals of City of Yonkers***, 238 AD2d 417, 418, 656 NYS2d 313 [2d Dept 1997]).

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]); ***Inlet Homes Corp. v Zoning Board of Appeals of the Town of Hempstead***, 304 AD2d 758, 757 NYS2d 784 [2d Dept.

2003], and its interpretation of its 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 Village of Southampton,*** 7 AD3d 710, 776 NYS2d 820 [2d Dept. 2004]). In reviewing an administrative determination, a court must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious (*see* ***Matter of Peckham v Calogero***, 12 NY3d 424, 863 NYS2d 751[2009]; ***Matter of Sasso v Osgood***, 86 NY2d 374, 384-85, 633 NYS2d 259 [1995]; ***Matter of Deerpark Farms v Agricultural and Farmland Prot. Bd.***, 70 AD3d 1037, 896 NYS2d 126 [2d Dept 2010];*see also* ***Matter of Bassano v Town of Carmel Zoning Bd. of Appeals***, 56 AD3d 665, 868 NYS2d 677 [2d Dept 2008]). A determination is rational "if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition" (***Matter of Halperin v City of New Rochelle***, 24 AD3d 768, 772, 809 NYS2d 98 [2005]; *see also* ***Matter of Ifrah v Utschig***, 98 NY2d 304, 308, 746 NYS2d 667 [2002]). "When reviewing the determinations of a Zoning Board, courts consider 'substantial evidence' only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination" (***Matter of Sasso v Osgood***, 86 NY2d 374, 384 n. 2, 633 NYS2d 259 [1995]; *see* ***Matter of Matejko v Board of Zoning Appeals of Town of Brookhaven***, 77 AD3d 949, 949, 910 NYS2d 123 [2d Dept 2010]; *see also* ***Matter of Campbell v Town of Mount Pleasant Zoning Bd. of Appeals***, 84 AD3d 1230, 1231, 923 NYS2d 699 [2d Dept 2011]). It so follows that the determination of a zoning board should be sustained upon judicial review if it is not illegal or arbitrary and capricious, and it has a rational basis (*see* ***Matter of Sasso v Osgood***, 86 NY2d at 384, 633 NYS2d 259; ***Matter of Carrano v Modelewski***, 73 AD3d 767, 899 NYS2d 634 [2d Dept 2010]).

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 (***Matter of Pecorano v. Board of Appeals of Town of Hempstead,*** 2 NY3d 608, 781 NYS2d 234 [2004]; ***Matter of Abbatiello v. Town of North Hempstead Board of Zoning Appeals,*** 164 AD3d 785, —NYS3d — [2d Dept. 2018]; ***Matter of Cacsire v. City of White Plains Zoning Bd. of Appeals,*** 87 AD3d 1135, 930 NYS2d 54 [2d Dept.] *lv. denied* 13 NY3d 716, 895 NYS2d 316 [2011]); ***Matter of East Hampton Indoor Tennis Club, LLC v Zoning Bd. of Appeals of Town of E. Hampton***, 83 AD3d 935, 937, 921 NYS2d 308 [2d Dept 2011]; ***Brancato v Zoning Bd. of Appeals of City of Yonkers, N.Y.***, 30 AD3d 515, 515, 817 NYS2d 361 [2d Dept 2006]).An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts (*see* ***Matter of Peckham v Calogero***, *supra*; ***Matter of Deerpark Farms v Agricultural and Farmland Prot. Bd.***, *supra;* ***Matter of Manko v New York State Div. of Housing & Community Renewal***, 88 AD3d 719, 930 NYS2d 72 [2d Dept. 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 on entirely subjective considerations...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 also* ***Matter of Abbatiello v. Town of North Hempstead Board of Zoning Appeals,*** 164 AD3d 785, —NYS3d — [2d Dept. 2018]; ***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 Greenburg, 68 AD 3d 62, 73, 886 NYS2d 442 [2d Dept. 2009]. "Further, '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'" (***Matter of Abbatiello v. Town of North Hempstead Board of Zoning Appeals,*** 164 AD3d 785, —NYS3d — [2d Dept. 2018] *quoting* ***Matter of Gabrielle Realty Corp. v. Board of Zoning Appeals of Village of Freeport,*** 24 AD3d 550, 550, 808 NYS2d 258 [2d Dept. 2005]). Where there is no evidence in the record to support the findings made by a ZBA, courts have held that the determination lacks a rational basis and is arbitrary and capricious (*see, e.g.,* ***Matter of Abbatiello v. Town of North Hempstead Board of Zoning Appeals,*** 164 AD3d 785, —NYS3d — [2d Dept. 2018] *quoting* ***Matter of Gabrielle Realty Corp. v. Board of Zoning Appeals of Village of Freeport,*** 24 AD3d 550, 550, 808 NYS2d 258 [2d Dept. 2005](Board failed to set forth specific factual support in record upon which it relied in denying petitioner's application for area variance, matter was remitted to Board to make factual findings in proper form); ***Matter of Marina's Edge Owner's Corp. v. City of New Rochelle Zoning Board of Appeals,*** 129 AD3d 841, 11 NYS3d 232 [2d Dept. 2015])(denial of area variance arbitrary and capricious and record did not contain sufficient evidence to support rationality of ZBA's denial of area variance where no evidence was adduced to demonstrate that health, safety, and welfare of neighborhood or community would be detrimentally affected by granting requested variance, how the variance would change the character of the neighborhood or that the situation was self-created); ***Matter of L & M Graziose, LLP v. City of Glen Cove Zoning Board of Appeals,*** 127 AD3d 863, 7 NYS3d 344 [2d Dept. 2015](even where variances were substantial, lack of evidence that variances created undesirable effect on character of neighborhood or adverse impact or detriment to health safety and welfare of neighborhood warranted annulling ZBA's denial of area variances on grounds that it was irrational and arbitrary and capricious); ***Matter of Quintana v. Board of Zoning Appeals of Inc. Village of Muttontown,*** 120 AD3d 1248, 992 NYS2d 332 [2d Dept. 2014](no evidence in record to support denial of variance, which was found to lack a rational basis and was deemed arbitrary and capricious); ***Matter of Daneri v. Zong Board of Appeals of Southold,*** 98 AD3d 508, 949 NYS2d 180 [2d Dept. 2012]; ***Matter of Cacsire v. City of White Plains Zoning Bd. of Appeals,*** 87 AD3d 1135, 930 NYS2d 54 [2d Dept.] *lv. denied* 13 NY3d 716, 895 NYS2d 316 [2011])(no evidence presented that variances would have undesirable effect on character of neighborhood or otherwise result in detriment to health, safety, and welfare of neighborhood); ***Matter of Beyond Builders, Inc. v. Pigott,*** 20 AD3d 474, 799 NYS2d 241 [2d Dept. 2005](same); ***Matter of Campbell v. Town of Mount Pleasant Zoning Board of Appeals,*** 84 AD3d 1230, 923 NYS2d 699 [2d Dept. 2011]) and cases cited therein); ***Matter of Rosasco v. Village of Head of the Harbor,*** 52 AD3d 611, 859 NYS2d 731 [2d Dept. 2008](no evidence in record that area variance to construct swimming pool would result in undesirable change in character of community or adversely affect physical or environmental conditions in the neighborhood); ***Matter of Filipowski v. Zoning Bd. of Appeals of Village of Greenwood Lake,*** 38 AD3d 545, 832 NYS2d 578 [2d Dept. 2007](insufficient evidence to demonstrate undesirable effect, adverse impact or detriment to the neighborhood on minimum lot size variance although variance was substantial).

A zoning board considering a request for an area variance 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 area variance is granted (*see* Town Law § 267-b [3] [b]; ***Matter of Pinnetti v. Zoning Bd. of Appeals of Village 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]; ***Matter of Colin Realty, LLC v. Town of Hempstead,*** 107 AD3d 708, 966 NYS2d 501 [2d Dept. 2013]***; Matter of Pecorano v. Board of Appeals of Town of Hempstead,*** 2 NY3d 608, 781 NYS2d 234 [2004]; ***Matter of Daneri v. Zoning Bd. of Appeals of Town of Southold,*** 98 AD3d 508, 949 NYS2d 180 [2d Dept.], *lv denied* 20 NY3d 852, 956 NYS2d 485 [2012]. A zoning board also must consider whether (1) 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) the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) the requested area variance is substantial; (4) the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district and (5) the alleged difficulty was self-created (*see* Town Law §267-b [3] [b]; ***Matter of Blandeburgo v. Zoning Bd. of Appeals of Town of Islip,*** 110 AD3d 876, 973 NYS2d 693 [2d Dept. 2013]; ***Matter of Davydov v. Mammina,*** 97 AD3d 678, 948 NYS2d 380 [2d Dept. 2012]). While the last factor is not dispositive, neither is it irrelevant (***Ifrah v Utschig***, 98 NY2d 304, 746 NYS2d 667 [2002]). 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" (***Matter of Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburg,*** 68 AD 3d 62, 73, 886 NYS2d 442 [2d Dept. 2009]; ***Matter of Jacoby Real Prop., LLC v. Malcarne,*** 96 AD3d 747, 946 NYS2d 190 [2d Dept. 2012]; ***Matter of Merlotto v. Town of Patterson Zoning Bd. of Appeals,*** 43 AD3d 926, 841 NYS2d 650 [2d Dept. 2007]).

According to §68-386 [D] of the Islip Town Code, "[n]o pool shall be erected, maintained or used unless the minimum setbacks from both the side and rear lines are met: (1) In a Residence AAA or Residence AA District: 18 feet. (2) Residence A District: 14 feet. (3) In a Residence BAA District: 25 feet. In all other districts: 10 feet." The ZBA's determination did not explain how the presence of an in-ground swimming pool 6 feet rather than 14 feet from the property line on this oversized lot in a residence A district would produce an undesirable change in the character of the neighborhood or be a detriment to nearby properties where the evidence before it established that only four lots, including petitioner's, were oversized in comparison to other surrounding lots and that only these four lots could sustain a pool. The ZBA did not explain how it would be a detriment to the health, safety or welfare of the neighborhood or community, again, where petitioner's lot is one of four and oversized in comparison to other lots in the area. Moreover, there was no evidence in the record that the variance for the constructed pool would produce an undesirable change in the character of the neighborhood or be a detriment to nearby properties or negatively impact the health, safety and welfare of the neighborhood or community. The evidence in the record was to the contrary. The benefit sought by the applicant cannot be achieved by another feasible method inasmuch as the pool is already constructed. While the requested variance is considered substantial by the ZBA, the Court notes that the percentages were miscalculated. The decision also finds, in a conclusory manner, that the variance would have an adverse impact on the physical or environmental conditions in the neighborhood. However, there was no evidence presented that this particular area variance would create an "unwarranted precedent" in that the evidence showed that the petitioner's

lot was one of only four oversized lots in the subject area where a pool could exist, petitioner's particular lot abuts a wooded area, and there exists significant foliage creating a buffer to petitioner's yard and the subject in-ground pool. The Court finds that an "unwarranted precedent" would not be created in granting this variance because the only lots in the neighborhood where a pool could be located have the required setbacks to place a pool 14 feet from the property line. Given the unique character and size of the petitioner's lot, the ZBA's concerns of an "unwarranted precedent" are unjustified and not supported by the evidence. The ZBA's determination that the difficulty or hardship to petitioner was self-created, is not supported by the evidence in the record. The evidence in the record established that the excavator hired by the pool contractor improperly measured the setback from the fence line, and not the actual property line. All of the testimony before the ZBA in this regard was that it was the excavator hired by Dunrite who made a mistake, not the petitioner. It appears from the ZBA's determination that the practical difficulties and expense in moving the in-ground pool and the letters submitted by the petitioner's neighbors who supported his application were not adequately considered. When all of the evidence is considered and rationally balanced in light of the totality of the circumstances presented, the denial of the petitioner's area variance was unwarranted.

Accordingly, inasmuch as the record does not contain sufficient evidence to support the rationality of the ZBA's determination denying the proposed area variance on the subject property for the constructed in-ground pool, the Court finds that the ZBA's determination was not rationally based and was arbitrary and capricious. Therefore, the petition is granted, the ZBA's determination dated December 5, 2017 is annulled and vacated and the matter is remitted to the ZBA for the issuance of the requested area variance for the constructed in-ground pool in accordance with this decision.

Submit judgment.

Dated: 10/17/2018

HON. WILLIAM B. REBOLINI, J.S.C.

__X__ FINAL DISPOSITION ______ NON-FINAL DISPOSITION