| **Smith v Board of Zoning Appeals of the Town of Islip** |
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| June 15, 2020 |
| Supreme Court, Suffolk County |
| Docket Number: 0000858/2017 |
| Judge: John J. Leo |
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# SUPREME COURT OF THE STATE OF NEW YORK
# PART 51 SUFFOLK COUNTY

PRESENT:

HON. JOHN J. LEO

**INDEX NO.:00858-2017**

**DECISION**

**AND ORDER**

KEVIN SMITH AND JOANN SMITH ,

Petitioners,

-against-

BOARD OF ZONING APPEALS OF THE TOWN OF ISLIP AND THE TOWN OF ISLIP

Defendant.

**PETITIONER'S ATTORNEY:**

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Petitioners Kevin and Joann Smith filed this Article 78 proceeding against the Respondents the TOWN OF ISLIP ( hereinafter also referred to as the "Town") and the Islip Town Zoning Board of Appeals ( hereinafter also referred to as "ZBA" or "Board") seeking an order reversing, annulling and setting aside only that portion of the Islip Town Zoning Board of Appeals decision that denied the petitioner's application to allow the petitioners to maintain a garage with 6.36 feet of side yard set back and to maintain an enclosed breeze way 5.8' x 6.4' which connects the garage to the house and/or granting such other and further relief as to this Court may deem just and proper

together with costs and disbursements of this proceeding.

Respondents oppose Petitioners application by filing a Verified Answer ; Affirmation in Opposition and Memorandum of Law. Petitioner posits a Reply Affidavit in Support.

FACTS

Petitioners are the owners of property located at 269 Belmore Avenue, East Islip, New York 11730, designated on the Suffolk County Tax Map as District 0500,Section 298.00, Block 03.00 and Lot 028.000 ( hereinafter referred to as "subject property"). The subject property is located within the Residence "B" zoning district. The Property measures 109.9 feet by 95 feet, for a total of 10,441 square feet. The subject property exceeds the minimum lot requirement for a property in the Residence B District and also exceeds the minimum width requirement in the Residence B District.

On or about June, 2016 the Petitioners applied to the Islip ZBA for an area variance required in order to legalize and maintain a garage which had been constructed with a breeze way connecting it to the single family dwelling on the subject property. Said garage as constructed with a breeze way requires a fourteen (14) foot side yard setback. Petitioner's also sought area variances to legalize a rear yard setback of 24 feet rather than the required 25 feet setback and to leave a deck having a rear yard of 3 feet rather than the required 4 foot setback.

On September 27, 2016 the ZBA held a public hearing at which Petitioner's application for relief was heard. Said hearing was adjourned to November 1, 2016 so that , inter alia, Petitioner could locate any cases that would serve as precedent for such an area variance. At the end of the hearing the ZBA reserved decision. In a written decision dated January 13, 2017 the ZBA granted the variances for the rear yard setback of 3 feet rather than the 4 feet setback required to maintain the deck. In the written decision the ZBA denied the Petitioner's request for side yard relief for the attached garage. Thereafter, the Petitioner filed this Article 78 action seeking to annul that portion of the ZBA's decision which denied them an side yard setback area variance to maintain the attached garage.

THE PROCEEDINGS

The one family dwelling was constructed on the subject property in 1949 and received Certificates of Occupancy from the Town as an improved single family dwelling with a one story addition, a vestibule and a roofed over porch.

In 2005 the Petitioners obtained a building permit from the Town to construct a detached garage . Said detached garage was approved to be built with a necessary side yard setback of four (4) feet. As noted, the garage has a side yard setback of 6.36 feet. In or about July 2005 the Petitioner hired a licensed contractor to construct the garage. During that construction the contractor enclosed a 22.5 foot breeze way connection between the dwelling and the garage . Petitioner alleges that the contractor did not inform him that by enclosing that breeze way the garage was subject to a fourteen (14) foot side yard setback. (Certified Return at p. 7). Furthermore, Petitioner's attorney, William Sweeney, established that without construction of the enclosed breeze way there would not be a side yard setback issue. (Certified Return at p.9)

At the September 27, 2016 portion of the hearing Petitioner distinguished the neighborhood from a typical residential neighborhood in that directly across the street from the subject property there is a 120 unit apartment complex . (Certified Return at p.8). Also entered into evidence was an affidavit from the neighboring (side yard) property owner Kathy Weber who expressed her support for the variance. ( Certified Return at p. 10) The Petitioner's attorney also offered that his clients would agree to certain conditions if granted the requested area variance. Those conditions were : there would be "no further additions , no habitable space, no second story, no expansions, no living space, no change in his request to obtain this particular relief here today." (Certified Return p.10) .

At the September 27, 2016 hearing, upon a query of the ZBA directed to Christopher D'Antonio, of the Town of Islip Planning Department ( hereinafter "D'Antonio") as to whether there was any precedent for granting the requested variance D'Antonio stated " We don't have any precedent, Mr. Chairman. My

recommendation to Mr. Sweeney of the conditions which he just detailed, emanated **for** a prior case that the Board heard that was very similar to this one where there was a passageway that attached to the garage. However, in all respects the garage, itself, met the parameters for our ordinance in terms of height, in terms of setback both in front yard setback and its side yard setback. And the applicant agreed not to place any living space within it, not expand the garage, itself, or add a second story or change the roof line. And I'm not positive, but I believe the Board considered those conditions significant and granted that particular application." (Certified Return at p.12) .

The ZBA further queried of D'Antonio when that particular application was granted . He stated that he believed it was approximately six months ago . Chairman Bowers stated he did not recall that variance being granted. (Certified Return pgs.12 ,13) There was further discussion of the possibility of opening up the breeze way. Upon ZBA member Lorenzo's inquiry, the Petitioner stated that the breeze way was just a hallway from the house to the garage and served as a sort of mud room. ( Certified Return p.13) . A lengthy discussion ensued as to the problem of the grant of the area variance establishing a precedent whereby other applicants could argue that such a variance was granted before and should be granted again. Chairman Bowers went on to state:

> " You see the problem is , as Mr. Sweeney will tell you, is precedent. I mean, when we make decisions, if we give it to you, then if somebody else comes up, they're entitled to it. The ordinance is 14 feet. What justifies us to go to 6.35? I mean, you have to have a reason. We don't have any that I see.
>
> We're not–you know, we don't like to ask people to take a structure apart. But when you look at the precedent involved, we have to have some basis. There's an explanation of why it happened. It's perfectly reasonable. We don't deal in fault here. You're not at fault here. We know that." ( Certified Return p. 14,15) .

Petitioner's attorney acknowledged that although the need for the variance was

self imposed at one point , the garage is fine by itself and the small connection to the house does not render the structure to be a one family dwelling.( Certified Return p.15)

The ZBA then engaged in discussion with D'Antonio as to conditions placed upon the prior application that was posited by Petitioner's attorney as the basis for his client's consent to the above listed imposition of conditions if the area variance was granted. D'Antonio stated he could not recall whether the ZBA granted the prior application but that there was "Spirited discourse regarding having those conditions. Because in it's substance, this is still the same garage it would be without that attachment . And so it's ultimately a matter of does that attachment enable this to become living space, or is there a way that it could be conditioned such that it remains a garage and functionally was only used as a garage". ( Certified Return, p.17)

The ZBA was clear in it's concern that if they approved Petitioners requested area variance that it would set a precedent for future applications. Board member Sullivan asked if the applicant was to open up the breeze way would there still be a problem. D'Antonio stated he did not know that for certain because the Building Department may still consider the garage attached because there would still be a roof. (Certified Return p. 21) Chairman Bowers stated "Well, I think we have to find out".

The remainder of the September 27, 2016 hearing involved clarification of the applicable code to be applied to the garage which was established to be under 500 square feet. Yet, the ZBA appeared to be unclear about the required side yard setback if the garage was detached. (Certified Return, p.22,23 )

Nonetheless, the ZBA adjourned the hearing to a later date to "look into it better"... and to "get it all straightened out and then come back". (Certified Return, p.23). Whereupon the hearing was adjourned to November 1, 2016.

At the start of the November 1, 2016 hearing Petitioner's attorney stated that the hearing had been adjourned for the "expressed purpose for us to find out whether there was precedent for what my client was requesting. We have found almost an exact precedent where it was approved". ZBA member Bowers queried " This is a question whether it was going to be attached or detached?" ZBA member Wexler then asked " Was there precedent in the Town of Islip? " Petitioner's attorney responded yes ,

indicating that it was granted on August 13, 2015. Then Board member Wexler asked whether the prior granted application was within 500 feet of the subject property. Petitioner's attorney presented the ZBA with their prior decision, denoted as Application #426-15. (hereinafter referred to as Application # 426-15) (Exhibit A , Certified Return, p.45) Upon presentation of the decision in Application #426-2015 Chairman Bowers exclaimed "2015? , Wow last year!" Petitioner's attorney provided the Board with the survey and all the specifics of the grant of the area variance in Application# 426-15.

Thereafter the Board engaged in discussion among the members as to whether the prior grant was considered to be precedent "when it is in the next hamlet over" to which Chairman Bowers stated "Well I don't think we consider it to be a direct precedent but I do think it has some---- obviously, some value for the Board's consideration" ( Certified Return p.31) .

As stated in the hearing, the ZBA granted application # 426-15 on the condition that the garage was "never to be converted to living space and no further expansion or extension of the mud-room, five zero; granted." (Certified Return p.31) . Board member Wexler pondered whether the Board could reserve "so we can look at this file? There may have been something that we felt was a special circumstance like a kitchen or something like that." (Certified Return p.31) . As to Petitioner's application, the attorney for Petitioners stated that the only factor he would like to point out was that "Directly across the street is an apartment complex". (Certified Return p.31). Chairman Bowers acknowledged that Application# 426-15 "has value because it is recent. May not be directly in the neighborhood." and then asked D'Antonio if the Board granted it.(Certified Return p.32).

D'Antonio responded that " In the past we did cite it as a conceptual work, Mr.Chairman, that the Board has made a similar decision previously. What's worth distinguishing about this particular instance of Mr. Smith's case versus the prior one, the Del Guardia's decision, that particular neighborhood on Lombardi Boulevard is a little more accustomed to seeing four foot side yard setbacks than this particular neighborhood in East Islip; that's probably the only major distinction." When questioned further by Board member Wexler as to whether there were other four foot setbacks in

Application# 426-15 , D'Antonio responded " Not of that nature. I only say that as a way of familiarizing the Board because it is a similar neighborhood". (Certified Return p.32, 33).

Board member Wexler then opined " I'm just curious. We use this 500 foot often enough and it becomes — this is what we denied on other applications. We came up with the 500 foot radius and now we say it doesn't apply? " (Certified Return p.33, 34). D'Antonio indicated "something like this it may be something the Board —" and Wexler interjected " Conceptually, meaning: the conditions we could place?" D'Antonio agreed stating "Yes. And that it was (Application# 426-15) a small mud room attachment; which is, in this case, very similar and comparable to this case." (Certified Return p.34).

Chairman Bowers then added " I take a slightly different position. My position, is that : This is a factor for the Board's consideration. We know it's outside of the 500 feet, which is still meaningful; but having done this previously, granted it previously under a remarkably similar application, I think it is something we have to consider in fairness to the applicant". Following a discussion which indicated that in the neighborhood in Application# 426-15 there were, on the opposite side of the street, many four foot setbacks, but there were none in the subject property's neighborhood. To which Petitioner's attorney emphasized that across the street from the subject property there is a 120 unit apartment complex which has high density. Wherein it was then reiterated that the Petitioner's application was requesting a lesser variance of 6.36 feet rather than Application# 426-15 which was granted a four foot side yard set back. (Certified Return p.36).

Petitioners further stressed that the subject property is not in a standard neighborhood in that it is not surrounded by standard single homes. Petitioner Kevin Smith testified that he is often having to clean garbage that emanates from the apartment complex. Petitioner further distinguished the subject property neighborhood in that there is a Shell gas station on Sunrise Highway just beyond the apartment complex. Before concluding the hearing Chairman Bowers stated "You're in a residential neighborhood; your location is unique." upon a motion by Board member Wexler, the matter was reserved for decision. (Certified Return p.36). Following the

ZBA's reserving decision on the subject application, Petitioners attorney posited a Supplemental Submission which was included in the Certified Return before this Court. In sum, Petitioner's Supplemental Submission called the Board's attention to the larger variance granted in Application# 426-15; the location of the subject property in an "very special residential area in that it is located directly across the street from a 120 unit apartment complex; that within one block to the north of the applicant's property is a commercial area of Sunrise Highway and the Sunrise Highway Service Road and that there are no other residential properties in that area and that there will be no effect or disturbance of many of the residential properties therein.(Certified Return p. 42,43)

By written decision dated January 12, 2017 the ZBA denied the Petitioner's application.

AREA VARIANCES

Pursuant to Town Law § 267 (1) (b) zoning boards are given the authority to grant area variances. An area variance as authorized by a zoning board can permit the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations.

Town Law § 267 -b (3) (a)(b)and (c) state as follows :

"3. Area variances.

(a) The zoning board of appeals shall have the power, upon appeal from a decision or determination of the administrative official charged with the enforcement of such ordinance or local law, to grant variances as defined herein.

(b) In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant 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 a 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 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.

(c) The board of appeals, in the granting of area variances, shall grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community. "

Section 4 of 267-b grants authority to boards of appeals to impose conditions on use and area variances which are consistent with the spirit and intent of the zoning ordinance or local law, for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community.

Respondent asserts in their Memorandum of Law in Opposition that "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 of the health, safety and welfare of the neighborhood or community if the variance is granted" citing to Matter of Pecoraro v.Board of Appeals of Town of Hempstead, 2 N.Y.3d 608, 612 , 781 N.Y.S.2d 234 (2004), citing Matter of Ifrah v Utschig, 98 N.Y.2d 304, 307, 746 N.Y.S.2d 667 (2002); Matter of Sasso v Osgood, 86 N.Y.2d 374, 382 (1995).

As to the statutory balancing test that is set forth in Town Law 267-b (3) the Respondents state that a Zoning Board is "not required to justify its determination with supporting evidence with respect to each of the factors, so long as its ultimate determination balancing the relevant factors was rational." Friedman v Board of Appeals of Village of Quogue, 84 A.D. 3d 1083,1085 (2d Dep't 2011).

The January 12, 2017 decision of the ZBA articulated certain factors as the basis pf their denial of the area variance. First the ZBA found that the variance requested was substantial in that it would require a 54% relaxation of the Town's code.

After stating in the decision that pursuant to Town Law § 267-b(3)(b) (1) and (4) the ZBA "must determine" whether the requested relief would alter the nature and

character of the neighborhood or whether it would produce an adverse impact on the surrounding area, the ZBA merely stated " There is no precedent showing this Board has granted any variances to allow an addition to any properties in the surrounding area with a side yard setback as little as 6.3 feet, as is not willing to such a precedent at this time. " Thus the ZBA failed to determine whether, if granted, the area variance would alter the nature and character of the neighborhood or if there would be an adverse impact on the surrounding area. There appears to have been no consideration as to the nature of the surrounding area which contains commercial roadways and uses in close proximity to the subject property and its neighborhood. Moreover, the existence of a 120 unit apartment complex directly across the street from the subject property was never mentioned in the decision, nor was it's existence as to the character of the neighborhood considered.

As far as distinguishing Application #426-15 which granted a more substantial setback of an attached garage (4.75 feet) with conditions , the ZBA decision distinguishes that grant by noting that the subject property is located six (6) miles away from the Bayshore property in Application #426-15 and that the garage (which had a certificate of occupancy for a detached garage issued in 1963 [1]) maintained that certificate of occupancy for fifty (50) years. On those two factors the Board, stated without any further specificity that "As such, the Board finds that the relief requested in the current application bears a different set of circumstances. It is therefore the Board's position that the significant variance requested for side yard relief does not conform to the nature an character of the area, and could establish unwarranted precedent for substandard side yard setbacks in the neighborhood."

In Knight v Amelkin, 68 N.Y.S. 2d 975 (1986) the Court of Appeals held that " a decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious " ( Matter of Field Delivery Serv. [*Roberts*], 66 NY2d 516,517). In as much as a zoning board of appeals performs a quasi-judicial function when

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[1]See Certified Return, p. 67.

considering applications for variances and special exceptions ( see *Matter of Cowan v. Kern*,41 NY2d 591, 598-599, *rearg denied* 42 NY2d 910; *Holy Spirit Assn. v. Rosenfeld*, 91 AD 2d 190, lv denied 63 NY2d 603), and completely lacks legislative power (2 Anderson, New York Zoning Law and Practice § 23.59, at 251; Rohan, Zoning and Land Use Controls § 43.01 [2][b] at 43-8--43-9), a zoning board of appeals must comply with the rule of the *Field* case."

The last factor that the ZBA cited in their denial of the variance was with respect to Town Law § 267-b (3)(b)(5) finding that the applicant's hardship was wholly self-created "as the breeze way between the detached garage and the dwelling was constructed without the benefit of a building permit sometime after 2005. The applicant held the 2005 permit open without renewal, and continued to use both the breezeway and the two car garage. Thus, the Board finds that there is no basis for permitting the garage to remain on the property attached to the dwelling with a side yard setback of 6.36 feet instead of the required 14 feet."

The Board's determination that the hardship was wholly self created ignores that the Town's records reflect that in Application #426-15 the property owner constructed the breeze way without a building permit, indicating that the hardship in that application was self-created as well.[2] ( Certified Return p. 67). Nonetheless, Town Law § 267-b (3)(b)(5) specifically states that though this factor may be considered it is not determinative. ( Matter of Mobil Oil Corp. v. Village of Mamaroneck Bd. of Appeals, 293 A.D.2d 679, 680 (2d Dept. 2002).

While the ZBA is not required to justify its determination with supporting evidence with respect to the five factors, so long as it's ultimate determination balancing the relevant factors was rational, (Pecoraro v Board of Appeals of the Town of Hempstead, 2 N.Y. 608, 613 (2d Dept 2004) the Court finds that here the ZBA did not engage in an appropriate balancing of the factors of Town Law 267-b (3) (1) and (4). Specifically, the Board makes no mention of the character of the subject property's

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[2] In addition at the September Hearing , Chairman Bowers made a point of stating that the applicant was not at fault in that the licensed contractor did not advise the applicant of the consequences of enclosing the breezeway. Certified Return p.4,5.

neighborhood and yet relies heavily on a 500 foot radius "policy" for precedent without regard or any reference to the unique conditions of the subject property's area. Additionally, the ZBA decision in Application#426-15 makes no mention of the character of that neighborhood, other than to impose certain conditions which the Petitioner here has submitted their application to, if granted.

Accordingly, the Court finds that the appropriate remedy is to remit this matter to the ZBA for further proceedings which take into account the necessary balancing of factors (1) and (4) of Town Law 267-b (3) .

The foregoing constitutes the decision and order of this Court.

HON. JOHN J. LEO, J.S.C.

Dated: May 15, 2020
Central Islip, New York