SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

INDEX NO. 150128-2022

ANGELA GUARINO

MOT. DATE

- v -

MOT. SEQ. NO. 001

MARGERY PERLMUTTER et al

The following papers were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS DOC No(s).____

Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS DOC No(s).____

Replying Affidavits ECFS DOC No(s).____

This is a CPLR Article 78 proceeding, whereby petitioner seeks an order vacating and reversing the determination of the respondent Board of Standards and Appeals (the "BSA") finding petitioner in violation of the New York City Zoning Resolution and failing to meet the findings required for a variance as established in ZR § 72-21. Respondents have answered the petition. For the reasons that follow, the petition is denied.

Petitioner Angela Guarino is the owner of the premises located at 142-30 13th Avenue, Queens, New York (the "premises"). The premises is a one-family house and is within an R1-2 zoning district. By decision dated February 28, 2020, the NYC Department of Buildings ("DOB") denied petitioner's Alteration Type 1 Application No. 402275006 due to the premises not complying with the minimum required front yard and side yard, contrary to the zoning regulations. Petitioner claims that the zoning non-compliance for which the variance is sought arises from the fact that, when constructed between 2006 and 2008, the premises was erroneously set at an angle from the plan and building permit as approved by the New York City Department of Buildings.

City Charter § 666(5) authorizes the BSA to hear and decide applications "to vary the application of the zoning resolution as may be provided in such resolution and pursuant to section six hundred sixty eight" of the City Charter. ZR § 72-21 requires an examination of five specific criteria: (a) unique physical conditions of the property impose practical difficulties or unnecessary hardship in complying with the zoning; (b) unique physical conditions that prevent a reasonable return from the zoned property; (c) that the proposed variance would not alter the essential character of the neighborhood; (d) that any practical difficulties or unnecessary hardship were not created by the owner; and (e) that only the minimum variance necessary is sought. Meanwhile, City Charter § 668 sets forth detailed and extensive procedural requirements for the zoning variance review process.

Dated: 8.19.22

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐ **GRANTED** ☒ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

On March 21, 2020, petitioner applied to the BSA for a variance (the "Application"), pursuant to ZR § 72-21, to legalize the single-family home despite the front and side yards being noncompliant with ZR §§ 23-45, 23-48. In the Application, petitioner argued for a variance on the basis that (1) "there are unique physical conditions inherent in the Premises that create practical difficulties or unnecessary hardship in complying strictly with applicable zoning regulations that are not created by general circumstances in the neighborhood or district, " and (2) "it is impossible to do the work to make the yards compliant with the provisions of the Zoning Resolution because it is cost-prohibitive, [ ] the resulting structure would create further non-compliance with room sizes and other regulations in the internal existing parts of the residence[, and] the required work would cause further extreme practical difficulty and hardship to the owner."

By letter dated June 8, 2020, the BSA directed petitioner to provide additional documentation including an updated survey, Sanborn maps, proposed landscaping and further evidence and information. By letter dated August 14, 2020, petitioner responded to the BSA. Petitioner made additional submissions in January 2021 and a virtual public hearing on the Application was scheduled for January 26, 2021. A transcript of the hearing has been provided to the court.

At the 1/26/21 hearing, BSA Commissioners expressed concerns with the uniqueness finding under ZR § 72-21(a) and discussed how the retaining wall is not a unique physical condition on the Premises as each house on the same side of the street as the Premises was built on a slope and had a retaining wall. Chair Perlmutter stated:

> This application actually sounds like a classic case of a professional malpractice on the part of either the surveyor, the contractor and perhaps the architect attempting to be cured through a variance. That is not what this 72-21 variance is for. Both lots 25 and 27 have been held in common ownership since before 1980. The ACRIS history stops then, so I don't know if there's any deeds before 1980 and until the construction of 17 new house, that's the subject of this variance application, lot 27 had been vacant that whole time. All of the -- that whole time, and it seems like long before that.
>
> All of the houses on that side of the street are built on a slope with retaining walls between them, so the claim that that's a unique condition or a difficultly makes no sense in this neighborhood where all of the houses on that side of the street are on a slope.

The Commissioners further stated as follows:

> COMMISSIONER SHETA: I was, like, staring at the drawings since the beginning of this case. And, and I'm not sure what kind of difficulty exactly that existed back then when this retaining wall collapsed. If the response is going to be it was very difficult to build close to that collapsed retaining wall and that necessitated the, the building could be shifted and in the way it's shifted, I would respond to that, why wasn't it possible to just turn part of the building and just build it with shorter than that. That could have resolved the issue immediately and eliminated the need for all the discussions we're having and to, for this case at all. So I'm not sure, unless, unless there is something material that could be presented to, to us on a case like this, I can't see any like uniqueness there. I can't see any hardship at all. I can't see any practical difficulty in abiding with the Zoning Resolution, which is the law of the land so far. This is, this is our law.
>
> ...

> CHAIR PERLMUTTER: Right. Okay. So, so the part of the problem is, you know, if there's going to be some argument that something, and this is not for Mr. Nunez, this is in general, for counsel, if there's an argument made that something very unusual happened on the site, we have no idea what it is. We have a sentence in the statement of facts that said something unusual happened at the site that had to do with the retaining wall, but no one to give testimony about what actually happened, no drawings, no photographs, no nothing to show us, uh, and so it's based on one sentence of somebody made a mistake and we're sorry. Eh, you know, and by the way, the difference is not a foot, the difference is three feet on the side yard.

After the hearing, petitioner submitted another written response via letter dated June 30, 2021 along with a supplemental statement of facts. Another hearing was then held on September 23, 2021, a transcript of which has also been provided to the court. At the 9/23/21 hearing, Chair Perlmutter noted:

> There are submissions, but as far as I can tell, no supporting documentation stating, no supporting documentation stating that the retaining wall conditions on site presented the unique physical conditions that would require the house to be improperly situated in the lot. Doing that might have demonstrated the practical difficulty that could help us establish an A finding in this case. Absent that, I see no A finding still. I continue to see no A finding.
>
> ...
>
> I note also that all of the cost estimates that were provided appear to be approaching this question as a complete demolition of the house and its reconstruction, so as to the exact house that was originally designed, moved over to the left and rear. Also, the bid from Davis Movers, a company that moves houses and a company by the way I know extremely well, seems not to have been based on a site visit, so it's just kind of a one sentence estimate to move a house, where they're the ones who lift houses, relocate them across the street and things like that. So they probably didn't visit the site to see the scope of the work.
>
> In fact, a bid should be based on merely removing the offending walls and cutting back the house by that much. This is a stick built with brick veneer house, not a masonry building. There's no need to re-pour foundations as the seller may penetrate beyond the side and front yard setback lines, so it needn't been disturbed at all. So I'm not saying that it will be free to do this, but certainly not $500,000 as is the proposal.
>
> And I don't see where plumbing is involved since this affects no bathrooms or kitchens based on the provided plans. The few rooms affected by the change will be a bit smaller, yes, but they are already of generous proportions. It's possible to correct this.

On November 15, 2021, the BSA held a final review session on the Application. A copy of the transcript is annexed hereto as Exhibit K.6 113. At the November 15, 2021 session, the BSA Commissioners voted on the Application to deny Petitioner's motion to grant a variance. On that same date, the BSA adopted Resolution No. 2020-25-BZ, denying Petitioner's Application for a variance.7

The Resolution stated, in part, as follows:

> At hearings, the Board expressed concerns about the applicant's failure to establish a Z.R. § 72-21(a) finding as the application provides no supporting documentation that the retaining wall conditions on the Premises presented the unique

physical conditions and caused a practical difficulty that required the residence be improperly situated on the lot. The Board further posited that if this application were to be approved, the applicant's failure to establish this finding could set a precedent for granting a variance solely to correct the malpractice of the contractor, surveyor and/or architect for "builder's error," and described the potential outcome as "havoc". The Board also stated that the applicant argues that because the noncompliances at the subject Premises are not as big as they could be, the site is deserving of a variance. The Board contemplates that a positive outcome for this applicant could lead builders who make "mistakes", chose not to correct them, and instead come before the Board to remedy them, which is not the Board's role. **The Board plainly stated that granting a variance in this case could invite fraud and/or variances of doubtful quality to enter and mar a community plan, and the Z.R. § 72-21 (d) self-created hardship finding is meant to prevent such outcomes**. In applications before the Board, common ownership is typically cited to differentiate a single, small, or narrow lot suffering a hardship from one that is similarly sized but is owned in common with an adjacent lot, as with the subject Premises, and does not suffer a hardship.

Based upon its review of the record, the Board has determined that this approval is not eligible for relief under Z.R. § 72-21 and that the applicant has not substantiated a basis to warrant exercise of discretion.

Therefore, it is Resolved, that the Board of Standards and Appeals does hereby deny this application.

(Emphasis in bold added).

Petitioner claims that the Board's denial of her application for an area variance was arbitrary, capricious and an abuse of discretion, and without regard to the law and the evidence. Petitioner further seeks an order directing the Board to issue the variance on the grounds that Petitioner has satisfied all legal requirements of ZR § 72-21 and other applicable statutory and case law. The court disagrees.

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: was made in violation of lawful procedure; affected by an error of law; or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders. "[Tlhe proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after *quasi*-judicial hearings required by statute or law" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck. Westchester Countv*, 34 NY2d 222, 231 [1974] [emphasis removed]; *see also Matter of Colton v. Berman*, 21 NY2d 322, 329 [1967]).

Petitioner complains that the noncompliance results in a total intrusion into the side yard of 9.92% and front yard of 2.76% and that the only other house affected by the noncompliance is the property immediately to the west, also owned by the Petitioner, who proposed to the BSA that she execute and record a restrictive declaration in title to the premises acknowledging and accepting the intrusions. These facts do not render the BSA's decision not to grant the variance petitioner seeks arbitrary or capricious. Petitioner does not point to any other Applications which were treated differently than hers.

Further, petitioner has not established that the BSA's determination lacked a rational basis. Indeed, the BSA and the Commissioners considered petitioners arguments and evidence presented and found that petitioner had failed to overcome the burden of self-created hardship under ZR § 72-21[d] or that the retaining wall on the premises was a unique condition that caused a practical difficulty requiring the residence to be deviated from, and in violation of, DOB-approved plans. Indeed, petitioner admits that the noncompliance was the result of professional error during construction of the premises and the

BSA's rationally reasoned that the variance petitioner seeks would invite fraud or further violations of zoning rules and requirements in the community. Accordingly, the petition must be denied.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that the petition is denied, this proceeding is dismissed and the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 8.19.22
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.