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SHORT FORM ORDER

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INDEX No. 14-19645

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 11-26-14
ADJ. DATE 3-10-15
Mot. Seq. # 001 - MG

JANICE M. GRAY,

Petitioner,

- against -

THE VILLAGE OF PATCHOGUE AND THE VILLAGE OF PATCHOGUE ZONING BOARD OF APPEALS,

Respondents.

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Upon the following papers numbered 1 to 17 read on this Article 78 proceeding; Notice of Petition/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 9-13; Replying Affidavits and supporting papers 14-15; Other 16,17; (~~and after hearing counsel in support and opposed to the motion~~) it is,

In October 2014, petitioner commenced this Article 78 proceeding to annul and set aside as arbitrary, capricious and contrary to law, the decision of the Zoning Board of Appeals of the Village of Patchogue denying petitioner's application for a variance to convert a two-car garage to living space for her 81 year old mother.

In June 2014, petitioner filed an application for a variance of the Village of Patchogue Code § 435-15 (A)(1) to convert a two-car garage to living space for an accessory apartment for a family member. The property is located at 84 N. Summit Avenue, Patchogue, New York. A hearing was held on July 16, 2014. Petitioner testified that she was asking for relief from the Village ordinance to convert the garage to living space for her mother who is of limited financial means. No one opposed the application. One neighbor spoke in favor of the application. The main house was built in approximately 1940, and the garage was constructed in 1952. Petitioner argues that § 435-15(J)(7) of the Village Code which requires a private garage on residential premises does not apply to dwellings constructed prior to

10/14

1953. During the hearing, Chairman Charles Fuccillo, indicated that the Village does not have an accessory apartment law and not many [applications] have been granted at all.

On September 3, 2014 the Board determined that the local zoning code restricts variances and special permits in an A-Residence district to one-family dwellings. The board noted that the code of the Village of Patchogue does not define "mother-daughter" or "accessory apartment" in its single family residence zone. The Board held that, "a private garage is required to be located on the premises (435-15(J)(7)."

Pursuant to the code of the Village of Patchogue §7-712-b(3)(b) , a zoning board considering a request for a variance must engage in a balancing test, weighing the benefit to the applicant if the variance is granted against the detriment to the health, safety and welfare of the surrounding neighborhood or community (*see* ***Matter of Pecorano v Board of Appeals of Town of Hempstead***, 2 NY3d 608, 781 NYS2d 234 [2004]; ***Matter of Colin Realty, LLC v Town of Hempstead***, 107 AD3d 708, 966 NYS2d 501 [2d Dept 2013]; ***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]). More particularly, the zoning board must consider whether the granting of a variance will produce an undesirable change in the character of the neighborhood or a detriment to neighboring properties; whether the benefit sought by the applicant can be achieved by some other feasible method, rather than a variance; whether the requested variance is substantial; whether granting the variance will have an adverse impact on the physical or environmental conditions in the neighborhood; and whether the alleged difficulty is self-created (code of the Village of Patchogue §7-712-b[3][b]; *see* ***Matter of Pecorano v Board of Appeals of Town of Hempstead***, *supra*; ***Matter of Sasso v Osgood***, *supra*; ***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]). Further, 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 Greenburgh***, 68 AD3d 62, 73, 886 NYS2d 442; *see* ***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]).

A local zoning board has broad discretion in considering applications for variances (*see* ***Matter of Pecorano v Board of Appeals of Town of Hempstead***, *supra*; ***Matter of Cowan v Kern***, 41 NY2d 591, 394 NYS2d 579 [1977]), and its interpretation of the 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 Vil. of Southampton***, 7 AD3d 710, 776 NYS2d 820 [2d Dept 2004]). However, "[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 Tall Trees Constr. Corp. v Zoning Bd. of Appears of Town of Huntington***, 97 NY2d 86, 93, 735 NYS2d 873 [2001]; ***Matter of Knight v Amelkin***, 68 NY2d 975, 977, 510 NYS2d 550 [1986]; ***Matter of Charles A. Field Delivery Serv., Inc.***, 66 NY2d 516, 517, 498 NYS2d 111

[1985]; ***Matter of Lucas v Board of Appeals of Vill. of Mamaroneck***, 57 AD3d 784, 785, 870 NYS2d 78 [2d Dept 2008]). "Thus, where, as here a zoning board is faced with an application that is substantially similar to a prior application that had been previously determined, the zoning board is required to provide a rational explanation for reaching a different result" (***Matter of Lucas v Board of Appeals of Vill. of Mamaroneck***, *supra*). "[T]o justify a departure from a prior determination, there must be a change of circumstances sufficient to justify the contrary result–i.e., that there were substantive differences between the applications or that there has been some other material change in circumstances (such as a change in the character of the neighborhood) to justify the different decision" (***Matter of Lucas v Board of Appeals of Vill. of Mamaroneck***, 14 Misc 3d 1214[a], 836 NYS2d 486 [Sup Ct, Westchester County 2007], *affd* 57 AD3d 784, 870 NYS2d 78 [2d Dept 2008]).

Here, the reason cited by the Board to justify denying the petitioners' application does not support that there was a material change in circumstances to warrant a different result from prior applications that were granted. In fact, the Chairman stated, "not many have been granted at all." Meaning, of course, that some have been granted. Indeed, the explanations articulated for the denial of the application, first that the code does not define "accessary apartments" or "mother-daughter" and second, that a private garage is required do not follow the Board's admitted prior precedent or the law.

Administrative due process prohibits inconsistent treatment of similarly situated parties (*see* ***Matter of Knight***, *supra*; ***Exxon Corp. v Board of Standards & Appeals of City of N.Y.***, 128 AD2d 289, 515 NYS2d 768 [1987], *lv denied* 70 NY2d 614, 524 NYS2d 676 [1988]). Additionally, no evidence was cited that the grant of the requested variance would 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. Moreover, since petitioner's home was constructed in approximately 1940, and the garage in 1952, § 435-15(J)(7) of the Village of Patchogue Code does not preclude petitioner's application. That section of the Village of Patchogue Code specifically provides, "[t]he requirement for a garage shall not apply to dwellings constructed prior to 1953." Therefore, the Board's determination must be annulled as arbitrary and capricious.

Accordingly, the petition is granted to the extent that the application is remanded to the respondent Zoning Board of Appeals with a direction to grant the application for a variance.

Submit judgment.

Dated: OCT 15 2015

A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION