Index No: 376/16

SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY

PRESENT:
HON. JOSEPH C. PASTORESSA
JUSTICE OF THE SUPREME COURT

Mot Seq: #001- MD; CDISPSJ

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In the Matter of the Application of
ANN L. NOWAK,

Petitioner,

For a Judgment Pursuant to CPLR Article 78

-against-

THE TOWN OF SOUTHAMPTON. THE TOWN OF SOUTHAMPTON ZONING BOARD OF APPEALS, INSOURCE EAST PROPERTIES, INC. JOSEPH GIANNINI and MAUREEN GIANNINI,

Respondent,

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ATTYS FOR PETITIONER(S):
JOSEPH LOMBARDO
PO BOX 1290
WATER MILL, NY 11976

ATTYS FOR RESPONDENT(S):
JAMES M. BURKE, TOWN ATTORNEY
116 HAMPTON ROAD
SOUTHAMPTON, NY 11968

O'SHEA MARCINCUK & BRUYN
250 NORTH SEA ROAD
SOUTHAMPTON, NY 11968

The respondents Joseph Giannini and Maureen Giannini are the owners of two parcels of real property located in the Town of Southampton. The two parcels are vacant and are located in a CR-200 zoning district which requires a minimum of 200,000 square feet. The combined area of the two parcels is 66,537 square feet and thus the two lots are nonconforming. The two parcels are landlocked but have access to Old Sag Harbor Road pursuant to a 50 foot wide easement. The respondents sought to merge the two parcels into one lot and construct a single family dwelling. The respondents applied to the respondent Town of Southampton Zoning Board of Appeals (the Board) for an area variance to allow a zero foot road frontage where the minimum road frontage for a lot under the Town Code is 40 feet. The petitioner is the owner of an adjoining parcel of real property who opposed the application on the grounds that the construction of a dwelling would obstruct her view of the wooded area and that the lots were not entitled to a building permit because they had merged. Following a hearing, the Board granted the application.

The petitioner then commenced this proceeding, pursuant to CPLR article 78, to annul the determination. The petitioner made a motion for a preliminary injunction seeking to restrain the Town from issuing any permits regarding the subject property. At a conference held on July 21, 2016, the petitioner withdrew the motion and the parties agreed to submit further memoranda of law on the merits of the petition.

Local 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 or an abuse of discretion (*see* ***Matter of Ifrah v Utschig***, 98 NY2d 304; ***Matter of Fuhst v Foley***,

45 NY2d 441; ***Matter of Miller v Town of Brookhaven Zoning Board of Appeals***, 74 AD3d 1343). Thus, the determination of a zoning board will be upheld if it is rational and not arbitrary and capricious (*see* ***Matter of Sasso v Osgood***, 86 NY2d 374; ***Matter of JSB Enterprises v Wright***, 81 AD3d 955; ***Matter of Caspian v Zoning Board of Appeals***, 68 AD3d 62, 67). 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 Caspian v Zoning Board of Appeals***, *supra quoting* ***Matter of Halperin v City of New Rochelle***, 24 AD3d 768, 772; *see* ***Matter of JSB Enterprises v Wright***, *supra*). Where a rational basis for the determination exists, "a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record" (***Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead***, 98 NY2d 190, 196; *see* ***Matter of Gebbie v Mammina***, 13 NY3d 728; ***Matter of Roberts v Wright***, 70 AD3d 1041).

In making its determination whether to grant an area variance, a zoning board of appeals is required, pursuant to Town Law § 267-b(3), 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 (*see* ***Matter of Pecoraro v Board of Appeals***, 2 NY3d 608; ***Matter of Ifrah v Utschig***, *supra*; ***Matter of Sasso v Osgood***, *supra*). The board 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 granting the area variance; (2) the benefit sought by the applicant can be achieved by some other method, feasible for the applicant to pursue, other than an area variance; (3) the requested variance is substantial; (4) the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood; and (5) the alleged difficulty was self-created (*see* ***Matter of Pecoraro v Board of Appeals***, *supra* at 613; ***Matter of Ifrah v Utschig***, *supra* at 307-308). A zoning board is not required to justify its determination with supporting evidence with respect to each of the five factors as long as its ultimate determination balancing the relevant considerations is rational (*see* ***Matter of Jacoby Real Prop. LLC v Malcarne***, 96 AD3d 747; ***Matter of Merlotto v Town of Patterson Zoning Board of Appeals***, 43 AD3d 926).

Here, the record demonstrates that the Board engaged in the required balancing test and considered the statutory factors. There was evidence that other properties in the area had received relief for reduced road frontage and there were other flag lots in the neighborhood. Thus, the Board's conclusion that the variances would not create an undesirable change in the character of the neighborhood or have an adverse impact on the physical or environmental conditions had a rational basis.

The petitioner's primary contention is that the respondents were not entitled to a variance because the two lots had merged for zoning purposes and lost their entitlement to be treated as two nonconforming lots. The Town Code provides that a "nonconforming lot separately owned and not adjoining any lot or land in the same ownership at the effective date of this chapter and not adjoining any lot or land in the same ownership at any time subsequent to such date may be used, or a building or structure may be erected on such lot for use, in accordance with all the other applicable provisions of this chapter, provided that proof of such separate ownership is submitted in the form of an abstract of title to said lot" (Town Code § 330-115[D]).

In support of the application, the respondents submitted an abstract of title from a title company asserting that the two parcels had been in single and separate ownership since 1954, prior

to the enactment of the zoning code. The petitioner disputes this assertion claiming that the abstract actually showed that the two parcels had been in common ownership and therefore merged. The abstract indicates that one lot, identified as Lot 6, was owned by John Cattani and Olga Cattani from 1954 to 1986. The County of Suffolk obtained title to the other lot, identified as Lot 32, by a tax deed in 1995. The abstract reports that the tax deed stated that the assessed owners of that lot were John Cattani and Olga Cattani but no deed of record to the Cattani's could be located. In the absence of a deed, the evidence was insufficient to establish that the two lots were in common ownership.

In any event, even if the two lots did merge, the Town Code provides that, if a nonconforming lot "shall thereafter be held in the same ownership as an adjoining parcel, it shall lose its status as a nonconforming lot, except to the extent that the lot created by the merger of the two parcels shall remain nonconforming in the same respect" (Town Code § 330-5). The two lots, if merged, remain nonconforming since the combined area of the parcels does not meet the minimum square footage requirement in the CR-200 zoning district. Thus, the petitioner's claim that the parcel would not qualify for relief under section 330-115 of the Town Code is without merit.

Accordingly, the petition is denied and the proceeding is dismissed.

Settle Judgment.

DATED: November 2, 2016

HON. JOSEPH C. PASTORESSA, J.S.C.

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