SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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CLAUDE SIMON,

Petitioner,

For a Judgment pursuant to Article 78 of the CPLR

DECISION AND ORDER

- against -

Index No. 030010/2017

THOMAS ENGLERT, Chair, STEPHEN LUBECK, MARION SHAW, MICHAEL KUHLING and JOSEPH SCARMATO, constituting the ZONING BOARD OF APPEALS OF THE VILLAGE OF UPPER NYACK,

Respondents.
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Sherri L. Eisenpress, A.J.S.C.,

The following papers, numbered 1 to 10, were considered in connection with the Amended Notice of Petition filed by Petitioner seeking, pursuant to *Civil Practice Law and Rules* Article 78, a judgment reversing, annulling and setting aside those portions of the determination of the Respondents set forth in (i) the transcript of its determination filed with the Village Clerk of the Village of Upper Nyack ("Village Clerk") on November 30, 2016 and (ii) the resolution memorializing its determination filed with the Village Clerk on January 9, 2017, denying certain variances and approval of a flag lot sought by the Petitioner, on the grounds that those portions of the said determinations were arbitrary, capricious, illegal, in error of law and unsupported by substantial evidence in the record, and remanding the matter with a direction that the Zoning Board of Appeals of the Village of Upper Nyack ("ZBA") grant the subject variances and flag lot approval:

PAPERS	**NUMBERED**
AMENDED NOTICE OF PETITION/AMENDED VERIFIED PETITION/EXHIBITS "A-K"/AFFIRMATION OF STEVEN M. SILVERBERG ESQ. IN SUPPORT OF APPLICATION/EXHIBITS "A-I"/AFFIDAVIT OF JAY GREENWELL/MEMORANDUM OF LAW	1-5
VERIFIED ANSWER TO AMENDED COMPLAINT/AFFIRMATION OF ROBERT P. LEWIS, JR. IN SUPPORT OF ANSWER TO THE AMENDED PETITION/ AFFIDAVIT OF STEPHEN LUBECK IN SUPPORT OF THE ANSWER TO THE AMENDED PETITION/CERTIFIED RECORD ITEMS "1-52"	6-9

Upon the foregoing papers, the Court now rules as follows:

Background

Petitioner is the owner of property located at 525 North Broadway, in the Village of Upper Nyack, New York. Said property is approximately 98,000 square feet in size (2.25 acres) and is bordered by North Broadway to the west and the Hudson River to the east, and is located in the R-2 zone which requires 30,000 square foot lots. The improved property contains a dwelling, a carriage house and other minor improvements. The Petitioner proposed subdividing the Property into two lots, the first of which ("Lot 1") would contain the existing dwelling and a now vacant lot ("Lot 2") which would contain a newly constructed single-family home. However, due to the configuration of the property and the existing topography, the only feasible way to do so was to propose that Lot 2 be a "flag lot", meaning that access to the property would be through a narrow piece of land (a "flagpole") which connected to North Broadway before the lot expanded further into the property. Both lots would use an existing driveway, which it is claimed, would not change the aesthetics along the frontage of the property, which is currently a wall with a gate from extending along North Broadway to the existing driveway.

Petitioner was advised that certain variances would be required in order to permit the subdivision of the Property and, in or about April 2015, he filed an application for what he believed to be the proper variances. While the initial application was being considered by the Planning Board, the chair of the ZBA, Thomas Englert, appeared before the Planning Board in his capacity as a neighbor of Petitioner to complain that he believed the proposed subdivision would adversely impact his property. In or about April 2015, the Planning Board assumed status as lead agency pursuant to the State Environmental Quality Review Act ("SEQRA") and thereafter issued a negative declaration finding there was no need for further environmental review.

It is alleged by Petitioner that, at the initial appearance before the ZBA in May 2015 on the application for variances, the Chair, Mr. Englert, opined that there was nothing to discuss with regard to the application and claimed that the ZBA did not have authority to issue variances from certain of the requirements of the flag lot ordinance. After the Planning Board initially issued its negative SEQRA declaration, the Village advised that the Planning Board had failed to notice the ZBA of its intent to serve as lead agency in a coordinated review pursuant to SEQRA. As such, a new notice of intent to serve as SEQRA lead agency was issued by the Planning Board, to which the ZBA consented. Mr. Englert, in response to the notice of intent, sent a letter on behalf of the ZBA, in which he raised issues he believed the Planning Board should consider including visibility from neighboring properties, which would include his own.

Thereafter, the Planning Board required preparation of a Full Environmental Assessment Form ("EAF") and required a "balloon test," an unusual step for a proposed single-family residence, which mandated that balloons be floated at the location and height of the proposed house so that the Planning Board Members could see any potential visual impacts on adjoining properties. In addition, the Planning Board required review of emergency access to the site and required certain modifications to the plans to address concerns regarding emergency access.

After examining potential environmental issues and taking the requisite "hard look" at them, on or about April 20, 2016, the Planning Board issued a new negative declaration which stated, in relevant part:

> WHEREAS, those additional impacts related to the visual impact of the proposed structure on the surrounding properties, adequate access for fire emergency vehicles and zoning variances required, and
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> WHEREAS, the applicant has provided additional information consisting of enhanced photo simulations and emergency vehicle access exhibits, and
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> WHEREAS, the applicant has proposed, or incorporated into the design plans for the action measures to mitigate the identified potential adverse environmental impacts...
>
> WHEREAS, additional information submitted indicates that the

visual impacts on surrounding properties are mitigated to the maximum extent practicable by dense screen plantings on the west and south sides of the site, and that access by emergency fire equipment can be achieved, and that the proposed residence will be equipped with residential sprinklers showing that the emergency fire access is not significant or mitigated, and that the plan is consistent with the community land use plans but not with the zoning code and that the flag lot configuration and variances required for the subdivision of the property and zoning compliance can only be mitigated by the grant of variances outside the jurisdiction of the Planning Board.

NOW THEREFORE BE IT RESOLVED that the Planning Board, based on review of proposed action, information submitted and the mitigation of the potential adverse environmental impact thereof, makes a determination that the proposed action will not have a significant adverse environmental impact.

After the second SEQRA negative declaration was issued, Petitioner's counsel requested, via letter, that the ZBA Chairman recuse himself due to the existence of a conflict of interest. On June 21, 2016, the ZBA held a meeting wherein Petitioner's application was considered last, and upon calling the matter, the Chair then recused himself. During the hearing on June 21, 2016, it was called to the attention of the Petitioner that there had been an amendment to the Zoning Code in July of 2015 (subsequent to the initial application), in which the flag lots were required to be 43,560 square feet, or 1 acre, regardless of zoning district.[1] While Lot 2 was proposed to be in excess of 58,000 square feet, after making the required deductions to the net lot area for such things as steep slopes, the flag lot would be 30,046 square feet, less than the required one acre, thus necessitating Petitioner to seek additional variances.

At the June 21, 2016, meeting, the ZBA indicated that they would like to do a site visit so that its members could see the property and evaluate the visual impacts from neighboring properties. Much discussion revolved around the neighbors' undisturbed view of

[1]While the flag lot law was passed on 12/16/2004 as local law #14 of 2004 and filed with the Secretary of State on 12/27/2004, the words "one acre" with respect to the minimum lot size permitted regardless of zone was not added until said amendment on 7/16/15,

the Hudson River[2], the potential for a substantial reduction in the value of the neighbors' property, as well as mitigating factors such as the fact that the proposed house would not be visible from North Broadway, visual impacts on the surrounding properties are mitigated to the maximum extent possible and that in rebuttal to the 100 foot standard frontage requirement, a neighboring lot has only 30 foot frontage. On or about September 27, 2016, the Building Inspector issued a letter outlining all required variances. In response, Petitioner made an amended submission for variances to the ZBA in accordance with the Building Inspector's interpretation.

A hearing before the ZBA was held on November 15, 2016, at which time a court reporter transcribed both the hearing and the subsequent deliberations. Petitioner presented the project to the ZBA, including a list of a number of similar variances which had previously been granted by them with respect to neighboring properties.[3] During the hearing, two neighbors spoke out against the variances and the flag lot claiming they would suffer negative visual impacts and/or possible depreciation of the value of their properties. The President of the Fellowship of Reconcilation ("FOR"), which at that time owned the neighboring property at 521 North Broadway, Upper Nyack, where its national headquarters were located, spoke out against the variances. Although the ZBA requires all written submissions be made prior to a meeting, FOR was permitted to submit an undated letter from Richard Ellis of Sotheby's International Realty, over Petitioner's objections, which states the following, in addition to providing his credentials:

The purpose of this letter is to offer my opinion regarding the

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[2] Gregory Stemkowski: "It's about the whole scenery in the back. Not, you know... We don't want to be looking at the top of somebody's carriage house, or any trees that they're putting up there because that further blocks any visual effects that we have now."

[3] It should be noted that since the flag law was passed in 2004, that there had been no applications, other than Petitioner's, with respect to creation of a flag lot. Thus, the variances presented were with respect to set-backs, building heights and disturbances of slopes.

> Claude Simon subdivision vis-a via the impact it will have on the adjoining property known as "Shadowcliff".
>
> My opinion is that such sub-division will negatively impact the value of Shadowcliff as views and privacy to this parcel will be reduced and the bucolic nature of the riverfront setting will be diminished too. Accordingly the value of Shadowcliff will be reduced. As the Simon sub-division requires several variances for sub-division, including creating a flag lot and a greatly reduced frontage, it does not seem equitable for approval of such a plan.

No supporting documentation or comparisons were provided with the letter nor did Mr. Ellis opine with respect to the amount of the alleged depreciation of FOR's property. The President of FOR further stated that he believed the "peace-building activities" of guests on their property would be significantly compromised. A representative of another neighbor voiced his opinion that there would be a negative impact upon the visual field in back of his client's property.

After the hearing was closed, the ZBA deliberated with respect to the ten proposed variances relating to Lot 1 and Lot 2, some of which were pre-existing conditions which merely needed to be "legalized." The variance were decided as follows:

Variance 1: Allow the flag lot on Lot #2 to be 30,046 net square feet where the code required an acre. Variance DENIED[4].

Variance 2: Allow the flag pole driveway (on lot 2) to be 18 feet wide adjacent to the existing house on Lot #1 where the Code requires a 25 foot wide driveway. Variance DENIED[5].

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[4]The ZBA found the variance to be substantial and that it would be detrimental to nearby properties. Much discussion revolved around how flag lots in general can have serious impacts on land development, property value, traffic, aesthetics, fire protection, poorly configured driveways and that they are not built to withstand use by multiple homeowners. Despite the negative SEQRA finding with regard to visual impacts, as well as repeated comments throughout the record that based upon photographs that the loss of a view shed would not be significant, the ZBA found that the impact for FOR's view was significant and that the grant of this variance would be a detriment to the public in that the view from the Hudson River would be affected. As with all of the variances, it found that the situation was self-created and that, with the exception of variance number 8 (number of stories on the proposed dwelling on Lot 2), there were no feasible alternatives to the variances.

[5]The ZBA found that the variance would be substantial. Much discussion revolved around the questioning of whether emergency vehicles would have sufficient access, despite the findings of the Fire Department that this was not an issue. The ZBA also found that there was a 'density

Variance 3: Disturb an area on Lot 1 with a slope of greater than 40%. Variance APPROVED[6].

Variance 4: Disturb an area on Lot 2 with a slope of greater than 40%. Variance APPROVED[7].

Variance 5: Allow the street frontage on Lot 1 of 50 feet where 100 feet is required. Variance DENIED[8].

Variance 6: Legalizing a preexisting nonconforming side yard setback along the north boundary of Lot 1 for the carriage house of 8/1 feet where 25 feet is required. Variance APPROVED[9].

Variance 7: Legalizing the pre-existing nonconforming three-story dwelling on Lot 1 where only two stories are permitted. Variance APPROVED[10].

Variance 8: Permitting the structure height on Lot 2 to be a three-story dwelling where only two stories are permitted. Variance DENIED[11].

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issue" meaning there would be crowding in a smaller driveway.

[6]The Board found that Petitioner had taken steps to mitigate the issue, that the pool would be removed and that the variance was not substantial.

[7]The ZBA found that there would be no undesirable change to the neighborhood and that Petitioner mitigated any adverse affects.

[8]The ZBA found this variance to be substantial. Notwithstanding its acknowledgment that the house on Lot 2 could not be seen from the street, and the property would appear the same from North Broadway due to the shared driveway, it nonetheless found that the variance would result in a change in the character of the neighborhood simply because granting the variance would enable construction of a single-family home on Lot 2.

[9]The ZBA granted this variance on the basis that it was pre-existing condition which was not substantial.

[10] The ZBA found that allowing the structure on Lot 1 to be three stories, rather than two, was not substantial. In fact, it specifically found that "there are other houses on Broadway that are as tall or taller." The ZBA determined that this variance would not result in an undesirable change to the neighborhood.

[11] In direct contrast to the finding that a three-story structure on Lot 1 would not be substantial, the ZBA concluded that a three story structure on Lot 2 would be substantial. The Board made this finding notwithstanding the statement that the members had looked at the photographs and that considering the flat roof of the proposed home, "you could pretty much see over it." The ZBA also stated that "I can't see giving a variance just for the sake of giving the variance to go up to three stories" and that it has an negative impact on the neighborhood simply because the building is there.

Variance 9: Permitting a side yard setback along the southern boundary of Lot 1 for the existing house to the flagpole of Lot 2 of 16.8 feet where 25 feet is required. Variance DENIED[12].

Variance 10: Allowing building coverage of 28.6% on Lot 1 where 25% is permitted. Variance APPROVED[13].

The record does not reveal that, as required by the code that a separate vote was taken with respect to the request for flag lot approval. A written resolution dated November 15, 2016 was apparently adopted at the ZBA meeting on held on December 20, 2016[14], and filed in the Village of Upper Nyack on January 9, 2017.

The Parties' Contentions

Petitioner timely commenced the instant action seeking, pursuant to *Civil Practice Law and Rules* Article 78, a judgment reversing, annulling and setting aside those portions of the determination of the Respondent set forth in (i) the transcript of its determination filed with the Village Clerk of the Village of Upper Nyack ("Village Clerk") on November 30, 2016 and (ii) the resolution memorializing its determination filed with the Village Clerk on January 9, 2017, denying certain variances and approval of a flag lot sought by the Petitioner, on the grounds that those portions of the said determinations were arbitrary, capricious, illegal, in error of law and unsupported by substantial evidence in the record and remanding the matter with a direction that the Zoning Board of Appeals.

Petitioner argues that the evidence in the record before the ZBA and the

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[12]The ZBA found the side yard setback variance to be substantial and found there to be a "density" issue based upon crowding in the drive-way with respect to the proposed single-family home. The ZBA found this set-back variance resulting in a 33% reduction of area to be substantial on Lot 2 but found a 68% set-back reduction to not be substantial on Lot 1.

[13]The ZBA found that the variance was minimal and would not produce an undesirable change in the neighborhood.

[14]It does not appear that Petitioner nor his representatives were advised that the application was on the agenda for this date nor was public notice given thereof. Neither Petitioner nor his representatives were present at this meeting.

transcripts of the public hearing do not provide an objective factual basis upon which to deny any of the variances requested by Petitioner. He argues that "visual impacts" was not a legitimate basis to deny the area variances since the Planning Board, as lead agency under SEQRA, conducted a thorough analysis of the potential visual impacts from the view of the public, as well as neighboring properties which included a balloon test usually reserved for larger commercial or multi-family developments, and nonetheless issued a negative declaration.

With the results of the balloon test, Petitioner's consultant created a rendering of the proposed dwelling to scale so the ZBA and other members of the public could see how the proposed dwelling would appear once constructed. In issuing a negative declaration, the Planning Board specifically noted that Petitioner would install "dense screen plantings on the west and south sides, which is where the only neighbors who objected to the project reside. Petitioner argues that where the ZBA had notice of the SEQRA application, and an opportunity to participate in the project, the ZBA was bound by the negative determination with regard to the Planning Board's negative declaration including as it pertains to adverse visual impacts.

Petitioner further argues that denial of certain variances was arbitrary in that variances for Lot 2 were denied but the same variances for Lot 1 were granted, such as the request for a three-story dwelling where two stories is the maximum. Likewise, the ZBA found that the side yard setback variance for the carriage house on Lot 1 to allow an 8.1 foot set back where 25 feet is required (68%) was not substantial but that a proposed 16.8 foot setback where 25 feet is required (33%) is substantial. Petitioner further argues that the ZBA improperly relied upon conclusory and generalized community opposition as a basis to deny certain variances.

Lastly, Petitioner argues that the ZBA was predisposed to deny the variances related to the creation of the flag lot without a legitimate basis to do so. With respect to this position, Petitioner points out that much of the Resolution focuses on "past" flag lot subdivisions and related problems such as poorly configured driveways and drainage problems, which clearly

did not exist with regard to this project. Petitioner points out that the ZBA denied the flag lot area variance for Lot 2 in part because of allegedly potential drainage and erosion issues but then granted the variances related to slopes of greater than 40 percent, finding that Petitioner had sufficiently mitigated these same potential impacts. It is further asserted that Petitioner presented the ZBA with a list showing several existing flag lost subdivisions within a very close proximity to Petitioner's property, including four almost directly across North Broadway and one several houses down, which demonstrate that a flag lot would not be inconsistent with the character of the neighborhood.

In opposition, Respondents argue that the houses on North Boradway in Upper Nyack are multi million dollar houses on larger lots. They note that the lot directly to the South of Petitioner's property is owned by FOR and that it is currently listed for sale in the amount of 2.4 million dollars. Accordingly, they argue that if the ZBA permitted all properties along North Broadway to have street frontage of only 50 feet, then the character of the neighborhood would be destroyed. Respondents point out that the Flag Law enacted in 2004 was in response to previous mistakes that were made by the Village in approving flag lot subdivisions in the past. Respondents contend in general terms that the Board listened carefully to all of the evidence presented by the applicant and public, did a site visit in early July of 2016 to walk the property, discussed the criteria required for area variances and argues, without citing specifics, that there was substantial evidence submitted that the Board considered and that it used a rational basis for its decision reflected in the Resolution.

In Reply, Petitioner argues that Respondents have failed to offer a single citation to the Certified Record to support their contention that the ZBA based its findings on substantial evidence or that its decisions on the various variances were neither arbitrary nor capricious. He claims that Respondents' failure to cite to the Certified Record is, in part, because those alleged facts upon which it relies are inconsistent with what is in the actual record. In addition, Petitioner argues that Respondents attempt to make arguments that are not set forth in the

Certified Record. For example, Petitioner asserts that Respondents denied the variances in part because of the visual impact on the neighboring properties, including the FOR property currently on the market. However, Petitioner claims that the photographic evidence presented to the ZBA conclusively demonstrates just how minimal any alleged impact on the FOR property would be. Petitioner argues that he would be permitted to install a higher fence right at his property line, and downhill from FOR's property toward the water, that would be much more impactful on FOR's views than the proposed single family home.

Petitioner further points out that to the extent that the ZBA concerned itself with the impact of increased density, it failed to explain how much increased density was expected from this single-family home, or how this would be detrimental to the neighboring properties where FOR maintains its national headquarters on the adjacent lot. As such, he argues that such a rationale is both arbitrary and capricious. Likewise, Petitioner argues that by keeping the wall in its current configuration, no one would be able to tell from the street that there was anything different about the property or that it had been subdivided since the proposed dwelling on Lot 2 would be set back. Thus, the ZBA's determination that there would be a change in the character of the neighborhood and that it would cause adverse impacts on the environment absent any factual support in the Certified Record, demonstrates that the ZBA's findings were arbitrary and capricious and not supported by substantial evidence.

Discussion

It is a well-established rule that local zoning boards have discretion in considering applications for variances and the judicial function is a limited one. Matter of Fuhst v. Foley, 45 N.Y.2d 441, 444, 410 N.Y.S.2d 56 (1978), Friendly Ice Cream Corp. v. Barrett, 106 A.D.2d 748, 483 N.Y.S.2d 782 (3d Dept. 1984). A determination of a zoning board of appeals should be sustained on judicial review if it has a rational basis and is supported by substantial evidence. Pecoraro v. Board of Appeals of Town of Hempstead, 2 N.Y.3d 608, 615, 781 N.Y.S.2d 234 (2004). For this reason, a reviewing court should refrain from substituting its own

judgment for the reasoned judgment of the zoning board. Id. "It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them." Id.; See also Matter of Kearney v. Village of Cold Spring Zoning Bd. Of Appeals, 83 A.D.3d 711, 714, 920 N.Y.S.2d 379 (2d Dept. 2011).

However, courts may set aside a zoning board determination where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure. Matter of Schumacher v. Town of E. Hampton, 46 A.D.3d 691, 693, 849 N.Y.S.2d 72 (2d Dept. 2007); Rosasco v. Village of Head of Harbor, 52 A.D.3d 611, 859 N.Y.S.2d 731, 732 (2d Dept. 2008). "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 Cascire v. City of White Plains Zoning Bd. Of Appeals, 87 A.D.3d 1135, 1136, 930 N.Y.S.2d 54 (2d Dept. 2011). Likewise, "a determination will not be deemed rational if it rests entirely on subjective considerations, such as general community opposition, and lacks an objective factual basis." Id. at 1137; Marina's Edge Owner's Corp. v. City of New Rochelle, 129 A.D.3d 841, 11 N.Y.S.3d 232 (2d Dept. 2015).

"In making its determination [whether to grant an area variance], 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." Sasso v. Osgood, 86 N.Y.2d 374, 633 N.Y.S.2d 259, 263 (1995). "The zoning board is also required to consider whether (1) granting the area variance will produce an undesirable change in the character of the neighborhood or a detriment to nearby properties; (2) the benefit sought by the applicant can be achieved by some method, feasible to the applicant, other than a variance; (3) the requested area variance is substantial; (4) granting the proposed variance would have an adverse effect or impact on

physical or environmental conditions in the neighborhood or district; and (5) the alleged difficulty is self-created." Matter of Pecoraro, 2 N.Y.3d at 612-613. While the last factor is not dispositive, it is also not irrelevant. Id. At 613; New York Town Law Sec. 267-b(3)(b).

Moreover, "in applying the balancing test set forth in Town Law Sec. 267-b(3)(b), [a] Zoning Board is 'not required to justify its determination with supporting evidence with respect to each of the five [statutory] factors, so long as its ultimate determination balancing the relevant considerations was rational'." Matter of Kaiser v. Town of Islip Zoning Bd. Of Appeals, 74 A.D.3d 1203, 1205, 904 N.Y.S.2d 166 (2d Dept. 2010); Matter of Harris v. Zoning Bd. Of Appeals of Town of Carmel,137 A.D.3d 1130, 27 N.Y.S.3d 660 (2d Dept. 2016).

Upon review of the entire record, and for the following reasons, the Court finds that the ZBA's decision to deny the five variances at issue, is arbitrary, capricious and not supported by an objective factual basis in the record. While the ZBA correctly determined that many of the requested variances are indeed substantial and self-created, the remainder of its other determinations are simply devoid of support in the record. It is apparent from review of the ZBA's discussion of the relevant statutory factors, that the main reason that the variances at issue were denied is the alleged visual impact upon neighboring properties in conjunction with the neighbors' objections to the proposal. However, the issues regarding potential visual impact upon the neighboring properties was fully investigated, assessed and addressed during the SEQRA review process conducted by the Planning Board, which included the consent and participation of the ZBA.

The Planning Board affirmatively found that "the visual impacts on surrounding properties are mitigated to the maximum extent practicable by dense screen plantings on the west and south sides of the site." Thus, with regard to the issue of adverse visual impacts, the ZBA was bound by the negative declaration of the Planning Board, which had "properly identified the involved agencies through 'due diligence' and apprised those agencies of its decision." Matter of Gordon v. Rush, 100 N.Y.2d 236, 244, 792 N.Y.S.2d 18 (2003). See also

Turkewitz v. Planning Bd. Of City of New Rochelle, 24 A.D.3d 790, 791, 809 N.Y.S.2d 113 (2d Dept. 2005)(Planning Board, as an involved agency for SEQRA purposes, properly relied upon the findings set forth in the Final Environmental Impact Statement circulated by the ZBA, which had appropriately designated itself as the lead agency.)

However, even if the ZBA was not bound by the negative SEQRA declaration of the Planning Board with regard to the visual impact issue, there is no objective evidence in the record which would support such a finding. The record is replete with photographic evidence demonstrating that any visual impact on the neighboring properties is minimal and/or mitigated. As pointed out by Petitioner, FOR's view of the Hudson River would be more adversely affected by the installation of a 6 foot stockade fence extending along Petitioner's property line to the water-- a fence which he would not need permission to install-- than it would be by the proposed single family dwelling. Likewise, as conceded by the ZBA, because the proposed single family dwelling is set back and thus not visible from the street, and due to the shared driveway and the existing fence along North Broadway, a passerby on North Broadway would be unaware of any change to the property at all.

Similarly, there is no factual basis in the record to support the ZBA's finding that the creation of the flag lot will produce an undesirable change in the character of the neighborhood. While the flag law was amended in 2015, after the instant application was submitted, to require 1 acre flag lots regardless of zoning district, other lots in this zoning district are only required to be 30,000 square feet. Even after sub-division, Lot 1 and Lot 2 would both exceed 30,000 square feet. In fact, the Planning Board found with respect to the negative SEQRA declaration that the proposed plan is in fact consistent with the community land use plans.

Moreover, Respondents failed to explain how the proposed flag lot would change the character of the neighborhood where there are at least five neighboring flag lots as well as

properties which had been granted similar set back and frontage size variances[15]. See Easy Home Program v. Trotta, 276 A.D.2d 553, 714 N.Y.S.2d 2000); Matter of Goldsmith v. Bishop, 264 A.D.2d 775, 695 N.Y.S.2d 381 (2d Dept. 1999).

Perhaps the most stark example of the arbitrariness of the ZBA's variance denials is the finding that the three-story dwelling on Lot 1 would not be substantial or affect the character of the neighborhood because there were other homes in the neighborhood that were equal to or taller than that dwelling--one such home was referred to as the "Hyatt" in the record--but that the same proposed three-story dwelling on Lot 2 was deemed to be substantial and found to negatively affect the character of the neighborhood. Similarly, there was no evidence to support the finding that the proposed variances caused "density" issues. There is no explanation offered by the ZBA demonstrating how a proposed single-family dwelling would create density issues in the neighborhood, particularly where the adjoining property serves as the national headquarters of FOR with a parking lot that accommodates many cars in the front of the property.

Thus, it appears that from the record that the area variances were denied based upon "general community opposition "of two neighboring property owners, both of which have put their properties up for sale and claim, without objective support, that if the area variances are approved and the single-family dwelling allowed to be built on the flag lot, they will suffer depreciation of the value of their properties. The law is axiomatic that "the mere presence of community opposition or the unsupported conclusory allegations voiced by the neighboring property owners does not justify the denial of the variance application." Matter of Necker Pottick, Fox Run Woods Builders Corp. V. Duncan, 251 A.D.2d 333, 335, 673 N.Y.S.2d 740 (2d Dept. 1998); Marina's Edge Owner's Corp v. City of New Rochelle, 129 A.D.3d 841, 11 N.Y.S.3d 232 (2d Dept. 2015); Markowitz v. Town Board of the Town of Oyster Bay, 200 A.D.2d 673,

[15] A lot on Carlson was referenced to have only a 30 foot frontage.

606 N.Y.S.2d 705 (2d Dept. 1994); Quintana v. Board of Zoning Appeals of Inc. Village of Muttontown, 120 A.d.3d 1248, 992 N.Y.S.2d 332 (2d Dept. 2014). The undated letter from FOR's real estate agent stating that its his opinion that approval of the flag lot will result in some un-quantified amount of depreciation and that it would be "unfair", is an insufficient basis upon which to deny Petitioner's application. See Goldsmith v. Bishop, 264 A.D.2d 775, 776, 695 N.Y.S.3d 381 (2d Dept. 1999).

Lastly, Petitioner is correct in his assertion that the ZBA did not take a separate vote on whether to deny or grant the application of Petitioner for a flag lot subdivision,as required. As such, said finding in the Resolution is a nullity. For the reasons set forth herein, it is the Court's determination that those portions of the ZBA's findings and Resolution which denied the five variances and flag lot approval were arbitrary, capricious and unsupported by substantial evidence in the record. Thus, this matter is therefore remanded to the ZBA with a direction that it grant the subject variances and flag lot approval.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the Article 78 petition which seeks a judgment vacating those portions of the determinations set forth in (i) the transcript of its determination filed with the Village Clerk of the Village of Upper Nyack ("Village Clerk") on November 30, 2016 and (ii) the resolution memorializing its determination filed with the Village Clerk on January 9, 2017, denying certain variances and approval of a flag lot sought by the Petitioner is GRANTED; and it is further

ORDERED that this matter is remanded to the ZBA with a direction that it promptly grant the subject five (5) variances which had previously been denied as well as flag lot approval.

This constitutes the Decision and Order of the Court.

Dated: New City, New York
June 29, 2017

Hon. Sherri L. Eisenpress
Acting Justice of the Supreme Court