

SHORT FORM ORDER

INDEX

NO.: 6138/2017

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SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY

PRESENT:

Hon. Sanford Neil Berland, A.J.S.C.

In the Matter of the Application of
Eric Ruttenberg, Perri Peltz Ruttenberg, Robert
Marston, and Nicholas Acquavella,

Petitioners,

-against-

Zoning Board of Appeals of the Village of
Southampton, 550 Hill Street, LP and 554
Hill Street, LP,

Respondents.

ORIG. RETURN DATE: January 12, 2018
FINAL RETURN DATE: February 5, 2019
MOT. SEQ #: 001 MD; CASEDISP

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Upon the reading and filing of the following papers in this matter: (1) Notice of Petition and Verified Petition, dated November 29, 2017 and supporting papers; (2) Verified Answer by respondent Zoning Board of Appeals of the Village of Southampton, dated April 30, 2018; (3) Affidavit by Dr. Robert DeVinney, dated April 26, 2018; (4) Verified Answer by respondents 550 Hill Street, LP and 554 Hill Street, LP, dated April 26, 2018; (5) Affidavit by Gilbert Flanagan, dated April 30, 2018; (6) Memorandum of Law by petitioners, dated July 16, 2018; (7) Memorandum of Law by respondent Zoning Board of Appeals of the Village of Southampton, dated September 20, 2018; (8) Memorandum of Law by respondents 550 Hill Street, LP and 554 Hill Street, LP, dated August 31, 2018; (9) Reply Memorandum of Law by petitioners, dated November 13, 2018; and (10) Certified Record of Proceedings (Return), dated April 30, 2018 it is

ORDERED that the petition is denied.

This is an Article 78 proceeding which arises from an application to respondent Zoning

RST

Board of Appeals of the Village of Southampton (the ZBA) for area variances to enable the approval

of a three-lot subdivision of what are currently two lots in the Town of Southampton known as 550 Hill Street (550 Hill) and 554 Hill Street (554 Hill), respectively (collectively "the Property"). The property is 2.8266 acres or 123,125 square feet in size. Both 550 Hill and 554 Hill are improved with a two-story single-family residence, and 554 Hill is also improved with an industrial storage/warehouse. The subject subdivision would allow the two existing dwellings and an industrial storage/warehouse to be replaced by three dwellings and two guest houses. The ZBA granted variances that would enable the proposed subdivision subject to certain conditions and modifications, and denied variances that would enable the two guest houses. Petitioners are now seeking to annul and set aside ZBA's determination pursuant to Article 78 of the Civil Practice Law and Rules on the grounds that the determination was arbitrary and capricious, affected by errors of law, and tainted by ethical misconduct on the part of a member of the ZBA.

Background:

550 Hill is owned by respondent 550 Hill Street, LP, and 554 Hill is owned by respondent 554 Hill Street, LLP (collectively the Hill Street respondents). Both lots are long and narrow. 550 Hill is 43,242 square feet, and entirely within the R120 residential zoning district. 554 Hill is 79,884 square feet, and split between the R120 and R40 zoning districts. Each lot is improved by a two-story, one-family residence, and 554 Hill is also improved by an industrial storage/warehouse that has and continues to be used by moving and storage companies. All three improvements are preexisting nonconforming uses entitled to be continued indefinitely under the Village Code. In April 2012, the Hill Street respondents engaged in informal discussions with the Planning Board of the Village of Southampton (the Planning Board) regarding an application for variances that would enable a subdivision of the property into four lots. In July 2012, the Hill Street respondents filed an application with the ZBA for approval of a four-lot subdivision of the property which provided for a twenty-five foot right of way through adjacent property owned by ABJ, LLC (ABJ), an affiliate of the Hill Street respondents, which would service the three proposed southerly lots. On August 23, 2012, a public hearing was held by the ZBA on the application. At a ZBA hearing on February 28, 2013, a question was raised as to the appropriate SEQRA classification for the proposed subdivision. In July 2013, the ZBA contacted the Planning Board for purposes of discussing whether the Planning Board should act as the lead agency in conducting the requisite SEQRA review. In September 2013, the Planning Board assumed the role of lead agency, and the ZBA suspended its consideration of the subject application indefinitely pending the completion of the Planning Board's SEQRA review, which the Planning Board officially began in November 2013. In May 2015, during the pendency of the Planning Board's SEQRA review, a report submitted by the Village Historical Consultant advised that neither lot was considered to be "contributing resources" for the Historic District,

nor did either lot possess any significant architectural or documented historical value. In September 2015, the Hill respondents submitted to the Planning Board an alternative plan for a three-lot subdivision of the property with guest houses on lots 2 and 3. In May 2016, the Village's

Environmental Planning Consultant, Nelson, Pope and Voorhis, submitted a staff memo to the Planning Board which suggested setbacks for the proposed lots based on lot size pursuant to the Village Code. In June 2016, the Hill Street respondents submitted revised plans to the Planning Board in keeping with these suggestions. On May 1, 2017 the Planning Board issued a negative SEQRA declaration for the three-lot plan. On May 25, 2017, the Hill Street respondents presented its three-lot subdivision plan to the ZBA. On October 26, 2017, the ZBA issued its decision, which was filed on October 30, 2017.

In its October 26, 2017 decision, the ZBA approved variances enabling a subdivision of the property as follows: Lot 1 would be 23,070 square feet in area, with a width of 100 feet and a front yard setback of 40 feet, and it would front on Hill Street; Lot 2 would be 48,284 square feet in area, with a width of 158 feet, a front yard setback of 60 feet and a 20-foot wide access easement to Hill Street along the easterly side of Lot 1; and Lot 3 would be 51,771 square feet in area, with a width of 188 feet, a front yard setback of 60 feet and a 25-foot wide access easement to Captains Neck Lane along the southerly side of adjoining property owned by an affiliate of the Hill Street respondents. The area variances granted by the ZBA were from Village Code §§ 116-4D (lot area and lot width), 116-11C (lot frontage on a street) and 116-11.1 (yards and setbacks). The variances were granted subject to certain conditions and modifications. The variances that would enable the two proposed guest houses on Lots 2 and 3 were denied.

Between August 2012, the date of the initial hearing held by the ZBA on the Hill respondents' initial application, and July 27, 2017, when the hearings before the ZBA were closed, exclusive of the period when the Planning Board was conducting its SEQRA review, several hearings were held. In addition, the ZBA accepted written comments during the same period and until August 24, 2017. Opposition to the Hill respondents' application(s) came from owners of neighboring properties and their attorneys. Opponents took the position that the current use of the storage/warehouse facility on the 554 Hill lot was more benign than the proposed residential use and that the proposed three-lot subdivision would represent an increase in density and nuisance to neighbors, in violation of the long-term planning goals of the Village of Southampton Comprehensive Plan to maintain a small scale of development that preserved the quality and character of existing single-family residential zones.

In 2012, in the initial stages of the application process, James Zuhusky, a board member of the ZBA, recused himself from participation in the proceedings because he was, and is, a

principal in the two entities that own the Hill Street properties. Another ZBA board member, Robert DeVinney, also recused himself and did not participate in the vote on the decision rendered by the ZBA on October 26, 2017 but gave no explanation for his recusal. Petitioners aver that emails between Mr. DeVinney and Gilbert Flanagan, the attorney for the Hill Street respondents, showed that Mr. DeVinney had spoken to Mr. Flanagan about a conversation he overheard between a Planning Board member and the Village mayor, and that he had worked with Mr. Flanagan to prepare an affidavit that Mr. Flanagan was going to use to seek the disqualification of the Planning Board member. In opposition to the petition, respondents proffer, *inter alia*, affidavits by Mr. DeVinney and Mr. Flanagan in which they aver that Mr. DeVinney overheard a Planning Board member, Warren Hamer, speaking loudly in a restaurant stating that the Hill Street application before the Planning Board was "illegal," that Hamer had confirmed this opinion with Mayor Mark Epley, and that Hamer went to Harvard and that he and two other Ivy Leaguers on the Planning Board "would prevail" in consideration of the application. Mr. DeVinney reported this to Mr. Flanagan, and together DeVinney and Flanagan reported this to Mayor Epley, who assured them that he had had no such conversation with Hamer, and would consider obtaining advice of the New York Conference of Mayors. No affidavits were prepared or presented to the ZBA with regard to the incident. At the time of the ZBA's vote on the Hill Street application, DeVinney chose to recuse himself; he states that he did so out of fear that his participation in the vote could have the appearance of impropriety.

Petitioners argue that the ZBA's determination should be annulled and set aside because (1) The ZBA failed properly to consider the five factors required by the Village Law balancing the benefit to the applicant against the detriment to the health, safety and welfare of the surrounding neighborhood; (2) the ZBA exercised legislative powers by re-zoning the property under the guise of granting variances; (3) the ZBA improperly approved two landlocked lots by approving street access for Lots 2 and 3 that relied on establishing an illegal accessory use of an adjoining property; (4) the ZBA made a flawed bargain in exchanging the elimination of the non-conforming storage/warehouse use for a residential use on the 554 Hill Street lot; (5) the ZBA improperly discounted evidence submitted by the opposition by characterizing it and their showing as generalized, conclusory and unsupported by substantial evidence; (6) the ZBA did not obtain written recommendations from the Planning Board as required by law; and (7) the ZBA's determination was tainted by ethical misconduct and/or undisclosed bias by ZBA board member Robert DeVinney. Respondents argue that (1) an applicant does not have to pass and/or satisfy all five factors balancing the benefit to applicant against the detriment to the surrounding neighborhood and the balance struck by the ZBA in its determination was amply supported by the evidence presented; (2) the variance relief granted was not substantial and was not tantamount to re-zoning of the property; (3) the elimination of the non-conforming storage/warehouse use is a proper element of the requisite balancing test; (4) the street access for lots 2 and 3 was lawful – a driveway is not a use traditionally considered an "accessory use," which is defined by state decisional law, whereas a driveway use is regulated by local law; (5)

the Planning Board reviewed the application over the course of approximately 42 months and clearly proffered its recommendations to the ZBA before the ZBA rendered its determination; and (6) the recusal of the ZBA board member DeVinney was ethical, and did not taint the ZBA's determination. In addition, the Hill Street respondents argue that petitioner Robert Marston's only contribution to the record was a letter submitted on September 17, 2017, in which he merely personally attacked certain individuals, and did not make any of the assertions that appear in the petition. Respondents contend that Marston has no standing to make the petition.

In the court's view, the central issue posed by petitioners is whether the ZBA, in granting the area variances, effectively rezoned the two lots and, thereby, impermissibly exercised legislative powers. The 550 Hill Street lot is 43,242 square feet in area, and existed entirely within the R120 residential zoning district. The 552 Hill Street lot is 79,884 square feet in area and is split between the R120 residential zoning district and the R40 residential zoning district. The proposed lots that were enabled by the ZBA's determination are each in split zones, namely R120 and R40, respectively. In the R120 zone, a minimum lot area of 120,000 square feet, a lot width of 200 feet, and an 80 foot front yard setback are required. In the R40 zone, a minimum lot area of 40,000 square feet, a lot width of 150 feet, and a 60 foot front yard setback are required. The approved lots deviate from these zone requirements to such a substantial degree, petitioners argue, that the ZBA has effectively re-zoned the lots.

Notably, the ZBA, in its decision, described the various lots in the neighborhood of the subject property and stated that "[u]pon the review of the documents, maps and aerial photographs submitted into evidence, it can be concluded that there are only one or two lots in the neighborhood that conform to the current zoning, and that the majority of the lots within the surrounding R40 zone are generally smaller than the required 40,000 square feet and have an average lot size of approximately 34,465 square feet. Likewise, it can be concluded that the lots within the surrounding R120 zone are generally smaller than the required 120,000 square feet and have an average lot size of approximately 85,517 square feet. So, the lots on the north and western portion of the neighborhood are closer to one-half acre in size, and lots on the south and eastern part of the neighborhood are closer to two acres in size."

"[Z]oning boards have broad discretion in considering applications for area variances" (*Wambold v. Village of Southampton Zoning Bd. of Appeals*, 140 AD3d 891, 892, 32 NYS3d 628 [2d Dept 2016], *quoting Matter of Margaritis v. Zoning Bd. of Appeals of Inc. Vil. of Flower Hill*, 32 AD3d 855, 856, 821 NYS2d 611 [2d Dept 2006]). In making a determination as to whether to grant an area variance, zoning boards are required 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 pursuant to Village Law § 7-712[b][3] (*Wambold v. Village of*

Southampton Zoning Board, *supra* at 892). The five factors that the zoning board must consider are: "(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 area 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" (Village Law § 7-712[b][3][b]; *see Wambold v. Village of Southampton Zoning Board*, *supra* at 892-893, *citing Matter of Kaufman v. Incorporated Vil of Kings Point*, 52 AD3d 604, 608, 860 NYS2d 573 [2d Dept 2008]); *see also Tall Trees Const. Corp. v. Zoning Bd. of Appeals of the Town of Huntington*, 97 NY2d 86, 735 NYS2d 873 [2001]).

"Local zoning boards have broad discretion in considering applications for area variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion" (*Hargraves v. City of Rye Zoning Board of Appeals*, 162 AD3d 1022, 1023, 81 NYS3d 72 [2d Dept 2018], *citing Matter of Ifrah v. Utschig*, 98 NY2d 304, 308, 746 NYS2d 667 [2002]; *Matter of Caspian Realty Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 67, 886 NYS2d 442 [2d Dept 2009]; *Matter of Genser v. Board of Zoning & Appeals of Town of N. Hempstead*, 65 AD3d 1144, 1147, 885 NYS2d 327 [2d Dept 2009]). Where the determination by the zoning board is made after a public hearing, "its determination should be upheld if it has a rational basis and is supported by the evidence in the record" (*Hargraves v. City of Rye Zoning Board of Appeals*, *supra* at 1023-1024, *citing Matter of Pecoraro v. Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613, 781 NYS2d 234 [2004]; *Matter of Sasso v. Osgood*, 86 NY2d 374, 384 n.2, 633 NYS2d 259 [1995]). The zoning board need not justify its determination with supporting evidence of each of the five statutory factors as long as the ultimate determination balancing the relevant considerations is rational (*Petikas v. Baranello*, 78 AD3d 713, 714, 910 NYS2d 515 [2d Dept 2010], *citing Matter of King v. Town of Islip Zoning Bd. of Appeals*, 68 AD3d 1113, 1115, 892 NYS2d 174 [2d Dept 2009]).

Here, a review of the ZBA's Findings and Decision reveals that the ZBA carefully considered each of the five statutory five factors of the area variance balancing test. Its conclusions were amply supported by evidence in the record, and it set forth a rational basis for its conclusions. The court finds that the action taken by the ZBA was not arbitrary or capricious or an abuse of discretion, affected by an error of law or irrational, and that, therefore, it is not subject to annulment as a matter of law (*see CPLR 7803[3]*; *Zupa v Board of Trustees of Town of Southold*, 54 AD3d 957, 957, 864 NYS2d 142 [2d Dept 2008]; *Matter of Scherbyn v Wayne-*

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Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753, 757-758, 570 NYS2d 474 [1991])
Accordingly, the petition is denied.

The court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein.¹

The foregoing constitutes the decision and Order of the court.

Dated: May 18, 2020



HON. SANFORD NEIL BERLAND, A.J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION

¹In light of Mr. DeVinney's ultimate recusal and based upon the materials presented, the court does not consider that the proceedings before the ZBA were tainted or compromised by Mr. DeVinney's actions.