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SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 23 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Justice of the Supreme Court

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Index No. 3461/17

In the Matter pf the Application of
D.P.R. SCRAP METAL, INC. and 125 HOPPER STREET, INC.,

Motion Seq. No.: 001
Motion Submitted: 4/5/18

For a judgment pursuant to Article 78 of the Civil Practice Law and Rules

Plaintiff(s),

-against-

ZONING BOARD APPEALS OF THE TOWN OF NORTH HEMPSTEAD,

Defendant(s).

_____x

The following papers read on this motion:

Notice of Petition/Memorandum of Law Supporting Exhibits.....X
Answer/Return/Memorandum of Law In Opposition.....X
Amended Answer/Return.....X
Reply Memorandum of Law.....X

Petitioners, D.P.R. Scrap Metal, Inc. (DPR) and 125 Hopper Street, Inc. (125) petition this court pursuant to Article 78 of the CPLR for a judgment annulling the determination of Respondent, Zoning Board of Appeals of the Town of North Hempstead (the ZBA), dated August 16, 2017 which denied DPR's application for a variance that would prevent them from having to build a 40-foot high building in which they would

need to conduct their scrap metal business. The ZBA opposes the petition.

DPR rents property, known as 125 Hopper Street, Westbury, Town of North Hempstead from 125, the owner. The area where 125 Hopper Street is located is largely industrial. DPR has rented the property since 2011, and has conducted their metal recycling business there the entire time. In June, 2016, the Town of North Hempstead (the Town) filed an eight count criminal information against DPR and 125 alleging various violations of the Town's zoning code. As a result, DPR filed an application for various permits. In December, 2016, the application was denied. DPR then appealed to the ZBA. A public hearing was conducted on March 8, 2017, and the only people to appear were DPR and Glenn Norjen, the Deputy Commissioner of the Town's Building Department, who opposed the appeal.1 Also, an unsigned letter was read or summarized into the record, where the author complained about DPR using the property to dismantle cars.

The ZBA issued its decision on August 16, 2017, and granted the majority of the appeal. The fence being three feet higher than code, the improper parking spaces and the Quonset hut being a structure not attached to the ground were all granted variances.2

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[1]It appears the impetus for Mr. Norjen's objections were the complaints of an unnamed Councilwomen who was "aghast" at being able to see piles of metal, and hear large machines working, from the Town's Yes We Can community center.

[2]There were conditions placed upon the Quonset hut, such as installing sprinklers, that DPR has not opposed in this application.

However, a variance was denied for two items. The first was the trailer that DPR used as its offices. The ZBA found that it was an improper structure and the offices needed to be a permanent structure attached to the ground. More significantly, a variance was denied that would continue to allow DPR to perform recycling and storing of the metal outside. The ZBA opined that DPR could build a 40 foot high enclosed structure that would allow DPR to continue its work within the boundaries of the Town code. It is this denial DPR claims was arbitrary and capricious.

" 'Local zoning boards have broad discretion in considering applications for area variances.' " *Matter of Goldberg v Zoning Bd. of Appeals of City of Long Beach*, 79 AD3d 874, 876 (2nd Dept 2010), quoting *Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 67 (2nd Dept 2009), *lv den.*, 13 NY3d 716 (2010), citing, *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 (2004); *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 771 (2nd Dept 2005), *lv den.*, 6 NY3d 890 (2006), *lv dism.*, 7 NY3d 708 (2006); *see also, DAG Laundry Corp. v Board of Zoning Appeals of Town of North Hempstead,* 98 AD3d 740 (2nd Dept 2012). "The judicial function in reviewing such determinations is limited and a reviewing court should refrain from substituting its own judgment for the judgment of the zoning board (citations omitted)." *Matter of Goldberg v Zoning Bd. of Appeals of City of Long Beach, supra*, at p. 877; *see, Matter of Pecoraro v Board of Appeals of Town of*

Hempstead, supra, at p. 613; *Matter of Halperin v City of New Rochelle. supra,* at p. 772. "Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion" (*Matter of Pecoraro v Board of Appeals of Town of Hempstead, supra,* at p. 613) " 'or succumbed to generalized community opposition' " (*DAG Laundry Corp. v Board of Zoning Appeals of Town of North Hempstead, supra,* at p. 741, quoting *Matter of Ramundo v Pleasant Val. Zoning Bd. Of Appeals*, 41 AD3d 855 [2nd Dept 2007]).' " "The determinations will be sustained if they have a rational basis in the record." *DAG Laundry Corp. v Board of Zoning Appeals of the Town of North Hempstead, supra,* at p. 741, citing *Edwards v Davison*, 94 AD3d 883 (2nd Dept 2012).

"In reviewing an application for an area variance, a zoning board is required to engage in a balancing test 'weigh[ing] the benefit of the grant to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted (citations omitted)." *Jonas v Stackler*, 95 AD3d 1325 (2nd Dept 2012); *see* Village Law § 7-712-b(3)(a); *see also, Matter of Pecoraro v Board of Appeals of Town of Hempstead, supra,* at p. 612; *Danieri v Zoning Board of Appeals of Town of Southold*, 98 AD3d 508 (2nd Dept 2012). "In making its determination, the zoning board must consider: '(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 variances.' " *Danieri v Zoning Bd. of Appeals of Town of Southold, supra* at p. 509.

" '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 (citations omitted).' " *Matter of Gabrielle Realty Corp. v Board of Zoning Appeals of Vil. of Freeport,* 24 AD3d 550 (2005), quoting *Matter of Farrell v Board of Zoning & Appeals of In. Vil. of Old Westbury*, 77 AD2d 875, 876 (1980); *see also, Cacsire v City of White Plains Zoning Bd. of Appeals*, 87 AD3d 1135, 1136-1137 (2nd 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." *Cacsire v City of White Plains Zoning Bd. of Appeals, supra*, at p. 1137, citing *Matter of Halperin v City of New Rochelle. supra*, at p. 772. Accordingly, "[c]ourts 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.' " *Cacsire v City of White Plains Zoning Bd. of Appeals, supra*, at p. 1137, citing *Matter of Pecoraro v Board of Appeals of Town of Hempstead, supra,* at p. 613. Substantiality alone should not be allowed to control. *Filipowski v Zoning Board of Appeals of Vil. of Greenwood Lake*, 38 AD3d 545 (2nd Dept 2007); *see also, Cacsire v City of White Plains Zoning Bd. of Appeals, supra*, at p. 1135; *Beyond Bldrs., Inc. v Pigott*, 20 AD3d 474 (2nd Dept 2005). In any event, it should not be viewed "in the abstract." Rather,

> "[t]he totality of the relevant circumstances must be evaluated in determining whether a deviation truly is substantial. The effect of the variance on the neighborhood, its true impact and the necessity for compliance with a regulation's mandate all are highly significant considerations in undertaking such an analysis. When presenting an application for a variance which might be considered substantial in purely mathematical terms, the applicant should relate the requirement to the foregoing considerations in order to place the matter in the proper context." *Rice, Practice Commentaries, McKinney's Cons. Laws of N.Y. Book 63, Village Law § 7-712-b at p. 610.*

Herein, the ZBA offered the following explanations for denying the variance and requiring an enclosure:

> 43. The Board finds there is a need for an enclosure around the site operation in order to protect the health, safety and welfare of the surrounding community, which includes residential properties, a community center and a park.

Specifically, the onsite operations, including baling and storage, require an enclosure in order to combat the issues of noise, dust and vibration related to the operation and to maintain the aesthetic of the surrounding neighborhood.

44. The Board was presented with photographic evidence showing piles of materials on the property...which exceeded the height of the existing ten-foot perimeter fence...Mr. Norjen testified that he has personally observed piles of material on the subject property that are visible from the residential properties north of the LIRR track.

45. The Board finds other similar uses in the area have either moved their operations indoors, or are in the process of completing Building Department reviews to do so, including: Family Realty located at 619, 633 and 635 Dickens Street, Westbury which recycles paper and plastic products; and D.F. Allen located at 91 New York Avenue, Westbury which recycles construction and demolition debris.

46. The Board takes notice that within an Industrial B zoning district, the Town Code permits a building to be constructed with a height up to 40 feet. Based upon the nature of the equipment used in the operation and the size of property, the Board finds that both the baling and storage of scrap metal can be accommodated within an enclosed building. To the extent that some of the recycled items would not ordinarily fit within the prospective building, the Board finds the applicant could reasonably impose maximum size requirements on delivered items or otherwise ensure that such items are reduced in size to conform with the dimensions of the building.

47. The Board has considered the possibility of granting the requested variance with a condition that the applicant maintain the height of the outdoor storage piles at a level below fence height. While this would minimize the aesthetic impact of the piles, it would not prevent the impact noise, dust

> and vibrations associated with use. Similarly, while the property is situated adjacent to the LIRR, the train tracks do no [sic] provide a sufficient physical barrier to mitigate the noise, dust and vibration issues.
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> 48. Based on the forgoing findings, the Board finds approval of this variance would be a detriment to the nearby properties; the variance requested is substantial, and would have an adverse physical or environmental impact on the nearby residential neighborhood. Constructing an enclosure for the storage piles onsite is a feasible alternative to the requested variance as evidenced by the numerous other buildings enclosures for similar uses, and the requested variance is self-created.

The court finds that, other than being able to see piles of scrap metal above the fence line, none of the Board's other findings are supported by any evidence, or sometimes even by an inference, in the record. There are multiple references to the "noise dust and vibration issues" caused by DPR's business. There is nothing in the record containing a complaint, or proof, that DPR's business causes any, if not excessive, noise, dust and vibrations. No member of the residential community, or local businesses appeared, at the hearing or wrote into the ZBA concerning dust or vibrations, nor did Mr. Norjen testify to same. While it may be safe to assume that DPR's operations cause some dust and vibrations, denial of a variance cannot be based upon the Board's assumptions. There must be some basis in fact, and there is none for these issues.

As for noise, the only evidence is the hearsay statements of the unnamed, unknown

Councilwoman or Town Board member who was taken aback at the noise being made by DPR's business and cranes, specifically a whistle that could be heard at the Yes We Can center. However, other than Mr. Norjen reciting this very general complaint, there is no proof it was DPR who was creating the noise, or when it was heard other than "mornings". This is the exact kind of conclusory finding the Board was to avoid.

The Board then references other local businesses that recently did, or are in the process, of moving their business into an enclosure such as a building. However, while the Board names two distinct businesses, this information came from Mr. Norjen's testimony, and he did not name any specific business. He referred to a business that recycles concrete and another that recycles plastic. Assuming these are the two that the ZBA chose to name, there is no evidence in the record as to how the businesses of recycling plastic and concrete compares to the business of recycling metal.

Something that is contained in the record is that some of the pieces of metal taken to DPR's site are very large. There is no information in the record to determine as to whether the concrete business gets similarly large slabs of concrete delivered to it, or whether there are large pieces of plastic delivered to the other business. One of the arguments made on the record by DPR was that the nature of recycling metal is such that it could not be done even in a 40 foot high building. There is no comparable evidence as to whether the other two business to which the Board compares DPR face similar hurdles.

As such, the comparisons are meaningless. Further, DPR stated the economics of the metal recycling business would not support building the multi-million dollar structure the Board would require. There is no evidence as to how the other referenced businesses addressed such concerns.

The Board next opines that if the pieces of metal are too big to be recycled or stored on the 40 foot high building, DPR could require any such deliveries to be no longer than a certain length, or have them shortened before arriving at DPR's location. Again, there is no evidence in the record supporting such an assertion or idea. While DPR very likely could have addressed such a suggestion on the record during the hearing, or even in the period after the hearing but before a decision was rendered, the Board did not inquire. They instead made an assumption that such "shortening" could be done, and after making the assumption they considered it as fact.

The one legitimate complaint that is actually supported in the record is that the piles of metal at times exceed, if not greatly exceed, the 10 foot high fences and can be seen from afar. Mr. Nojen testified, and presented pictures, that the piles can be seen from the residential neighborhood and the Yes We Can center. However, this issue does not require a building to be built to remedy it. Instead, the variance can be granted with the condition that the piles are not to exceed the height of the fence.

Having reviewed the record, the court finds there is no evidence supporting a

finding that an undesirable change or detriment will be produced in the character of the neighborhood or nearby properties. The neighborhood and nearby properties are all industrial. The residential neighborhood is not within a 300 foot radius of DPR, save for a house or two, and is buffered by the LIRR tracks in between them. Requiring the piles to be lower than 10 feet resolves any of the residential neighborhood concerns. There is no evidence that the benefit sought by the applicant can be achieved by some feasible method other than the variance. The only evidence in the record on this issue actually establishes the opposite. The court finds no evidence establishing that the requested variance is substantial, or that the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood. Finally, while the condition is undeniably self-created, this alone is not determinative. (*Danieri v Zoning Bd. Of Appeals of Town of Southold, supra*). The court therefore finds the ZBA's determination arbitrary and capricious and not supported by evidence in the record.

Accordingly, it is hereby

ORDERED, that the petition is GRANTED and the ZBA's determination denying DPR's application for a variance is annulled; and it is further

ORDERED, that the ZBA is directed to issue the requested variance preventing DPR from having to construct an enclosure. The variance may contain the condition that none of the piles of metal or other material may exceed the height of the fence.

The court has considered the other arguments raised by the parties and finds them to be without merit.

This constitutes the Decision and Order of the Court.

Dated: July 3, 2018
Mineola, N.Y.

Hon. James P. McCormack, J. S. C.