SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

In the Matter of the Application of
FRANCESCO CUFFARO and ASHLEY CUFFARO,

Petitioners/Plaintiffs,

Index No.
620453/2021

Motion Seq:
001 Mot D

For a Judgment under Article 78 of the Civil Practice Law and Rules, and for Declaratory and Injunctive Relief

-against-

ZONING BOARD OF APPEALS OF THE VILLAGE OF BELLPORT, VILLAGE OF BELLPORT, and MARYLOU BONO, as the Building Department Supervisor of the Building Department of the Village of Bellport,

Respondents/Defendants.

The following papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	1-11
Answering Papers.....	14-24
Reply/Sur-Reply.....	30-38; 45

It is undisputed that the petitioners seek to build a single-family dwelling on the subject premises, which is an undeveloped piece of land in Bellport, New York. This property was the subject of an earlier action over which this Court presided (Index No. 3783/2019). Although pertaining to the same piece of property, the prior action requested different relief from the relief sought in this action.

In the prior action, the petitioners sought to reverse and annul a determination of the Zoning Board of Appeals (ZBA) of the Village of Bellport dated June 26, 2019, that denied petitioners' application for variances related to the subject premises known as 5 Gerard Street, Bellport, New York

following two public hearings. In that proceeding, two variances were requested by the petitioners, one for a side yard deck, and the other for a variance from the "up-zoning" that was enacted in 1993 requiring a buildable lot to be 40,000 square feet. The subject property's lot area is only 31,593 square feet, which was in accordance with the earlier Village code prior to 1993 that required minimum lot size of 30,000 square feet. By written decision dated December 16, 2020, this Court determined that the Zoning Board of Appeals' (ZBA) decision was not arbitrary and capricious and should be upheld based on the ZBA's reasoning that the side yard deck was a 100% deviation from the applicable Village code since no other surrounding properties had a side yard deck, and that the area variance requested represented a 21% deviation from code, which was substantial. These factors, plus the undisputed fact that the petitioners closed on the subject property prior to obtaining the necessary approvals from the Board, thereby self-creating hardship, led this Court to uphold the ZBA's determination, as limited to the record presented to this Court at the time of the prior Article 78 proceeding.

Now, the petitioners request that this Court annul and set aside the ZBA's determination dated October 5, 2021 and compel Marylou Bono to issue a building permit in response to the petitioners' new application; issue judgment declaring that the petitioners' lot is a legally existing subdivided lot that should be treated as such by the Village; issue judgment declaring that the subject lot is in single separate ownership; issue judgment declaring that the subject lot is a legally existing vacant substandard lot that should be treated as such by the Village, essentially "grandfathering" the subject lot pursuant to Village Code sections 21-1 and 21-87 (b) to render it a buildable lot .

Procedural History of The Instant Application

The application submitted to the Village that forms the basis of this proceeding is dated July 21, 2021, and at the time it was submitted to the Village, petitioners' new counsel accompanied the application with a letter, caselaw (***Lund v. Edwards***, 118 AD2d 574 [2d Dept 1986]), and proof establishing that the subject property was created by deed as the result of Peter and Natalie Paige splitting their existing property (Lot No. 7) into two lots. Suffolk County property records submitted as part of the permit application and for this Court's consideration demonstrate that Lot No. 7 was retired in 1978 and that two new lot numbers were assigned: 7.1 and 7.2. Lot 7.1 is substantially larger than 7.2 and it meets and exceeds the new up-zoning adopted in 1993 (7.1 is 2.7 acres/117,612 square feet). The subject lot, 7.2, is 31,593 square feet, which no longer conforms to the Village code since it is less than 40,000 square feet.

Marylou Bono, the Village's building inspector denied the petitioners' application by written letter dated August 3, 2021 on the basis that the subject lot has an area of less than 40,000 square feet. She also added in her letter the statement that "[a] previous application has been made to the Zoning Board of Appeals seeking relief of lot area for 5 Gerard Street. Since the requested relief for lot area was previously denied, an application for a rehearing must be made to the Zoning Board of Appeals before the Board can hold a hearing on this application." Apparently, Ms. Bono was referring to the prior proceeding presided over by this Court.

On September 30, 2021, the ZBA held a hearing concerning the petitioners' application, at which petitioners' new counsel was heard. Counsel presented evidence of the permits and certificates of occupancy issued by the Village to the other lot, Lot 7.1 in addition to the documents that were submitted with the permit application. The hearing was closed on that evening but before voting, one of

the ZBA members expressed his desire to "have a little bit more time to think about it" and to "review the case law submitted." For whatever reason, that member ultimately acceded to the vote and the ZBA unanimously voted to uphold the building inspector's decision to deny the permit application.

By written determination dated October 5, 2021, the ZBA formally denied the permit application and this proceeding subsequently ensued. In its October 5, 2021 determination, the ZBA made three findings. First, the ZBA recounted the history of the petitioners' first application that resulted in Index No. 3783/2019. Secondly, the ZBA determined that it is not the role of the building inspector to interpret the caselaw submitted with the application, and that the ZBA could not consider any evidence introduced at the hearing because the building inspector did not rely upon that in reaching her decision to deny the application. Specifically, the ZBA wrote, "[t]he building inspector testified that she reviewed the application against the zoning code and denied the building permit based upon the deficiencies in lot area." Thirdly, the ZBA determined that the building inspector "properly directed the applicants to seek permission for a rehearing from this Board since a prior application for lot area deficiency had been previously denied," that the applicants' argument that a building permit should be issued without rehearing was an "attempt to have a building permit issued without having to request a rehearing from this Board because then the applicant would face issues of res judicata," and that the ***Lund*** case is not binding upon the Village. The ZBA also noted that "[t]he issue of the subdivision was discussed in the prior application and both the applicant's previous counsel and the Board agreed that the subdivision was illegal which rendered the lot substandard and required lot area variances." The ZBA determined "to uphold the building inspector's denial of issuance of a building permit for the subject premises as proper because the application does not conform to the zoning code and is deficient in lot area."

The Parties' Contentions and the ZBA Hearing

It is undisputed that, in 1975, the Village adopted a code provision stating that "any division of property in the village into two (2) or more lots shall require the approval of the planning board," and that the planning board never gave its approval of the foregoing division despite the fact that the division is recorded in Suffolk County's records, that the two parcels are assigned separate tax map numbers by the County, and that the two parcels have been separately assessed by the Village since 1978.

Petitioners rely on Village Code sections 21-1 and 21-87 (b). Section 21-1 provides the definition of a lot in single separate ownership as being "a parcel of land not conforming to the definition of 'lot,' in respect of minimum size. . .the ownership of which, on the effective date of this chapter or of an amendment hereto which imposes new or enlarged area, width or other nonuse requirements, continually from such time to the time of the application for a building permit with respect thereto, is vested in a person or persons. . .owning no contiguous parcel of land reasonably capable of being used in connection therewith." Petitioners contend that their lot has been in single and separate ownership since its creation in 1978 by virtue of the Paige deed. Indeed, there does not seem to be a genuine dispute as to this issue.

Village Code Section 21-87 (b) provides that, "[o]n legally existing vacant substandard lots, a building and structures may be erected without a variance so long as all area requirements of this chapter are complied with (sic) the exception of minimum lot area and street frontage." Petitioners assert that their lot, which is admittedly substandard in terms of lot area since the up-zoning was enacted, was

legally existing when the division occurred, that the other, larger lot is recognized by the Village and the owner thereof has received numerous building permits and certificates of occupancy for various improvements without its alleged illegal creation in 1978 being an impediment to issuance of those permits/certificates. Accordingly, say the petitioners, the Village should also recognize the legality of their lot (7.2) and its entitlement to being "grandfathered" under the Village Code.

At the ZBA hearing held on September 30, 2021, petitioners' counsel, relying on ***Lund***, ***supra***, the Village Code sections, and the certificates of occupancy for the adjoining lot that were submitted with the petitioners' application, the petitioners contended that the ZBA could not use the alleged illegal subdivision as a basis to deny their application when the Village issued many permits/certificates of occupancy to the adjoining property that was created from the same alleged illegal subdivision that occurred in 1978. According to the petitioners, applying the up-zoning to the subject property, as was done in this instance, improperly ignores that the subject property legally exists pursuant to Village Code Sections 21-1 and 21-87(b) and should be "grandfathered" in pursuant to the square footage requirement that existed at the time of the subject lot's creation in 1978 (30,000 sq. ft.). In other words, since the Village has apparently repeatedly recognized the legally existing nature of Lot 7.1 by issuing permits/certificates, then the Village must equally recognize the legally existing nature of the petitioners' lot, 7.2 that qualifies for "grandfathering" pursuant to Village Code 21-87.

In support of petitioners' application, counsel maintained to the ZBA that, when the permits/certificates were issued to the larger lot (7.1), "[w]hy was it not questioned? Presumably because that lot met the minimum lot area, even though it had not been legally created. The Village code also requires separate lots to be created with the Planning Board's approval and so even though that lot was large enough under the Village's code to merit all of these building permits and Certificates of Occupancy, it was not a legally separate lot, and, therefore, if the Village was going to make that an objection to the lot's existence, neither those building permits, nor the Certificates of Occupancy should have been issued. So, the case law in question is simply applying what I would call, a rule of fairness. If you are going to recognize the legality of one half of the property created by deed, then you must recognize the legality of the other half."

Also, at the ZBA hearing, Ms. Bono testified that the 2021 application was different from the prior application made by the petitioners, which resulted in the 2019 action previously discussed. When asked at the ZBA hearing whether the present application was, in any event, code-compliant, she responded that it was not, because the lot size is only 31,595 square feet but the current code requires lot sizes to be a minimum of 40,000 square feet. She was also asked what she applies to any new application for a building permit, and she answered that she "start[s] with the current zoning," and that is what she applied to this application. The Court notes that the 2021 application submitted to the building inspector consisted of the application itself, counsel's letter explaining the history of the property and its division, with specific citations to tax map number, copies of the applicable recorded deeds and maps, the ***Lund*** case, the Village Code sections relied upon, the NYS Department of Environmental Conservation Permit Modification, and the site plan. It does not appear from her testimony that the building inspector considered any of this other information submitted with the application.

At the ZBA hearing, counsel for the Village advised the ZBA members when asked that the Court's prior Decision "does somewhat draw the substance of collateral estoppel," because "things that are raised in the first case, whether it should have been raised, was raised, wasn't raised, applies

thereafter. I don't know if it is necessarily in this exact instance. . ." Petitioners' counsel pointed out that the earlier application was for multiple variances, including a side yard variance and lot size variance because "apparently people were of the belief that a lot area variance was required. I will tell you that it's not possible by bringing on an application seeking a lot area variance to waive the right to claim that no lot area variance was required because, in fact, the lot qualified for grandfathering under the Village's Code;" "it's not possible to waive a legal right such as this by applying for a variance that you didn't need."

Subsequent Revelation

Following the ZBA hearing and the ZBA's October 5, 2021 determination, petitioners filed this action on October 28, 2021. In the months following commencement of this action, petitioners and their counsel made several FOIL requests of the Village. What they uncovered is central to this Court's determination of the instant petition.

When petitioners' counsel reviewed the property cards for both lots that had been obtained through FOIL requests, she noticed that the property card for the larger lot, 7.1, contained the notation, "Zoning Board of Appeals 77/10." In turn, counsel submitted another FOIL request for the minutes of the ZBA minutes related to that entry. On January 31, 2022, counsel received the Village's FOIL response attaching those minutes. In those minutes pertaining to the Paige property, it is written that, "[a]fter further discussion and deliberation on the Paige application, Mr. McChesney moved that a variance be granted for the ***division*** of property owned by Peter and Natalie Paige at 2 Gerard Street such that one parcel containing an existing dwelling shall have frontage of 13. 97ft. on Gerard Street and an area of 2. 737 acres and the second parcel shall have a frontage of 150ft. on Gerard Street and an area of 31, 593 sq. ft. (.725 acres) all as provided in the application and attached drawing" (emphasis added). The ZBA voted unanimously to approve the division on October 11, 1977.[1] This discovery was submitted with petitioners' reply papers filed on February 10, 2022.

As noted, and uncontroverted, is the fact that the planning board did not approve a subdivision of the Paige property, but this Court cannot ignore the fact that the ZBA gave its imprimatur to the division of the Paige property into two lots such that they had different dimensions and frontage. Having sanctioned this division, plus the fact that the Village has granted permits and certificates of occupancy to the larger lot over the ensuing years without any concern as to the legality of that parcel as a separate legally existing lot, it is this Court's view that the Village is hard-pressed to deny the same status to the petitioners' lot. Petitioners have invoked Village Code section 21-87 in response to the denial of their building permit, apparently to their advantage.

When oral argument was had before the Court on June 27, 2022, the Village continued to maintain that the subdivision never vested because the subdivision was never approved by the planning board, a requirement that was in existence in 1978, when the Paige deed divided the lots. The Village also argued that "almost everything that was talked about here today was neither before the building inspector nor before the Zoning Board of Appeals." To the contrary, as noted herein, there were several documents submitted with the application, which the Village also had at the time of the September 30, 2021 ZBA hearing, plus the five or six certificates of occupancy granted to Lot 7.1 presented to the ZBA

[1] This Court takes judicial notice of all of the documents submitted in support of and in opposition to this petition, including the Village's own records that contain the property cards and minutes of the 1977 ZBA hearing.

on September 30, 2021. The Village also advanced the argument that this Court can only look at what the building inspector looked at when the permit application was denied, which apparently was only the current zoning code provision requiring minimum lot size of 40,000 square feet. The Court provided the Village the opportunity to submit a sur-reply.

In its sur-reply, the Village asserts that it "was not aware of the ZBA decision from 1977 as it was not contained in the building department file for the Subject Premises. However, said decision is irrelevant not only to the instant action because it was not made part of the building permit application nor the BZA record, but it is irrelevant for the Subject Premises because a BZA grant to allow the one lot to have less frontage than required by the code does not grant a subdivision."

This Court finds that the Village's contention is shocking since it reveals an apparent lack of accurate and complete record-keeping that was only discovered by the petitioners in pursuit of their application, after said application was denied by the very department that should have had complete records as to the history of the properties. There is certainly a question raised by the discovery of the 1977 minutes. Had the building inspector reviewed the materials supplied by the petitioners upon their 2021 application that plainly appear designed to alert her to a potentially significant issue with the subject property rather than rotely applying the current zoning code to the application, this proceeding may have been able to be avoided.

Moreover, the ZBA had counsel's letter and the certificates of occupancy for Lot 7.1 before it on September 30, 2021, and petitioners' counsel framed the issue before the ZBA as "purely a legal issue. This is not a variance application. There are no five factors(inaudible). It's not a question of whether the neighbors are thrilled with the house or not. I will say that we believe, and I think a denial by the Building Inspector bears out, that the plans that were submitted are entirely compliant with all of the setbacks and other requirements in the Village and the only respect in which the Building Inspector found the submission wanting was the fact that the lot area was less than 40,000 square feet." As noted, counsel went on to cite the Village Code sections 21-1 and 21-87, requesting that the ZBA provide a legal interpretation of "legally existing" as set forth in 21-87, for which there is no definition in the Village Code.

Also, the Village asserts in its sur-reply that, "[i]f the applicant obtains a variance, but does not effectuate the BZA grant within one (1) year said grant lapses and is null and void. Bellport Village Code § 21-108 (former §90-78 in 1975). In the instant matter, the variance granted for lot frontage lapsed in 1978 as the applicant did not effectuate the BZA grant by obtaining Planning Board approval for the subdivision." Applying this logic, then Lot 7.1, which was granted a variance for substandard frontage of only 13.97 feet in 1977, is presently in violation of the Village Code since the "variance for lot frontage lapsed in 1978" due to failure to obtain planning board approval, yet, the Village has continued to grant Lot 7.1 various building permits/certificates over the subsequent years, thereby raising a question as to whether there is selective enforcement of Code provisions. Notably, the 1977 BZA determination to divide the Paige property reflects that the petitioners' property had not only the required frontage of 150 feet, but at the time was also in compliance with the minimum lot area of 30,000 square feet.

Article 78 Standard

The relevant questions in an Article 78 proceeding are whether or not a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion (***CPLR § 7803[3]***), or whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence (***CPLR § 7803 [4]***).

The Court recognizes that zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action by the board was illegal, arbitrary, or an abuse of discretion (***Matter of Traendly v. Zoning Board of Appeals of Town of Southold***, 127 AD3d 1218, 1218 [2d Dept 2015] [internal quotation marks omitted]; ***Pecoraro v Board of Appeals of Town of Hempstead***, 2 NY3d 608 [2004]; ***Hurley v Zoning Board of Appeals of Village of Amityville***, 69 AD3d 940 [2d Dept 2010]). Accordingly, a zoning board's determination should be upheld on judicial review if it has a rational basis and is supported by the record (***Pecoraro***, ***supra*** at 613; *see also* ***Matter of Teixeira v. DeChance***, 186 AD3d 1521 [2d Dept 2020]).

Zoning boards "are free, like courts, to determine how disputed facts are to be decided, judging credibility and drawing such inference as they find reasonable in order to resolve contested questions of fact" (***In re Charles A. Field Delivery Serv.***, 66 NY2d 516, 519 [1985]). The courts will upset the determination of an administrative body acting within its jurisdiction only if the action taken lacks rationality to the point where it constitutes and abuse of discretionary authority, regardless of whether the court would make the same judgment (***Matter of Pell v. Board of Education***, 34 NY2d 222, 230-231 [1974]).

That said, in this case, the ZBA's determination is not supported by substantial evidence in the record, and as noted, there is a question raised as to selective enforcement of the zoning code provisions, signaling an arbitrary and capricious determination. It is evident to this Court that the ZBA acted much like a "horse with blinders" relying solely upon the current zoning requirement of 40,000 square feet, while utterly disregarding the nuances of this divided property that were clearly set forth in writing to the building inspector and then brought to the attention of the ZBA by petitioners and their new counsel.

Even if the building inspector does not have discretion to consider the supporting documentation and caselaw submitted with the permit application, the ZBA certainly does, but with the exception of one member who attempted to apply a more in-depth analysis and actually review the submitted caselaw, that body roundly ignored that which was presented to them, including ***Lund*** and the Village's own code sections, namely 21-87(b), in reaching their October 5, 2021 determination.

Res Judicata

The Village's argument that the petition must be dismissed as barred by res judicata is specious since the Village did not articulate this ground at the September 30, 2021 ZBA hearing. As cited herein above, the Village's counsel stated that "I don't know if it is necessarily in this exact instance. . ." Moreover, the Village's claim that the petitioners "faced issues of res judicata if they requested a rehearing because there are no new/changed fact or circumstances" flies in the face of the minutes from

the 1977 ZBA hearing approving the "division" of the Paige property that were unearthed only after the ZBA hearing, and which should have been part of the Village's institutional knowledge.

Incredibly, in January 2019, the Village's building inspector, Marylou Bono, advised petitioner Francesco Cuffaro by email that she had "culled together some of the information you requested that is available for you to pick up. *There was never any planning board or zoning meeting to approve subdividing the property* and I don't yet have the copy of the local law" (emphasis added). So, it appears that the Village's own lack of knowledge of its very own records led the petitioners to believe that they needed a variance for lot size.

Accordingly, the issues and circumstances presented upon this proceeding are markedly different than that which was previously presented to the ZBA. Petitioners did not previously maintain that due to the Village code sections cited and the Village's treatment of the other adjoining lot that no area variance was needed (*see* ***Hunt v. Board of Zoning Appeals of Incorporated Village of Malverne***, 27 AD3d 464 [2d Dept 2006]). This Court also notes that the ZBA did not deny the appeal giving rise to this action on the basis of res judicata; it upheld the building inspector's denial of the permit "because the application does not conform to the zoning code and is deficient in lot area" (*see* ***Filipowski v. Zoning Board of Appeals of the Town of Putnam Valley***, 3 AD3d 496 [2d Dept 2010]).

Application of ***Lund*** and its Progeny as applied to the Zoning Code

Since zoning regulations are in derogation of the common law, they must be strictly construed against the municipality which has enacted and seeks to enforce them. Any ambiguity in the language used in such regulations must be resolved in favor of the property owner (***Allen v. Adami***, 39 NY2d 275, 277 [1976] [internal citations omitted]).

It is undisputed that the Village's Code does not define the term "legally existing" that is found in Section 21-87(b). By interpreting that term to mandate that a parcel must be created "in conformity with subdivision regulations," i.e., with planning board approval, completely ignores the evidence presented to the ZBA of the separate tax map number, the separate assessments by the Village's assessor, the deed creating the separate lots, and most importantly, the 1977 ZBA's sanctioning of the division of the Paige property into two separate lots, one of which is now petitioners' lot that did not need any variance in 1977 because it was completely conforming to frontage and lot area.

The Village's claim that it cannot consider caselaw since the building inspector does not have discretion to do so, and therefore, the ZBA did not have to do anything but blindly apply the current zoning provision without any analysis whatsoever although the caselaw was provided to them is ludicrous. The Village does not exist as a *sui generis* entity but is subject to the laws and controlling precedents of this State.

Lund and its progeny, including ***Shaughessy v. Roth*** (204 AD2d 333 [2d Dept 1994]) and ***Richter v. Curran*** (5 AD3D 687 [2d Dept 2004]), stand for the principle that a municipality's issuance of, for example, building permits to a similarly situated lot effectively sanctions the subdivision of that property previously done without necessary approval, and contributes, in part, to the creation of a petitioner's difficulties. Furthermore, according to this line of cases, "the Board cannot now utilize the alleged illegal subdivision as a ground for denying the application of the petitioner. . ." (***Lund***, ***supra*** at

575). The fact that ***Lund*** involved two substandard lots does not dilute the principles of fairness involved in these cases. In ***Shaughessy***, the planning board only tentatively approved subdivision of a larger parcel but no final subdivision map was ever filed; yet the Town subsequently issued a building permit to the owner of the larger, conforming parcel, effectively sanctioning the creation of the subdivision.

The Village's contention in this matter that the house on the larger lot, Lot 7.1, existed before the Paige lot was split into two lots is unavailing especially in view of the Village's argument discussed herein above that the variance granted to Lot 7.1 for substandard footage expired in 1978 because there was no planning board approval of the subdivision, yet the Village has apparently not pursued that issue with Lot 7.1 and instead, granted four or five certificates of occupancy to that lot over the course of the last forty (40) years before the petitioners brought their first application for a building permit.

Accordingly, this Court determines that the ZBA's October 5, 2021 determination is hereby annulled and set aside, and that the matter is remitted to the ZBA for determination in accordance herewith and taking into consideration the entire history of the subject property as presented by petitioners upon the submission of the building permit and at the September 30, 2021 hearing, the entirety of the Village's records related thereto, including the 1977 ZBA minutes, and the relevant caselaw.

This Court declines to issue the declarations requested in petitioners' second through fifth claims as they are now moot.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 16, 2023
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [X] NON-FINAL DISPOSITION [ ]