

COPY

MEMORANDUM

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK**

In the Matter of the Application of
Lee Avenue Lot I LLC

Petitioner,

For a Judgment under Article 78 of the
Civil Practice Law and Rules

-against-

Zoning Board of Appeals of the
Village of East Hampton,

Respondent.

Motion Sequence No.: 001; MG; CD
SUBJ

Motion Date: 5/21/15
Submitted: 12/2/15

Index No.: 05690/2015

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In this Article 78 proceeding, petitioner seeks a judgment annulling and vacating the determination of respondent Zoning Board of Appeals of the Village of East Hampton ("ZBA"), and remanding the decision dated February 27, 2015, upon the grounds that the decision was made in violation of lawful procedure, was affected by errors of law, was arbitrary and capricious, was an abuse of discretion, and was not supported by substantial evidence. The petition contains two causes of action. The first cause of action alleges that the ZBA imposed an unlawful condition when it granted petitioner's variance application in its decision rendered on February 27, 2015. The second cause of action alleges that the condition imposed by respondent ZBA lacks specificity.

The subject property is located at 74 Lee Avenue in the Incorporated Village of East Hampton, and is owned by the petitioner Lee Avenue Lot 1 LLC. The property consists of 4.4 acres (193,364 square feet) and is located in Residence District R-80. The subject property was created by a determination of the Village of East Hampton Planning Board ("Planning Board") adopted on July 11, 2002, which granted a subdivision of a 12.037 acre parcel into four separate lots. Prior to the subdivision, petitioner sought and obtained variance relief from the ZBA on December 22, 2000,

including a special permit to allow two existing dwellings to remain on the subject property, which was necessary because the Village Zoning Law allows only one dwelling per residential lot. As a condition of the ZBA decision, petitioner was required to grant a scenic easement to the Village along the northern portion of the subject property, as well as the adjoining lot, on the area of these lots which fronts on Apaquogue Road. According to paragraph 2(a) of the scenic easement, which was duly filed in the office of the County Clerk on July 24, 2002:

There shall be no disturbance of the easement area, including, but not limited to the installation of utilities, removal of soil, the construction of any structures, or the installation of driveways, walks, steps, or patios, whether paved or unpaved.

Petitioner concedes that here are a number of improvements within the scenic easement area, including a fire pit, access driveway, drainage grate and fencing. The Village has served petitioner with notice of violation of the terms of the scenic easement.

In or about 2004, petitioner applied to the Village Building Department for a building permit to allow certain alterations to be made on the second dwelling on the subject property. After the alterations were completed, petitioner failed to obtain or to apply for a certificate of occupancy. On March 28, 2014 petitioner, in order to obtain a certificate of occupancy for the alterations, as constructed, filed, under the then existing Zoning Code, for a special permit. Petitioner thereafter, under the current Zoning Code, applied for area variances, pursuant to §278-7 C(2)(d) of the Village Zoning Code, to allow the continued maintenance of a 74 square foot expansion of a non-conforming 1,546 square foot second dwelling for which a special permit was granted by the ZBA in 2000, and, under §278-3 A(3)(a) of the Zoning Code to allow the continued maintenance of a slate patio at a 25.2 foot setback, air conditioning units at a 30.7- foot setback from the southerly property line, a built-in trampoline at a setback of 36.4 feet from the westerly property line, a slate patio and chimney adjacent to the expanded second dwelling at a setback of approximately 35 feet, as well as below-grade HVAC and pool equipment, covered by a grade level grate, 34 feet from the northeasterly property line, and slate pavers extending to the easterly property line, where the required rear and side yard setbacks are 55 feet.

A public hearing was held by the ZBA on the application on February 13, 2015. The ZBA issued a determination on petitioner's application on February 27, 2015. Petitioner's variances requests were granted in full. However, the approval was granted "on the condition that all of the structures placed within the Scenic Easement area at the north end of the lot are removed prior to the issuance of the Certificate of Occupancy for the structures for which variance relief was granted pursuant to this determination."

Petitioner now seeks to annul the condition attached to its variance approval. "Local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary [and capricious], or an abuse of discretion" (*Matter of Daneri v Zoning Bd. of Appeals of the Town of Southold*, 98 AD3d 508, 509, 949 NYS2d 180 [2d Dept 2012], quoting *Matter of Matejko v Board of Zoning of Appeals of Town of Brookhaven*, 77 AD3d 949, 949, 910 NYS2d 123 [2d Dept 2101]; see also

Matter of Goodman v City of Long Beach, 128 AD3d 1064, 1065, 10 NYS3d 302 [2d Dept 2015]). A court, however, may set aside a zoning board's determination if the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or succumbed to generalized community pressure (see *Matter of Pecorano v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234 [2004]; *Matter of Cacsire v City of White Plains Zoning Bd. of Appeals*, 87 AD3d 1135, 930 NYS2d 54 [2d Dept], *lv den* 18 NY3d 802, 938 NYS2d 859 [2011]). "In applying the arbitrary and capricious standard, a court inquires whether the determination under review had a rational basis . . . [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" (*Matter of Kabro Assoc., LLC v Town of Islip Zoning Bd. of Appeals*, 95 AD3d 1118, 1119, 944 NYS2d 277 [2d Dept 2012]; see *Matter of Ifrah v Utschig*, 98 NY2d 304, 746 NYS2d 667 [2002]; *Matter of Cacsire v City of White Plains Zoning Bd. of Appeals*, *supra*; *Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 886 NYS2d 442 [2d Dept 2009], *lv den* 13 NY3d 716, 895 NYS2d 316 [2010]).

A zoning board may, where appropriate, impose 'reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property,' and aimed at minimizing the adverse impact to an area that might result from the grant of a variance or special permit" (*Matter of St. Onge v Donovan*, 71 NY2d 507, 515-516, 527 NYS2d 721, 522 [1988]; see *Rendely v Town of Huntington*, 44 AD3d 864, 843 NYS2d 668 [2d Dept 2007]). "However, 'if a zoning board imposes unreasonable or improper conditions, those conditions may be annulled although the variance is upheld' " (*Matter of Martin v Brookhaven Zoning Bd. of Appeals*, 34 AD3d 811, 812, 825 NYS2d 244 [2d Dept 2000], quoting *Matter of Baker v Brownlie*, 270 AD2d 484, 485, 705 NYS2d 611 [2d Dept 2006]; see *Matter of Gentile v Vil. of Tuckahoe Zoning Bd. of Appeals*, 87 AD3d 695, 929 NYS2d 167 [2d Dept 2011]). Conditions are proper if they relate directly to the use of the land in question, and are corrective measures designed to protect neighboring properties against the possible adverse effects of that use (*Matter of St. Onge v Donovan*, *supra*).

The record establishes that the condition imposed by the ZBA was arbitrary and capricious. The condition imposed is totally unrelated to the variances granted, and is not aimed at minimizing the adverse impact to an area that might result from the grant of the variances requested by the petitioner. As such, the condition was improperly imposed and must be annulled (see *Matter of St. Onge v Donovan*, *supra*; *Matter of Gentile v Vil. of Tuckahoe Zoning Bd. of Appeals*, *supra*).

Accordingly, the petition is granted, the condition attached to the variance approval by respondent ZBA, dated February 27, 2015, is vacated and annulled, and the matter is remitted to the ZBA for a new determination in accordance herewith.

Settle judgment.

Dated:

9/19/2016


HON. WILLIAM B. REBOLINI, J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION