

SHORT FORM ORDER

Index No. 615527/2021

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

P R E S E N T:

HON. CHRISTOPHER MODELEWSKI
Justice of the Supreme Court

MOTION DATE 09/30/2021 (001)

ADJ. DATE 02/02/2022

Mot. Seq. # 001-MD

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PAMELA FRANKLIN PORGES, MFP 448
LLC, and ANDREW E. PRICE

Plaintiffs,

- against -

VILLAGE OF WESTHAMPTON
ZONING BOARD OF APPEALS, BRAD
HAMMOND, AS CHIEF BUILDING
INSPECTOR FOR THE VILLAGE
OF WESTHAMPTON BEACH, and JODI
SCHERI,

Defendants
-----X

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Upon the E-file document list numbered 1 to 66 read on the petitioner's Pamela Franklin Porges, MFP 448 LLC, and Andrew E. Price Article 78 petition to reverse, annul, and set aside a determination by the Westhampton Beach Zoning Board of Appeals dated July 16, 2021; it is

Porges v Village of Westhampton Zoning Board
Index No. 615527/2021
Page 2

ORDERED that this Article 78 petition to reverse, annul, and set aside a determination by the Westhampton Beach Zoning Board of Appeals dated July 16, 2021 is denied, and the petition is dismissed in its entirety, for the reasons set forth herein.

Before the Court is a CPLR Article 78 petition challenging the decision of the Westhampton Beach Zoning Board of Appeals ("Board") respecting a request for two area variances: individual side yard (18.4 feet whereas 20 feet is required) and cumulative side yards (36.1¹ feet whereas 50 feet is required). The applicant appeared by counsel over three evening public hearings in April, May, and June of 2021. Neighboring property owners including the individually named petitioners herein, appeared by counsel in opposition at the May and June 2021 hearings.

A review of the written decision of the Board, the transcript of hearings and the exhibits which constitute a return of the record firmly supports the action of the Board in granting the requested relief.

The subject waterfront parcel located at 452 Dune Road in Westhampton Beach is irregularly shaped. At the time hearings were conducted by the Board, the subject parcel was improved with a single-story residence. The applicant before the Board sought the aforementioned area relief to add a second story above much of the first-floor footprint of the existing home.

While the opposition centered on alleged language of limitation in a 2014 Board decision concerning this same parcel, this was dispensed with by the Board both on the record and in the written Board decision. The Board explained the presence and purpose of such language so as to "alert all owners that the decision pertaining only to the particular plans and that any future changes to nonconforming dimensions would have to be presented to the Zoning Board of Appeals in a new variance application" (see Exhibit "E" to the verified petition). The applicant was before the Board seeking equitable relief not at all in contravention of the 2014 Board Decision, but in harmony with such decision. Presented as it was with a completed variance application, the Board was lawfully obliged to entertain the application, conduct a hearing and render a decision. That is what this Board did.

The Petitioners in their reply brief stress that the Board was required to have found "changed circumstances" in order to get past the condition in the 2014 Board decision and grant the relief sought by the applicant. "Changed circumstances" is a doctrine that is typically applied by a reviewing court to the determination of a planning board to modify a previously adopted subdivision plat map. *See Matter of Lynn v. Planning Bd. of the Town of East Hampton*, 89 AD3d 1028 (2d Dept 2011). A planning board lacks statutory authority to reconsider a final determination. (*See Village Law* Sections 7-728, 7-730). Zoning boards of appeal in New York are creations of the state legislature and, when acting in their appellate capacity on a variance application (as in the instant matter) are quasi-judicial bodies, not subject to constraints which apply to planning boards.

¹ The applicant amended the application by reducing this to a request for 38.4 feet following publication of the original notice.

Porges v Village of Westhampton Zoning Board

Index No. 615527/2021

Page 3

Testimony at the Board hearing from petitioner Pamela Franklin Porges on April 15, 2021 (Page 10 of the Transcript) discloses the discomfort of that neighboring property owner concerning the location and orientation of the subject home “The orientation of this house on the cove itself. It’s behind another house, so it’s behind 450 [Dune Road] and diagonally behind our house and it juts into the cove....” The Court notes that nothing in the record makes mention of a view corridor protected by a deed covenant or by any section of the Westhampton Beach Zoning Code.

The Board rejected an argument by the opposition raised during the hearings that the home to result from the proposed second floor addition was not in character with other nearby homes because of its size. It was rational for the Board to reason that existing conditions in the more restrictive R-5 zone nearby did not define the neighborhood in the R-3 zone which is where the subject parcel is located.

This Zoning Board of Appeals gave the opposing neighbors every opportunity to present evidence over three evening hearings. The transcript discloses that the Board gave due consideration to opposition evidence and testimony. The record is buttressed by sufficient evidence to support the Board’s determination to grant variance relief, and it is clear that the Board engaged in the statutory balancing test. The petitioners raise no issues which would warrant disturbing the Board’s decision.

Local Zoning Boards of Appeal have broad discretion in determining matters on appeal from the denial of the building official, and judicial review is limited to determining whether the action taken was illegal, arbitrary, or an abuse of discretion (*Matter of Ifrah v Utschig* 98 NY 2d 308, 746 NYS2d 667 [2002]; *Matter of Caspian Realty, Inc. v Zoning Board of Appeals of Town of Greenburgh* 68 AD 3d [2d Dept 2009]). Where a zoning board’s determination is made following a public hearing (in the matter at bar it was a hearing held over three evenings) it’s determination should be upheld if it is supported by evidence in the record (see *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234 [2004]; *Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 259 [1995]).

A zoning board of appeals is charged with applying the statutory balancing test and must weigh the benefit to the applicant against the detriment to the health, safety, and welfare of the community (*Matter of Nataro v DeChance* 149 Ad 3d 1081, 53 NYS3d 156 [2d Dept 2017]). This ZBA engaged in the required balancing test and, as borne out by the transcript as well as the written decision, considered the relevant statutory factors (see *Matter of Goldman v City of Long Beach*, 128 AD3d 1064, 10 NYS2d 303 [2d Dept 2015]).

The variances granted are not substantial. While the difficulty is self-created, that fact, standing alone is not a sufficient basis to overturn this Board. The finding and determination that a) no undesirable change to the character of the neighborhood; b) that no adverse impact on physical and environmental conditions; or c) that no detriments to community health, safety, or welfare would result from a grant, was rational and supported by evidence in the record (see *Matter of Daniel v Zoning Board of Appeals of the Town of Southold*, 98 AD 3d 508, 949 NYS2d 180 [2d Dept 2012]).

Petitioners also raise, for the first time in this special proceeding, the claim that an unadvertised variance or variances under the amended § 197-29.1 05 of the Westhampton Beach Code, not originally captured in the denial of the building official, should cause the Court to reverse the Board. In order for the

Porges v Village of Westhampton Zoning Board
Index No. 615527/2021
Page 4

Court to consider this claim, the petitioners were obliged to have raised it at the Board level (*Wertheimer v Town of Huntington Zoning Board of Appeals*, 287 AD2d 511 [2d Dept 2001]). The Petitioners did not raise such claim before the Board, therefore the Court has nothing in the record to review.

Accordingly, the petition is denied in its entirety and the proceeding is dismissed.

The foregoing constitutes the decision and Order of the Court.

Submit Judgment.

Dated: February ²², 2022



HON. CHRISTOPHER MODELEWSKI, J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION