

MEMORANDUM

COPY

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 17

In the Matter of the Application of

By: PETER H. MAYER, J.S.C.

Dated: January ____, 2013

ALAIN LACHAUD,

Index No. 12-18363

Mot. Seq. # 001 - MG

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules,

Return Date: 7-20-12

Adjourned: 9-25-12

- against -

THE ZONING BOARD OF APPEALS OF THE INCORPORATED VILLAGE OF BELLPORT,

Respondent.

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Patchogue, New York 11772

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In this proceeding, petitioner seeks a judgment pursuant to CPLR article 78 annulling and reversing a decision by respondent Zoning Board of Appeals of the Incorporated Village of Bellport which upheld a determination of the Historic Preservation Commission that denied an application by petitioner for a certificate of appropriateness permitting the use of "Hardi Board" siding to the entirety of the front of the structure known as 33 Bellport Lane, Bellport, New York.

Petitioner is the owner of premises known as 33 Bellport Lane, Bellport, New York, which is located within the Village of Bellport in an area designated as the "Bellport Lane Historic District". Applicable portions of Section 22-5 of the Village Code state:

Criteria for approval of a certificate of appropriateness

- (a) In passing upon an application for a certificate of appropriateness, the commission shall not consider changes to interior spaces.
- (b) The commissions' decision shall be based upon the following principles, as applicable:
 - (1) Properties which contribute to the character of a designated historic district shall be retained, with their historic features altered as little as possible;

(2) Any alteration of a designated landmark or a property within a designated historic district shall be compatible with its historic character, as well as with the surrounding designated historic district; and

...

(c) In applying the principle of compatibility, the commission shall consider the following factors, as applicable:

(1) The general design, character and appropriateness to the designated landmark or designated historic district of the proposed alteration or new construction;

...

(3) Texture, materials, and color and their relation to similar features of other properties in the neighborhood of the designated historic district;

(4) Visual compatibility with surrounding properties or the designated historic district, ...

(5) The importance of historic, architectural or other features to the significance of the property or the designated historic district.

(d) The commission shall prepare and adopt guidelines that contain suggested standards of compatibility elaborating upon the principles set forth above regarding the future development of and the preservation of properties, buildings and structures within the district.

As adopted in August 2001, the Bellport Lane Preservation Commission District Guidelines state in pertinent part: “3. GENERAL GUIDELINES The following guidelines are provided as suggested and recommended elements of general design for assisting applicants.” Under “Element” labeled “House Covering” the “Recommended” guideline states “White clapboard with about 8-inch exposure. Cedar shingled painted white. Unpainted cedar shingles. Modern materials that really look like wood clapboards or shingles. Traditional trim”, while the “Not Recommended” guideline states “Paint other than white. Clapboard with too little exposure. Modern materials that look artificial.”

It appears that petitioner first applied for a certificate of appropriateness to make renovations to the exterior of his 33 Bellport Lane home on or about July 27, 2007. His application made requests to replace approximately twenty-two windows as well as the siding, insulation, and plywood in and about the windows. Additionally, he made application in October 2007 to replace existing gutters made of aluminum with copper half-round gutters and leaders. Generally, these applications were approved. A certificate of appropriateness was issued to petitioner on April 25, 2010 permitting him to use “hardie plank” as the first 3 courses of siding up from the ground in the front portion of his home, after which a hearing was held in May 2010 by the Village of Bellport Historic District Preservation Commission relative thereto.¹ During the course of the hearing, petitioner’s attorney stated that it was “absolutely

¹There is no question that the petitioner was permitted to use the “hardie planking” on the exterior back and side portions and the first three boards from the ground up on the front of his home at

correct” that although petitioner had agreed to use cedar siding above the first two or three boards, he proceeded to side the rest of the front of the house with “hardy plank” boards. Petitioner’s attorney indicated that any liability for that said violation was addressed by the Village Justice Court and that the said Court recommended that petitioner renew or make a new application to the Village of Bellport Historic District Preservation Commission to permit the installation of the “hardie planking” on the remainder of the front of his home. Thus, on or about August 1, 2011 petitioner filed a new application for a certificate of appropriateness requesting that he not be required to cover with cedar, the “hardie planking” he had installed on the front of his house. This application was denied by a 4 to 1 vote after a hearing was held on October 8, 2011. Petitioner appealed this decision pursuant to Section 22-6 of the Village Code and the Zoning Board of Appeals (“ZBA”) denied his appeal after a hearing was held on February 16, 2012.

In its decision dated April 15, 2012, the ZBA concluded that the petitioner “1) [Petitioner] has failed to reach his burden of proof before this Board, as a result of which the HPC [Historic Preservation Commission] determination should stand undisturbed 2) The application challenging the HPC determination that the use of “Hardi Board” is not an appropriate material for use in those areas designated by the HPC, which they believe would affect the historic appearance of this designated structure situated within a historic district is denied. 3) The applicant failed to prove any hardship existed warranting the use of the “Hardi Board” material.” In reaching this conclusion, the ZBA found that there was credible testimony on both sides of the issue, that petitioner’s premises was a designated structure within the Historic District, that the dwellings situate therein have historically significant features which include wooden clapboard siding, that the HPC had never granted the use of “Hardi Board” on any other structure within the historic district and was not persuaded by “testimony of a few other jurisdictions throughout the country may be doing.” In addition, the ZBA found that HPC abided by the intent of the code by allowing petitioner to use “Hardi Board” on the other sides of the premises “thus recognizing the hardship alleged by the [petitioner] and in doing so finding a reasonable middle ground.” The ZBA also found that “ ‘Hardi Board’ with its especially clean lines and lack of the expected and typical features of the wood clapboard would create something other than what exists” in the historic district, that “Hardi Board” as a manmade cementitious product is too perfect and would detract from the home’s designated historic appearance as it relates to the streetscape yet recognized that the HPC’s finding that “the use of ‘Hardi Board’ was appropriate in those areas which they felt did not interrupt the historic character of the area” was a determination well within the discretion of the HPC, and that the petitioner failed to sustain his burden in reference to any hardship, “financial or otherwise”.

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, or an abuse of discretion (*Matter of Ifrah v Utschig*, 98 NY2d 304, 746 NYS2d 667 [2002]; see *Matter of DiPaolo v Zoning Bd. of Appeals of Town/Vil. of Harrison*, 62 AD3d 792, 879 NYS2d 507 [2d Dept 2009]). Thus, a determination of a zoning board should be sustained upon judicial review if it has a rational basis and is supported by substantial evidence (*Matter of Pecoraro v Board of Appeals of the Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234 [2004]; *Matter of Ifrah v Utschig*, *supra*; *Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 259 [1995]). A determination is rational “if it has some objective

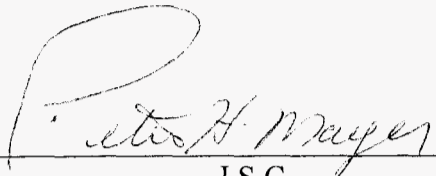
factual basis, as opposed to resting entirely on subjective considerations such as general community opposition” (*Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 67, 886 NYS2d 442, 446 [2d Dept 2009], quoting *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 772, 809 NYS2d 98, 105 [2d Dept 2005]). The consideration of “substantial evidence” is limited to determining whether the record contains sufficient evidence to support the rationality of the zoning board’s determination (*Matter of Sasso v Osgood, supra*; see *Matter of DiPaolo v Zoning Bd. of Appeals of Town/Vil. of Harrison, supra*). This Court may not substitute its discretion for that of the zoning board unless its determination is arbitrary or contrary to law (*Matter of Smith v Board of Appeals of the Town of Islip*, 202 AD2d 674, 609 NYS2d 912 [2d Dept 1994]). Nor may the court weigh the evidence or reject the choice made by the zoning board where the evidence is conflicting and room for choice exists (*Matter of Calvi v Zoning Bd. of Appeals of City of Yonkers*, 238 AD2d 417, 656 NYS2d 313 [2d Dept 1997]; see *Matter of Toys R Us v Silva*, 89 NY2d 411, 654 NYS2d 100 [1996]; *Stork Rest. v Boland*, 282 NY 256 [1940]).

Here, those portions of the ZBA’s findings/conclusions which indicate that the petitioner failed to prove a “hardship” and to meet his burden of proof are clearly contrary to the applicable law. Section 22-6 of the Village Code, which refers to Appeals, states in section (a) that “[a]ny person aggrieved by a decision of the commission may, ... file a written application with the zoning board of appeals (ZBA) for relief from said decision.” In section (b), the Village Code indicates that “[a]n applicant whose certificate of appropriateness for a **proposed demolition** was denied may apply for relief on the ground of hardship” (emphasis added). It then states the elements which must be established to prove a hardship. Petitioner’s original application did not request a certificate of appropriateness for proposed demolition, nor did the appeal involve demolition. Petitioner’s application concerned the use of man-made material for siding his home, thus as no demolition was involved, it was not necessary to establish a “hardship” on this appeal. Finally, petitioner’s burden was to show that the man-made material he wished to place on his house constituted “modern materials that really look like wood clapboards or shingles” as was recommended but not mandated. Thus, the ZBA’s conclusion that petitioner did not meet his burden was not supported by the record and was not articulated in the determination.

Neither the Decision of the ZBA nor the Determination of the Historic Preservation Commission specifically address the Bellport Lane Preservation Commission District Guideline which recommends the use of “[m]odern materials that really look like wood clapboards or shingles” for house coverings. As is indicated above, both the Village Code at Section 22-5 and the Bellport Lane Preservation Commission District Guidelines, make recommendations with regard to the exterior of the homes located on Bellport Lane, but neither makes the use of wood mandatory. As written, the language of the code and the guidelines call for subjective determinations in almost each instance with regard to renovations on Bellport Lane homes. Here, where petitioner submitted evidence to the Historic Preservation Commission and to the ZBA (which the ZBA determined was credible²) that the Hardi

²In its findings in the April 15, 2012 Decision, the ZBA stated that it “heard credible testimony on both sides of the issue having an interest in the determination of the HPC.” The testimony presented at the HPC hearing contained the recitation of letters from community members which stated in part that “the materials blended very well with the original siding,” “we believe the new siding agrees with [the] requirements” of the Preservation Brief 16, Technical Preservation Services, U.S. Department of the

Board planking is a modern man-made material that bears a close resemblance to wood, relative to other man-made materials, and that its use on the front of petitioner's home would be in keeping with the original appearance of the house, the ZBA's conclusion that the petitioner failed to reach his burden of proof in challenging the determination that the use of Hardi Board is not an appropriate material for use on the front portion of his home was arbitrary and capricious and without a rational basis. Accordingly, the petition is granted and the May 18, 2012 decision of the ZBA is annulled and set aside and the Historic Preservation Commission is directed to issue a Certificate of Appropriateness approving the use of Hardi Board siding on the entire structure situated at 33 Bellport Lane, Bellport, New York.



J.S.C.

1/29/2013

Interior, "I would hope you consider Hardy Plank as an acceptable siding material," "I feel that the siding that he has installed is very attractive and, from the street, it is indistinguishable from cedar," "[t]he guidelines of the Historic District even list 'modern materials that really look like clapboard' as proper for house covering. I feel that the covering [petitioner] has used fits this description well. I am further struck by the concluding sentence in paragraph 3 of the general description of the Historic District guidelines: 'The whole piece is held together by coherence in size, shape, placement, decoration and color.' As anyone who passes the [petitioner's] home can see, the house clearly meets the standard as well as the recommendations for house covering embodied in the Historic District guidelines", "the alterations of 33 Bellport Lane do not deviate from that character and are consistent with what we've come to expect in Bellport Village", "I think the siding as installed is an excellent match of the existing siding ... From the street, the only difference that I was able to see between the new and original siding was that the paint on the original was peeling", and "[a]s for the Bellport Lane facade at the [petitioner's] house, the material is visually indistinguishable from the clapboard surfaces of his neighbors' houses. Unless a passer-by were [*sic*] to examine it with a pair of calipers and magnifying glass, no difference can be detected".