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Index No.: 3012-17

SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:
Hon. **DENISE F. MOLIA,**
Justice

IN THE MATTER OF THE APPLICATION OF RONALD A. KAYE,

Petitioner,

- against -

ZONING BOARD OF APPEALS OF THE VILLAGE OF NORTH HAVEN,

Respondent,

For a Judgment Pursuant to Article 78 of the New York State Civil Practice Law and Rules,

CASE DISPOSED: YES
MOTION R/D: 7/19/17
SUBMISSION DATE: 2/9/18
MOTION SEQUENCE NO.: 001 MD

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Upon the following papers filed and considered relative to this matter:

Notice of Petition and Verified Petition dated June 7, 2017; Exhibit A annexed thereto; Petitioner's Memorandum of Law; Verified Answer dated July 27, 2017; Exhibit A annexed thereto; Verified Answer dated July 19, 2016; Respondent's Return; Respondent's Memorandum of Law; and upon due deliberation; it is

ORDERED, that the petition of Ronald A. Kaye, pursuant to CPLR Article 78, for an Order annulling and setting aside the May 11, 2017 determination of the Zoning Board of Appeals of the Village of North Haven, which denied the petitioner's application for an area variance with respect to his property located at 39 Artists Colony Road, North Haven, is denied.

Petitioner Ronald A. Kaye is the owner, since December 21, 1995, of the property located at 39 Actors Colony Road, Village of North Haven, New York ("subject property"). The subject property, which measures 157,241 square feet in size, is located within the confines of the Village's One-Family Residence R-1 District where the minimum permissible lot size is 80,000 square feet. On or about October 13, 2016, the petitioner made application to the respondent Zoning Board of Appeals ("Board") for an area variance required to prosecute an application to

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subdivide the subject property into two lots that would measure 77,241 square feet and 80,000 square feet, respectively. The petitioner's application was initially heard by the Board at its November 7, 2016 meeting and at each successive meeting until the record was closed at the meeting of February 14, 2017. By written decision dated May 9, 2017, the Board denied Kaye's application. The petitioner then commenced the instant proceeding seeking to review and annul the respondent's decision, alleging same to be arbitrary, capricious and affected by an error in law.

Local zoning boards have broad discretion in considering applications for variances, and judicial review of such municipal decisions is limited. Matter of Fuhst v. Foley, 45 N.Y.2d 441, 444, 410 N.Y.S.2d 56, 382 N.E.2d 756. However, a court may set aside the determination of a zoning board if the record reveals that the board acted illegally or arbitrarily, abused its discretion, or succumbed to generalized community pressure (see, Matter of Pecorano v. Board of Appeals of Town of Hempstead, 2 N.Y.3d 608, 814 N.E.2d 404). "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 A.D.3d 1118, 944 N.Y.S.2d 277.

Village Law §7-712-b(3)(b) provides:

> "In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also 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 variance."

The petitioner contends that his application was for a *de minimis* 3.45% variance and that the board's determination did not apply the required balancing test, but instead rendered a decision based upon precedent and generalized community opposition.

A zoning board decision is deemed rational so long as it has some objective factual basis

(Burden v. Town of Southold Zoning Board of Appeals, 2015 NY Slip Op. 30256 [U]) and a sound basis in reason, without regard to the facts (Matter of Halpern v. City of New Rochelle, 24 A.D.3d 768, 809 N.Y.S.2d 98, appeal dismissed, 6 N.Y.3d 890, 817 N.Y.S.2d 624, lv. den. 7 N.Y.3d 708, 822 N.Y.S.2d 486).

The Court of Appeals has reaffirmed the limited role of the courts in the review of decisions issued by local land use boards as follows:

> "As with board determinations on variances, a reviewing court is bound to examine only whether substantial evidence supports the determination of the board. Where substantial evidence exists, a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record."

Retail Property Trust v. Bd. of Zoning Appeals of Town of Hempstead, 98 N.Y.2d 190, 196. (See also, Matter of P.M.S. Ltd. v. Zoning Board, 98 N.Y.2d 683; Matter of Ifrah v. Utschig, 98 N.Y.2d 304)

The reason for the limited scope of judicial review was set forth by the Court of Appeals in Cowan v. Kern, 41 N.Y. 2d 591 at 599, as follows:

> "The crux of the matter is that the responsibility for making zoning decisions has been committed primarily to quasi-legislative, quasi-administrative boards composed of representatives from the local community. Local officials generally possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community. Absent arbitrariness, it is for the locally selected and locally responsible officials to determine where the public interest in zoning lies. (McGowan v. Cohalan, 41 N.Y.2d 434, 438, supra.) Judicial review of local zoning decision is limited: not only in our court but in all courts. Where there is a rational basis for the local decision, that decision should be sustained."

In its decision, the Board noted that to the naked eye the prevailing character of the Actors Colony neighborhood consists of larger lots improved with single residences, with such area being set off from the encircling area of smaller nonconforming lots, which with one exception incident to a prior subdivision, do not infiltrate into the larger lot neighborhood. The decision further notes that the effect of the smaller lots is to frame or render as separate and distinct, the larger lots on Actors Colony Road. The Board also considered that the net effect of future subdivisions by means of variances could result in the addition of up to fifteen lots within

the neighborhood. The petitioner's testimony acknowledged that the granting of the subject application could be used as a precedent to compel a similar outcome on any future applications.

The Board discussed in its decision the fact that Actors Colony Road is not the product of the modern subdivision process, with the lots lacking any uniform configuration, and almost all being oversized. It was noted that the applicant's representative observed at the hearing on November 7, 2016, that "Actors Colony Road has a better street address" and "Actors Colony Road has a better connotation" than the smaller nonconforming lots encircling Actors Colony Road. Taking the foregoing into account, the Board determined that although the relief requested by petitioner was not substantial as a percentage of lot size, the effect of granting the application and the precedent created would result in a substantial detriment to the neighborhood.

The decision of the Board also noted that the petitioner did not claim ignorance of the R-80 Zoning District requirements, either at the time of his purchase of the property in 1995 or at any time thereafter, supporting a finding that the hardship of the petitioner was self-created.

In the Decision dated May 9, 2017, the respondent Zoning Board of Appeals found that on a balancing and weighing of the statutory requirements, the record demonstrated that the hardship expressed by the applicant was self-created, and that the granting of the Kaye application would have a detrimental future impact on the unique nature of the Actors Colony Road neighborhood and result in an undesirable change to the character of that neighborhood.

Under the circumstances presented, the Court finds that the findings of the respondent Board are rational and supported by the substantial evidence on the record, and are not found to be arbitrary, capricious, erroneous as a matter of law, or an abuse of discretion. Accordingly, the petition is dismissed.

The foregoing constitutes the Order of this Court.

Dated: June 18, 2018

Hon. Denise F. Molia

HON. DENISE F. MOLIA A.J.S.C.