SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

In the matter of the application of GARY LEVINE,

Plaintiff,

-against-

MOTION SEQ. NO.:004
MOTION DATE: 3/31/10

THE VILLAGE OF ISLAND PARK BOARD OF ZONING APPEALS, THE ISLAND PARK VILLAGE BOARD OF TRUSTEES, AND JOSEPH BALABANICK,

INDEX NO.: 4699/09

Defendants.

The following papers having been read on the motion (numbered 1-5):

Amended Notice of Petition.....1
Reply Affirmation and Memorandum of Law.....2
Verified Answer to Amended Petition.....3
Memorandum in Opposition.....4
Affirmation in Opposition.....5

Motion (seq. No. 4) by the attorneys for the petitioner for an order pursuant to CPLR Article 78 annulling the decision of the respondent Village of Island Park Zoning Board of Appeals dated February 17, 2009 and filed in the Village Clerk's Office on February 26, 2009, and declaring the actions and resolution by the Island Park Village Board of Trustees on August 16, 2007 with respect to certain Village Park property at Pershing Place to be null and void and of no effect, as well as any contract or conveyance of any part thereof is **denied.**

On August 16, 2007 the Board of Trustees of the Incorporated Village of Island Park, sued herein as The Island Park Village Board of Trustees (hereinafter referred to as the "Board of Trustees"), adopted a resolution approving the sale of

Village property located at 15 Pershing Place, Island Park, New York (hereinafter referred to as the "subject premises") to Banick Construction Inc. and authorized the Mayor to proceed with the conveyance. Pursuant to the August 16, 2007 resolution, on or about September 26, 2007 the Mayor executed a contract for the sale of the subject premises to Joseph Balabanick, the principal of Banick Construction Inc. The sale was subject to the granting by The Village of Island Park Board of Zoning And Appeals (hereinafter referred to as the BZA) of the variances required for the construction of a new single family dwelling on the subject premises. By application dated December 31, 2007 Joseph Balabanick filed for variances for height, lot area, lot coverage front yard setback and rear yard setback to permit the construction of a new single family dwelling on the subject premises. By decision dated February 17, 2009, BZA granted the variance application, subject to the conditions set forth therein.

On March 13, 2009, the petitioner Gary Levine an owner of property adjacent to the subject premises, filed the within Article 78 proceeding seeking to (1) annul the February 17, 2009 decision of the BZA and (2) "declaring the action and resolution by the Island Park Village Board of Trustees on August 17, 2007: to be "null and void," and (3) for an award of damages.

In this court's prior decision, *Levine v Village of Island Park et al*, Index No. 4699/09 seq. Nos. 1,2,3, the motion to dismiss was denied without prejudice for failing to join Joseph Balabanick as a necessary party defendant. On March 10, 2010, petitioner served an Amended Notice of Petition, Amended Petition and Verification with Exhibits on Joseph Balabanick by personal service. Joseph Balabanick has not appeared or answered. The court now has jurisdiction over all the necessary parties and petitioner seeks a determination on the validity of the decision of the Board of Trustees and the ZBA. *See Windy Ridge Farms v Assessor Town of Shandaken*, 11 NY3d 725; *Matter of Romeo* 41 AD3d 1102;

Friedland v Hickory, 60 AD3d 426; *Matter of Lazzari*, 62 AD3d 1002; *Matter of Alexy v Otte*, 58 AD3d 967.

An Article 78 proceeding to annul the decision of the Board of Zoning Appeals must be commenced within 30 days after the filing of the decision in the office of the Village Clerk, see Village Law § 7-712-C(1). The 2009 variance determination was filed on February 26, 2009. The 30-day limitations period has expired. In its prior decision in this action, the court also held that if the cause of action for a declaratory judgment action cannot be raised in an Article 78 proceeding, then the limitations period applicable to the Article 78 proceeding does not apply. The cause of action would be governed by the six year "catch-all" limitation period set forth in CPLR 213(1) that has not yet expired, citing *Jones v Amicore*, 27 AD3d 465.

Respondent argues that even if the petition was timely, it should be dismissed on the merits.

Respondents have demonstrated that the subject premises was never dedicated as parkland, and as such cannot be an improper alienation of parkland.

Village-owned property that was:

> never dedicated, used or otherwise devoted to park purposes, and neither the deed of conveyance, nor the judgment registering the title to the property in the Village, restricted or conditioned its use to such purposed, the Board of Trustees of the Village had authority to sell it after determining that it was no longer required for a public use or was unsuitable therefore. *O'Shea v Hanse*, 3 Misc. 2d 307, 313, 147 NYS 2d 792, 799 (Sup. Suffolk Co. 1955).

A search performed by Brooklyn Mortgage Guaranty and Title Company indicates the premises are subject only to reservations for utility access and repair. The records demonstrate that the property was never dedicated for use as parkland. The only structure on the property was a one-story 22' x 26' concrete block building that was covered by graffiti and used for Village storage. The property was not being used as parkland, state or otherwise. The only non-Village employees that went near the property were teenagers that would park their cars on the neighboring road, drink alcohol, and write graffiti - the exact complaints made by petitioner that the subject sale seeks to rectify.

Prior to the sale, the Village, by counsel, confirmed that the subject property was not parkland . Therefore, the approval of the state legislature was not required. The Village then circulated Requests for Proposals and obtained the bid of Joseph Balabanick of Balabanick Construction, Inc. Petitioner has not offered any of evidence to substantiate its claim or refute the respondents showing that the land was never dedicated as parkland. The Village's actions were not an unlawful alienation of parkland. The Village's resolution approving the sale is affirmed.

Considering the next aspect of the claim regarding the ZBA determination, pursuant to the New York Village Law a zoning board must consider "the benefit to the applicant if the variances is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant" see, Village Law § 7-712(b)(3)(b). The zoning board must also consider the following factors when determining whether to grant an application for an area variance: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties, if the area variance is granted; (2) whether the benefit sought by the applicant can be achieved by some method, feasible to the applicant, other than an area variance; (3) whether the required area variance is substantial; (4) whether the proposed variance will have an adverse

effect or impact on physical or environmental conditions in the neighborhood or district if it is granted, and (5) whether the alleged difficulty was self-created. Respondent Balabanick applied to the ZBA for area variances regarding height, lot area, lot coverage, front yard setback and rear yard setback for the subject property. In response to Balabanick's application, the ZBA held a public hearing with written notice given to neighboring homeowners possibly affected by the application. Petitioner, Gary Levine, received notice of the hearing and appeared together with his father and counsel, Samuel Levine, Esq., to participate. Testimony was taken from several presumptively affected parties, including: Balabanick; professional real estate appraiser Barry Nelson; Levine's counsel and father Samuel Levine, and other neighboring homeowners. Numerous exhibits were offered into evidence at a public hearing that took place over two (2) days. Petitioner's primary argument was that Balabanick's proposed project would decrease his water view and potentially affect the market value of his home. In response, Balabanick explained that the proposed dwelling is the same size as petitioner's except he purposely made the house three feet shorter so as to not block petitioners view from his deck. Additionally, appraiser Nelson concluded that the erection of Balabanick's proposed two-story single home would not be of any detriment to the property values of neighboring homes. Neither Levine nor any other resident provided proof to the contrary. Nor would the proposed dwelling block residents' access to the beach area. At that time, Balabanick offered testimony that his proposed project would generate significant income for both him and the Village. Namely, the Village would enjoy a financial gain of $280,000 from the sale of the property, as well as increased tax revenues generated from the new home. Notably, the property would only be worth approximately $40,000 as a non-buildable lot if the variances sought by Balabanick were denied. Meanwhile, applicant Balabanick would benefit by

earning a financial profit, which benefit was requested to be considered by the ZBA. Factoring in the costs of the property, demolition of the existing structure, and construction of the new dwelling, Balabanick estimated a monetary gain of approximately $150,000 if and when he sold the lot. Non-monetary gains to the Village community would include the removal of a graffiti covered storage building which has been the subject of neighborhood complaints, including underage drinking, loitering on the site and overnight parking. Neighbors Nicholas Kyriakou and Carl Hansen supported this argument and agreed that the current state of the Village property is an eyesore. The petitioner was the most outspoken resident when it came to complaints about graffiti, loitering, overnight parking and underage drinking. Balabanick pointed out that his proposal for a single family residence offers a solution to all of those problems. Balabanick further explained to the ZBA that his "proposed home would be almost identical to the two houses directly east of it" thereby fitting into the character of the community. Nelson's testimony revealed that the two houses next door are situated upon parcels of identical size to Balabanick's while seven of eight properties on the block leading to the property are smaller than the subject lot. The four houses surrounding the subject lot have front yard setbacks of 6.8 feet, 6.1 feet, 6.3 feet and 3.2 feet while Balabanick sought a setback of 8 feet to the dwelling and 5 feet to the roofed-over open porch. Similarly, the two houses to the east have side yard setbacks in the aggregate of 15 feet and Balabanick's proposal would also have side yard setbacks in the aggregate of 15 feet. Also, the two houses to the east maintain 22 foot rear setbacks and Balabanick's proposal provides for a 23 foot setback.

After consideration of Balabanick's application and the 126 pages of testimony as well as exhibits, the ZBA chose to grant the variance application. In accordance with its duties under Village Law § 7-712, the ZBA concluded that:

> Based upon the uncontroverted expert testimony adduced at the second portion of the hearing, that: a) the proposed construction will not adversely alter or change the character of the neighborhood or area surrounding the subject parcel; b) the variances requested are not substantial or unreasonable; c) provided the construction is performed in compliance with FEMA elevation regulations there will be no adverse impact on any physical or environmental conditions in the area; d) the benefit sought by the application cannot be achieved in any other way than in the variance proceeding; e) applicant's hardship is not self-created, but a result of the substandard dimensions of the property.

In reviewing a determination of a zoning board, courts should presume that the decision was correct (*see*, 2 Anderson, *New York Zoning Law and Practice* § 26.17 [3d ed.]). However, a determination of a zoning board will be set aside if it is arbitrary and capricious. *Preston v Board of Zoning Appeals of Town of North Hempstead*, 229, AD2d 585. A zoning board's determination "must be sustained if it has a rational basis and is supported by substantial evidence" *(Matter of Toys "R" Us v Silva,* 89 NY2d 411). The court in *Cowan v Kern*, 41 NY2d 591, 599 stated:

> "The crux of the matter is that the responsibility for making zoning decision 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 locally selected and locally responsible officials to determine where the public interest in zoning lies."

Even where a contrary determination would be reasonable and sustainable, a reviewing court may not substitute its judgment for that of the agency if the determination is supported by substantial evidence. *Matter of Consolidated Edison Co. of N.Y. v New York State Div. of Human Rights (Easton)*, 77 NY2d 411. Substantial evidence has been defined as "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176.

The decision of the ZBA was based on full consideration of all the evidence and was not arbitrary, capricious, or irrational.

The motion to annul the decision of the respondent Village of Island Park Zoning Board of Appeals dated February 17, 2009 and filed in the Village Clerk's Office on February 26, 2009, and declare the actions and resolution by the Island Park Village Board of Trustees on August 16, 2007 with respect to certain Village Park property at Pershing Place to be null and void and of no effect, as well as any contract or conveyance of any part thereof is **denied.**

This decision terminates all proceedings under Index No. 4699/09.

This Constitutes the Order of the Court.

Dated: June 17, 2010

ENTER:

J.S.C.