

71 A.D.3d 1014

Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of Alex BOUT, et al., petitioners,

v.

ZONING BOARD OF APPEALS OF
TOWN OF OYSTER BAY, respondent.

March 23, 2010.

Synopsis

Background: Property owner commenced article 78 petition seeking review of determination of town zoning board of appeals (ZBA) which, after, hearing, denied his application for amended area variance in connection with proposed addition to his home. The Supreme Court transferred proceeding.

Holdings: The Supreme Court, Appellate Division, held that:

[1] trial court should not have transferred proceeding, and

[2] ZBA's determination was arbitrary and capricious.

Petition granted.

West Headnotes (4)

[1] **Zoning and Planning** 🔑 Jurisdiction

Trial court should not have transferred to appellate court article 78 proceeding in which property owner sought review of determination of town zoning board of appeals (ZBA) denying his application for amended area variance in connection with proposed addition to his home, since determination to be reviewed was not made after quasi-judicial hearing at which evidence was taken and which was held pursuant to direction of law. [McKinney's CPLR 7801 et seq.](#)

[2] **Zoning and Planning** 🔑 Right to variance or exception, and discretion

Zoning and Planning 🔑 Variances and exceptions

Zoning and Planning 🔑 Illegality

Zoning and Planning 🔑 Variances and exceptions

Local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether action taken by particular board was illegal, arbitrary, or an abuse of discretion.

[3] **Zoning and Planning** 🔑 Decisions of boards or officers in general

Determination of a zoning board of appeals that neither adheres to its own prior precedent nor indicates its reason for reaching different result on essentially same facts is arbitrary and capricious, and such determination must be annulled pursuant to article 78 proceeding even if there may otherwise be evidence in record sufficient to support determination. [McKinney's CPLR 7801 et seq.](#)

3 Cases that cite this headnote

[4] **Zoning and Planning** 🔑 Building or setback lines

Determination of town zoning board of appeals (ZBA) to deny property owner's application for amended area variance in connection with proposed addition to his home was arbitrary and capricious; there was no basis in record for ZBA's conclusion that application sought permission to maintain side yard 16 inches narrower than previously approved, and even if neighboring landowners' uncertified survey that footprint of addition was "larger" than it had been when approved, owner's requested amendments to variance were de minimis.

Attorneys and Law Firms

****206** Anthony J. LaMarca, P.C., Syosset, N.Y., for petitioners.

Sinnreich & Kosakoff, LLP, Central Islip, N.Y. (James M. Boyce of counsel), for respondent.

PETER B. SKELOS, J.P., JOSEPH COVELLO, RUTH C. BALKIN, and LEONARD B. AUSTIN, JJ.

Opinion

***1014** Proceeding pursuant to CPLR article 78 to review a determination of the Zoning Board of Appeals of the Town of Oyster Bay dated May 8, 2008, which, after a hearing, denied the application of the petitioner Alex Bout for an amended area variance.

ADJUDGED that the petition is granted, on the law, with costs, the determination is annulled, and the Zoning Board of Appeals of the Town of Oyster Bay is directed to issue the requested amended area variance.

[1] The Supreme Court erred in transferring the proceeding to this Court pursuant ****207** to CPLR 7804(g) since the determination to be reviewed was not made after a quasi-judicial hearing at which evidence was taken and which was held pursuant to direction of law (see CPLR 7803[4]; *Matter of Sasso v. Osgood*, 86 N.Y.2d 374, 384 n. 2, 633 N.Y.S.2d 259, 657 N.E.2d 254; *Matter of Halperin v. City of New Rochelle*, 24 A.D.3d 768, 769–770, 809 N.Y.S.2d 98). Nevertheless, in the interest of judicial economy, we will decide the case on the merits (see *Matter of Silvera v. Town of Amenia Zoning Bd. of Appeals*, 33 A.D.3d 706, 707–708, 823 N.Y.S.2d 430; *Matter of Halperin v. City of New Rochelle*, 24 A.D.3d at 772–773, 809 N.Y.S.2d 98).

[2] [3] “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 N.Y.2d 304, 308, 746 N.Y.S.2d 667, 774 N.E.2d 732). Nonetheless, a determination of a zoning board of appeals that “ ‘neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious’ ” (*Knight v. Amelkin*, 68 N.Y.2d 975, 977, 510 N.Y.S.2d

550, 503 N.E.2d 106, quoting *Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 N.Y.2d 516, 517, 498 N.Y.S.2d 111, 488 N.E.2d 1223; see *Matter of Corona Realty Holdings, LLC v. Town of N. Hempstead*, 32 A.D.3d 393, 395, 820 N.Y.S.2d 102). Such a determination must be annulled even if there may otherwise be evidence in the record sufficient to support the determination (see *Matter of Campo Grandchildren Trust v. Colson*, 39 A.D.3d 746, 746–747, 834 N.Y.S.2d 295; *Matter of Corona Realty Holdings, LLC v. Town of N. Hempstead*, 32 A.D.3d at 395, 820 N.Y.S.2d 102).

[4] ***1015** Here, by a vote of six to zero, with one member absent, the Zoning Board of Appeals of the Town of Oyster Bay (hereinafter the ZBA) granted the initial application of the petitioner Alex Bout for an area variance in connection with a proposed addition to the petitioners' home. After a Town building inspector noticed cut-outs for windows on the west side of the addition, which were not in accordance with the notice of variance, he issued a stop work order. The Town issued a corrected notice of variance providing that only windows on the *second* floor of the addition were prohibited.

However, while the stop work order was in effect, neighboring landowners complained to the ZBA, alleging that the footprint of the addition was larger than permitted by the variance, and that the side yard was narrower than permitted by the variance. The ZBA then held a hearing on the matter and, by a vote of four to three, denied an application for an amended area variance, holding that the application contained a request to maintain a side yard at a width 16 inches less than it had previously approved, and that the footprint of the addition was “larger” than it had previously approved.

However, there was no basis in the record for the ZBA's conclusion that the application sought permission to maintain a side yard 16 inches narrower than previously approved. Even if the neighboring landowners' uncertified survey were correct, the application requested, at most, an amended variance permitting the petitioners to maintain the side yard at a width only 3.6 inches less than the previously approved side yard requirement, i.e., 7.7 feet rather than the previously approved 8 feet, and to increase the overall footprint of the addition a mere 8%, i.e., 6 inches larger than planned on one side and approximately 18 inches larger on the other ****208** side. As a basis for rejecting the application, the ZBA additionally referred to the windows that were being installed

on the second floor of the addition, which the petitioners stated that they would remove.

Under the facts of this case, the requested amendments to the variance are de minimis (see *Matter of Stapen v. Siegel*, 105 A.D.2d 841, 481 N.Y.S.2d 762). Since the ZBA did not explain its reasons for reaching a different result on essentially the same facts as it had faced when making its

prior decision, under the specific circumstances of this matter, its determination to deny the application for an amended variance was arbitrary and capricious, and must be annulled.

All Citations

71 A.D.3d 1014, 897 N.Y.S.2d 205, 2010 N.Y. Slip Op. 02555

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