

MEMORANDUM

CURT

SUPREME COURT, SUFFOLK COUNTY

L.A.S. PART 27

In the Matter of the Application of
ROBERT OLIVIERI,
Petitioner,

By: Ralph F. Costello, J.S.C.
Dated: April 15, 2002

For an Order Pursuant to Article 78 of the Civil
Practice Law and Rules,

Index No. 02-00609

- against -

Mot. Seq. #001 - CDISPSUBJ

Return Date: 2/7/02

Adjourned: 3/12/02

BROOKHAVEN ZONING BOARD OF
APPEALS, FRANK C. TROTTA,
CHAIRPERSON, EUGENE ZANGHI,
VICE CHAIRMAN, VINCENT LIGUORI,
GRACE COPPES AND MARVIN COLSON,
Respondents.

TIMOTHY M. McENANEY, ESQ.
Attorney for Plaintiff, Staff Counsel
to The Coalition of Landlords,
Homeowners & Merchants, Inc.
28 East Main Street
Babylon, New York 11702

ANNETTE EADERESTO, ESQ.
and/or Brookhaven Town Attorney
3233 Route 112
Medford, New York 11763

STANLEY ALLAN, Town Clerk
and/or Town Clerk
205 South Ocean Avenue
Patchogue, New York 11772

This is an Article 78 proceeding brought to annul, vacate, or set aside a determination of the Respondent Brookhaven Board of Zoning Appeals (the "Board"), dated December 19, 2001, which conditionally granted an application by the Petitioner for an area variance.

In May, 1999, the Board held a public hearing regarding the subject parcel (the "parcel"), which is approximately 42,500 square feet in size and located on a private right of way in the Town of Brookhaven. The applicant in that hearing was a contract vendee, a company named Devin Home Design ("Devin"). That company employed an expediter, Charles Lyon ("Lyon"), in an attempt to obtain the necessary permits/variances from the Board to begin construction of a 3,600 square foot, two-story residence. That project required a lot frontage variance and relief from Town Law §280-a. After several hearings and amended determinations, the Board approved the variance application. However, due to

opposition voiced by the parcel's westerly neighbor, Ms. Denise Gerra, the approval came subject to a twenty-five foot natural buffer on the west side of the parcel and further required the applicant to pave the private right of way from the easterly boundary of the front of the parcel to the westerly boundary. Subsequent to obtaining the necessary variances Devin failed to close on the contract for the sale of the parcel. Thereafter, the land was purchased by another buyer and re-sold in December, 2000 to the current applicant, and petitioner herein, Robert Olivieri ("Petitioner"). After purchasing the property, the Petitioner sought a building permit to construct a private 1,100 square foot, one floor residence. At that point, Petitioner alleges he learned of the buffer requirement from personnel in the building department. Petitioner was informed that in order to contest the conditions imposed by the Board he would have to submit a request to the Board to reopen the application hearings and appeal for relief from the Board's prior determination. After Petitioner complied with the notice requirements and notified the Board of his intention re-address the imposition of the buffer and paving requirements, the Board agreed to rehear the case and a public hearing was held on November 7, 2001.

At the hearing the Petitioner agreed to pave the entire portion of the right of way in the front of the parcel, including the drainage required by the Respondent, but contested the validity of the buffer requirement and suggested there was no notice of such a requirement in the public record. At that point the Board instructed the Petitioner that a new application would have to be made for the removal of the buffer condition. However, after a unanimous vote, the Board agreed to reconsider that aspect of the original application. Also appearing at the rehearing was Ms. Gerra who testified that the Petitioner had already cleared the buffer zone of all existing vegetation and averred that the Petitioner knew of the buffer zone prior to purchasing the property. After some discussion wherein there were accusations by Ms. Gerra that the Petitioner harassed her and of the Petitioner's alleged cavalier attitude with respect to clearing the buffer zone, the Board voted to hold the application on the decision calendar. On December 19, 2001, the Board voted unanimously to amend its prior decisions and determined that the Petitioner was to pave from the edge of the existing pavement on the right of way up to and including the driveway on the subject parcel (a significant portion of which falls in front of Ms. Gerra's property) and also revegetate the buffer zone on the westerly line of the parcel pursuant to a revegetation plan approved by the Department of Planning, Environment and Development. The Board also determined that Petitioner would also be permitted to construct a fence in the buffer area. The Board apparently imposed the conditions in an effort to avoid an "undesirable change in the character of the area or a detriment to the nearby properties."

Petitioner commenced this Article 78 proceeding, arguing that Respondent's imposition of the several conditions to the variance approval was an abuse of their discretion, was illegal, and that the Board acted arbitrarily and capriciously. Petitioner alleges that Respondents' reasons for conditionally approving the variance application fail to find any support in the record or in the applicable law.

It is now beyond cavil that the pertinent criteria for determining an application for an area variance are those set forth by Town Law § 267-b(3)(b) (see, *Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 259 [1995]). Pursuant to that statute the Board must, based upon the listed factors, engage in a balancing test, weighing the benefit to petitioners if the variances are granted against the detriment to the health,

safety, and welfare of the surrounding neighborhood or community (see, *Matter of Sasso v Osgood, supra*). The determination of the Board must be upheld if it is rational and supported by substantial evidence (see, *Matter of Khan v Zoning Bd. Of Appeals of Vil. of Irvington*, 87 NY2d 344, 639 NYS2d 302 [1996] [construing an analogous provision in Village Law § 7-712-b(3)(b)]). The consideration of "substantial evidence" is limited to determining "whether the record contains sufficient evidence to support the rationality of the Board's determination" (*Matter of Sasso v Osgood, supra*, 384 n 2). Where a Board does not properly consider and weigh all the relevant statutory criteria and its determination is not supported by substantial evidence, courts should not hesitate to annul such determinations (see, *Lazzara v Kern*, 269 AD2d 449, 702 NYS2d 898 [2000]; *Peccoraro v Humenik*, 258 AD2d 465, 684 NYS2d 588 [1999]). Finally, a court may not substitute its judgment for that of the Board unless its determination is arbitrary or contrary to law (see, *Baker v Brownlie*, 248 AD2d 527, 670 NYS2d 216 [1998]).

The law is also well settled that in considering applications for area variances, a zoning board is authorized to impose such reasonable conditions as: (1) are directly related and incidental to the proposed use of the property, (2) are consistent with the spirit and intent of the zoning ordinance, and (3) minimize any adverse impacts resulting from the variance (see, *Matter of Baker v Brownlie*, 270 AD2d 484, 705 NYS2d 611 [2000]; *Matter of Charisma Holding Corp. v Zoning Bd. of Appeals*, 266 AD2d 540, 699 NYS2d 89 [1999]). However, if a zoning board imposes unreasonable or improper conditions, those conditions may be annulled although the variance is upheld (see, *Matter of St. Onge v Donovan, supra*).

In the instant proceeding, that condition requiring a 25 foot buffer zone on the parcels westerly boundary is hereby annulled. An examination of the record before this Court reveals that the reasoning for the buffer zone was primarily the result of Ms. Gerra's general opposition to the Devin application. As was stated earlier, that design called for the construction of a two-story, 3,600 square foot home whereas the petitioner's application included the construction of a more modest single-story home. In the Devin application hearings Ms. Gerra stated, "It is not a private person buying this parcel, it is a speculator and we are looking at the problems in the future." Later at the same hearing the expediter, Lyon, states that he will get Devin to agree to the proposed buffer zone. However, Devin failed to close on the contract for the property and the Board failed to consider the Petitioner's revised plans for the parcel. The record is absent of any evidence the Board considered the Petitioner's plans for the parcel when reconsidering the buffer zone condition to the variance application. Equally puzzling is the Board's basis for the buffer zone condition. The Board, by it's conclusions seems to espouse the buffer requirement under the guise of protecting the nature and character of the nearby properties. Such a conclusion is belied by the evidence in the record before this Court which depicts a veritable eyesore on Ms. Gerra's property, complete with rusted oil basins, chicken coops, barbed wire fencing, and other assorted debris. In short, it is difficult for this Court to comprehend how the variance would have an undesirable effect on the character of the neighborhood and how the buffer zone is necessary to protect that supposed character (see, Town Law §267-b(3)(b)(1)); *ELN Realty Corp. v Zoning Bd. of Appeals of the Town of Greenburgh*, 261 AD2d 619, 690 NYS2d 700 [1999]). Furthermore, the condition is seemingly the result of one neighbors opposition to the prior applicant's building plans and bears no relation to the Petitioner's proposed use of the parcel. For all of the foregoing reasons the condition requiring the buffer zone is annulled (see, *Matter*

of *Baker v Brownlie*, 248 AD2d 527, 670 NYS2d 216 [1998]; *D'Angelo v Zoning Bd. of Town of Webster*, 229 AD2d 945, 645 NYS2d 378 [1996]).

With respect to that condition requiring the Petitioner to pave the right of way from the edge of the existing pavement up to and including the driveway of the parcel with drainage, that condition is hereby upheld. The record establishes that the Board's imposition of this condition was supported by substantial evidence and had a rational basis. The paved roadway is necessary for the direct and incidental use of the parcel and minimizes any adverse impact on the area surrounding the parcel.

Finally, Petitioner's claim for punitive damages is dismissed. The degree of misconduct necessary to warrant punitive damages has been defined in various ways, but all definitions involve the idea of "intentional, wanton, willful, or malicious commission of some illegal act, or of such a perverse and obstinate failure to discharge a duty as warrants a presumption of a reckless indifference to the rights of others which is equivalent to intentional conduct (see, *Kartagener v Grando*, 1997 N.Y. Misc. LEXIS 405 [1997]; *DaCosta v Technico Construction Corp.*, 74 Misc.2d 583, 344 NYS2d 967 [Civil Ct of the City of N.Y., Cty. Of N.Y. 1973]). Such is not the case in the instant proceeding.

Accordingly, Petitioner's application is hereby granted to the extent that the Board's imposition of buffer and revegetation condition to the approval of the application is annulled and is dismissed in all other aspects.

Dated: April 15, 2002

RALPH F. COSTELLO

Ralph F. Costello
J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION