

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

X
In the Matter of the Application of

DAVID NUNNALLY,

Petitioner,

To commence the statutory time
for appeals as of right (CPLR 5513
[a]), you are advised to serve a
copy of this order, with notice of
entry, upon all parties.

For a Judgment Pursuant to Article 78
Of the Civil Practice and Rules

INDEX NO.: EF000196-2020

Petition Date: May 4, 2020

-against-

ZONING BOARD OF APPEALS OF THE TOWN OF
NEW WINDSOR and WINDSOR HOSPITALITY,
LLC,

Respondents.

X
BARTLETT, J.

The following papers numbered 1 to 71 were read on this CPLR Article 78 petition for a
judgment vacating and annulling the "Memorandum of Decision" for Case #19-29 dated
December 9, 2019, granting Respondent Windsor Hospitality's variance application:

Notice of Petition - Petition / Exhibits A-D	1-6
Answer (Windsor Hospitality) - Affirmation (Osterhoudt) / Exhibits A-M - Memorandum.....	7-22
Answer (Zoning Board) - Certified Record / Exhibits 1-42 - Affidavit (Kane) - Memorandum	23-68
Reply Affirmation (Bazydlo) / Exhibits A-B.....	69-71

Upon the foregoing papers the Petition is disposed of as follows:

Windsor Hospitality, LLC (“Windsor Hospitality”) is the owner of real property located at 915 Union Avenue in the Town of New Windsor (“The Town), which is approximately 6.8 acres in size and improved by a two-story 97-room hotel (“The Property”). The Property is in the Highway Commercial (HC) Zoning District. The stated purpose of the HC Zoning District is “to encourage a full range of commercial activity along major highways.” Town of New Windsor Zoning Code §300-3[A][8]. The Property is on the west side of Union Avenue, with access from Route 300.

The Petitioner is the owner of real property located at 30 Liner Road. His property is improved by a single-family dwelling. Petitioner’s residence is also in the HC Zoning District, and is situated in a neighborhood of various commercial properties including the existing hotel, a Wal-Mart Supercenter, a self-storage facility, and a Sonic-Drive Thru. The New York State Thruway is approximately 560 feet to the west of Petitioner’s property. Petitioner’s home is separated from the subject Property by Liner Road.

In 2015, Windsor Hospitality applied to the Town Zoning Board of Appeals (“ZBA”) for area variances in order to construct two new hotels on the property: a five-story, 102-room hotel (“Hotel A”), and a four-story, 88-room hotel (“Hotel B”) (hereinafter referred to as “the Project”). Hotels are uses “permitted by right” under the Town Zoning Code. *See*, Town of New Windsor Zoning Code 300 Attachment 2:4. The closest corner of Hotel A is approximately 250 feet from the closest corner of Petitioner’s property. The southwesterly corner of Hotel B (i.e. the location that is closest to the southerly property line requiring the side yard variance) is approximately 1,050 feet from Petitioner’s property.

In 2016, the ZBA granted the application for substantially similar variances as are at issue here. However, those variances were annulled by the Court on SEQRA procedural grounds

in an Article 78 proceeding brought by a different petitioner. *See, Banta Realty Newburgh, LLC v. Zoning Bd. Of Appeals of New Windsor*, Orange County Index No. 1659-2016.

Over a two-year period, the SEQRA review was conducted. In 2019, upon completion of the process, the Town Planning Board as lead agency issued and adopted a positive Statement of Findings. After the Environmental Impact Statement ("EIS") and SEQRA process was completed in accordance with the Court's 2016 Order, Windsor Hospitality in October 2019 again applied to the ZBA for area variances.

The proposed improvements required the following variances:

Hotel A

<u>Bulk Regulation</u>	<u>Minimum Required</u>	<u>Proposed</u>	<u>Variance Requested</u>
Maximum Building Height	60 feet	73 feet	13 feet

Hotel B

<u>Bulk Regulation</u>	<u>Minimum Required</u>	<u>Proposed</u>	<u>Variance Requested</u>
Maximum Building Height	16.7 feet	63 feet	47 feet
Minimum Required Side Yard	30 feet	16 feet	14 feet
Minimum Required Total Side Yard	70 feet	62.5 feet	7.5 feet

On November 25, 2019, the ZBA held a public hearing on Windsor Hospitality's application. As an involved agency, the ZBA voted unanimously to accept the Planning Board Findings as its SEQRA Findings. Petitioner spoke in opposition to the Variances. Upon closing the public hearing, the ZBA voted to approve the requested variances. The ZBA's findings and determination were memorialized in a written Memorandum of Decision Granting Certain Variances.

Petitioner brings this action arguing that the ZBA's granting of the variance application was "arbitrary, capricious, an abuse of discretion and contrary to law." Specifically, Petitioner contends that the ZBA's approval of the variances violated Town Law §267-b(3), and that the ZBA's determination did not include all variances required for the project.

"Local zoning boards have broad discretion in considering variance applications, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary and capricious, or an abuse of discretion." *Harn Food, LLC v. DeChance*, 159 AD3d 819 (2d Dept. 2018). "A determination of a zoning board should be sustained upon judicial review if it has a rational basis and is supported by substantial evidence." *See, Matter of Pecoraro v. Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 (2004). "A determination is rational if it has some objective factual basis, and courts consider "substantial evidence" only to determine whether the record contains sufficient evidence to support the rationality of the determination being questioned." *Harn Food, LLC v. DeChance, supra*, 159 AD3d at 819-820 [internal citations omitted].

"In determining an application for an area variance, a zoning board must engage in a balancing test, weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the area variance is granted." *Matter of Neeman v. Town of Warwick, et al.*, 2020 NY Slip Op 03113 (2d Dept., June 3, 2020). A zoning board must consider (1) whether granting the variance would result in an undesirable change in the character of the neighborhood, or a detriment to neighboring properties, (2) whether the benefit sought can be achieved by some method other than an area variance, (3) whether the requested variance is substantial, (4) whether granting the variance will have an adverse impact

upon the physical or environmental conditions in the neighborhood, and (5) whether the alleged difficulty is self-created. *See*, Town Law § 267-b[3][b]. Consistent with this deferential “rational basis” standard of review, a ZBA is “not required to justify its determination with supporting evidence with respect to each of the five [statutory] factors, so long as its ultimate determination balancing the relevant considerations was rational.” *Matter of Merlotto v. Town of Patterson ZBA*, 43 AD3d 926, 929 (2d Dept. 2007).

As an initial matter, Windsor Hospitality argues that Petitioner lacks standing to challenge the ZBA’s issuance of variances with respect to Hotel B, since his property is approximately 1,050 feet from Petitioner’s Property. The Court agrees. Petitioner’s property is not close enough to Hotel B to be afforded a presumption of injury-in-fact based on proximity alone. *See, Matter of Riverhead Neighborhood Preserv. Coalition, Inc. v. Town of Riverhead Town Bd.*, 112 AD3d 944, 944-945 (2d Dept. 2013) (no presumption at 1,300-2,000 feet); *Matter of Gallahan v. Planning Bd. of City of Ithaca*, 307 AD2d 684, 685 (3d Dept.), *lv denied* 1 NY3d 501 (2003) (no presumption at 700 feet); *Matter of Oates v. Village of Watkins Glen*, 290 AD2d 758, 760-761 (3d Dept. 2002) (no presumption at 530 feet); *Matter of Buerger v. Town of Grafton*, 235 AD2d 984, 985 (3d Dept.), *lv denied* 89 NY2d 816 (1997) (no presumption at 600 feet). Furthermore, Petitioner’s allegations are insufficient to demonstrate that he would suffer an environmental injury different from that of the members of the public at large to demonstrate standing with respect to Hotel B. *See, Matter of Riverhead Neighborhood Preserv. Coalition, Inc., supra*, 112 AD3d at 945).

However, even if the Court were to find that Petitioner had standing with respect to Hotel B, the record evidences that the ZBA’s review of Windsor Hospitality’s application and its

determination to grant the requested variances were well-supported, and that the ZBA specifically examined each of the provisions of the Town Law.

The ZBA fully considered the matter and determined that the variances would not produce an undesirable change in the character of the neighborhood or create a detriment to nearby properties. In this regard, the ZBA considered that the Property is in the HC Zoning District, where hotels are a permitted use as of right. Moreover, the Property has been in continuous use and occupied as a commercial property with an existing hotel in operation. The ZBA found that the Project would not “significantly change the overall similarity in size and nature of the subject property compared to other commercial properties in the neighborhood,” would “represent an overall improvement in the appearance and use of [the] property,” and would be “similar in use, quality and design to other improved commercial properties in the neighborhood.” The ZBA also considered that the surrounding neighborhood is inherently commercial in character, consisting of a Walmart Supercenter, a Sonic Drive-Thru, and a self-storage unit in addition to the existing hotel. Moreover, the record establishes that the design of the façade of the proposed hotels is broken up horizontally and vertically by stepping up-and-down, and in-and-out, to give the appearance that the buildings are not one structure, but a series of smaller-scaled buildings.

The ZBA next rationally determined that the benefit sought by Windsor Hospitality could not be achieved by some method feasible for it to pursue other than an area variance. The ZBA properly considered the unique configuration of the Property, including its geometric and topographical constraints, existing access point and nonconformities, as well as the location of the existing hotel in determining that development of the property could not be achieved by some other feasible method. Contrary to Petitioner’s contentions, the ZBA had before it and

reviewed the Draft Environmental Impact Statement, Final Environmental Impact Statement, and the Planning Board Findings. Windsor Hospitality presented alternative plans for the property, and the Planning Board determined that the proposed Project “is one which minimizes or avoids adverse environmental impacts to the maximum extent practicable.” The ZBA adopted the Planning Board’s findings as its own. Thus, alternatives were considered and rejected.

The ZBA also correctly determined that the area variances were not substantial. Here, Hotel A, which is the building in proximity to Petitioner’s property, requires a 13-foot, or 21% height variance. Courts have regularly found similarly sized variances to be insubstantial. *See, Matter of Suffern v. Zoning Bd. of Appeals of Town of Greenville*, 17 AD3d 373, 374 (2d Dept. 2005) (20-foot variance found to be “relatively minimal”); *Matter of Townwide Properties, Inc. v. Zoning Bd. of Appeals of Town of Huntington*, 143 AD2d 757, 759 (2d Dept 1988) (finding 10-foot variance at setback line and 5-foot variance at side yard to be a minimal deviation from town regulations); *Matter of N. Country Citizens for Responsible Growth, Inc. v. Town of Potsdam Planning Bd.*, 39 AD3d 1098, 1102 (3d Dept 2007) (deeming a 27% variance insubstantial). In addition, as more fully discussed below, the proposed visual and light mitigation serving to limit any adverse impact, also supported the ZBA’s finding that the variance is insubstantial. *See, Matter of N. Country Citizens for Responsible Growth, Inc., supra*, 39 AD3d at 1102.

Contrary to Petitioner’s contentions, the ZBA’s finding that granting the area variances would not have an adverse impact on the physical or environmental conditions in the neighborhood, except as set forth and as mitigated by the Environmental Impact Statement adopted by the ZBA, is supported by the record. Notably, the Project would result in improved

water quality over existing conditions due to the installation of a stormwater management system. With respect to Petitioner's allegations of visual impacts, the façade of the proposed hotels is, as noted above, designed to mitigate this impact. Moreover, the Project includes "a combination of deciduous trees (red oak) and evergreen trees (blue spruce), and a 6-foot-tall fence . . . along Liner Road to provide screening of the buildings from the residential area to the north." With respect to lighting impacts, the Project includes the use of house side shields and cutoff fixtures in addition to screening and the preservation of buffers to mitigate these impacts. Furthermore, Petitioner has not pointed to any evidence in the record which would tend to support his allegations that there is hazardous material on the project site which the ZBA failed to consider. In addition, while Petitioner claims that noise impacts were not addressed, he does not identify any specific noise impact the ZBA failed to consider and disregards the fact that the Project is located in a substantially commercial neighborhood adjacent to the New York State Thruway and Route 300, a four-lane thoroughfare. *See generally, Neville v. Koch*, 79 NY2d 416, 425 (1992) ("An agency's responsibility under SEQRA must be viewed in light of a 'rule of reason;' not every conceivable environmental impact, mitigating measure or alternative need be addressed in order to meet the agency's responsibilities").

Lastly, "[a]lthough one of the factors to be considered is whether the difficulty is self-created, this factor is not determinative." *Matter of Lessings, Inc. v. Scheyer*, 16 AD3d 418, 419 (2d Dept. 2005). *See, Peccoraro v. Humenik*, 258 AD2d 465, 465 (2d Dept. 1999). Here, the ZBA duly considered that "the design and intended use of the proposed new buildings and the circumstances of this matter do not suggest that the requested variances should be denied on the basis that the need for same was self-created by the Applicant in such manner as to estop the Applicant from seeking same."

The record before the Court demonstrates that the ZBA engaged in the required balancing test and considered the relevant statutory factors. Its conclusions were supported by substantial evidence in the record, and its determination was not irrational, arbitrary or capricious. *See, Matter of Pasceri v. Gabriele*, 29 AD3d 805, 806 (2d Dept. 2006); *Matter of N. Country Citizens for Responsible Growth, Inc. v. Town of Potsdam Planning Bd.*, *supra*, 39 AD3d 1098, 1102 (3d Dept. 2007).

Petitioner next contends that New Windsor Hospitality did not apply for and the ZBA did not consider and evaluate all area variances required for the project. Petitioner's claims are not properly before this Court. The ZBA's jurisdiction is limited to the area variances requested in the application before it. *See generally, Matter of Angel Plants, Inc. v. Schoenfeld*, 154 AD2d 459, 461 (2d Dept. 1989).

The Court has considered the Petitioner's remaining contentions and considers them to be without merit.

It is therefore

ORDERED, ADJUDGED AND DECREED, that the Petition is denied and the proceeding is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: June 15, 2020
Goshen, New York

ENTER:


HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE

TO: All Counsel of Record via NYSCEF