

TOWN OF LEWISBORO
Westchester County, New York

RECEIVED BY

MAY 27 2022

ZONING BOARD OF APPEALS
TOWN OF LEWISBORO
MINUTES

Town Clerk
Town of Lewisboro

Minutes of the Meeting held by the Zoning Board of Appeals on Wednesday, April 27, 2022 at 7:30 P.M., at the Town of Lewisboro Offices, 79 Bouton Road, South Salem, NY.

Board Members Present: Robin Price, Jr., Chair
Carolyn Mandelker
Thomas Casper
Daniela Infield
Todd Rendo

Also Present: Donna Orban, Secretary
Gregory Folchetti, Town of Lewisboro Attorney
Absent: Joseph Angiello, Building Inspector

The Meeting was called to order at 7:38 P.M. by Chair Price who introduced the members of the Board and noted the emergency exits. He announced that the next ZBA meeting is scheduled for Wednesday, May 25, 2022.

I. Review and adoption of minutes for March 23, 2022.

The Board reached consensus to approve the meeting Minutes for March 23, 2022. Mrs. Mandelker made a motion to approve the minutes. The motion was seconded by Mr. Casper. To approve: Mrs. Mandelker, Mr. Casper, Mrs. Infield, Mr. Rendo and Mr. Price. To Abstain: None.

II. OTHER BUSINESS

CAL. NO. 10-20-BZ

Application of Kenneth Askildsen, [Askildsen, Kenneth, owner of record], 82 Mill River Road, South Salem, NY, for a variance in the matter of a proposed replacement dwelling that will have a southeast front yard setback of 21.3' whereas 50' are required per Article IV Section 220-23E, a proposed replacement dwelling overhang that will have a southeast front yard setback of 20' whereas 50' are required per Article IV Section 220-23E, a proposed replacement dwelling that will have a southwest side yard setback of 33.5' whereas 50' are required per Article IV Section 220-23E, a proposed deck that will have a southeast front yard setback of 26.5' whereas 50' are required per Article IV Section 220-23E, a proposed replacement dwelling that will have a northeast side yard setback of 36.5' whereas 50' are required per Article IV Section 220-23E, a proposed covered porch that will have a northeast side yard setback of 32.5' whereas 50' are required per Article IV Section 220-23E, a proposed covered porch steps that will have a northeast side yard setback of 30.5' whereas 50' are required per Article IV Section 220-23E of the Town of Lewisboro Zoning

Code and a proposed building coverage that will have 14.78% whereas 6% is the maximum per Article IV Section 220-23E of the Town of Lewisboro Zoning Code.

The property is located at (#82) Mill River Road, South Salem, NY and designated on the Tax Map as Sheet 42 Block 10299 Lot 83 in an R-4A Residential District consisting of approximately .467 acres.

“Remand by Order of Westchester County Supreme Court, Hon. Anne E. Minihan, A.J.S.C. dated February 25, 2021.”

Jody Cross, attorney representing the owner, present
Mr. and Mrs. Askildsen, owner of record, present

Mr. Price introduced, Greg Folchetti.

Mr. Folchetti explained how this was an application that was previously denied for a series of area variances for setback and coverage. There was a decision order of the Supreme Court of New York, County of Westchester, Honorable Anne E. Minihan, A.J.S.C. presiding, from February 2022. The judge remanded the order back to the board for further proceedings. Mr. Folchetti explained that the board would make a determination on prior record, with respect to the application. There is no further testimony, there is no further submission of evidence, and no public comment. The applicant and or council is given a chance for a brief comment before the board begins the process of remand.

Ms. Cross introduced herself and the legal firm of Zarin & Steinmetz as representing Mr. and Mrs. Askildsen. Ms. Cross commented that she felt that the application is slightly different from the original notice, because it was reduced. Mr. Folchetti acknowledged that this notice was from the last application that is sited in the agenda. Ms. Cross commented that the denial was annulled and was remitted back to the board. Ms. Cross asked the board to grant the variances that were set forth in the record and the reasons that were highlighted in the court’s decision, and subject to the client would also agree to reduce the studio structure in order to reduce the extent of the variance.

Mr. Price read the application which was posted as the public notice. Mr. Price explained that the board is to reexamine the five factors that are used to determine the granting or denial of variances.

Mr. Price read question number one of the five factors. Mr. Price said that the board discussed the proximity to the street and the proximity to the side and front lines. The building would be out of character with the other existing houses in the area.

Mr. Price asked the board for any other comments.

Mr. Casper responded that the items in factor number one were found to be substantial.

Mr. Price read factor number two and responded that the board went over the sizes of the areas. Mr. Price noted that they have a 14.78 coverage when 6% is allowed by code; this is more than twice that is allowed in the code. Mr. Price commented that the house be reduced or require more land to make the lot bigger.

Ms. Cross questioned the figures that were listed were not the ones in the final variance. Ms. Cross stated that the variance was reduced. The figures in the court decision are the actual figures to be considered.

Mr. Rendo questioned the number in the agenda. Ms. Cross said that the numbers are greater.

Mr. Price said that he had a proposal of 13.60. Ms. Cross said that was correct. Mr. Price stated again that the proposal is more than twice that which is permitted by code.

Mr. Price asked the board if they have anything more to add to question number two.

Mr. Casper reiterated that the percentage is more than twice which is permitted; is viewed as being substantial and a significant increase.

Mr. Price read factor number three and replied that the board has gone over whether the requested area variance is substantial. Mr. Price commented that the board partially answered that with a coverage being over two times what is permitted, and the size of the dwelling being proposed. The square footage had also been discussed. The board had asked that it be reduced, and it had been once or twice, but not much of a reduction.

Mr. Price asked the board if there were anything more to add.

Mrs. Infield stated that according to the court document the existing coverage was 14.49% and then proposed to 13.60%. Mrs. Infield commented that this was still not a percentage point and is over double the 6% allowable by code. This was discussed previously.

Mr. Rendo reference the totality of the proposed request of 22.7' which is 45% over and is out of character.

Mr. Price read factor number four. Mr. Price answered the question that there are not any environmental conditions as far as the board is concerned. Mr. Price noted that the environment concerns would have to go before the Planning Board, Health Department and the Wetlands Office. Mr. Price said the answer to factor four is, no.

Mr. Casper offered his opinion as being different and that the property is one giant wetland buffer. He feels in theory that it is an environmental infringement.

Mr. Price read factor number five. Mr. Price stated that he felt the application is self-created, since it is asking to not conform to any of the side or front yard setbacks. The coverage is over two times what is permitted by the code.

Mrs. Infield went over the numbers of the setbacks from the court document, attached as exhibit A. Mrs. Infield reiterated that the proposal is substantial. Mrs. Infield said that board was in its discretion to deny the request. She told how the board looked at the proposals repeatedly. Mrs. Infield stated that this request was substantial.

Mr. Rendo agreed with Mrs. Infield's comment and reiterating the totality of the application.

Mr. Price asked the board to move or deny the application.

Mr. Folchetti advised the board that if they are done with their discussion of the five factors, they are to move on their action one way or the other.

Mr. Price asked the board to make a motion.

Mr. Casper made a motion to deny the application. Mrs. Infield second the motion. To Deny: Mr. Casper, Mrs. Mandelker, Mr. Price, Mrs. Infield and Mr. Rendo. To Approve: none, To Abstain: none.

PUBLIC HEARING

III CAL. NO. 07-22-BZ

Application of Michael Mongiello [Mongiello, Michael, owner of record], 26 Salem Hill Road, South Salem, NY for the following variance of the proposed generator will have a front yard setback of 15' whereas 50' are required per Article IV Section 220-23E of the Town of Lewisboro Zoning Code.

The property is located on the west side of (#26) Salem Hill Road, South Salem, NY designated on the Tax Map as Sheet 0031 Block 10805 Lot 077, in a R-2AC, Two-Acre Residential District consisting of approximately 2.00 acres.

There was no objection to the notice of public hearing as published.

Mr. Mongiello, owner of record, present
Mr. Duffy, neighbor on Bayberry Lane, present

Mr. Price asked Mr. Mongiello to present the application.

Mr. Mongiello spoke about the placement of the proposed generator in the front of the house. It was determined that this is the only acceptable location due to setbacks on the side of the house, septic field, utilities and the feasibility of the project. Mr. Mongiello mentioned that he had letters of support from three of his neighbors that would be affected.

Mrs. Mandelker asked Mr. Mongiello to clarify where the front entrance is. Mr. Mongiello explained the footprint of the house. Mrs. Mandelker asked Mr. Mongiello if there is no practical alternative to place the generator anywhere else on the property?

Mr. Mongiello replied that it is the only place for the generator.

Mr. Price asked where the utility service is located.

The board discussed other alternatives for the location of the proposed generator.

Mrs. Mandelker acknowledged that the generator would be screened. Mr. Mongiello said he would put in more screening if needed.

Mr. Mongiello submitted a site plan to the board at the meeting. Mr. Mongiello showed the board pictures of the site of the proposed generator and the screening that is currently there.

Mrs. Mandelker and Mr. Price talked about another alternative to the placement of the generator.

Mr. Price asked if anyone from the public wanted to comment on the application.

Mr. Duffy introduced himself and commented that he was in support of the application.

Mr. Price asked if there were any more comments from the board. No comments.

Mr. Rendo made a motion to approve the application. Mrs. Infield second the motion. To Approve: Mr. Casper, Mrs. Mandelker, Mr. Price, Mrs. Infield and Mr. Rendo. To Deny: none, To Abstain: none.

CAL. NO. 08-22-BZ

Application of Michael Liffland, [Liffland, Michael V. & Corrie L., owner of record], 1187 Route 35, South Salem, NY for the following variance of a proposed 6ft high fence whereas a 4ft high fence is allowed per Article IV Section 220-12E of the Town of Lewisboro Zoning Code.

The property is located on the south side of (#1187) Route 35 South Salem, NY designated on the Tax Map as Sheet 0031, Block 12669 Lot 030, in an R-1/2A, Half-Acre Residential District consisting of approximately 1.19 acres.

Mr. and Mrs. Liffland, owner of record, present

Mr. and Mrs. Thompson, neighbor, present

Mrs Thompson of 1185 Route 35, South Salem objected to the notice of public hearing as published.

Mrs. Thompson approached the board with her objection about the fence, stating that she wanted more information about the application.

Mrs. Infield asked Mrs. Thompson if she had seen the plan. Mrs. Thompson answered yes to seeing the plan.

Mr. Casper suggested to Mr. Price if maybe the applicant wanted to adjourn for the meeting and present at another meeting.

Mr. Price said he wanted the applicant to present the application.

Mr. Price asked Mr. Liffland to present the application.

Mr. Liffland explained to the board that he is applying for a variance of an additional two feet on a proposed fence. He commented that he thinks Mrs. Thompson is concerned with the placement of the fence.

Mrs. Mandelker asked Mr. Liffland to explain the need for a six-foot fence.

Mr. Liffland replied that living next to Route 35 this would be good for his children and dog. He stated that a four-foot fence is an obstacle, and a six-foot fence is a barrier.

Mrs. Infield asked if the proposed fence would be in the back portion of the property.

Mr. Liffland answered yes that it is the back portion of the property.

Mrs. Mandelker spoke to Mr. Liffland about her site visit and how she could understand the wanting of the six-foot fence in the front to block out the noise from Route 35. Mrs. Mandelker questioned the need for the fence in the back since the property is wooded nothing seems to be back there. Mrs. Mandelker questioned why the need for the fence to be solid as opposed to being open.

Mr. Liffland replied that the property goes back to Spring Street. Mr. Liffland commented that this is the most protection he would be able to give his family. Mr. Liffland added that he investigated different options for the fence and there would be an added cost difference, this option was feasible.

Mr. Price asked Mrs. Thompson to address the board with her concerns.

Mrs. Thompson stated that she is concerned about the wall like look that the fence will have. She would like to have further discussions with Mr. and Mrs. Liffland before coming to any conclusions, as to the style and height of the fence.

Mrs. Infield spoke that the applicant can erect a four-foot fence but is requesting a variance for an additional two feet in height.

Mr. Price suggested that the application be tabled for one month. This would allow time for Mrs. Thompson and Mr. and Mrs. Liffland to talk about the fence.

Mr. Liffland spoke of how he wanted to continue with the presentation of the application and was hoping to get a vote this evening.

Mrs. Thompson commented that she wanted to have more time to find out more information.

Mrs. Liffland conveyed her concerns about delaying the project another month.

Mr. Price explained options to Mr. and Mrs. Liffland, that the application could be voted on as is; a shorter fence; different fence; or move the fence down more to the setback line.

Mr. Price said the application would be tabled for one month.

CAL. NO. 09-22-BZ

Application of Hogan and Rossi, [Dayton, Renea Topp & Duncan N., owner of record], 62 Mead Street, Waccabuc, NY for the following variance of a proposed garage that will have a floor area of 1775 whereas 600 square feet is the maximum permitted per Article IV Section 220-23D(11) of the Town of Lewisboro Zoning Code.

The property is located on the west side of (#62) Mead Street, Waccabuc, NY designated on the Tax Map as Sheet 0022, Block 10802 Lot 070, in an SCR-4A, Special Character District, Four-Acre Residential District consisting of approximately 6.15 acres.

There was no objection to the notice of public hearing as published.

Mr. Rossi, attorney for applicant, present
Mr. O'Leary, architect, present

Mr. Rossi introduced himself from Hogan and Rossi and introduce Mr. O'Leary from Two Tall Trees Designs. Mr. Rossi presented the application on behalf of the owners of record. Mr. Rossi described the property and the proposed garage. The garage is designed to keep consistent with the existing house. There is a single-story garage existing, that building will be demolished, and the proposed larger two-story garage and grotto constructed. Mr. Rossi explained the grotto as being a covered seating area which would function as a pool house. Mr. Rossi commented that the plan is to stay within the already disturbed portion of the property. The proposed project is entirely in the side yard setback. Mr. Rossi commented that there have been no objections from the neighbors and there was letter of support from neighbor Michael Boublik.

Mrs. Mandelker asked if the height of the proposed garage will be same as the current garage with the cupola?

Mr. O'Leary answered that the existing cupola will be going away, and a chimney will be in its place. The ridge line of the building will be going up approximately three feet. The shape of the roof will be the same. Mr. O'Leary stated that the proposed roof will be eighteen feet in height whereas twenty feet is allowed, mean of the roof.

Mr. Casper asked what the difference is with the height of the building now and then the proposed building.

Mr. O'Leary replied that the proposed height will be twenty-two- and one-half feet, currently with the cupola its twenty-four- and one-half feet. It will be two feet lower than the existing cupola.

Mrs. Mandelker asked if the grotto will be open all year.

Mr. O'Leary replied that it will be open all year. It is open on one side.

Mrs. Mandelker asked if the building would be used as an apartment.

Mr. O'Leary assured that the building is an office.

Mr. Casper commented on the open space of the property. There did not seem to be an impact on anyone.

Mrs. Infield commented that it will be in good character and does not seem to change the look of the house or the neighborhood. It will conform well with the criteria.

Mr. Rendo commented that each one is taken individually.

Mrs. Mandelker made a motion to approve the application. Mr. Casper second the motion. To Approve: Mr. Casper, Mrs. Mandelker, Mrs. Infield and Mr. Rendo. To Deny: none, To Abstain: Mr. Price.

IV. CORRESPONDENCE & GENERAL BUSINESS

The board reached consensus to adjourn the meeting at 8:45 P.M.

Respectfully submitted,


Donna Orban

Secretary, Zoning Board of Appeals

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
In the Matter of the Application of

KENNETH ASKILDSEN,

Petitioner,

DECISION & ORDER

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

Index No. 61853/2021

-against-

TOWN OF LEWISBORO ZONING BOARD OF APPEALS,

Respondent.
-----X

MINIHAN, J.

The following papers, numbered 1 to 12, were read on this petition to vacate, annul, and reverse the determination of Respondent, the Town of Lewisboro Zoning Board of Appeals (hereinafter "ZBA"), denying Petitioner, Kenneth Askildsen, area variances to reconstruct a single-family home (hereinafter "Proposed Home") on a legally preexisting, nonconforming building lot.¹ For the reasons that follow, the ZBA's decision is vacated and annulled, and the matter is remitted to the ZBA for its proper consideration of the variance application and for detailed findings in support of that determination.

Notice of Petition/Verified Petition/Memorandum of Law/Exhibits A-L	1-4
Mr. Askildsen's Affidavit in Support of Petition/Architect Hans Hansen's Affidavit in Support of Petition	5-6
ZBA's Answer/Memorandum of Law/Certified Return/Corrected	7-11
Certified Return/Exhibits A-Z & AA	
Memorandum of Law in Reply	12

Factual and Procedural History

Petitioner, Kenneth Askildsen, owns the property subject to this proceeding, which is located at 82 Mill River Road in South Salem, New York, also identified on the Town of Lewisboro (hereinafter "Town") Tax Map as Sheet 42, Block 10299, Lot 83 (hereinafter "Subject Property"). Mr. Askildsen has owned the Subject Property since 1997.

¹ The Court also viewed the recordings of the ZBA meetings held herein. A thumb drive of these recordings was provided by the ZBA.

The Subject Property is approximately 0.467 acres (100 feet wide by 200 feet deep) and is located within the Town's R-4A One-Family Residential Zoning District which requires a minimum lot size of 4 acres. The Subject Property is presently improved with a single-family home as well as a detached two-story accessory garage/barn/studio structure (hereinafter "Studio") located behind the home. The home was originally constructed over a century ago, predating the Town's R-4A zoning designation. The home has had the current footprint for over 50 years. The Studio was constructed in or about 1974, was issued a Certificate of Occupancy (hereinafter "CO") from the Town on or about June 13, 1974, and is therefore, a legal preexisting accessory structure. The Subject Property is a legal preexisting, nonconforming, and undersized lot. As such, the existing home does not comply with several minimum bulk regulations required in the R-4A Zoning District, including the minimum 50 feet required front and side yard setbacks or the 6% maximum lot coverage.

The Subject Property is surrounded on three sides by approximately 30 acres of wooded Town-owned land and is in a regulated wetland buffer area. The closest residential lot to the northeast of the Subject Property on Mill River Road, 74 Mill River Road, is separated from the Subject Property by 135 feet of parkland. The Subject Property and the surrounding lots are part of a long-established pattern of development in the area. Several nearby lots are also under 4 acres, including neighboring 74 Mill River Road.

In 2011, a fire heavily damaged the existing home on the Subject Property. At the time, tenants occupied the Subject Property. Petitioner, Mr. Askildsen, was prevented from rebuilding the home sooner because of insurance issues in the wake of the fire.

Petitioner, Mr. Askildsen, intends to demolish the existing home and build the Proposed Home to use as his and his wife's primary residence. They also wish to utilize the Studio as a personal art studio and creative space.² Since the Subject Property is undersized, no home could be constructed that would comply with the bulk requirements for a single-family home in the R-4A Zoning District.³ Any home that would be built thereon would require variances, including if Petitioner were to reconstruct the existing home exactly as it was before the fire.

In order to seek variances, and proceed to the ZBA, the Town first requires submission of materials to the Building Department to obtain a Zoning Denial. In or about June 2019, an initial set of architectural plans was prepared and submitted by Petitioner to the Town Building Department for initial permit review. After discussions with the Building Department, Petitioner revised the plans and submitted them for formal permit review in or about March 2020. An undated⁴ Zoning Denial was received thereafter from the Building Department, finding that pursuant to Article IV Section 220-23E of the Town's Zoning Code, eight variances would be required to construct the Proposed Home.

² According to Petitioner's Verified Petition and the Affidavit of Mr. Askildsen, Mr. Askildsen is an amateur artist and his wife is a renowned portrait artist who intends to use the Studio as a personal art studio.

³ In architect Hans Hansen's Affidavit, he avers that there is no building envelope that would be able to comply with the 50 foot side yard setbacks required by the R-4A Zoning District since the Subject Property is only 100 feet wide.

⁴ The Town Building Department subsequently sent a duplicate letter containing a date, June 23, 2020.

Article IV Section 220-23E of the Town Zoning Code delineates the dimensional and bulk regulations for residential districts within the Town. In order to construct the Proposed Home, Petitioner seeks side yard (both northeast and southwest), front yard, and lot coverage variances. The variances sought are as follows:⁵

Variance Description	Req'd R-4A	Existing	Proposed	Feet/% of Variance
Front Yard Setback, Southeast (Dwelling)	50'	15.3'	27.3	22.7'/45%
Front Yard Setback, Southeast (Dwelling Overhang)	50'	N/A	26'	24'/48%
Side Yard Setback, Southwest (Dwelling)	50'	33.5'	33.5	16.5'/33%
Side Yard Setback, Southwest (Proposed Deck)	50'	28.1'	26.5'	23.5'/47%
Side Yard Setback, Northeast (Dwelling)	50'	40'	36.5'	13.5'/27%
Side Yard Setback, Northeast (Covered Porch)	50'	N/A	30.5'	19.5'/39%
Side Yard Setback, Northeast (Covered Porch Steps)	50'	N/A	28.5'	21.5'/43%
Building Coverage	6% allowable	14.49%	13.60%	7.6%

On or about May 28, 2020, Petitioner submitted his initial application for variances to Respondent, the ZBA.

The application was heard by the ZBA at four separate meetings, held virtually, on July 29, 2020, September 30, 2020, February 24, 2021, and May 26, 2021.

At the first public meeting on July 29, 2020, the ZBA expressed its concern regarding the Subject Lot's lot coverage and a third floor being added to the home. The ZBA considered oral and written comments from three neighbors who were in opposition to the Proposed Home. At the conclusion of the meeting, Petitioner's application was adjourned to allow Petitioner's architect, Hans Hansen, to present additional technical information regarding the dimensions of the Proposed Home.

The ZBA again considered the variances at the meeting held on September 30, 2020. Petitioner, Mr. Askildsen, was present with his architect, Mr. Hansen, who explained the benefits sought by Petitioner and presented the architectural details of the Proposed Home. The ZBA expressed concern that the Proposed Home was two times the Town Code requirement and offered a suggestion that the Studio be removed, and the Proposed Home relocated further back

⁵ Petitioner made changes to the design of the Proposed Home to reduce the nonconformities after hearing from the ZBA and neighbors at the meetings held in this matter, discussed *infra*. The following chart has been copied from page 7 of Petitioner's Verified Petition and the figures reflect the final variances sought at the last meeting held on May 26, 2021, wherein these variances were denied by the ZBA.

on the property. Mr. Hansen explained that the house could not be relocated on the Subject Property due to wetland constraints and septic concerns. The ZBA also believed the height of the Proposed Home was too tall for the "small" and "narrow" lot. Two of the same neighbors from the July 2020 meeting reiterated their opposition to the variances and the Proposed Home. The ZBA Chairman, Mr. Price, suggested a motion be made to deny the application or the applicant return in two months with a revised plan. Petitioner elected to revise the plans for the Proposed Home.

In a letter dated January 20, 2021, Petitioner, through his attorneys, Jody T. Cross, Esq. and Matthew J. Acocella, Esq., advised the ZBA of the specific variances being sought in connection with the Proposed Home and submitted an updated drawing of the proposed Home.⁶ In this letter, counsel for Petitioner examined each of the five criteria as set forth in the balancing test pursuant to New York Town Law § 267-b(3b)(1-5) and argued for the issuance of the requested variances, stating that the benefit to Petitioner to rebuild the Proposed Home in its existing location would outweigh any potential detriment to the neighborhood or community.

During the February 24, 2021 meeting, Petitioner was represented by attorney Jody T. Cross. Petitioner, Mr. Askildsen, and architect, Mr. Hansen, were present. The ZBA's attorney, Gregory L. Folchetti, was also present. Ms. Cross reiterated the benefits sought by Petitioner in seeking the variances for the Proposed Home and reviewed the statutory variance factors as laid out in the letter submitted to the ZBA. The ZBA requested a comparison be made of the earlier plan to the new one and Mr. Hansen detailed the changes made to the Proposed Home. The ZBA commented that it believed the house was a "giant house on a tiny lot" and the Proposed Home "is probably twice what it is now, which is an increase in nonconformity." Significant discussions ensued about the legality of the Studio. Petitioner explained that the Studio was subject to the Studio CO and was legal. One of the opposed neighbors expressed concern that the Studio would be rented to tenants as it had been in the past. Another neighbor expressed worry about environmental issues since the area encompassed wetlands. Petitioner again requested that the matter be adjourned in order to analyze the plans for the Proposed Home and determine whether any additional reductions could be made to the nonconformities. The ZBA suggested that Petitioner should resubmit a more modest plan with the Proposed Home being the same size as the existing home and should investigate any existing building violations relating to the Studio. The ZBA adjourned the matter.

The final meeting regarding this matter was held on May 26, 2021. Petitioner, Mr. Askildsen, was present with architect Mr. Hansen and Petitioner's attorney, Matthew J. Acocella. The final iterations of the Proposed Home were presented, which further reduced the bulk of the structure. In addition to architectural drawings, a sketch depicting the Proposed Home was also submitted. The overall square footage of the Proposed Home would increase over the existing home (from 2,638 square feet to 3,792 square feet), it would be constructed in essentially the same footprint as the existing home, it would be almost 10 feet lower than the maximum permitted height in the R-4A Zoning District, and it would have a 3.5 foot increase in the width on the northeast side of the Subject Property to provide an entrance hall with adequate viewing

⁶ The required variances were slightly changed from those that the Building Inspector denied because Petitioner made changes to the Proposed Home after the ZBA hearing held on September 30, 2020.

distances to appreciate artwork and a 6 foot by 10 foot increase for the porch and steps. Although the Studio was not part of the request for variances, Petitioner submitted sketches from different perspectives showing the removal of various exterior architectural features of the Studio and aesthetic improvements to the structure. This included a reduction in the square footage of the Studio and the overall percentage of nonconforming site coverage to approximately 13%. In response, the ZBA stated that the Proposed Home was double the square footage of the existing home and that it should not be any bigger than the existing home. Neighbors spoke in opposition to the Proposed Home. At the close of public comment, the ZBA voted to deny the variances, precluding Petitioner from constructing the Proposed Home on the Subject Property, stating that the "building is way too big for the lot" and suggesting that the Studio be added to the structure of the Proposed Home and not remain a separate building.

Present Proceeding

Petitioner commenced this proceeding to request an Order vacating, annulling, and reversing the ZBA's determination and granting the variances. Specifically, the verified petition seeks an Order vacating, annulling, and reversing the ZBA's denial of the variances as arbitrary, capricious, not supported by the substantial evidence in the administrative record, and contrary to law. Petitioner argues that the ZBA failed to apply the statutorily mandated factors in determining whether to grant the necessary variances and instead the ZBA focused solely on the size of the Proposed Home without regard to the totality of the circumstances and deferred to community opposition.

In opposition to the petition, the ZBA argues that its decision was not arbitrary and capricious nor was it an abuse of discretion. The ZBA contends that its determination was supported by the evidence presented to and considered by it in the proceedings before it. The ZBA does not address how it examined each of the five factors of the balancing test in making its decision, but rather states in its opposition, "The record further supports the conclusion that the Respondent ZBA applied the evidence to the balancing test factors in reaching its determination to ultimately to [sic] deny the Petitioner's application in May of 2021" (see ZBA's Memorandum of Law in Opposition to Petition, page 6).

Analysis

New York Town Law § 267-b(3a) authorizes the ZBA to grant area variances and, in making that determination, the ZBA must weigh the benefit to the Petitioner if the variances were granted against the detriment to the health, safety, and welfare of the neighborhood community if granted. In doing so, the ZBA must consider five factors set forth in New York Town Law § 267-b(3b)(1-5).

Under this statute, the five criteria to consider are:

- (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 record is devoid of the ZBA reviewing any of these five factors above, nor did it weigh the benefit to the Petitioner if the variances were granted against the detriment to the health, safety, and welfare of the neighborhood or community if granted.

At each of the four meetings held in this matter, the ZBA focused on the size of the Proposed Home and issues it had with the Studio, which was not part of Petitioner's application for variances. Petitioner's attorneys, in their letter to the ZBA dated January 20, 2021, detailed the benefit to the Petitioner if the variances were granted and outlined each of the five statutory criteria in arguing why the variances should be granted. Even after Ms. Cross, Esq. discussed each of the statutory factors at the meeting on February 24, 2021, the ZBA did not reply or discuss them. It was the ZBA's responsibility to examine these factors when making its decision on whether to grant the variances sought and it did not.

In applying the balancing test set forth in New York Town Law § 267-b(3b)(1-5), a zoning board need not justify its determination with supporting evidence with respect to each of the five statutory factors as long as its ultimate determination balancing the relevant considerations is rational (*see Matter of Harris v Zoning Bd. of Appeals of Town of Carmel*, 137 AD3d 1130, 1131 [2d Dept 2016]). Here, without weighing the benefits that the Petitioner was seeking to achieve against any detriment to the health, safety, and welfare of the neighborhood or community, and without examining *any* of the five statutory factors, the ZBA denied the variances at the meeting on May 26, 2021.

"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" (*Ifrah v Utschig*, 98 NY2d 304, 308 [2002]). The ZBA's determination should be sustained upon judicial review if it has a rational basis and is supported by substantial evidence (*see Matter of Sasso v Osgood*, 86 NY2d 374, 382 [1995]). However, findings of fact are essential for intelligent judicial review of the record and to ascertain the basis for a board's decision (*see Swan v Depew*, 167 AD2d 835 [4th Dept 1990]; *see also Greene v Johnson*, 121 AD2d 632 [2d Dept 1986]). Here, the ZBA failed to set forth any factual findings that would enable this Court to intelligently review the record to determine whether, under the proper legal principles, a denial of the variances was supported by substantial evidence.

Accordingly, the ZBA's decision is vacated and annulled, and the matter is remitted to the ZBA for its proper consideration of the variance application and for detailed findings in

support of that determination.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
February 25, 2022


Hon. Anne E. Minihan, A.J.S.C.

TO:

ZARIN & STEINMETZ
Attorney for Petitioner
81 Main St., Suite 415
White Plains, NY 10601
Attn: Jody Cross, Esq.

COSTELLO & FOLCHETTI, LLP
Attorney for Respondent
1875 Route 6, 2nd Floor
Carmel, NY 10512
Attn: Gregory L. Folchetti, Esq.