At a term of Supreme Court of the State of New York held in and for the County of Oneida at the Oneida County Courthouse, 200 Elizabeth Street, Utica, New York on the 16th day of February 2011.

**PRESENT: HONORABLE BERNADETTE T. CLARK**
**Justice Presiding**

**STATE OF NEW YORK**
**SUPREME COURT COUNTY OF ONEIDA**

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**In the Matter of**



**Frances E. Bradley**
**Petitioner**

**-against-**

**Town of Boonville Zoning Board of Appeals**

**Forrest C. Bartelotte and**
**Marilyn G. Bartelotte**
**Respondent-Intervenors**

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**Decision/Order**

**Index No.:**
**CA2009-002541**

**RJI No.: 32-09-0800**

## Procedural History

On August 9, 2010 this Court issued a Decision (which is hereby incorporated into this Decision) remanding the Petitioner's application for multiple area variances back to the Respondent, Town of Boonville Zoning Board of Appeals (hereinafter ZBA). The ZBA was directed by this Court to reopen its public hearing that was held on June 4, 2009 for:

> "1) deliberations and specific findings as to whether the Property meets the requirements of Article 5 section 5.2(1) known as the 'single and separate exemption'. The ZBA will allow the Petitioner, Intervenors and any other surrounding neighbors an opportunity to submit oral and written evidence bearing on the issue. The ZBA will consider all of the evidence presented and issue written findings regarding the requirements and the criteria contained in the Town of Boonville Zoning Ordinance Section 5.2(1) relating to the 'single and separate exemption'." Decision/Order Clark, J, August 9, 2010

## Facts

On November 3, 2010 the ZBA determined by unanimous vote that Petitioner is entitled to the

exemption under Article 5 section 5.2(1) known as the 'single and separate exemption'. The ZBA found that the Petitioner held the lot under separate ownership at the time of the adoption of this ordinance and the owner owned no adjoining land that could be combined with said lot to meet the dimensional requirements. However, the ZBA interpreted this section, apparently relying on the language in Section 5.2(1) "provided that all other regulations prescribed for the district shall be complied with", requiring that Petitioners seek variances from the ZBA for side front and rear yard setbacks contained in Schedule A of the Zoning Ordinance. However, here the ZBA has previously considered these remaining two variances on August 9, 2010 and by a tie vote denied these same variances to the Petitioner.

The Petitioner's original application, which was denied by virtue of the 2-2 tie vote on August 9, 2010 sought four variances. First, a variance for 64,440 square feet for minimum lot area; second, a variance for 265 square feet for minimum width or frontage; third, a variance of 25 feet for a minimum yard width one side and fourth, a variance of 65 feet for both sides. It is important to note that the Petitioners did not seek nor do they require a variance for minimum front yard depth as they have 90 feet, almost double the 50 feet required.

Thus, the two variances that Respondent-Intervenors considered "substantial": the 64,440 square foot variance for the minimum lot area; and the 265 foot variance for the width or frontage, are now moot as a result of the ZBA's November 3, 2011 decision to grant Petitioner the single and separate exemption. Accordingly, the parties acknowledge that the third variance request of 25 feet for minimum yard width one side and the fourth variance request for 65 feet for both sides are all that remains of Petitioner's application for area variances. As stated previously, these particular requests for variances were considered and denied by the ZBA on August 6, 2009 by virtue of a 2 to 2 tie vote.

**Decision**

First, in this Court's view, the ZBA's decision unanimously granting the Petitioners the "single and separate exemption" was lawful, proper and not arbitrary and capricious and in accordance with

their Zoning Ordinance Section 5.2(1).[1] The Petitioners submissions and presentation to the ZBA unequivocally established and the ZBA agreed that compliance with the "single and separate exemption" in that the lot in question was held under separate ownership since 1958 for the purpose of building a lakefront residence; the lot was created as a single lot by virtue of the 1958 Moran subdivision; the lot has not been altered in size and has been held in single and separate ownership by petitioner since 1958, 37 years before the Zoning Ordinance was amended in 1995. Petitioner acquired another lot nine years later from a different grantor and never used the lots in conjunction with one another since they are physically separated by an easement known as Moran Drive or Shore Drive; and in any event the lots could not be combined to meet the dimensional requirements of the Zoning ordinance.

With the two "substantial variances" requested by Petitioners now moot due to the ZBA's decision to grant the 'single and separate exemption', this Court will turn to the remaining two variances which were denied by the ZBA on August 6, 2009. Respondent-Intervenors argue that Petitioner's application should be determined in accordance with prior decisions of the ZBA and the courts on the basis of *res judicata*. This argument is without merit. First, the original application by Petitioners filed on April 23, 2009 is not identical to any of the prior applications as correctly pointed out by Petitioners. More importantly, the application currently before this Court is certainly and substantially different from all of the prior rulings of the ZBA as well as the Supreme Court and Appellate Division, Fourth Department. As far as this Court could determine the ZBA had never granted the Petitioners the "single and separate exemption" and has always considered an application that contained four separate variances, two of which Respondent-Intervenors argued were substantial are no longer part of this application. Accordingly, since this application before the Court now is for only two variances, this application and petition is certainly not barred by the doctrine of *res judicata*.

The remaining two variances under consideration here are: 1) 65 feet for both sides and 2) 25 feet for one side. Petitioners argue that in 2007 the ZBA granted these identical variances to a

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[1]Respondent-Intervenors conceded at the October 13, 2010 ZBA meeting that the ZBA's decision to grant the "single and separation exemption" was proper.

neighboring property (hereinafter Stanton property). This fact was not disputed by the Respondent ZBA nor Respondent-Intervenors. In fact, their papers concede that in 2007 the ZBA granted four area variances to the Stanton property as follows: 1) 275 feet frontage variance; 2) total area variance of 55,000 square feet ; 3) minimum side variance of 65 feet and 4) 25 feet one side variance.

However, Respondent-Intervenors argue that the four variances given by the ZBA in the Stanton application were distinguishable from the Petitioner's application because the Stanton property had a pre-existing structure. That argument, however, is specious since the fact remains that the new structure was of such dimensions and placed in such a way on that lot that the Zoning Officer and ZBA determined that four variances were required before a building permit could be issued. Ultimately, the Stanton property was granted all four variances: including two substantial variances, one for 275 feet for frontage and one for 55,000 square feet total area. The remaining two variances (which are **identical** to those requested by the Petitioner, Stanton's **neighbor)** were 65 feet both sides and 25 feet one side. In this Court's view, the ZBA's action a mere two years after granting the Stanton's four area variances in total and denying these two identical variances to Petitioner is or should be the very essence of an abuse of discretion and/or arbitrary and capricious by definition.

Moreover, here the ZBA's consideration and decision relating to the Petitioner's application for area variances was seriously lacking in substance especially relating to the required analysis of the statutory criteria. "In considering the application, respondent, Town of Boonville Zoning Board of Appeals, was required to weigh the benefit to the applicants of granting the variances against any detriment to the health, safety and welfare of the neighborhood or community affected thereby, taking into account the five factors set forth in Town Law Section 267-b(3) (Conway v. Town of Irondequoit Zoning Board of Appeals, 38 A.D.3d 1279 [4th Dept. 2007])". Although it is true that a zoning board is not **required** to grant a variance solely on the basis that it granted an identical variance two years before, certainly the ZBA **is required** to explain why it failed to follow its earlier decision. **Knight v. Amelkin**, 68 N.Y.2d 975 (1986). A review of the ZBA's August 6, 2009 decision denying all four of the Petitioner's variances revealed that the ZBA did not mention the Stanton variances in an attempt to distinguish Petitioners application from the four variances granted to the Stantons which is **adjacent**

to Petitioner's property. [2] **Id.**

For the most part the two ZBA members voting to deny Petitioner variances basically restated the statutory criteria with no factual support. Particularly egregious is the lack of reasoning as to how granting these variances would negatively impact the neighborhood. The reasons given in support of the motion to deny the variances to Petitioners were totally unavailing. The two ZBA members opposed to granting the variances reasoned that "the proposed building was smaller than other residences". Based upon this record it must be noted that the camps around Kayuta Lake are not "cookie-cutter" development type homes, they are of a variety of sizes as are the lots upon which the camps are located. Moreover, one would expect a camp to be smaller in the instant case since the lot is smaller than some of the other lakefront lots. The other reason given as to why allowing Petitioner to build a camp on her property would create a negative impact on the neighborhood is not only equally as legally unavailing as the other stated reason but actually laughable if this were not such a serious matter. One ZBA member stated in response as to why building a camp would have a negative impact on the neighborhood replied "yes it will". However, to add insult to injury, in response to the statutory inquiry of whether the difficulty was self-created the two ZBA members stated "she could have built before zoning". To accept this logic, one would have to conclude that long time property owners like Petitioner who has owned this property since 1958, should not be given the same consideration as "newer" property owners on this lake regardless of the merits of the particular variances requested in an application. Apparently this is the opinion of two ZBA members despite the fact that Petitioners' request for variances are identical to two of those granted in Stanton's application in 2007. It is important to note as pointed out by Respondent-Intervenors that the Petitioner has been exercising her

[2] This Court is compelled to mention another recent decision of the ZBA which granted multiple variances on the Gaffney's application: 1) 140 feet frontage; 2) 20 feet total yard width and 3) 71 feet rear yard depth. The Gaffney application, which was subject of a previous Article 78 Petition was brought (in part) by the very same Respondent-Intervenors in this case. This Court upheld the variances given by the ZBA to the Gaffney's as being in accordance with the law and not arbitrary and capricious.

rights in attempting to obtain these variances since 1994, when she was first denied. In 1996, Petitioner filed for variances for this property and was again denied. In 1999, Petitioner applied to the ZBA and again was denied. In this Court's view to deny variances to this Petitioner when the ZBA has granted similar and substantial variances to the Stantons and most recently, the Gaffneys, is an obvious abuse of discretion.

The only conclusion this Court can reach in this case is that the ZBA acted contrary to the law, abused their discretion and was arbitrary and capricious in denying these two remaining variances to the Petitioner. Although this Court considered remanding this matter back to the ZBA for a second time to consider and vote on the remaining two minor variances, this Court has made this decision because justice delayed any further for this Petitioner is justice denied and these variances should have been granted by the ZBA for all of the reasons stated above. Accordingly, the Petitioner is hereby granted the two remaining variances: a variance for 25 feet for a minimum yard width one side and a variance of 65 feet for both sides. This Court however will require that the Petitioner obtain all of the necessary approvals from the Oneida County Health Department before any permits are issued.

Now, therefore, in accordance with the above decision, it is hereby

**Ordered** that the Petitioner is hereby granted the two remaining variances: a variance for 25 feet for a minimum yard width one side and a variance of 65 feet for both sides, provided approval is obtained from the Oneida County Health Department before any permits are issued.

This shall constitute the Decision and Order of this Court.

Dated: February 16, 2011

Bernadette T. Clark

Honorable Bernadette T. Clark
Justice of the Supreme Court