

**Matter of Visconti v Zoning Bd. of Appeals of
Town of E. Hampton**

2008 NY Slip Op 30455(U)

February 14, 2008

Supreme Court, Suffolk County

Docket Number: 0018502/2007

Judge: Emily Pines

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Index Number: 18502-2007

Supreme Court – State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

HON. EMILY PINES
J. S. C.

Original Motion Date: 07-27-2007
Motion Submit Date: 12-13-2007
Motion Sequence No.: 001 MOTD

casesdisp

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In the Matter of the Application of
JOSEPH VISCONTI and LEWIS VISCONTI,

Petitioners,

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

-against-

ZONING BOARD OF APPEALS OF THE TOWN
OF EAST HAMPTON, RONAN O'DWYER
(CONTRACT VENDEE) and GEORGE
BALASSES (OWNER),

Defendants.
-----X

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ORDERED, that this Petition seeking to review, annul and set aside the determination of the Zoning Board of Appeals of the Town of East Hampton, dated May 22, 2007 is granted to the extent that the matter is remanded to the Zoning Board of Appeals for further findings in accordance with the decision herewith.

Petitioners, Joseph Visconti and Lewis Visconti ("petitioners") commenced this proceeding against respondents, Zoning Board of Appeals of the Town of East Hampton ("Zoning Board" or "Board"), Ronan O'Dwyer ("O'Dwyer") and George Balasses ("Balasses") by the filing of a Notice of Petition and Petition on or about June 21, 2007. The Zoning Board filed a Verified Answer and Return and Memorandum of Law on or about August 2, 2007 and Respondent O'Dwyer filed a Memorandum of Law on or about November 30, 2007.

The subject matter of this proceeding is the Board's issuance of a Natural Resources Special Permit and two variances from the minimum wetland setback requirements for the construction of a single family residence on property located

at Fresh Pond Road, Amagansett, New York. The property is designated on the Suffolk County Tax Map as 0300-127-1-4 (the "subject premises"). Petitioners are the owners of property adjacent to the subject premises to the south; petitioners' property is located as the back "flag" lot on a common driveway which accesses both petitioners' property and the subject premises. Respondent Balasses was the owner of the subject premises and O'Dwyer was the contract vendee for the subject premises at the time of the application, although the submissions reflect that since the commencement of this action, O'Dwyer has taken title to the property.

The 2004 Application

In 2004, Balasses submitted an application to the Zoning Board for approval for the construction of a 2,416 square foot dwelling with 656 square feet of decking on the subject premises, which is 21,576 square feet (the "2004 application"). The application requested setback variances of 37.2 feet, 45.2 feet and 35 feet from freshwater wetlands and a 56 foot variance to locate the septic system 94 feet from the wetlands where 150 feet is required and a 2.8 foot variance to locate the residence 16 feet from the side lot line where 18.8 feet is required. By Determination dated January 11, 2005, the Board denied the application.

In its Findings and Conclusions denying the application, the Board noted that the wetland located on the parcel was an extensive wetland which covers approximately 32,889 square feet and known as Bellyache Swamp. The Board made the following findings as relevant to the decision herein:

2. This wetland constitutes an integral part of the natural environment, and more specifically, the hydrologic system. In addition to diversifying the landscape, Bellyache swamp often plays a significant role in the storage of water, flood control, and the maintenance of water quality. *Any amount of development within proximity of this wetland could have a detrimental impact on the wetland's ability to retain and re-charge floodwaters.*
4. The project requires *substantial* wetland setback variances as proposed. The sanitary system is proposed up gradient and 94' away from the wetland. The applicant requires a 37% variance for the sanitary system. The residence as proposed is 62.8' from the wetland, which is a 37% variance as well. The wetland in question is a large wetland. The NYSDEC classifies this as a type II wetland,

which is the second highest rating of NYSDEC wetlands. The applicant is requesting a *substantial* 37% variance for the sanitary system and the residence.

5. The Planning Department recommended that a smaller less ambitious project be considered for this parcel. It was the Planning Department's opinion that the wetland constraints on the lot are may be too severe to support a residence of this scale. The applicant is proposing to clear 32.49% of the lot for the proposed project. The clearing as proposed will be 50' from the wetland. The parcel in question is 21,576 sq. ft. The residence proposed will have an approximate footprint of 1,280 sq. ft. It was the Planning Department's opinion that the scale of the proposed improvements together with the proposed clearing is excessive on a lot as constrained as this one.
6. It was the Planning Department's opinion that the project as proposed should be denied and the Zoning Board consider a smaller less ambitious project on this parcel. The major benefit of a smaller scale project would be *less clearing*, which would protect a *greater buffer* to Bellyache Swamp. A smaller project could also be designed to avoid more of the area containing archaeological resources. A smaller project would also allow a greater retention of woodlands within the area preserving the natural character. The Zoning Board should consider a smaller scale project, which would have less of an impact on the wetlands.

(Emphasis added). Based on the foregoing findings, the Board denied the application for a Natural Resources Special Permit and wetland setback variances.

The 2005 Application

In April of 2005, Balasses submitted a second application for a Natural Resources Special Permit and wetland setback variances for the construction of an 1,886 square foot residence with 626 square feet of decking (the "2005 application"). In the 2005 application, in addition to the Natural Resources Special Permit, Balasses sought the following variances: 38.1 foot variance to locate the residence 61.9 feet from the wetland; 38 foot variance to locate the northern front yard deck 62 feet from the wetland; 16 foot variance to locate the northeastern front yard deck 84 feet from the wetland; and 63.1 foot variance to locate the sanitary system 86.9 feet from the wetlands where 150 feet is required. By Determination dated November 1, 2005, this application was also denied by the

Zoning Board. In its Determination, the Board made the following Findings and Conclusions as germane to the Decision herein:

Natural Resources Special Permit

2. The Board has determined that the natural characteristics of the site are such that the proposed construction may in fact cause a disturbance to the natural features, systems and processes and may cause significant negative impact to groundwater and surface waters on and off the site. The wetland located on the parcel is an extensive Type II wetland otherwise known as Bellyache Swamp, which covers approximately 32,889 sq. ft. *Any development within the proximity of the wetland will clearly impact its ability to retain and recharge flood waters.* According to the Planning Department this wetland constitutes an integral part of the natural environment, and more specifically, the hydrologic system. In addition to diversifying the landscape, Bellyache Swamp often plays a significant role in the storage of water, flood control, and the maintenance of water quality. The Planning Department also identifies that Type II wetlands provide important wetland and wildlife benefits and support an abundance of animal species and storm water retention. It is the opinion of the Planning Department that at times of severe flooding the wetland located on this parcel provides the very important function of helping to abate storm water. In a letter dated August 22, 2005, Larry Penny, Director of the Natural Resources Environmental Protection Department for the Town of East Hampton, stated his opposition to the proposed construction. Mr. Penny believes that due to the "topography (of the parcel), the overland drainage from the proposed residence would be towards this wetland. The well is to be situated downgradient of two septic systems (the one proposed) and an existing one about 130' away." It is Mr. Penny's belief that the new well and the existing one less than 30 feet away will act in synergy to pull subsurface discharges from the septic systems toward them when operating. Mr. Penny also states that the current proposal does not reduce environmental impacts noted in the Board's prior determinations.
3. Analysis of the property shows that the parcel is located directly across from Fresh Pond Park and Town Nature

Preserve. It is believed that the proposed construction would eliminate the wooded buffer that now exists between residences and the picnic area and beaches. The Board has determined that adequate buffer, yards and screening cannot be provided to properly protect adjacent properties and land uses from the detrimental impacts of the proposed use.

Variance Request

5. The applicant is seeking variances from §255-4-40 (Minimum wetland setbacks) of the Town Code. The Board has examined whether the grant of the variance will cause an undesirable change in the character of the neighborhood or will create a detriment to nearby properties. Several residents of Fresh Pond Road submitted letters and memoranda opposing the application. The Board generally agrees with the opponents and finds that the new construction would not only cause hardship during the building period (with trade vehicles blocking the narrow roadway) but would all but eliminate the noise buffer that is naturally provided between the park and the existing residences. The Board has found that approval of the current application would not only alter the character of the neighborhood but cause a detriment to the nearby properties. *The Board is not satisfied that the 4.8% reduction in clearing from the prior application is sufficient to reduce the detrimental effect on the sensitive area.*
6. Although the applicant has reduced the size of the proposed construction and clearing, the variances sought in the current application with regard to the house and septic system seem to be greater than those sought in the previous application. The Board has determined that the applicant could (i) further reduce the size of the home *and proposed clearing*; (ii) *eliminate decks* from the proposal, and (iii) *reduce clearing* to allow a greater buffer between the clearing and the wetlands. The Board has determined that the benefit sought by the applicant can be achieved by a method, feasible for the applicant to pursue other than the scope of the variances requested in this application.
7. The requested area variances are *substantial*. The applicant is seeking some variances that are marginally greater than the variances previously applied for and denied. The current

application seeks a septic variance of 63.1 feet where the required setback is 150 feet and locates the septic tank *a mere 86.9 feet away from the wetlands*. The present application seeks a variance for the proposed residence that may bring the improvements closer to the location of the wetlands. The proposed location may not be the farthest from the wetlands. Thus, the Board finds that the variances requested are substantial and are not the minimum necessary and sufficient to allow the proposed construction.

8. The Board finds that the variances requested would have an adverse effect or impact on the physical environmental conditions in the neighborhood. The subject parcel is not only directly across from Fresh Pond Park but is located in a Fresh Ponds primary watershed. The property also backs up to Bellyache swamp which is one of the largest and least disturbed freshwater wetland kettles in Amagansett. The Board firmly believes that the proposed construction will have an adverse impact on the wetland's ability to retain and re-charge floodwaters as well as damage the habitat provided for a variety of wildlife species. The Planning Department also notes that the proposed clearing will obliterate the depression associated with the archeological features of the site.
9. The Board feels that the detriment to the general health, safety and welfare of the neighborhood, Town of East Hampton, Fresh Pond Park including Bellyache swamp in particular, outweighs the benefit to the applicant of building the improvements on the land as proposed.

(Emphasis added). Based on the foregoing, the Board denied the 2005 application.

The Subject Application

On or about October 6, 2006, O'Dwyer submitted the third application for approval of a Natural Resources Special Permit and wetland setback variances for the construction of a 1,150 square foot residence with 626 square feet of decking on the subject premises. This application required a Natural Resources Special Permit and two (2) wetland setback variances; a 40 foot variance to locate the residence and decking 60 feet from the wetland where 100 feet is required; and

a 63.1 foot variance to locate the sanitary system 86.9 feet from the wetlands where 150 feet is required. A public hearing on the application was held on March 27, 2007, and by Determination dated May 22, 2007, the Board granted the application. In support of its Determination granting the application, the Board made the following Findings of Fact:

2. The wetland located on the parcel is an extensive wetland which covers approximately 32,889 sq. ft. known as Bellyache Swamp. This wetland constitutes an integral part of the natural environment and more specifically, the hydrologic system. In addition to diversifying the landscape, Bellyache Swamp often plays a significant role in the storage of water, flood control and the maintenance of air quality. *Any amount of development within proximity of this wetland could possibly have a detrimental impact on the wetland's ability to retain and re-charge floodwaters.*
4. The subject parcel was the subject of two (2) previous ZBA decisions in which a 2,416 sq. ft. residence with a crawlspace, 656 sq. ft. of first and second floor decking was denied and a 1,886 sq. ft. residence with 626 sq. ft. of decking was denied. In the first application, applicant was requesting six (6) variances. In the second application, the applicant requested four (4) variances. In both of these applications, the Board found that the requested variances were not the minimum necessary and that an alternative smaller project should be proposed that would have less of an impact on the wetlands. In the present application, applicant reduced the overall size of the house than what was proposed in the first application by more than half the square footage. Further, in this application the applicant eliminated the need for all but two (2) variances. The Board finds that this third proposal is sited in best location on the parcel to minimize distances to the wetlands and side yard lot lines. The Board also finds that a smaller house than what is presently proposed would not provide the wetlands any greater environmental protection.
6. The Board finds that granting the requested variances will not cause an undesirable change in the character of the neighborhood or create a detriment to nearby properties. The Board finds that by reducing the size of the house and eliminating the need for unnecessary variances the proposed residence will be consistent to other houses in the area. Moreover, applicant will be placing a scenic easement over the majority of the subject parcel. This easement will forever require that the greater part of this parcel remain in a natural state.
7. Neighbors have expressed concern throughout the numerous applications for this parcel regarding noise buffer this lot

provides. The Board finds that by *clearing the minimum necessary and placing the scenic easement* over the parcel the lots ability to filter out noise from the Fresh Pond Park will not be weakened.

8. The Board recognizes that the requested variances are substantial, but finds that the impact on the wetlands can be mitigated by the placement of a scenic easement over a large portion of the property. The Board finds that the requested variances are the minimum variances necessary and adequate to alleviate the difficulty causing the applicant to request said variances.
9. The Board finds that the proposed project will not have any adverse impacts on the physical or environmental conditions in the neighborhood as the applicant will establish a scenic easement on the property to preserve much of the natural features of the parcel and to protect the wetlands. *With respect to clearing the Board finds that the applicant is proposing to clear the minimum amount necessary to construct the proposed house and sanitary system.* Further, by requiring applicant to revegetate any areas disturbed by construction activities any adverse impacts will be mitigated.

(Emphasis added). Based on the foregoing, the Board found that the benefit to the applicant outweighed any detriment to the general health, safety and welfare of the neighborhood and the Town of East Hampton as a whole, and granted the application. The within proceeding ensued.

The Petition

Petitioners argue that the subject application is not sufficiently distinguishable from the prior applications to warrant the Board's issuance of the Natural Resources Special Permit and the wetland setback variances. Therefore, petitioners urge that the grant of this application was arbitrary and capricious, irrational, erroneous, unsupported by the evidence in the record, patently unfair and an abuse of discretion. Petitioners cite **§255-8-50(D)** of the East Hampton Town Code which requires that the applicant for a wetland setback variance demonstrate:

- (a) The benefit to the applicants from grant of the requested variances outweighs any detriment which grant of the variances

will cause to the general health, safety and welfare of the neighborhood or the Town as a whole; and

- (b) That the variances sought were the minimum variances necessary and adequate to alleviate the difficulty causing applicant to request area variances, while at the same time preserving and protecting the character of the neighborhood and the general health, safety and welfare of the Town as a whole.

Petitioners argue that the subject determination contains numerous unsupported and conclusory findings and conclusions. Specifically, petitioners assert that although the subject application seeks two (2) fewer variances than the 2005 application, the variances abandoned were for front and side yard decks, not principal structures or sanitary system components. Petitioners note that the Board changed the language from the 2005 denial to the subject determination granting the application from indicating that development within proximity of the wetland “will clearly impact” its ability to retain and recharge flood waters” to development within proximity of the wetland “could possibly have” a detrimental impact”. Petitioners allege that such change is not supported by the record or any rational explanation by the Zoning Board.

With regard to clearing, petitioners argue that the clearing denied by the Board in the 2005 application is exactly the same as the clearing requested in the subject application and granted by the Board. Petitioners urge the Court to recognize that in the 2005 application referenced above, the Board found that the reduction in the amount of clearing from the 2004 application, of only 4.8% was insufficient to reduce the detrimental effect on the area. Moreover, the wetland setback variances, a 40 foot variance to locate the residence and decking 60 feet from the wetland where 100 feet is required; and a 63.1 foot variance to locate the sanitary system 86.9 feet from the wetlands where 150 feet is required, were the same variances requested and rejected in the 2005 application. Petitioners argue that the Board neither followed its own precedent nor indicated its reason for reaching a different result on essentially the same facts and thus is arbitrary and capricious.

In anticipation of respondents’ argument that the Determination granting the variances and Natural Resources Special Permit is somewhat justified by the requirement of a scenic easement, petitioners argue this is merely a “red herring”.

Petitioners argue that this scenic easement does not offer a solution because the Board is still permitting the clearing that was rejected in the 2005 application and the Board has already determined that the buffer requested by respondent was insufficient.

In sum, petitioners argue that the Board's determination was irrational, arbitrary and capricious because the reasons cited for the approval of the subject application were not the basis for the denial of the prior applications. That is, the removal of the requests for variances for decks did not result in denial of the 2005 application, rather, it was the substantial variances for the residence and sanitary system, which are the same as granted in the subject application. Moreover, they assert that the 2005 application was denied because the clearing was not the "minimum necessary", yet the Board has now granted the subject application with identical clearing and the scenic easement will not minimize the negative impacts as a result of such clearing. Additionally, petitioners assert that these variances for the residence (40%) and septic system (42.1%) were already found by the Board to be impermissibly substantial in the 2005 application. In fact, the variance for the residence is 2% larger than denied in the 2005 application and thus, the Board cannot conclude that the variances were the minimum necessary. Finally, petitioners argue that the grant of the variances will have an adverse effect and impact on the physical and environmental conditions in the neighborhood and area as has been previously determined by the Board. In this application, the well remains in the exact same location, clearing is the same and the house and septic system have moved closer to the wetlands, thus, petitioners argue, the Board's prior determinations demonstrate the adverse effects and such were not mitigated in the subject application.

Based on the foregoing, petitioners argue that the Determination by the Zoning Board should be vacated and annulled.

Zoning Board Opposition

The Zoning Board submits a Verified Answer, Return, Affidavit of Joel Halsey, Planner, and Memorandum of Law in Opposition to the Petition. The Board argues that the reduced size of the residence (to 1,150 square feet) and the consequential reduced impact on the wetlands, the surrounding environment, and the character of the neighborhood justified the granting of the application. The

Board relies heavily on the imposition of the scenic easement on the property and the reduced scale of the project as a basis for its Determination. The Board asserts that it did not act arbitrarily or capriciously, but rather adhered to the statutory requirements, and its determination should not be disturbed by the Court.

The Zoning Board argues that it followed the statutory criteria of **Town Law §267-b(3)(b)** in that it concerned the reduced size of the residence and adequate screening as limiting the intensity of the use and preserving the character of the neighborhood. Moreover, the Board found that the residence was sited in the best location on the parcel to minimize distances to the wetlands and it is unlikely that a smaller septic system could be possible. Additionally, the Zoning Board argues that it properly weighed the fact that the applicant reduced the number of variances from six (6) in the 2005 application to only two (2) in the subject application. The Board argues that although it did not mention the wetland setback variances for the decking in the 2005 denial, that was only because the Board had already determined the residence was too large and thus further comment on the decking was unnecessary.

The Board further argues that the imposition of the scenic easement, along with other mitigation measures, minimizes the potential adverse impact of the variances on the surrounding community. It explains that scenic easements are an effective conservation tool and help inform current and subsequent property owners of the environmentally sensitive nature of the property. Additionally, the Board notes that the reduction in the size of the residence necessarily reduces the potential intensity of use on the property and the flow of sanitary effluent and that the reduced residence conforms with other residences in the neighborhood. The Board stresses that the applicant reduced the size of the residence and the scale of the proposed construction project and is proposing to clear only the “minimum necessary” to construct the home and sanitary system.

Based on the foregoing, the Zoning Board urges that the Determination should be upheld and the Petition dismissed.

O'Dwyer Opposition

O'Dwyer submits a Memorandum of Law in Opposition to the Petition.

O'Dwyer argues that the Zoning Board rationally and reasonably found that the subject application met the standards and criteria for issuance of the Natural Resources Special Permit and the wetland setback variances and should be upheld.

O'Dwyer's arguments essentially parallel those of the Zoning Board. O'Dwyer argues that the Board properly distinguished the two prior denials, including the reduction in the number of variances to only two (2) and the reduction in the size of the residence. O'Dwyer asserts that there was substantial evidence in the record to support the finding that the benefit of the proposed improvements outweighed any detriment to the welfare of the neighborhood and environment. Moreover, he asserts, that the granting of the scenic easement as a condition of approval and other mitigation measures limits any detrimental impact on the environment. Additionally, O'Dwyer argues that the Board properly considered the magnitude of the requested variances. Specifically considering the project as a whole, including the "presence of wetlands, the modest size of the improvements and their proposed location on the parcel, and the great amount of mitigation required, including the extensive scenic easement, the ZBA reasonably concluded that although the variances may be large, they were the minimum variances necessary to alleviate the difficulty causing the applicant to request those variances."

Finally, O'Dwyer argues that the Board's determination granting the Natural Resources Special Permit was reasonable, rational and overwhelmingly supported by the evidence. O'Dwyer asserts that the Board properly and carefully considered the Environmental Assessment Form and all the evidence presented at the hearing and concluded that the scenic easement and revegetation would minimize any negative impact on the natural features of the site, the lot area was sufficient for the modest size residence proposed and there would be minimum clearing for the project.

Based on the foregoing, O'Dwyer argues that the Determination of the Zoning Board was not arbitrary and capricious and was supported by substantial evidence in the record and must be affirmed.

Analysis

Pursuant to **Town Law §267-b(3)**, when determining whether to grant an

area variance, a Zoning Board of Appeals must weigh the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted. ***Pecoraro v. Board of Appeals of Town of Hempstead*, 2 N.Y.3d 608, 781 N.Y.S.2d 234, 814 N.E.2d 404 (2004)**. The law is well settled that a Zoning Board has broad discretion in considering applications for variances and judicial review is limited to a determination as to whether the Board's determination "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." ***Berk v. McMahon*, 29 A.D.3d 902, 814 N.Y.S.2d 753 (2d Dept. 2006)** (internal citations omitted). The Court should not substitute its own judgment for that of the Zoning Board, even if, in a close case, the Court would have decided the matter differently or there are some factors weighing in favor of a different result. ***Pecoraro, supra; Tetra Builders, Inc., v. Scheyer*, 251 A.D.2d 589, 674 N.Y.S.2d 764 (2d Dept. 1998)**.

Notwithstanding the foregoing general principle, it is axiomatic, that a "decision of an administrative agency which neither adheres to its own precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious." ***Civic Assoc. of the Setaukets v. Trotta*, 8 A.D.3d 482, 778 N.Y.S.2d 524 (2d Dept. 2004)**, quoting, ***Matter of Field Delivery Serv.*, 66 N.Y.2d 516, 498 N.Y.S.2d 111, 488 N.E.2d 1223**. See also, ***Waylonis v. Baum*, 281 A.D.2d 636, 723 N.Y.S.2d 55 (2d Dept. 2001)**; ***Spandorf v. Board of Appeals of Village of East Hills*, 167 A.D.2d 546, 562 N.Y.S.2d 215 (2d Dept. 1990)**. If the Board sets forth a rational and satisfactory explanation for departing from the prior precedent, however, the determination should be upheld. ***Nozzleman v. Village of Cold Spring Zoning Board*, 34 A.D.3d 682, 825 N.Y.S.2d 107 (2d Dept. 2006)**.

In the case *sub judice*, the Court has been given insufficient information to determine whether the Zoning Board has provided a rational explanation for departing from its precedent in granting the subject application. In the 2004 and 2005 denials, the Board relied in part on the amount of clearing necessitated by the projects and the substantial nature of the setback variances and proximity to the wetlands. The Board was not satisfied with the clearing in 2005 based upon the clearing proposed in this application. The Board does state that the reduction in the size of the house and the elimination of the need for certain front and side yard setback variances in support its determination. However, the Court has not been given sufficient information to determine whether such changes justify the

Board's departure from its own precedent.

As set forth by the Court of Appeals, where the Court has insufficient factual findings to understand the basis of a zoning board's determination, the matter may be remanded to the Board so that such entity delineates these findings that form the basis for its decision. *see, Matter of Community Synagogue v. Bates*, 1NY 2d 445, 154 Nys 2d 15, 136 NE 2d 488.

Based on the foregoing, the matter is remitted to the Respondent, Zoning Board of Town of East Hampton for further Findings and Conclusions in accordance with the determination herein.

This constitutes the *DECISION* and *ORDER* of the Court.

Dated: February 14, 2008
Riverhead, New York


EMILY PINES
J. S. C.