

**Dolphin v Zoning Bd. of Appeals of Town of  
Shelter Is.**

2008 NY Slip Op 31016(U)

April 1, 2008

Supreme Court, Suffolk County

Docket Number: 0040170/2007

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 1/25/08  
ADJ. DATES \_\_\_\_\_  
Mot. Seq. # 001 - MG

-----X  
LAURIE DOLPHIN and STUART SHAPIRO, :  
 :  
 Petitioners, :  
 :  
 For a Judgment pursuant to Article 78 of the Civil :  
 Practice Law and Rules :  
 :  
 -against- :  
 :  
 ZONING BOARD OF APPEALS OF THE TOWN :  
 OF SHELTER ISLAND, :  
 :  
 Respondent. :  
-----X

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Upon the following papers numbered 1 to 11 read on this Article 78 Petition  
\_\_\_\_\_; Notice of Petition and supporting papers 1-3; 4-6; \_\_\_\_\_; Notice of Cross  
Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 7-9 \_\_\_\_\_; Replying  
Affidavits and supporting papers \_\_\_\_\_; Other 10 (memorandum); 11 (memorandum) \_\_\_\_\_; (~~and after~~  
~~hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this Petition pursuant to CPLR Article 78 for an Order annulling and setting aside that part of respondent's determination, issued on November 28, 2007, which in part denied petitioners' application to repair and restore an accessory garage/apartment located at 43 Midway Road, Shelter Island, New York, on the grounds that the respondent's action was illegal, arbitrary, capricious, and constituted an abuse of discretion, was without basis in fact or law and was not supported by evidence, and directing the respondent to grant petitioners' request as applied for in full, is granted; and it is further

**ORDERED AND ADJUDGED** that the November 28, 2007 determination by the respondent denying a part of petitioners' application as related to the accessory building, is annulled, vacated and set aside and only that portion is remitted to the Zoning Board of Appeals for proceedings consistent with this decision; and it is further

**ORDERED** that the counsel for the petitioners shall serve a copy of this Order with Notice of Entry upon counsel for respondent within forty (40) days of the date herein pursuant to CPLR 2103( b)(1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court.

Petitioners are the owners of property located in the Town of Shelter Island. A survey of the

property shows that it is wedged shaped, bounded by a town road on the west, a freshwater wetlands pond on the east and private property on the north and south. The property runs approximately 473 feet from the town road gradually narrowing to approximately half of the frontage on the road at the wetland pond. The two buildings on the property consist of a nonconforming house and detached nonconforming accessory garage/apartment, which are connected by a breeze way for which a permit was issued in 1992. The buildings are setback approximately 100 feet from the freshwater wetland pond. The house and accessory garage/apartment are legal as evidenced by a certificate of compliance dated October 13, 1988, which states that the buildings "were built before the adoption of the Shelter Island Zoning Ordinance." The certificate further states that "as this building pre-exists our Zoning Ordinance, no certificate of occupancy has been issued and one is not needed or necessary." Typed onto the certificate is the following statement:

This certificate pertains to the one-family residence and detached one-car garage with 1 bedroom Apartment. Said apartment can be occupied from May 15-October 15.

The location of the house and detached garage/apartment was not set forth in the 1988 certificate of compliance, nor was its footprint. An updated survey dated June 19, 2006, shows the footprint of the buildings as they relate to the protected wetlands and the very close proximity of the detached garage/apartment to the northern neighbor's property. An aerial photograph, shown at the October, 2007 hearing by petitioners in support, indicates, according to petitioners, many nonconforming setbacks. However, the map does not indicate the type and physical characteristics of the setbacks and their relationship to the matter herein.

The buildings in question are small with the main house being approximately 26 feet by 23 feet or 598 square feet. The attached apartment and garage is approximately 25 feet by 15 feet or 375 square feet. The garage measurement was 12 feet by 15 feet or 180 square feet. The petitioners removed the interior wall separating the garage from the apartment and replaced the garage type door sometime in or around 1994 based upon the fact that the this space was too small for a vehicle to be parked in and was disused space.

Although the structures possess a certificate of compliance, they are deemed to be legal nonconforming structures as to use and property setbacks. The accessory garage/apartment does not conform with a north side yard requirement of a 10 foot setback, and the wetlands setback is less than 100 feet from the landward boundary of the freshwater wetland. As noted, both buildings predate the enactment of the zoning code.

Petitioners seek to annul the respondent's (hereinafter "Zoning Board") decision dated November 28, 2007, which denied their application to renovate and restore more than 50% of the floor area of the interior of the nonconforming garage/apartment, which according to petitioners, was marred by water damage.

Petitioners applied for a permit to perform certain construction work on the buildings. While the record indicates that the application for the permit was the result of earlier work being performed without a permit at the time, the record does not indicate the type and scope of same; only that as a result of the prior work on February 25, 2005, a permit was granted to perform the following construction work:

Repairs and renovation of existing dwelling and attached accessory to include: re-roofing, residing, installation of all new windows and doors, installation of skylight, replacement of 1 sliding door w/2 windows, remove and replacement of breeze way, in-kind & in-place, raising floor approx. 6". Minor repairs to sheetrock to accommodate windows. Spec Cond.: haybaling to be installed to prevent runoff. Work performed under this permit constitutes a 50% restoration of existing structures. ANY FURTHER WORK will require wetland approvals and additional building and health [sic].

However, the work permit was silent as to which section of the zoning code was applicable.

On or about December 15, 2005, the Town Building Inspector issued a Stop Work Order alleging that the work being done on the property exceeded the scope of work allowed under the February 25, 2005 permit. The building inspector calculated at the time the Stop Work Order was issued, that 66% of the dwelling and garage/apartment had been demolished and thence restored. This did not include installation of new heating and air conditioning systems or the proposed new deck. The record does not indicate the status of any activity involving this property during the year 2006. In April, 2007, petitioners submitted an application to the Zoning Board for relief under § 133-23(A) pursuant to the zoning code. The relevant part of the building code at issue states as follows:

§ 133-23 Nonconforming buildings and uses:

Buildings and uses and the use of any land or building legally existing prior to October 19, 1959, or prior to any applicable revision or amendment to this chapter thereafter, may be continued although such use does not conform to the provisions of this chapter, and any such building may be reconstructed or structurally altered, subject to the following regulations.

A. Alteration and expansion. A legal nonconforming building or structure may be altered or expanded without a special permit from the Zoning Board of Appeals so long as such action does not create any new nonconformity or increase the degree or extent of nonconformity with regard to the bulk or use regulations of the zoning district in which it is located. If, however, such alteration involves a majority of the building, the entire building or structure must meet the requirements of the New York State Uniform Building and Fire Prevention Code (Amended 5-25-2007 by L.L. No. 5-2007).

B. Restoration. A legal nonconforming building or structure damaged to the extent of less than a majority of the building may be rebuilt, provided that the application for same is filed within two years of the damage so long as such action does not create any new nonconformity or increase the degree or extent of nonconformity with regard to the bulk or use regulations of the zoning district in which it is located. If any such damage involves more than a majority of the building, any restoration shall require approval of the Zoning Board of Appeals. The Zoning Board of Appeals when considering such an application, may impose reasonable conditions, among which shall be that the entire building or structure must meet the requirements of the New York State Building and Fire Prevention Code (Amended 5-25-2007 by L.L. No. 5-2007).

A hearing was conducted over several days spanning from June to October 2007. In addition to the relief sought under this section, the petitioners sought permission to construct a wooden porch over an existing concrete deck and that the deck, as proposed, would be 63 feet from the wetland pond. During the hearing, counsel for the petitioners presented a permit dated September 7, 2006, from the New York State Department of Environmental Conservation granting petitioners permission under Article 24 Freshwater Wetlands to construct a 265 square foot deck on an existing concrete patio, construct steps off the rear and off the side of the dwelling, remove an underground fuel tank and construct a new septic system. The petitioners also presented a permit from the Suffolk County Health Department for a new septic system, which would be located well outside the 100 feet wetland boundary whereas the existing cesspool was located in a nonconforming area of the property and a report from a hydro geologist indicating that the sanitary system would be a significant improvement over the current method of sewage disposal on the property.

The petitioners testified during the hearings their concern regarding the construction cost overruns and why there were cost overruns. They indicated that the work entailed more repairs than anticipated because of the severity of the water damage and that actual costs of the repairs exceeded that which was

anticipated when the building permit was issued. Further, petitioners presented estimates of work that still needed to be done regarding the filling in of the old cesspool, installation of a new septic system, replacement of the heating system and the installation of an air conditioning system. These items were not listed as required work under the permit. An additional submission by petitioners addressed to the Zoning Board consisted of letters from seven neighbors, including those immediately north and south of the petitioners' property, stating that they had no objection to the improvements being done to the dwellings or the property.

During the hearings, the petitioners presented to the Zoning Board an estimate from a local construction firm indicating that the cost to demolish the existing 1,312 square foot wood frame structure and construct a new wood frame residence on the conforming part of the property would be approximately \$419,000.00 (this square footage is different from the number presented by petitioners and the estimate gave no explanation as to the increased footage). Additionally, during the hearings, petitioners also presented an estimate of \$190,000.00 from a house moving and rigging firm indicating the cost of moving the house and associated construction work which would have to be done prior to, during and after the relocation. This documentation was provided to the Zoning Board to demonstrate that the cost to either reconstruct the nonconforming buildings or move them would be cost prohibitive and that the prohibitive cost would be more detrimental to the petitioners and would far outweigh any alleged detriment to the neighbors, who in fact, did not oppose the alterations.

At the conclusion of the public hearings, the Zoning Board issued its decision on November 28, 2007 making the following findings:

1. The property currently consists of 0.98 acre, developed with a nonconforming 700 s.f. single story house with a detached 300 s.f. one bedroom seasonal apartment; and
2. The garage/apartment abuts the north side property line, and both that structure and the house are built within 50 feet of Fresh Pond, a sensitive freshwater wetland; and
3. The garage apartment had a certificate of compliance indicating it was a small garage and small unheated seasonal apartment when the applicant purchased it in 1989, and testimony indicated that it has been converted entirely to residential living area without benefit of building permits; and
4. On 4/25/05 applicant obtained a building permit to do repairs to a renovation of existing dwelling and attached accessory to include re-roofing, new windows and doors, add skylights, replacements of breezeway, sheetrock repairs; and
5. This permit specifically stated that the work performed under this permit constituted a 50% restoration of existing structures, and that any further work would require wetlands approval and additional building and health department approvals; and
6. On December 1, 2005 the building inspector learned that significantly more work than was authorized had been done and issued a stop work order. The additional work included all new windows and doors, demo and reconstruction of master suite, foyer, kitchen, bathroom. Floor sheetrock, floors, electrical, plumbing, which the building inspector has estimated at a 66% demolition and reconstruction which triggers review under § 133-23(B); and
7. Applicant indicates that \$77,835 of work was done prior to the issuance

of the stop work order and this application, \$12,000 of which exceeded work allowed by the building permit, and that an additional \$104,590 of work remains to be done to finish the proposed restoration of the structures; and

8. Applicant seeks to get after-the-fact approval of the restoration of the dwelling and attached accessory building and legalize the conversion of the garage to year round residential use as part of the house to nearly double the size of the original dwelling; and

9. Applicant has stated that the work was done by her contractor (now deceased) and she did not know she needed permits, although the buildings permit examiner has stated that she met with applicant several times before construction and advised her that any work in excess of that stated in the building permit would require additional permits and approvals; and

10. The existing dwelling is located in a conforming location, but the Zoning Board has serious concerns about restoration and conversion of the grossly nonconforming accessory garage/apartment, which is within inches of the property line; and

11. The Zoning Board believes there are feasible alternatives to restoring the accessory garage/apartment in the existing location, and that it could be moved to a conforming location near the house; and

12. The Zoning Board has determined that applicant knew or should have known that further approvals were needed before investing money in restoration of the nonconforming accessory building and that there was a possibility that the building would have to be demolished or relocated, and that restoration is less than half way completed, so it is not an undue burden for applicant to remove or demolish/replace the nonconforming accessory building in a conforming location; and

13. Applicant seeks to replace an existing concrete patio with a wooden deck, and the ZBA believes that this is a minor change to an existing structure and can be approved; and be it further

**RESOLVED**, that the board has considered the proposed reconstruction of a nonconforming house and has weighed the benefits to applicant versus the impact on the neighborhood and finds the following:

a) The proposed restoration of the original dwelling should not have an undesirable impact on the neighborhood because it conforms to the setbacks, but restoration of the accessory garage/apartment would have an undesirable impact because the structure is so grossly nonconforming to the setbacks that it extends to within inches of the side yard property line, as well as, the fact that the original use as a garage/apartment has been changed without permits so that the building would now become part of the dwelling; and

b) The benefit to the applicant can be achieved by a feasible alternative, because the restoration of the accessory garage/apartment is only partly completed and there is plenty of space on the property to pursue the restoration of that space in a conforming location; and

c) The request to restore the accessory garage/apartment is substantial, as it extends to the property line and would require a complete waiver of the

required side yard setback as well as the fact that applicant proposes to change the use of that building to function as part of the residence which increases the nonconformity; and

d) The proposed project does not have the potential to have significance on the environment since the proposed restoration would take place within the existing footprint; and

e) The applicant's difficulty is self created because the applicant was clearly advised of the limitations of the building permit and choose to go ahead and exceed it by restoring substantially more than 50% of the structure without benefits of permits, thus putting any investment in restoration at risk of loss if the permits were not granted.

**BE IT FURTHER RESOLVED** that the zoning board, after taking into consideration the above findings, finds that to some extent, the benefit to the applicant does not outweigh the detriment to the neighborhood and is not the minimum necessary to preserve and protect the character, health, safety and welfare of the community, so that while permission to restore the original dwelling in the existing location is hereby GRANTED, permission to restore and convert the accessory building (originally consisting of a garage/apartment and now proposed to become part of the dwelling) is hereby denied. (The vote was unanimous).

Petitioners then commenced this Article 78 proceeding for a judgment reversing and annulling the Zoning Board's determination.

Petitioners claim that the Zoning Board's determination was arbitrary, capricious and without a rational basis in that while approving the restoration of the house, it denied the de minimis variance requested for the conversion of the accessory apartment; that the Zoning Board ignored the fact that petitioners, by installing a new septic system further away from the wetland's pond and abandoning the cesspool, resulted in an environmental benefit to all; and that the footprint of the accessory apartment will not change because all the work that is being done is interior except for re-roofing and window installation and it will not impact on the neighborhood. The Zoning Board, in its answer and supporting papers, denies the claim of the petitioners on the grounds that its November 28, 2007 determination had a rational basis on the record and was neither arbitrary, capricious nor an abuse of discretion.

The Zoning Board's decision was rendered pursuant § 133-23 A of the Zoning Code. The decision correctly granted the application relative to the main dwelling. That part of its decision concerning the accessory dwelling centered on the application by the petitioners to complete the work on the accessory building indicating that this would have an undesirable impact and be detrimental to the neighborhood. The Zoning Board also mentioned that its closeness to the property line was not a minimum setback necessary to preserve and protect the character, health, safety and welfare of the community because it was grossly nonconforming in being inches away from the property line. Therefore, this was unacceptable as the Zoning Board was being asked to allow the apartment to be living quarters that were attached to and would become part of the main dwelling.

The Zoning Board's decision glosses over several issues. First, it fails to state how this building, with a certificate of compliance since 1988, is now suddenly one which would have an undesirable detrimental effect on the neighborhood and would effect the character, health, safety and welfare of the community based upon the alteration of same due to water damage and the repairs necessitated by said damage and an increase of livable space. The second issue is that, in 1992, the Zoning Board issued a permit to the petitioners to enclose the breeze way between the two buildings, which, for all practical purposes, joined the two buildings. Also, in 2005, the Zoning Board issued a building permit allowing petitioners to replace it. A letter from the Town of Shelter Island Office of Code Enforcement (hereinafter "Town") to

petitioners' representative, dated April 18, 2007, acknowledges that "portions of the 'cottage' area [are] actually now part of the dwelling proper" (see petitioners' Exhibit F in the record). Thirdly, the Town mistakenly raises the issue of the applicability of § 133-23 B of the Zoning Ordinance to the petitioners' application. The fourth issue is that the garage/apartment was, in fact, a habitable area comprising over 50% of the accessory building since, at least, 1988 and the garage area was a wasted space. The fifth issue is that there is no conflict with the Zoning Code as the Code itself defines "Alteration" as a change or rearrangement to the structural elements of an existing structure, or any enlargement or diminution of an existing structure. Such did not occur here. Finally, the Town has failed to show any new or increased nonconformity with regard to the bulk or use regulations of the Zoning District (see § 133-23A).

The Court finds that the Zoning Board's decision was arbitrary, capricious and without a rational basis. The buildings already exist and have existed since prior to the enactment of the Zoning Code in the same footprint next to the property line. The accessory building was already a habitable space, comprising greater than 50% of the total area of the building. Further, a building permit was issued in 1992 to enclose the breeze way connecting the main building and the accessory building, which was acknowledged by the Town as being part of the building structure. In the years of the buildings' existence, there has not been any known complaint that the location is undesirable or had a detrimental environmental impact on the neighborhood. There is no evidence that its closeness to the property line since it was built destroyed the character or injured the health, safety or welfare of the community despite its nonconforming setback. The evidence in the record is to the contrary.

The application, as noted, was not to extend any of the four walls of the building but rather, to utilize unuseable space that was already within the building footprint. The record indicates that the petitioners were not seeking to circumvent the zoning code but to upgrade the property and in doing so, also provide an economic and environmental benefit to the community by the installation of an ecological friendly septic system. The draconian alternative given petitioners by the Zoning Board's decree to remove it or move it was without any basis in law or fact (see Town Law § 267[b][2][b]), and unjustified.

During the scope of judicial review of an administrative action, the court must determine whether there is a rational basis for the decision or whether it is arbitrary or capricious (see *Matter of Warder v Board of Regents*, 53 NY2d 186, 194, 440 NYS2d 875 [1981] citations omitted). However, a court may substitute its judgment for that of a Zoning Board of Appeals where its determination is irrational and arbitrary, capricious or an abuse of power. The scope of judicial review is limited to an examination of whether the determination has a rational basis and is supported by substantial evidence (see *Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 259 [1995]; *M&M Partnership v Sweenor*, 210 AD2d 575, 619 NYS2d 802 [3d Dept 1994]). An arbitrary and capricious action is one taken "without sound basis in reason and generally without regards to the facts" (*Pell v Board of Ed. of Union Free Sch. Dist.*, 34 NY2d 222, 232, 356 NYS2d 833 [1974]). In reviewing zoning board actions, a court does not make or substitute its judgment but restricts itself to ascertaining whether there has been any illegality, arbitrariness, capriciousness or an abuse of discretion (see *Inlet Homes Corp. v Zoning Bd. of Appeals Town of Hempstead*, 304 AD2d 758, 757 NYS2d 784 [2d Dept 2003]; *lv app granted* 100 NY2d 516, 769 NYS2d 203 [2003]; *affd* 2 NY3d 769, 780 NYS2d 298 [2004]; *Town of Huntington v Five Towns Coll. Real Prop. Trust*, 293 AD2d 467, 740 NYS2d 107 [2d Dept 2002]; *Richard Dudyshyn Contr. Co. v Zoning Bd. Of Appeals of the Town of Mt. Pleasant*, 255 AD2d 445, 680 NYS2d 571 [2d Dept 1998]; *Matter of Lemir Realty Corp. v Larkin*, 11 NY2d 20, 226 NYS2d 374 [1962]).

Under the particular facts and circumstance of this matter, the Court finds that the Board's determination did not have a rational basis, was not supported by substantial evidence in the record and was arbitrary and capricious (*cf. Polsen v Rosenberg*, 295 AD2d 352, 743 NYS2d 879 [2d Dept 2002], *lv app den* 98 NY2d 613, 749 NY2d 475 [2002]; *Ifrah v Utschig*, 98 NY2d 304, 746 NY2d 683 [2002]; *David Park Estates v Trotta*, 283 AD2d 429, 723 NYS2d 885 [2d Dept 2001]; *Bivona v Town of Plattskill Zoning Bd. of Appeals*, 268 AD2d 877, 701 NYS2d 734 [3d Dept 2000]; *Monte v Edwards*, 258 AD2d 584, 685 NYS2d 479 [2d Dept 1999]; *Budget Estates v Roth*, 203 AD2d 287, 610 NYS2d 69 [2d Dept 1994]; *Kroumer v City of Albany*, 192 AD2d 930, 595 NYS2d 891 [3d Dept 1993], *app den* 82 NY2d 656, 602 NYS2d 69 [1994]; *Matter of Consolidated Edison of N.Y. v New York State Div. of Human Rights*, 77

NY2d 411, 568 NYS2d 569 [1991] *rearg den* 78 NY2d 909, 573 NYS2d 470 [1991]).

“Substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably probatively and logically” (*300 Gramaton Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181, 408 NYS2d 54 [1978], *citations omitted*).

Therefore, the petition is granted, the November 28, 2007 determination denying petitioners’ application to allow the de minimis 12 x 15 foot area of the accessory building to remain as a liveable space is annulled, vacated and set aside (*see E&B Realty, Inc. v Zoning Bd. of Appeals of Inc. Vil. of Roslyn*, 275 AD2d 779, 713 NYS2d 744 [2d Dept 2001]) and the matter is remitted to the Board for proceedings consistent with this decision.

Accordingly, the petition is granted as noted herein. This constitutes the Order and Judgment of the Court.

DATED: \_\_\_\_\_

4/1/08

  
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THOMAS F. WHELAN, J.S.C.