

**Matter of Scherer v Town of Southampton Zoning  
Bd. of Appeals**

2011 NY Slip Op 31498(U)

April 20, 2011

Sup Ct, Suffolk County

Docket Number: 05083-10

Judge: Peter Fox Cohalan

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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 24

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In the Matter of the Application of :  
Kevin Scherer, :  
Petitioner, :

By: Cohalan, J.S.C.  
Dated: April 20, 2011

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

Index No. 05083-10

- against -

Mot. Seq. # 001 - CDISPSUBJ

TOWN OF SOUTHAMPTON ZONING BOARD :  
OF APPEALS and WENDY LEHMAN, :

Return Date: March 8, 2010  
Calendar Date: July 28, 2010

Respondents. :  
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This is an Article 78 special proceeding brought by the petitioner seeking to reverse, annul and set aside a determination by the respondent, Zoning Board of Appeals (hereinafter ZBA) of the Town of Southampton (hereinafter Town), dated January 7, 2010, granting an application by the co-respondent, Wendy Lehman (hereinafter Lehman), for approval of a 1,984 square feet artist's studio as a customary accessory structure with an attendant area variance which exceeds 25% of the 4,086 square feet floor area of the main premises, a two story residence.

The petitioner, Kevin Scherer, is the owner of an adjacent residential parcel of real estate located at 64 Mecox Bay Lane in Watermill, Suffolk County on Long Island, New York. The respondent Lehman is the owner of property located at 535 Mecox Road, Watermill, Suffolk County on Long Island, New York. She sought approval for the proposed construction of a 1,984 square foot artist studio to be located within the rear yard of her premises measuring with a pool 4,496 square feet on a 1.4257 acre flag lot. Lehman is an accomplished artist whose art work involves large sculptures and paintings, some measuring more than 10 feet in length and/or width. The proposed structure would allow the storage of her art work and also allow space to create her art. Her initial application #0900140 to the Town building inspector was denied in a decision, dated October 29, 2009, with the statement that the structure "is not a subordinate or incidental building because of its size in proportion to the main dwelling." The petition alleges that while there is no size limitation on accessory structures the building inspector denied the permit because the accessory structure violated an unwritten rule of thumb that no accessory structure should exceed 25% of the principal structure's size and Lehman's proposed accessory structure did so.

Lehman appealed the denial to the ZBA on October 16, 2009. She sought a variance on the size of the accessory structure premised upon a supposed 25% rule of thumb on the size of accessory structures referable to the size of the existing principal structure on her property. The ZBA conducted a hearing on November 19, 2009 which continued on December 17, 2009 with the petitioner arguing in opposition to the proposed accessory structure that the Town Code §330-5 and §330-105.a precluded an artist's studio of more than 500 feet, that this artist studio would be a commercial enterprise in a residential area and therefore there should be strict controls.

The ZBA, in its decision, dated January 7, 2010, granted the variance requested by Lehman finding that the artist studio was a customary accessory structure, not a home office, and made the grant conditional on the continued maintenance of the existing hedge line of 23 to 25 feet between her property and petitioner's and prohibited any exhibitions, showings or parties in the accessory structure. The ZBA went on to specifically refute any presumed 25% rule stating "This board once again reiterates that it has no so called "25% rule" but rather examines the facts and circumstances of each case as presented."

In its decision, the ZBA rejected the petitioner's argument that the proposed structure was a "professional home office" under Town Code §330-5 and §330-105.a, limiting any structure to 500 feet, because the contemplated use was the storage and making of works of art whereas a home professional office suggested employees, visitors, traffic and public exhibitions not contemplated or allowed on this particular application.

The petitioner thereafter brought this Article 78 proceeding contesting the ZBA's decision and determination of January 7, 2010 claiming that the ZBA, contrary to all the evidence, found that Lehman's proposed accessory structure and use of an artist's studio "inexplicably held that it is not an artist's studio" and therefore not subject to the 500 square feet rule contemplated by the Town Code §330-5 and §330-105.a and claiming that the

ZBA's grant of the application was against the law and arbitrary, capricious, against the weight of the substantial evidence presented and legally without merit.

For the following reasons, the petitioner's Article 78 special proceeding seeking to vacate and annul the ZBA's decision, dated January 7, 2010, is dismissed.

It is settled law "that in a proceeding seeking judicial review of administrative action the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary or capricious." ***Flacke v. Onondaga Landfill Systems, Inc.***, 69 NY2d 355, 363, 514 NYS2d 689,693 (1987). In this regard, the Court's review is limited to determining whether the action taken by the ZBA was illegal, arbitrary, capricious or an abuse of discretion. See, ***Ifrac v. Utschig***, 98 NY2d 304, 746 NYS2d 667 (2002); ***Association of Friends of Sagaponeck v. Zoning Board of Appeals of Town of Southampton***, 287 AD2d 620, 731 NYS2d 851 (2<sup>nd</sup> Dept. 2001). Further, the ZBA's interpretation of the Town Code with regard to the appropriateness or factual findings of what constitutes an accessory structure also is entitled to judicial deference unless such interpretation of the provisions of the Town Code are irrational, arbitrary or capricious. See, ***Zupa v. Zoning Bd of Appeals of Town of Southold***, 56 AD3d 569, 867 NYS2d 189 (2<sup>nd</sup> Dept. 2009) citing to ***NY Botanical Garden v. Bd of Standards & Appeal of City of New York***, 91 NY2d 413, 671 NYS2d 423 (1998).

In ***NY Botanical Garden v. Bd of Standards & Appeal of City of New York***, supra, at 420, the Court of Appeals in dealing with the very nature of accessory uses and the standard to be used as being very factually based stated:

"Whether a proposed accessory use is clearly incidental to and customarily found in connection with the principal use depends on an analysis of the nature and character of the principal use of the land in question in relation to the accessory use, taking into consideration the overall character of the particular area in question. This analysis is, to a very great extent, fact-based... . This Court may not lightly disregard that determination."

While the petitioner claims that Lehman's artist studio is not an artist studio but a professional home office, the real question which the ZBA attempted to answer was when is an artist's studio not an artist's studio but instead is an accessory structure. In this regard, the distinction draw by the ZBA appears to be clearly rational and fact based and within its authority to determine the provisions of law involved in deciding what is the distinction between a true artist studio as contemplated within the definition of a home professional office (as stated in Town Code §330-5 and §330-105.a ) allowing only a 500 square feet structure and Lehman's considerably larger accessory structure. The ZBA noted:

"In determining whether the Building Department properly denied

applicant's request for a building permit for a 1,984 square foot artist's studio, this Board first notes that an artist's studio is, and has historically been held by this Board, to be a "customary accessory structure" with respect to use in a residential zone. Indeed, as discussed at the hearing of this application, the Town... has taken pride in the fact that its hamlets, particularly those such as Water Mill boast the character and charm that artist's studios often afford properties."

The ZBA then went on to discuss the distinction of when an artist's studio is not an artist's professional home studio as contemplated in Town Code §330-5 and §330-105.a and instead is an accessory structure by noting:

"Despite [petitioner's] counsel arguments to the contrary, this Board finds that the home professional office definition herein [Town Code §330-5], contemplates something other than that proposed by applicant, that is, other than a large studio space for storing previous works of art, and for creating new ones. Rather, it seems clear that the definition for a home professional office contemplates (i) employees, (ii) visitors, such as patients, clients, or customers, and (iii) the traffic that accompanies these persons.

As the ZBA noted, the home professional office contemplated by the Town Code §330-5 and §330-105.a involves uses more commonly associated with a commercial establishment such as the office of a medical doctor, lawyer, dentist, architect, artist, real estate broker involved with clients, commercial traffic and exhibitions and waiting areas rather than a storage and private working area for an artist. "[W]hen applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to great deference." See, *Raritan Development Corp. v. Silva*, 91 NY2d 98, 667 NYS2d 327 (1997); *Beekman Hill Association v. Chin*, 274 AD2d 161, 712 NYS2d 471 (1<sup>st</sup> Dept. 2000). The ZBA conducted a lengthy discussion concerning the differences between an artist studio as an accessory structure on a residential property and an artist studio as a commercial home office and as the Town Code §330-165(A) charges the ZBA with the responsibility to interpret its zoning code, the ZBA fulfilled its responsibilities. The Court does not find, as petitioner suggests, that the ZBA engaged in a "legislative annulment" of the Town Board's authority. Thus the ZBA did that which it was charged by law to do i.e. factually determine and interpret when an "artist studio" may or may not be an artist studio within the parameters of Town Code §330-5 and §330-105.a dealing with home professional offices. See, *Jennings v. New York State Office of Mental Health*, 90 NY2d 227, 660 NYS2d 352 (1997).

The ZBA's interpretation of the Town Code with reference to Lehman's proposed structure as an accessory structure rather than a home professional office does not signify or require a strained interpretation or irrationally define an accessory structure as opposed to a

professional office. In point of fact, the ZBA's interpretation of the Town Code §330-5 and §330-105.a as a defined determination of what constitutes a commercial enterprise and the regulations inherent within the use of a commercial home office was reasonable and neither arbitrary, capricious or irrational. As the ZBA stated in its decision "[T]his Board finds that the applicant's 1,984 square foot artist's studio is a customary accessory structure as it relates to the 4,495 square foot principle (sic) dwelling on the subject premises." The petitioner's strained interpretation to preclude Lehman's accessory structure as more properly defined as a home professional office was flatly rejected by the ZBA and indeed in its decision the ZBA noted that its grant of the application was approved "upon applicant filing a covenant in the Suffolk County Clerk's Office, approved by the Town Attorney's Office, (1) prohibiting any exhibitions, showings or parties ..." within the accessory structure, thus recognizing the difference between Lehman's accessory structure and a commercial home professional office .

The proper standard for a reviewing court is whether the challenged administrative ruling lacked a rational basis for the action taken and was arbitrary and capricious. As set forth by the Court in **Matter of Halpern v. City of New Rochelle**, 24 AD3d 768, 809 NYS2 98 (2<sup>nd</sup> Dept. 2005),

"In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis. Under this standard, a determination should not be disturbed unless the record shows that the agency's action was 'arbitrary, unreasonable, irrational or indicative of bad faith' (**Matter of Cowan v. Kern**, 41 NY2d 591, 599; see **Matter of Pell v. Board of Educ.**, 34 NY2d 222, 231 ["Arbitrary action is without sound basis in reason and is generally taken without regard to the facts"]).

The Court, in **Halpern**, went on to state

"The Court of Appeals has long recognized the 'settled rule' that 'in reviewing board actions as to variances or special exceptions the courts...restrict themselves to ascertaining whether there has been illegality, arbitrariness, or abuse of discretion' (**Matter of Lemir Realty Corp. v. Larkin**, 11 NY2d 20, 24 [collecting cases]; see **People ex rel. Hudson-Harlem Val. Tit. & Mtgw. Co. v. Walker**, 282 NY 400, 405 [determination of zoning board of appeals 'may not be set aside unless it appears to be arbitrary or contrary to law'] [collecting cases]). The Court of Appeals has continued to articulate the CPLR 7803 (3) standard of review in zoning cases, emphasizing the deference that must be afforded to local officials in making judgments concerning land use in their community (see **Matter of Pecoraro v. Board of Appeals of Town**

of Hempstead, 2 NY3d 608, 613 [‘courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure’] Matter of Ibrah v. Utschig, 98 NY2d 304, 308 [‘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’]; Matter of Cowan v. Kern, supra at 599 [‘Where there is a rational basis for the local decision, that decision should be sustained’]).

Thus the ZBA’s determination must be upheld if it is rational, and supported by substantial evidence. Khan v. Zoning Board of Appeals of Village of Irvington, 87 NY2d 344, 639 NYS2d 302 (1996) rehearing den. 87 NY2d 1056, 644 NYS2d 148. The consideration of “substantial evidence” is limited to determining “whether the record contains sufficient evidence to support the rationality of the [Respondent’s] determination.” Sasso v. Osgood, 86 NY2d 374, 633 NYS2d 259 (1995). When the evidence of opposition is limited and the record reflects the denial or granting of an application was rendered without findings or limited findings, based upon impermissible community pressure, the petition must be granted and the matter remanded to respondent. See, Buckley v. Amityville Village Clerk, 264 AD2d 732, 694 NYS2d 739 (2<sup>nd</sup> Dept. 1999).

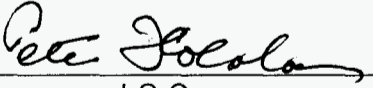
A review of the record presented establishes more than enough support to substantiate the ZBA’s decision, dated January 7, 2010, granting Lehman’s application for an accessory structure for the storage of the large artworks and sculptures in her collection as well as providing work space to continue her artwork. The Court finds that the ZBA engaged in the required balancing test and review of the applicable Town Code provisions based upon the evidence submitted in support of and against Lehman’s application. Town of Lysander v. Hafner, 96 NY2d 558, 759 NYS2d 356 (2001). See also, Gibbons v. New York State Unified Court System, 78 AD3d 942, 911 NYS2d 169 (2<sup>nd</sup> Dept. 2009).

Based upon the entire record before it, and balancing all the factors established, the ZBA could rationally conclude that the application for an accessory structure should be granted and its determination granting such requested relief was not irrational, arbitrary or capricious. Trump on Ocean LLC v. Cortes-Vasquez, 76 AD3d 1080, 908 NYS2d 694 (2<sup>nd</sup> Dept 2010). Accordingly, the petition is denied and the proceeding dismissed.

### Settle Judgment

The foregoing constitutes the decision of this Court.

Date: April 20, 2011

  
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J.S.C.