

<b>Matter of DiDomenico v Phillips</b>
2013 NY Slip Op 31707(U)
July 3, 2013
Sup Ct, Suffolk County
Docket Number: 32291/2012
Judge: William B. Rebolini
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MEMORANDUM

**SUPREME COURT - STATE OF NEW YORK**

**I.A.S. PART 7 SUFFOLK COUNTY**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK**

In the Matter of David M. DiDomenico  
and Arthur C. Romaine,  
  
Petitioners,

Motion Sequence No.: 001; MG; CD  
SUBJ

Motion Date: 12/12/12  
Submitted: 3/20/13

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

Index No.: 32291/2012

-against-

Attorney for Petitioners:

Herbert Phillips, Chairman, Adam Grossman,  
Vice Chair, Ann Nowak, Member, Keith Tuthill,  
Member, Denise O'Brien, Member, David Reilly,  
Member, Brian Desesa, Member, together  
constituting the Town of Southampton Zoning  
Board of Appeals and Janet Finkel,

Jeffrey L. Bragman, P.C.  
15 Railroad Avenue, Suite 1  
East Hampton, NY 11937

Attorney for Respondent  
Town of Southampton:

Respondents.

Tiffany Scarlato, Esq.  
116 Hampton Road  
Southampton, NY 11968

Attorney for Respondent Janet Finkel:

Clerk of the Court

Bennett & Read, LLP  
212 Windmill Lane  
Southampton, NY 11968

In this article 78 proceeding, the petitioners challenge a September 20, 2012 determination of the Town of Southampton Zoning Board of Appeals ("the ZBA") which granted an application by Janet Finkel ("the respondent") for variances to allow a proposed aboveground pool and deck, measuring 14 feet by 28 feet, in the front yard<sup>1</sup> of her property located at 41 Hildreth Avenue, Bridgehampton, New York.

<sup>1</sup> According to the respondent, the front yard is the only feasible location on her property to construct a swimming pool since the lot is significantly burdened by wetlands.

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The property is located in the Town's "Residence 20" (R-20) zoning district. Section 330-76 (D) of the Code of the Town of Southampton provides generally that accessory buildings and structures "shall not be placed within a required front yard, a required side yard nor the total required side yard for a principal building." Section 330-11 requires that accessory buildings and structures on lots in the R-20 district be set back a minimum of 50 feet from the street. Section 330-5 defines the term "accessory building" to include a swimming pool.

The petitioners, David M. DiDomenico and Arthur C. Romaine, are owners of the residential property located, respectively, at 54 and 27 Hildreth Avenue. The DiDomenico property is situated on the west side of Hildreth Lane, across the street from the Finkel property and less than 50 feet from the site of the proposed pool and deck. The Romaine property is situated immediately to the north of the Finkel property on the same (east) side of the street. According to the petition, the DiDomenico property sits at a higher elevation than the Finkel property, a circumstance which leaves the front yard of the Finkel property "highly visible, especially from the second story of the DiDomenico house." The petitioners describe the lots on Hildreth Avenue as "side by side, rectangular half acre parcels," and describe Hildreth Avenue itself as "a notably quiet, attractive street with generally small houses and open front yards" in "a modest neighborhood with an unspoiled appeal."

It appears that after the respondent purchased the property on September 13, 2008, and before she made the application which is the subject of this proceeding, she applied on at least two separate occasions for similar variance relief. On July 16, 2009, the ZBA denied an application which was to construct a proposed 16-foot by 32-foot aboveground pool and deck located approximately 26 and 20 feet, respectively, from the street. Then, on December 15, 2011, the ZBA reversed a determination of the Town's chief building inspector granting a building permit to construct a 16-foot by 32-foot in-ground gunite pool and deck—a determination premised on the finding that the Finkel property was "waterfront," allowing the respondent to swap her front and rear yards for zoning purposes—and concluded that the variance relief would be required to construct a pool in the respondent's front yard. This application followed, with the respondent seeking variances to allow a proposed 14-foot by 28-foot pool and deck in a required front yard, to allow a front yard setback of 27.5 feet for the pool, and to allow a front yard setback of 21.5 feet for the deck.

Following a series of public hearings at which attorneys for both the petitioners and the respondent appeared and testified, and after considering the testimony and other evidence received at those hearings—including prior ZBA determinations, letters and e-mails from neighbors, and environmental reports—the ZBA concluded, on the following findings, that the respondent was entitled to the requested relief.

In order to grant the area variance relief requested, the Zoning Board of Appeals shall take into consideration the benefit to the applicant if the variances are granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. Further, the applicant must demonstrate, pursuant to §330-166(C) of the Town Code, that the proposed variances meet the standards set forth in that section, as well as the standards set forth in §267-b of New York State Town Law.

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Here, this Board finds that the benefit to the applicant outweighs any perceived detriment to the health, safety and welfare to the neighborhood or community. While this Board denied applicant's earlier request for a slightly larger pool in 2009, it is now the determination of this Board that the modified relief requested should be granted. Specifically, this Board finds that the granting of the variances will not cause an undesirable change in the character of the neighborhood nor create a detriment to nearby properties. While front yard pools are not the character of this neighborhood, it has been established that pools are common accessory structures both in the general vicinity and specifically in this neighborhood and that further, this Board has recently granted front yard relief/reduced front yard setbacks for two garages and a house on Hildreth Avenue. As such this Board has found that there are circumstances when open front yard views may be obstructed for the benefit of the property owner.

Further, while the opposition remains convinced that the proposed pool and any proposed landscaping will either be insufficient to screen the pool or negatively impact the character of the neighborhood, this Board finds it persuasive to note that the applicant, and for that matter, anyone in the neighborhood, is permitted to install hedges of any height as of right. As such, the more relevant question with respect to the character of the neighborhood is whether screening of the pool would mitigate its visual impact or instead negatively impact the open vistas of the front yards. Since vegetation can be planted at any point, of any height, by any property owner as of right, obscuring any view of any yard, this Board finds the screening of the proposed pool to be the most appropriate method of mitigating any negative impacts to the neighboring community. Here, the applicant proposes to screen the proposed pool with 10-12 foot trees, and the Board finds that this mitigation in combination with the rights of neighboring property owners to plant screening an adequate remedy to the neighbors' complaints. Therefore this Board finds that the benefit to the applicant outweighs any detriment to the neighborhood.

The benefit sought by applicant cannot be achieved by some method, feasible for applicant to pursue, other than an area variance. Applicant's initial proposal for a 16 foot x 32 foot pool was denied by this Board, as was the Chief Building Inspector's "waterfront" determination. Similarly, applicant's stated goal, to construct a swimming pool, has been proposed at various sizes with corresponding setbacks, none of which have been amenable to the opposition, all of which require, to some degree, relief from this Board as applicant's rear yard is consumed by wetlands. While the premises may not be "waterfront" as is contemplated by the Southampton Town Code, the presence of such significant wetlands limits applicant's alternate plans and places virtually any accessory structure within the required front yard.

While the variances requested, at first glance, appear substantial, the Board finds that the requested variances are the minimum necessary in order to achieve applicant's requested benefit, particularly when there are no alternatives for the placement of a pool due to the extensive presence of wetlands on the premises.

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Further, this Board finds that the proposed variances will not have an adverse effect and impact on the physical and environmental conditions in the neighborhood, as screening will be required as a condition of approval. Lastly, applicant's hardship is not self-created since the lot is constrained by both the significant wetlands and the existing location of the house. Assuming *arguendo*, however, that the difficulty was self-created, this Board is ever cognizant of the fact that a self-created hardship, in and of itself, is not a legal basis to deny the requested relief.

Therefore, in the interests of justice and for the reasons set forth herein, this Board grants applicants [sic] relief from (i) Town Code §330-11 to allow a front yard setback of 27.5 feet where 50 feet is required for a proposed 14 foot x 28 foot pool; (ii) Town Code §330-11 to allow a front yard of 21.5 feet where 50 feet is required for a proposed deck; (iii) Town Code §330-76(D) to allow a proposed 14 foot x 28 foot pool and deck in a required front yard; and (iv) Town Code §330-83(C) to allow a proposed 14 foot x 28 foot pool and deck in a required front yard. This determination is based upon the structures as shown on the survey of Steven Barylski, dated September 16, 2008, last revised July 23, 2012, and is conditioned upon applicant planting and maintaining 10-12 foot Leland Cypress along the westerly and southerly property lines and for 30 feet along the driveway. Grant of the foregoing relief is subject to such other conditions and permits as applicant has already acquired or may otherwise have to acquire for final approval of the subject premises.

This proceeding followed.

In support of the petition, the petitioners contend that there is no precedent to support the granting of the relief challenged in this proceeding, as each of the prior determinations submitted for the ZBA's review involved different neighborhoods, more discreet locations, and less intrusive uses. The petitioners further contend that the ZBA improperly failed to adhere to its July 16, 2009 determination, denying the respondent's earlier application, in that both applications were based on essentially the same facts and that no relevant circumstances had changed in the interim.

Pursuant to Town Law § 267-b (3), which sets forth the same standards as section 330-166 (C) of the Code of the Town of Southampton, when a local zoning board considers whether to grant an application for an area variance, it 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. In making its determination, the board must also consider (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 (Town Law § 267-b [3]).

A local zoning board has broad discretion in considering applications for variances, and judicial review is limited to ascertaining whether the action taken by the board is illegal, arbitrary and capricious, or an abuse of discretion (*Matter of Ifrah v Utschig*, 98 NY2d 304, 746 NYS2d 667

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[2002]). In applying the “arbitrary and capricious” standard, a court looks only to whether the determination lacks a rational basis, *i.e.*, whether it was without sound basis in reason and without regard to the facts (*Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 809 NYS2d 98 [2005], *appeals dismissed* 6 NY3d 890, 817 NYS2d 624, *lv denied* 7 NY3d 708, 822 NYS2d 482 [2006]). However, a determination which neither adheres to the board’s prior precedent nor indicates the board’s reason for reaching a different result on essentially the same facts will be found to lack a rational basis (*Knight v Amelkin*, 68 NY2d 975, 510 NYS2d 550 [1986]; *Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 498 NYS2d 111 [1985]).

Here, and with particular reference to the ZBA’s findings that the requested variances would not create a detriment to nearby properties and that the benefit to the respondent outweighs any perceived detriment to the health, safety, and welfare of the neighborhood, the court finds that the ZBA’s determination is arbitrary and capricious and cannot be sustained. In denying the respondent’s earlier application, the ZBA rested its July 16, 2009 determination, in part, on a June 18, 2009 letter from Paul W. Grosser, Ph.D., P.E., on which it based the following finding.

From an environmental perspective, evidence submitted indicates that given (i) the shallow depth to groundwater, (ii) the wetland setback requirement, and (iii) the location of an existing well, effective, functioning drywells cannot be constructed at the site, and a significant adverse impact to the area will be realized. As a consequence, this Board is not willing to jeopardize the environmental integrity of surrounding parcels.

In its September 20, 2012 determination, the ZBA indicated that it was again “in receipt of” the June 18, 2009 letter, as well as a January 21, 2010 letter from Paul W. Grosser, Ph.D., P.E. which confirmed his prior findings. However, the ZBA did not explain in the September 20, 2012 determination why it is now, theoretically, willing to “jeopardize the environmental integrity of surrounding parcels” when it was not willing to do so before. As the ZBA failed to articulate any reasons to justify a departure from its prior finding, its determination must be annulled, and the court need not consider whether the evidence was otherwise sufficient to support the determination (*see Matter of Bout v Zoning Bd. of Appeals of Town of Oyster Bay*, 71 AD3d 1014, 897 NYS2d 205 [2010]).

Accordingly, the petition is granted, and the matter is remitted to the ZBA for further proceedings consistent with this decision.

Submit judgment.

Dated: 7/3/2013

  
HON. WILLIAM B. REBOLINI, J.S.C.

\_\_\_\_\_ FINAL DISPOSITION \_\_\_\_\_ X \_\_\_\_\_ NON-FINAL DISPOSITION