

Supreme Court of the State of New York
IAS Part 43 - County of Suffolk

PRESENT: Hon. ARTHUR G. PITTS

In the Matter of the Application of

**LISA GERBINO and ROBERT
GERBINO**

Petitioners,

**For a Judgment Pursuant to Article 78 of
the Civil Practice Law and Rules**

- against-

**JOHN WHELAN, Chairman, CATE
ROGERS, Vice Chair, DAVID LYS, ROY
DALENE, THERESA BERGER,
Members, constituting the TOWN OF
EAST HAMPTON ZONING BOARD OF
APPEALS,**

Respondents.

ORIG. RETURN DATE: 7/20/17

ADJOURNED DATE: 9/7/17

MOTION SEQ. NO.: 001 - MotD

PLTF'S/PET'S ATTY:

PHILLIPS NIZER LLP

666 Fifth Avenue

New York, NY 10103-0084

DEFT'S/RESP'S ATTY:

MICHAEL SENDLENSKI

Easthampton Town Attorney

159 Pantigo Road

East Hampton, NY 11937

Upon the following papers numbered 1 to 32 read on this motion for an Article 78 Notice of Motion and supporting papers 1-32 Notice of Cross-Motion and supporting papers_ Affirmation/affidavit in opposition and supporting papers_ Affirmation/affidavit in reply and supporting papers _ Other verified answer; petitioner's memorandum of law; respondents memorandum of law; (and after hearing counsel in support of and opposed to the motion) it is,

ORDERED that the petition herein pursuant to Article 78 of the CPLR 7801 *et seq.* requesting a judgment annulling, vacating, and setting aside the determination of the respondent Town Zoning Board of Appeals filed on May 11, 2017 is determined as follows:

The petitioners Lisa and Robert Gerbino are the owners of the real property located at 3 Old Station Place, Amagansett, East Hampton, Suffolk County, New York. The subject parcel is improved with a single family dwelling containing 4,122 square feet with porches, patios, decking, swimming pool, an associated pool house and patio, and a 522 square foot garage. By application dated July 18, 2016 the petitioners sought an area variance to allow an existing slate swimming pool patio to remain within the southern rear yard lot line setbacks. The patio is associated with a swimming pool constructed in conjunction with a building permit issued in January, 2014 and a certificate of occupancy issued in August, 2014. The previous owner of the property, the builder of the premises, had installed the pool patio which is the subject of the within petition, which was installed after the closing of title. Thereafter, the petitioners sought and obtained a building permit for the construction of a pool house. It was when they applied for

an updated certificate of occupancy that it was discovered that the patio was located within the required setbacks. As a result thereof, the petitioners submitted an application to the respondent East Hampton Zoning Board of Appeals for an area variance allowing the patio, adjacent to the swimming pool, to remain at a location 10.2 feet from the rear southern line of the property, which is a variance of 9.8 feet, constituting less than fifty (50%) of the required 20 feet.

A public hearing was held on February 28, 2017. At the hearing the respondent ZBA heard from the petitioner's counsel, Andrew F. Goldstein, Esq., petitioner Robert Gerbino and Britton Bistrain, representing her father, Bruce Bistrain, the owner of 5 Old Station Place, the property located on the southern border of the subject premises, who opposed the application. In support of the application the ZBA received a letter from the owner of the neighboring property to the east, 52 Atlantic Avenue.

By Findings and Conclusion filed on May 11, 2017, the petitioners' application was denied. Respondent ZBA concluded "that the requested variance will create a detriment to nearby properties. The reason setbacks are doubled for pool patios are to mitigate the noise impact to neighbors caused by the use of the pool and patio. Applicant is requesting a 51% variance along the entire length of the patio. Moreover, the applicants have not presented the Board with any unique circumstances explaining why they cannot comply with the Town Code. There is area along the north side of the pool that can accommodate the same amount of pool patio without requiring a variance from the Board..... The Board finds that the need for a variance is self-created. While the Board is sympathetic to how the patio was installed, this is a new house that can and should comply with all dimensional setbacks..... the benefit to the applicant does not outweigh the detriment which grant (sic) of the variance will cause to the general health, safety, and welfare of the neighborhood or the Town as a whole."

Town Law Section 267-b provides that "in making its determination whether to grant an area variance, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall 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 other 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, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance." In applying Town Law § 267-b(3)(b) the Zoning Board is required "to engage in a balancing test, weighing 'the benefit to the applicant' against 'the detriment to the health, safety and welfare of the neighborhood or community' if the area variance is granted, and that an applicant need not show 'practical difficulties' as that test was formerly applied." (*Sasso v. Osgood*, 86 N.Y.2d 374, 633 N.Y.S.2d 259, 264 [1995]).

"It is well settled that 'the determination of the responsible officials in the affected community will be sustained if it has a rational basis and is supported by substantial evidence in the record' (*Matter of*

Cowan v. Kern, 41 N.Y.2d 591, 598, 394 N.Y.S.2d 579, 363 N.E.2d 305; see also, *Matter of Fuhst v. Foley*, 45 N.Y.2d 441, 444, 410 N.Y.S.2d 56, 382 N.E.2d 756).” (*Buckley v. Amityville Village Clerk*, 264 A.D.2d 732, 694 N.Y.S.2d 739, 741 [2nd Dept. 1999]) In reviewing a determination of a zoning board of appeals as to an application for an area variance, the scope of judicial review is limited to whether the action taken is illegal, arbitrary, or an abuse of discretion (see, *Matter of Tarantino v. Zoning Bd. of Appeals of Town of Brookhaven*, 228 A.D.2d 511, 644 N.Y.S.2d 296; *Matter of Smith v. Board of Appeals*, 202 A.D.2d 674, 609 N.Y.S.2d 912). The court may not substitute its judgment for that of the Board unless its determination is arbitrary or contrary to law (see, *Matter of Brucia v. Planning Bd. of Town of Huntington*, 157 A.D.2d 657, 549 N.Y.S.2d 757). (*Baker v. Brownlie*, 248 A.D.2d 527, 670 N.Y.S.2d 216 [2nd Dept. 1998])

Herein upon review of the record before the Court, it is apparent that the decision of the respondent ZBA was not supported by a rational basis and as such, was arbitrary and capricious. Except for an unsupported objection by one adjoining property owner, there was no evidence proffered that the requested variance would have an undesirable effect on the character of the neighborhood, nor would it be detrimental to the physical and environmental conditions. (see i.e *Matter of Marro v. Libert*, 40 A.D.3d 1100, 836 N.Y.S.2d 691 [2nd Dept 2007]) Furthermore, a patio located 10.2 feet from the southern border of the property as opposed to the 20 feet required, clearly does not impact the adjoining property owners or other neighbors. Accordingly, pursuant to the foregoing and under the circumstances presented, the petition is granted and the determination of the respondent ZBA filed on May 11, 2017 is vacated.

This shall constitute the decision and order of the Court.

Settle judgment.

So ordered.

**Dated: Riverhead, New York
November 27, 2017**



ARTHUR G. PITTS, J.S.C.

CHECK ONE: FINAL DISPOSITION NON-FINAL DISPOSITION