HTW | HOCHERMAN TORTORELLA & WEKSTEIN LLP

Attorneys at Law
Geraldine N. Tortorella (NY, CT)
Adam L. Wekstein (NY)
Noelle C. Wolfson (NY, CT)

Henry M. Hocherman, Retired

May 10, 2023

Via Electronic Mail

Hon. Seamus O'Rourke, Chairman,
and Members of the Village of Mamaroneck
Planning Board
Village Hall
169 Mt. Pleasant Avenue
Mamaroneck, New York 10543

Re: 921 Soundview Drive – Application for Site Plan and Wetlands Approvals

Dear Chairman O'Rourke and Members of the Planning Board:

As you are aware, we represent the applicant, the Estate of Marjorie D'Arcangelo (the "Applicant"), on its application seeking Site Plan Approval and a Wetlands Permit for its property located at 921 Soundview Drive (the "Application"). We are writing to address the concern repeatedly expressed during the course of the public hearing on the Application, that if your Board were to grant approval for the proposed house and swimming pool it would create precedent requiring you to grant approvals for swimming pools on the residential lots adjoining Otter Creek. Such a proposition is legally inaccurate and factually insupportable. In fact, controlling case law makes clear that granting the Application would not impair the Board's flexibility to decide on a case-by-case basis such future applications.[1]

This is the case, because to succeed on a claim that a land use board's determination must be annulled as being inconsistent with its prior decisions, a party must establish the Board reached a "different result on *essentially the same facts"* as those which were the basis for the earlier decision. *Matejko v. Board of Zoning Appeals of Town of Brookhaven*, 77 A.D.3d 949, 950-951, 910 N.Y.S.2d 123, 126 (2d Dep't 2010); *see Expressview Development , Inc., v. Town of Gates Zoning Board of Appeals*, 147 A.D.3d 1427,1429, 46 N.Y.S.3d 725, 728 (4th Dep't 2017)("Petitioners' contention that the determination was arbitrary and capricious because the ZBA failed to adhere to its precedent is without merit inasmuch as *petitioners failed to establish the existence of earlier determinations by the ZBA that were based on essentially the same facts as petitioners' present application* (emphasis added)").

[1] Although in the land use realm most of the cases regarding administrative precedent were decided in the context of zoning board determinations, their principles apply to the decisions of other administrative boards, including those of planning boards. See, e.g., *Nicholai v. McLaughlin*, 163 A.D.3d 572, 81 N.Y.S.3d 89 (2d Dep't 2018); *Callanan Industries, Inc. v. Rourke*, 187 A.D.2d 781, 589 N.Y.S.2d 663 (3d Dep't 1992)

Even where the facts underlying previous determinations are substantially similar to those which are being considered on a pending application, a board can reach a different result so long as it provides a rational explanation for doing so. *Monte Carlo 1, LLC v. Weiss*, 142 A.D.3d 1173, 1175-1176, 38 N.Y.S.3d 228, 231 (2d Dep't 2016); *see Zapson v. Zoning Board of Appeals of City of Long Beach*, 193 A.D.3d. 948, 142 N.Y.S.3d 844 (2d Dep't 2021)(holding that even if prior successful applications were based on similar facts, the denial of a current application had to be upheld where the board provided a rational explanation for reaching a different result); *Gallo v. Rosell*, 52 A.D.3d 514, 516, 859 N.Y.S.2d 675, 677 (2d Dep't 2008); *see also Blandeburgo v. Zoning Board of Appeals of Town of Islip*, 110 A.D.3d 876, 878, 972 N.Y.S.2d 693, 695 (2d Dep't 2013)(upholding the denial of a variance for a swimming pool notwithstanding the fact that the board had granted recent variances for two in-ground pools, because the applicants failed to establish that the previous applications bore sufficient similarity to have even required an explanation from the board for the deviation from them). In turn, among the legally-recognized rational explanations for reaching a different outcome would be findings that the board has changed its views as to what is in the best interests of the municipality or is giving weight to slight differences that are not easily discernable. *Monte Carlo 1, LLC*, 142 A.D.3d at 1176, 38 N.Y.S.3d at 231; *Waidler v. Young*, 63 A.D.3d 953, 882 N.Y.S.2d 153 (2d Dep't 2009).

Here, a confluence of factors makes it extremely doubtful that there will be a significant number, if any, other properties along Otter Creek or, for that matter, elsewhere in the Village, for which an application could be said to have been made on essentially the same facts as are currently before your Board.

First, the proposal is fully zoning-compliant and, significantly, the Property is 22,999 square feet in area, in a district in which the minimum lot size is 10,000 square feet and the building coverage is less than one-third of what is permitted.

Second, the uncontradicted professional opinion of the Applicant's wetlands scientist, Beth Evans, P.W.S., is that the proposed development will not impact the wetlands. Ms. Evans testified to that effect at the Board's prior meetings, including on April 26, 2023.

Third, the New York State Department of Environmental Conservation has confirmed that none of the proposed improvements or work on the Property will occur within the state-regulated wetlands or its regulated adjacent area.

Fourth, the HCZMC made a determination that the proposal is consistent with the Local Waterfront Revitalization Plan, which of course, includes a policy of protecting wetlands.

Fifth, the exhibits show that the proposed improvements on the Property are set back further from the wetlands than a number of the nearby houses on Soundview.

Sixth, the proposed development of the Property will leave a substantial natural buffer between the planned improvements on the Property and Otter Creek, unlike a number of other lots on Soundview which have lawn or cleared yards that extend actually or virtually to the Otter Creek wetlands.

Seventh, the exhibits submitted by the Applicant demonstrate that the house and pool will have no discernable visual impacts on Otter Creek due to their setback from and the intense vegetative buffer along the creek, with videos submitted to the Board showing that a number of homes in Property's environs are fully or substantially visible from that vantage point.

Eighth, the proof showed that the stormwater management plan will fully treat runoff from the Property. In contrast, other properties on Soundview Avenue have substantial areas of impervious coverage, but no stormwater management measures. Further, the untreated runoff from the existing manicured lawns on such properties is likely to contain, among other pollutants, nitrogen, which would presumably have an adverse impact on the quality of water in Long Island Sound.

Based on the foregoing and other facts related to the Property and the Application, under controlling law, a favorable decision on the Application would not handcuff the Board by foreclosing denial of future applications for site plan approval and/or wetlands permits. Fear that granting the Application will set rigid precedent that will open the door for undesirable development is unwarranted and should not serve as a basis for denial.

Respectfully submitted,

Hocherman Tortorella & Wekstein, LLP

By: _____
Adam L. Wekstein

ALW:hc
cc: *(via electronic mail)*
Brittanie O'Neill
Jaclyn Tyler, AIA, LEED AP
John Fry, AIA, LEED AP
Alan Pilch, P.E., R.L.A.
Inez D'Arcangelo
James D'Arcangelo
Beth Evans, P.W.S.
Geraldine N. Tortorella, Esq.