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| <b>Minutti v Town Bd.</b>  |
| 2007 NY Slip Op 33913(U)   |
| November 27, 2007  |
| Supreme Court, Suffolk County  |
| Docket Number: 0012723/2006  |
| Judge: Melvyn Tanenbaum  |
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JUDGMENT

INDEX No. 12723-2006

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

PRESENT:

Hon. MELVYN TANENBAUM  
Justice

MOTION #<sup>001</sup>~~003~~-CASEDISP  
R/D: 062907  
S/D 071807

DOMINICK MINUTTI

PLTF'S/PET'S ATTY:  
JOHN N. PRUDENTI, ESQ.  
1235 Montauk Highway  
Mastic, New York 11950

Petitioner,

against

THE TOWN BOARD AND THE TRUSTEES OF THE  
FREEHOLDERS AND COMMONALTY OF THE  
TOWN OF BROOKHAVEN

DEFT'S/RESP'S ATTY:  
ROBERT F. QUINLAN, Town Attorney  
One Independence Hill  
Farmingville, New York 11738

Respondents.

Upon the following papers numbered 1 to \_\_\_ read on this motion for an order pursuant to

\_\_\_\_\_  
Motion/Order to Show Cause and supporting papers \_\_\_; Notice of Cross Motion and supporting papers \_\_\_\_\_; Notice of  
and supporting papers \_\_\_\_\_; Answering Affidavits  
Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; ~~(and after~~  
hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the CPLR Article 78 petition seeking a judgment annulling the decision of the respondent "Trustees" dated February 16, 2006 and July 10, 2007 which denied petitioner's wetland permit application to construct a single family dwelling and compelling respondent "Board of Trustees" to issue a wetland permit is determined as follows:

Petitioner Dominick Minutti ("Minutti") owns a 12,500 square foot unimproved lot located in freshwater wetlands. On August 21, 2001 the respondent "Board" granted petitioner a wetlands permit to "construct a single family residence with associated septic system including concrete retaining walls and fill, an attached rear deck, a front porch and an access driveway." Prior to commencing construction petitioner's wetlands permit expired. In February, 2004 petitioner applied for a permit extension. The Town requested that the prior approved map be modified to correct the size of the proposed deck and to eliminate a four foot contour line. In May, 2004 the Town directed that petitioner file a de novo wetlands permit application.

In May, 2005 petitioner applied for an amended wetlands permit to construct the residential dwelling. A public hearing was held on August 2, 2005. Petitioner's attorney made statements on the record. The Town Director of Environmental Protection, and two individuals who owned residences near the proposed dwelling testified during the hearing. By decision dated February 16, 2006 the respondent "Board" denied petitioner's permit application. Among the 14 reasons for denying petitioner's application, the "Board's" "Findings For Denial" determined that: 1) the proposed project would result in destruction of 10,500 square feet of wetlands and wetland vegetation together with a significant loss of critical wildlife habitat; 2) the proposed project would adversely impact the quality of surface waters and shallow groundwater; 3) the

project would adversely affect local drainage and cause storm and flood waters to back up; 4) the project's proposed concrete components differed from current surrounding land use patterns; 5) the proposed project would negatively impact aesthetic resources, scenic views and the quality of future open spaces. The "Board" concluded that petitioner's proposed structure would adversely impact the character of the existing neighborhood and be detrimental to the health, safety and welfare of the community since it would increase the potential for flooding and storm water runoff to adjoining properties and increase the associated contaminants entering the Town's estuaries and bays.

"Minutti's" CPLR Article 78 petition seeks a judgment annulling and vacating the respondent "Board's" determination denying the amended wetlands permit application claiming the "Board's" actions were arbitrary, capricious and not supported by substantial evidence in the record. The petition claims that respondent's denial was arbitrary and capricious since the relief sought was identical to the original wetlands permit application granted by the "Board" when it approved petitioner's application in 2001. It is the petitioner's position that the "Board's" prior approval for nearly the identical application is inconsistent since there has been no physical change to the parcel or the area determined to be wetland. Petitioner contends that no relevant, substantial or credible evidence was presented to support the "Board's" denial. It is petitioner's contention that in May, 2005 the Board made findings for approval which set forth that the project "...shall not significantly alter the local habitat", and "is not anticipated to have a significant environmental impact...". Petitioner claims the "Board's" action was dictated by community pressure and that such neighborhood opposition cannot justify the denial of "Minutti's" wetland permit application.

In the original reply filed by "Minutti" in support of this petition, petitioner submitted as an exhibit, a document entitled "Town of Brookhaven's Findings for Approval Category and Variance Approval From 85-287.1 & 85-287.2 of the Wetlands Overlay District". The document references this application and sets forth seven paragraphs detailing reasons to approve petitioner's wetlands permit application. The proposed Findings directly contradict the "Board's" February 16, 2006 Findings. By short form Order dated October 6, 2006 the Court remanded this matter to the respondent "Town" for the purpose of scheduling a hearing to reconcile the documents and to determine whether the area variance denial renders petitioner's parcel unusable.

A hearing was conducted by the respondent "Board" on July 10, 2007 during which the Town Director of Environmental Protection testified about the two sets of findings prepared by the department. On the same date the "Board" adopted Findings for Denial for (petitioner's) Wetlands Permit. The July 10, 2007 Findings are identical to the 14 paragraph February 16, 2006 "Board" Findings.

Petitioner claims that the public hearing failed to address the underlying factual data and information used by the "Board" to ultimately deny "Minutti's" application and failed to reconcile two diametrically opposite conclusions concerning the grant or deny characteristics of petitioner's wetlands permit application. It is petitioner's contention that the "Board's" failure to adequately explain how one set of findings can conclude that the proposed construction will have no environmental impact while the second (adopted) findings conclude the construction will have a tremendous environmental impact proves the denial was arbitrary, capricious and not supported by substantial evidence in the record. Petitioner reiterates that community opposition without submission of substantial evidence supporting such environmental claims does not provide an adequate basis to deny "Minutti's" wetlands permit application.

In a proceeding seeking judicial review of administrative action, the court must determine whether there is a rational basis for the decision or whether it is arbitrary and capricious (MATTER OF WARDEN v. BOARD OF REGENTS, 53 NY2d 186, 194, 440 NYS2d 875, 881 (1981)). The determination of responsible local officials in the affected community will be sustained if it has a rational basis and is supported by substantial evidence ( MATTER OF FUHST v. FOLEY, 45 NY2d 441, 410 NYS2d 565 (1978)).

In August, 2003 the Town of Brookhaven amended the Town Code provisions by adding Article XXVIII B entitled "Wetland Overlay District". The new district was intended to provide additional protection for properties in areas identified as wetlands, surface waters and buffer areas. Among the goals for the new zoning district were: 1) to provide protection against destruction of wetlands; 2) to preserve and protect natural drainage and to prevent flooding and storm water runoff associated with adjoining properties; 3) to reduce the amount of storm water runoff and 4) to regulate new construction in environmentally sensitive areas. Although petitioner had been granted a wetlands permit in 2001, his failure to commence construction prior to enactment of the town's overlay zoning district in August, 2003 resulted in de novo application for a wetlands permit under the law existing in May, 2005.

The issue presented is whether the respondent "Board's" determination denying the wetlands permit application has a rational basis and is supported by substantial evidence. While the Town's 2003 amended Code provision ("Wetland Overlay District") set forth additional factors for the "Board" to examine to regulate proposed new construction for the protection of environmentally sensitive areas, the record indicates no rational basis for the determination reached by the respondent "Board" in denying petitioner's application.

The evidence shows that Town Department of Environmental Protection prepared two proposed findings: one for approval and one for denial. Each finding set forth contrary conclusions concerning the likelihood that petitioner's dwelling would pose a significant environmental risk to wetlands vegetation, surrounding wildlife and the existing neighborhood.

The proposed "Findings for Approval" provide that:

- 1) the proposed "shall not significantly alter the local habitat"
- 2)"is not anticipated to have a significant environmental impact
- 3) "will not pose a danger to public health and welfare"; "the wetlands and waterways will be protected and enhanced".

The "Findings for Denial" adopted by the "Board" concluded that:

- 1) the proposed project will result in the destruction and loss wetlands and wetland vegetation;
- 2) will result in a loss of significant and/or critical wildlife habitat;
- 3) will adversely affect that character of the neighborhood
- 4) will pose a danger to public health and welfare

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The Court ordered hearing provided the Town with a possible mechanism to reconcile its two contradictory findings. A review of the July 10<sup>th</sup> hearing however shows no reasonable explanation justifying the conclusions ultimately reached by the respondent "Board". When questioned how findings can alternatively conclude that construction would result in no environmental impact or have a tremendous environmental impact, the Town's representative answered that it became a question of a "balancing" test among the decision makers. Clearly this project either poses a significant environmental risk or it does not. The record submitted reveals the "Board's" decision seems to have been by flip of a coin together with rationalization. Such analysis provides no evidentiary support for the 14 reasons the "Board" sets forth in denying petitioner's application.

Based upon these circumstances respondent's determination is neither rationally based nor supported by substantial evidence. Petitioner's application for a judgment annulling the respondent "Board's" determination must therefore be granted. Accordingly it is

**ORDERED, ADJUDGED and DECREED** that petitioner's CPLR Article 78 petition seeking a judgment annulling the respondent "Board's" February 16, 2006 and July 10, 2007 decisions which denied petitioner's wetlands permit application to construct a single family dwelling is granted. Respondent "Board" is directed to issue a wetlands permit for construction of the single family dwelling. Upon issuance of the permit, the permit shall be valid for one year from date of issuance.

Dated: November 27, 2007

**MELVYN TANENBAUM**

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J.S.C.

**FINAL DISPOSITION**