

**Matter of Lynch v Board & Trustees of
Freeholders & Commonalty of Town of
Southampton**

2008 NY Slip Op 32123(U)

June 11, 2008

Supreme Court, Suffolk County

Docket Number: 0035916/2007

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 23, SUFFOLK COUNTY

Present:

HON. EMILY PINES
 J. S. C.

Original Motion Date: 12-19-2007
 Motion Submit Date: 04-10-2008
 Motion Sequence No's.: 001 MG

_____ **X**

In the Matter of the Application of
KENNETH LYNCH and VERA LYNCH,

Attorney for Plaintiff
 Esseks, Hefter & Angel, LLP
 108 East Main Street
 PO Box 279 Riverhead, New York 11901

Petitioners,

For a Judgment under Article 78 of the Civil Practice
 Law and Rules,

Attorney for Defendant
 Devitt Spellman Barrett, LLP
 50 Route 111
 Smithtown, New York 11787

-against-

**BOARD AND TRUSTEES OF THE
 FREEHOLDERS & COMMONALTY OF THE
 TOWN OF SOUTHAMPTON**
 Suffolk County, New York,

Respondent.

_____ **X**

ORDERED, that the Petition (motion sequence number 001) by KENNETH LYNCH and VERA LYNCH for a Judgment pursuant to CPLR Article 78 annulling the permit issued by respondent dated September 5, 2007, directing and compelling respondent to approve petitioners' application to construct a 165 foot long by 4 foot wide upland walkway, a 55 foot long by 4 foot wide elevated pier, a 16 foot long by 3 foot wide ramp, and a 20 foot long by 6 foot wide float, secured by four (4) guide piles, is granted to the extent indicated below.

FACTUAL AND PROCEDURAL HISTORY

This is the fourth Article 78 proceeding involving an attempt by petitioners, KENNETH LYNCH and VERA LYNCH ("petitioners") to construct certain structures on their property located on the Shinnecock Canal, Village of Quogue, Town of Southampton, County of Suffolk, State of New York (the "subject premises"). The subject premises is located on the north side of the Quogue Canal and is more particularly described on the Suffolk County Tax Map as district 0902, section 010, block 03, lot 10.003. According to petitioners, in or about 1995, they began the process of obtaining the

necessary approvals to construct an indented boat slip on the subject premises, but in 1996, the New York State Department of Environmental Conservation (“DEC”) advised respondent that the construction of the proposed indented boat slip was not compatible with the purposes of the Tidal Wetlands Act. In 2003, the DEC denied petitioners’ application for the indented boat slip and such denial was communicated to respondent.

As a result of the foregoing denial by the DEC, on or about January 13, 2005, petitioners thereafter sought permission from respondents to construct a dock, specifically, a 165 foot long by 4 foot wide upland walkway, a 55 foot long by 4 foot wide elevated pier, a 16 foot long by 3 foot wide ramp, and a 20 foot long by 6 foot wide float, secured by four (4) guide piles. In conjunction with this application, petitioners obtained approvals and permits for these structures from the DEC and Army Corps of Engineers and also received a determination from the New York State Department of State that the project met the general consistency concurrence criteria required for such construction.¹ When respondent failed to act on petitioners’ application, on or about August 23, 2005, they commenced an Article 78 proceeding seeking to compel respondent to act. However, in the interim, it appears that at a meeting on or about September 7, 2005, respondent voted to deny petitioners’ application, thus rendering the Article 78 proceeding moot.

Petitioners then commenced a second Article 78 proceeding challenging respondent’s denial of their application. On or about June 19, 2006, the Court (LOUGHLIN, J.) issued a decision and on August 24, 2006, issued Judgment dismissing the petition in the second Article 78 proceeding and remitted the matter to respondent for a new determination. In its decision, the Court found that respondent’s determination lacked a rational basis, in that there was no evidence in the record supporting a policy of denying all dock applications in Quogue Canal and petitioners submitted evidence from DEC indicating that “the canal was wide enough to allow construction of a reasonably sized dock with no interference of the navigation channel.” Thus, the Court granted the petition, annulled respondent’s determination and remitted the matter to respondent for a new determination on the application.

When respondent again failed to schedule a hearing on petitioners’ application after directed to do so by Justice Loughlin and demanded by petitioners, on or about April 4, 2007, they commenced yet a third Article 78 proceeding seeking to compel respondent to schedule a hearing and issue a new determination. Seemingly in response thereto, respondent agreed to reschedule the hearing and by the third Article 78 proceeding was withdrawn. By letter dated June 20, 2007, respondent’s scheduled a public hearing on petitioners’ application for August 20, 2007.

¹Copies of these permits and approvals are annexed as exhibits to the Petition.

THE AUGUST 20, 2007 PUBLIC HEARING

Counsel herein represented petitioners at the public hearing. Robert Fox of Sea Level Mapping and David Fox of Fox Land Survey, testified on behalf of petitioners. In support of the application, petitioners submitted the permits from the DEC and Army Corps of Engineers and Department of State consistency letter, together with the prior Order of Justice Loughlin. Robert Fox testified that he did the hydrographic measurements and located both the channel on a survey and the structures shown on the survey prepared by David Fox. David Fox testified that he prepared the survey submitted to respondents in support of the application. David Fox stated that he and his crew located the property lines, shoreline and outer roadway and Robert Fox located the structures on the water. David Fox also testified that he observed two (2) docks located on the south side of Quogue Canal and that the closest distance between each of those docks to the southerly edge of the channel was eighteen (18) feet. He also measured the distance from the northerly edge of the channel to the proposed float and found that it was sixty (60) feet.

Trustee Warner stated that he believed there although the distance from the docks on the south side was only eighteen (18) feet as opposed to the sixty (60) feet proposed by petitioners, the likelihood of hitting either of the docks on the south side was less. He indicated that based on his experience, having clammed the Quogue Canal since he was 16 years old, and because the depth of water is greater on the north side and boats tend to "hug the shoreline" where the water is deep enough to navigate a "substantial size boat". He stated that he believed that placing a dock "that's never been there in history out in the middle of the channel" would be "very much of a navigation hazard".

In response, petitioners' counsel advised that petitioners would be willing to undertake the cost of putting in a channel marker and maintaining whatever safety lights were deemed necessary for the dock structure. Trustee Warner, in response to a question from Trustee Havemeyer, stated that he did not believe there was any better location for a dock on the subject premises. Additionally, petitioners' counsel advised that he attempted to get approval from DEC for a boat slip, but they have refused and instead insist on a dock.

Bay Constable Sadleir also testified at the hearing. He testified that the water is actually deeper than indicated on petitioners' survey and also that the placement of any buoys requires approval from the United States Coast Guard. Mr. Sadleir refused to indicate whether the placement of any buoys or channel markers would help but merely stated upon questions from the trustees that "It might. You know, I'm not gonna say whether it would or wouldn't. It might help, but the federal

government would be involved.”

At the conclusion of the August 20, 2007 hearing, respondents voted to “leave the hearing open for written comment for ten days” and render a decision at their next meeting on September 5, 2007. Thereafter, on or about August 30, 2007, petitioners’ attorney wrote to respondents and advised that he contacted the Coast Guard to inquire about the placement of navigation aids in conjunction with this application. Counsel stated in his letter that he was advised by a representative of the Coast Guard that the Town of Southampton had installed numerous aids to navigation in town waters and that the Town could place an aid to navigation in the Quogue Canal. He further advised that petitioners would be willing to pay for the cost of acquiring and installing such navigation aid. By separate correspondence, also dated August 30, 2007, petitioners’ counsel advised respondents that the Coast Guard representative also advised that the speed limit in Quogue Canal is five (5) miles per hour, there are markers posted indicating such speed limit, and as a result, there is little likelihood of any accidents, let alone accidents resulting in serious damage.

THE SEPTEMBER 5, 2007 PUBLIC HEARING

As discussed at the conclusion of the August 20, 2007 public hearing, petitioners’ application was placed on the calendar for September 5, 2007. However, although petitioners were advised on August 20, 2007 that the matter would be calendared for a determination, at the beginning of the September 5, 2007 public hearing, respondents voted to “reopen” the public hearing. Thereafter, when Trustee Havemeyer asked whether the matter should be postponed because no one representing petitioners was present, Trustee Shultz stated:

No, we have the lead on it. We’re gonna make a – we advised the Lynches that we were gonna have a decision for them at this meeting. So we ought to discuss it, discuss the situation and, as you know everybody, the applicants appeared last week and presented testimony and brought the surveyors and indicated that the DEC was not apt to approve a slip into the shoreline of their property on Shinnecock Avenue and they wanted a dock projecting out into the Quogue Canal. We made some comments about the navigational issues and they had assured us that they were gonna put any kind of lights or navigational aids on the dock in order to alay (sic) our concerns.

He then stated that the Trustees were “gonna have a discussion of the application right now on any of our concerns.” Trustee Shultz then proceeded to express his concern regarding docks projecting out in this particular area and that it was going to be a navigation hazard. Trustee Warner also interjected his concern regarding the boat traffic in the Quogue Canal in the summertime from boaters who are unfamiliar with the canal and his expressed his personal belief that he didn’t think it was a good idea to place a dock at the subject premises. He stated that his recommendation was to grant

an indented boat slip. Trustee Shultz expressed his concern regarding boat traffic in the wintertime and his concurrence that a boat slip would be a better option, despite the conflict with the DEC.

The hearing continued with each of the Trustees expressing their personal beliefs and experiences in support of their opinion to approve an indented boat slip. At the conclusion of the September 5, 2007 public hearing, respondents voted unanimously to approve an indented boat slip. A permit therefor was issued by respondents to “construct an indented boat slip sufficient to accommodate two (2) vessels and associated dredging to access the waters of the Quogue Canal. Size and scope of project to be determined by plans to be submitted by applicant.”

Petitioners then commenced the instant proceeding by the filing of a Notice of Petition and Petition on or about November 16, 2007 and service upon respondents on or about December 3, 2007.

PETITIONERS' ARGUMENTS

Petitioners argue that respondent's determination granting an indented boat slip was illegal, arbitrary and capricious, and not based on substantial evidence. Specifically, petitioners argue that there was no evidence presented at the public hearing that the proposed dock and catwalk would interfere with navigation and in fact, petitioners offered to bear the cost of the placement of any aids to navigation. Additionally, petitioners argue that the determination by respondent was based on pure conjecture and speculation by individual trustees, rather than a rational basis in the record.

Petitioners assert that respondent's determination was arbitrary and capricious in that respondent acknowledged the width of the canal where the proposed dock would be located was sixty (60) feet, the speed limit was only five (5) miles per hour in Quogue Canal, and the Coast Guard advised that the town could install aids to navigation, with petitioners bearing the cost of such installations. Instead, petitioners argue, respondent elected to approve a project that petitioners had not applied for, to wit, an indented boat slip. Additionally, petitioners argue that respondent has arbitrarily rejected all measures offered to address the safety concerns, including removal of the dock in the winter to alleviate concerns about ice formation or turning the dock to make it T-shaped so it would not stick out as far into the canal. Moreover, petitioners argue that respondent's determination to approve an indented boat slip was arbitrary and capricious and disingenuous because it knew that DEC had rejected the construction of an indented boat slip.

Petitioners also urge this Court to recognize that they were improperly denied notice and an opportunity to be heard. In this regard, petitioners assert that the public hearing was “reopened” on

September 5, 2007, without notice to them, and thereby improperly denying them the opportunity to address the concerns raised by the trustees at this meeting. Rather, petitioners argue that respondent told them at the conclusion of the August 20, 2007 public hearing that the hearing would be open for written submissions only during that window. Petitioners highlight the three prior Article 78 proceedings they were forced to commence to get respondent to act on their application.

Finally, petitioners argue that under the doctrine of riparian rights, they are entitled to “wharf out” to navigable waters. That is, they have the right to erect structures to reach navigable waters. Here, they argue, the only means of accessing navigable waters, is the erection of the proposed catwalk and dock, and not the construction of an indented boat slip that has been rejected by the DEC. In fact, despite the concerns expressed by respondent, neither the DEC, Army Corps or Department of State have perceived any navigational concerns.

Based on the foregoing, petitioners argue that respondents acted arbitrarily and capriciously in approving an indented boat slip and denied them an opportunity to be heard when it reopened the public hearing on September 5, 2007 without affording them notice. Moreover, they assert that respondents arbitrarily rejected the solutions proposed by petitioners and the determination to approve an indented boat slip was directly contradicted by the findings of the DEC. Thus, they seek an Order annulling the permit issued for the indented boat slip and directing respondent to approve the application as submitted for the dock and catwalk.

RESPONDENT’S ARGUMENTS

Respondent has served a Verified Answer, Administrative Return and Memorandum of Law in opposition to the Petition. Respondent argues that petitioners have failed to sustain their burden of proving that the denial of the subject application was arbitrary, capricious or irrational. Respondent asserts that the evidence adduced at the public hearing, together with the personal knowledge of the trustees, supported its determination that the proposed dock would present a navigational hazard in Quogue Canal. Additionally, respondent argues that petitioners’ application was denied because of the safety hazard and petitioners do not have a vested right to construct a “dangerous dock”. Respondent asserts that petitioners failed to rebut the conclusion that the dock was unsafe, rather, they merely offered to provide warning devices, which would not be effective in fog or rain. Thus, respondent was bound by its obligation to promote the health, safety and welfare of the community, and deny the application as presented. Respondent asserts that the testimony at the hearing by the Bay Constable and trustees supported its determination that the proposed dock, located near a navigational channel at a bend in the waterway, would create a potential for serious collisions.

The mere fact that the determination was based on the experience and knowledge of the trustees, does not, respondents argue, make it arbitrary, capricious or illegal.

Respondent further asserts that the fact that the DEC rejected construction of a boat slip at the subject premises does not render their determination arbitrary. Respondent argues that it is vested with regulation and authority of the tidewaters bordering the town and DEC does not have jurisdiction over the waterway.

With regard to petitioners' argument that they were denied notice and an opportunity to be heard at the September 5, 2007 public hearing, respondent disagrees. It admits that at the conclusion of the August 20, 2007 public hearing it was agreed to "leave the hearing open for written comment for ten days" and to render a determination on September 5, 2007. However, respondent asserts that petitioners elected not to attend the September 5, 2007 hearing and, in any event, at that hearing, the trustees merely "reiterated" the concerns expressed at the earlier hearing and did not offer any new evidence. Respondent feels so strong about this argument, that it states that "the determination can be confirmed without relying on the reiterated testimony of the Board and petitioners' assertion that the determination should be annulled on this basis is vacuous."

Finally, respondent argues that the riparian rights of petitioners are subject to regulation by the trustees and their rights must yield to the protection of the public interest. Thus, they assert, the determination is not irrational because the testimony and evidence revealed that the proposed dock would be a navigation hazard. Therefore, respondent urges the Court to uphold their determination.

In Reply, petitioners reiterate that respondent did not present any evidence or testimony sufficient to support its determination. Rather, petitioners argue that the statements made by Trustee Warner at the August 20, 2007 hearing were not testimony, and Trustee Warner offered merely his personal opinion without explaining his background or expertise to justify same. Additionally, petitioners argue that respondent's claim that the DEC lacks jurisdiction without merit and the DEC has authority to regulate construction in tidal wetlands in Suffolk County. Moreover, petitioners urge the Court to disregard any evidence presented at the September 5, 2007 hearing as respondent assert that its decision could be upheld based solely on the evidence presented at the August 20, 2007 hearing. Finally, petitioners assert that respondent's approval of an indented boat slip, which they did not apply for, denied their riparian rights, despite petitioners' suggestion of mitigation measures to address the safety concerns. Thus, petitioners request the Court grant the Petition.

THE LAW

The law is well settled that in an Article 78 proceeding challenging the determination of a municipality, “a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion.” *Jul-Bet Enterprises, LLC, v. Town of Riverhead*, 48 A.D.3d 567, 852 N.Y.S.2d 242 (2d Dept. 2008), quoting, *Pell v. Board of Education*, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321. In considering whether a determination is arbitrary and capricious or an abuse of discretion, the must inquire whether the determination had a rational basis. *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 809 N.Y.S.2d 98 (2d Dept. 2005). Under this standard, an agency’s action should not be disturbed “unless the record shows that the action was arbitrary, unreasonable, irrational or indicative of bad faith.” *Rendely v. Town of Huntington*, 44 A.D.3d 864, 843 N.Y.S.2d 668 (2d Dept. 2007). Additionally, a Board, in its determination, may not consider evidence presented or submitted subsequent to the close of the public hearing on the application without giving the applicant the opportunity to be heard. *Sunset Sanitation Service Corp. v. Board of Zoning Appeals of Town of Smithtown*, 172 A.D.2d 755, 569 N.Y.S.2d 141 (2d Dept. 1991). *See also, Hampshire Management Co. v. Nadel*, 241 A.D.2d 496, 660 N.Y.S.2d 64 (2d Dept. 1997).

In the case at bar, at the conclusion of the August 20, 2007 public hearing, respondent voted to close the hearing and leave the record open only for written submissions, with a determination to be rendered on September 5, 2007. Contrary to this pronouncement, however, on September 5, 2007, respondent voted to “reopen” the public hearing so the application could be further discussed by the trustees. While respondent argues that no new evidence or testimony was presented and respondent is entitled to rely on the personal knowledge of the trustees in its determination, such is just not what happened in this case. Here, it is obvious from the record that respondent knew petitioners were not present and Trustee Havemeyer attempted to inquire whether the matter should be postponed. The transcript reflects that his inquiry was all but cut-off by Trustee Shultz who wanted to continue to “discuss” the application in great detail. The statement by Trustee Shultz that petitioners were “advised” that respondent were going to make a decision is telling. Although petitioners knew respondent was going to render a determination, they were unaware respondent was going to “reopen” the public hearing and continue to “discuss” the application. The Court rejects respondent’s claims that the comments by the trustees at the second public hearing were merely reiterations of testimony from the first hearing. Rather, the transcript reflects extensive commentary regarding the reasons purportedly justifying the approval of an indented boat slip versus the requested dock and catwalk. Such was clearly instrumental in respondent’s determination to grant the indented boat slip and petitioners were not afforded the opportunity to address the issues raised and discussed. Thus, the

petitioners were not afforded the opportunity to address the issues raised and discussed. Thus, the Court finds that petitioners' due process rights were violated by respondent's reopening of the public hearing on September 5, 2007 without affording them notice and an opportunity to be heard. *See, Stein v. Board of Appeals of Town of Islip*, 100 A.D.2d 590, 473 N.Y.S.2d 535 (2d Dept. 1984).

Although in light of the determination herein, the Court is not reaching the merits of petitioners' claims, it notes that respondent's argument that DEC lacks jurisdiction over the subject premises and application is wholly without merit. *See, Palmieri v. Lynch*, 392 F.3d 73 (2d Cir. 2004). Thus, respondent is cautioned that the approval of an indented boat slip is without a rational basis in the record, as such was explicitly denied by DEC.

Based on the foregoing, the petition is granted to the extent that this matter is remitted to the respondent Board of Trustees of the Freeholders & Commonalty of the Town of Southampton for a further hearing on notice to petitioners. Said hearing shall be held no later than forty-five (45) days from the date of the Order herein.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: June 11, 2008
Riverhead, New York



EMILY PINES
J. S. C.