

<b>Lupoli v Conservation Bd. of Town of Southampton</b>
2009 NY Slip Op 31377(U)
June 17, 2009
Supreme Court, Nassau County
Docket Number: 5886/09
Judge: Anthony L. Parga
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY**

Present:

HON. ANTHONY L. PARGA

Justice

-----X PART 10

**MATTHEW LUPOLI and ANNETTE LUPOLI,**

Petitioner,

INDEX NO. 5886/09

XXX

-against-

MOTION DATE: 5/20/09

SEQUENCE NO. 001

**THE CONSERVATION BOARD OF THE  
TOWN OF SOUTHAMPTON,**

Respondent,

**For a judgment pursuant of Article 78 annulling  
and vacating a final decision filed on February  
25, 2009 by the Conservation Board of the  
Town of Southampton denying a wetlands  
permit to construct a single family residential  
dwelling with accessory structures.**

-----X

Notice of Petition, Pet. & Exs.....	<u>1</u>
Verified Answer & Exs.....	<u>2</u>

---

Upon the foregoing papers, it is ordered that the application pursuant to CPLR Article 78 brought by the petitioners, Matthew Lupoli and Annette Lupoli (collectively referred to herein as the "Lupolis"), for a judgment vacating, annulling, reversing and setting aside a determination of the respondent, The Conservation Board of the Town of Southampton (hereinafter "Board" and/or "respondent") dated February 25, 2009, which denied the issuance of a wetlands permit, on the grounds that the respondent's action was illegal, arbitrary, capricious, discriminatory, not

related to public safety, health or welfare, and constituted an abuse of discretion, was without basis in law or in fact, was outside of the authority and jurisdiction of the respondent, held petitioners to a higher standard than others similarly situated and constituted an unconstitutional and illegal taking of petitioners' property; and declaring the permit requirements of Town Code Section 325-9 illegal, unconstitutional, and of no legal effect or force; the proceeding is denied in its entirety.

Petitioners are the owners of premises known as 55 Jones Road, East Quogue, New York in Suffolk County (the "subject property"). The subject property is a vacant 121,768 square foot or 2.8 acre parcel of unimproved land. The subject property is located in an R-40 Zoning District, which contains Town regulated wetlands, pursuant to Chapter 325 of the Southampton Town Code (the "Town Code"), as well as State regulated freshwater and tidal wetlands, pursuant to New York State Environmental Conservation Law (ECL) Article 24 (Freshwater Wetlands) and ECL Article 25 (Tidal Wetlands).

Petitioners have owned the subject property since March 23, 1982. On April 11, 1994, the Board flagged a wetland delineation line at the subject premises. Approximately 7 years later, on March 7, 2001, petitioner, Annette Lupoli, pursuant to Chapter 325 of the Town Code, submitted a wetland permit application to the Southampton Conservation Board. Petitioners requested approval to construct, *inter alia*, a two story, three bedroom, single family residence, 17 feet landward of the wetlands. The application originally proposed construction of a 1,623 square foot residence, a 728 square foot deck, a well, a 40 foot long concrete timber bridge, and a sanitary system with a 120 foot concrete retaining wall. Petitioners claim that their

proposed project would deposit about 605 cubic feet of fill to create a gravel driveway in the wetlands along with the septic system, and would require clearing of about 14,000 square foot of vegetation, of which 11,156 square feet were delineated wetlands. Petitioners further claim that, with the exception of part of the driveway and a bridge, all of the proposed improvements were a substantial distance from the wetland delineation line flagged by the Board's staff in April 1994. Petitioners claim that at the time of their initial application, they had a wetland permit from the New York State Department of Environmental Conservation (NYSDEC) as was required by Articles 24 and 25 of the ECL.

On June 26, 2001, the Board re-flagged the wetland delineation line at the subject premises and petitioners claim that pursuant to the new flagging, all of their proposed improvements were now within the wetland area with the exception of the septic system. In response to the new wetland lines, petitioners immediately undertook efforts to reassess the wetland boundary and plan for a smaller house.

Approximately 2 and ½ years later, in December 2003, the Board flagged another wetland boundary, which was closer to the 1994 delineation. Petitioners expert did not agree with the revised 2003 delineation.

On April 14, 2004, an on-site meeting of environmental consultants to discuss the placement of the wetland boundary took place. Petitioner's expert and the Board's staff submitted reports to the Conservation Board seeking a determination of the proper placement of the flags for such wetland boundary.

Thereafter, on September 22, 2004, the Board, passed a resolution, pursuant to Chapter 325 of the Town Code, which required petitioners to re-notice their application and Project Plan to abutting owners by certified mail. Applicants were

also required to “post” a notice of the application at the property sufficiently before the first Public Hearing date.

On May 2, 2006, petitioners’ NYSDEC permit expired. On May 24, 2006, the Board, through its chairperson, orally stated that it was accepting the December 2003 wetland boundary and it was adopted by the Board. Petitioners again objected to the location of this line and claimed that the Board erred in this decision to their substantial prejudice. In response to the 2006 boundary, petitioners asked their environmental expert and land planner to draw a proposed project which would be “much smaller, less environmentally impacting, [and] comply with Chapter 325.”

Hence, by revised Project Plan dated April 16, 2007, petitioners proposed a 1,200 square foot house, a reconfigured septic system, retaining walls and a bridge. Additionally, petitioners made several revisions on June 7, 2007, May 6, 2008, October 20, 2008, December 9, 2008 and January 14, 2009, in order to gain additional distance from the wetland boundary, substantially reduce the environmental impacts and to minimally impact the protected property overall.

Meanwhile, on September 28, 2008, there was a public hearing. Following the public hearing, there was some discussion about the length of additional time needed for petitioners to submit a Mitigation Plan. Petitioners claim that “due to the impending holiday season and the fact the Project Plan was not yet in a final proposed format, [they] were reluctant to pick a date that was too soon to accomplish this complicated and data driven enterprise” (*Petition*, ¶30). Petitioners assert herein that after making it clear that January 28, 2009 might not be enough time to properly complete and submit a Mitigation Plan, the Board agreed to continue the hearings to that date. Petitioners maintain herein that realistically, a formal Mitigation Plan could

not be formatted until the Project Plan was in final form and only then could the finally proposed improvements be properly assessed and calculated as to their environmental impacts. Petitioners allege that on this hearing date, they advised the Board that the mitigation process was ongoing, and the then current Project Plan dated May 6, 2008 would likely be amended a few more times to lessen the environmental impacts further.

The final project plan was produced on January 14, 2009.

As with each proposed plan, in accordance with the September 22, 2004 resolution passed by the Board, petitioners mailed 10 copies of their January 14, 2009 project plan on January 23, 2009 to the abutting land owners as well as to the respondent. Respondent, however, claimed that this plan was received too late to be part of their record.

On January 27, 2009, petitioners expert, Charles Bowman, requested an adjournment of the proceedings before respondent for a period of five months. Mr. Bowman claimed that the preparation of the mitigation plan required a comprehensive natural resource inventory of the site and surrounding area and that such inventory could not be completed during the winter and early spring seasons because the presence or absence of flora and fauna species could not be documented.

On January 28, 2009, almost eight years after the application was first filed, petitioners appeared at the public hearing and stated that they could not submit a Mitigation Plan on that date because their plan was only finalized on January 14, 2009. The Board did not grant the continuance for submission of a formal Mitigation Plan. At the hearing, the Board expressed concern that the public had lost contact with the application to which petitioners pointed out that the abutting owners were

all noticed in September 2008, some 4 months earlier. The Board referred to the number of adjournments and petitioner responded that the same were all on advance notice and on consent. The Board also queried about the expert's ability to provide the Mitigation Plan by that date. Petitioner referred to the expert's letter dated January 27, 2009 which the Respondent acknowledged receiving. A Board member apparently suggested that the expert should be brought in to explain his position more fully. Petitioners claim that they were not adverse to this or a suggestion that the adjournment be granted for a shorter period, which also would allow the expert to appear and explain his position if the plan was not yet completed. Respondent, however, did not grant a brief continuance to let petitioner's expert appear, explain his position, and answer the many technical questions being asked of the petitioners. Respondent also failed to grant a lesser continuance for the submission of a mitigation plan. Rather, respondent moved directly to close the record to which the petitioners objected stating that such action would substantially prejudice their application. Petitioners urged that the application was finally near the end, that the only item left for the petitioners was to submit the Mitigation Plan and that the Board, by closing the record, was "pulling the rug" out at the end of a long process. Respondent proceeded to close the record.

On February 12, 2009, petitioners received a new NYSDEC wetlands permit which approved the project plan dated January 14, 2009. Petitioners claim that this permit is still in full force and effect.

On February 25, 2009, respondent issued a determination by resolution denying the subject application.

Because of its importance to the case at bar, the February 25, 2009 determination of the Board is herein reprinted verbatim, in large part, as follows:

WHEREAS, a wetland permit application was submitted by Annette M. Lupoli (“the applicant”) to the Conservation Board (“the Board”) on March 7, 2001, pursuant to Chapter 325 of the Code of Southampton; and

\*\*\*

WHEREAS, the subject property contains Town regulated freshwater wetlands, consisting of lands and submerged lands supporting wetland indicative vegetation, including, among others, wetland trees, wetland shrubs, woodland herbaceous groundcovers and ferns, and emergent vegetation, as well as waters substantially enclosed by wetland vegetation, as defined in Section 325-3B (Freshwater Wetlands) of the Town Code; and

WHEREAS, the subject property also contains Town regulated brackish wetlands, including lands and submerged lands commonly called “brackish or intermediate marshes,” which occur along coastal streams, and which frequently form a transition zone or a very narrow band between tidal and coastal fresh marshes, supporting wetland indicative vegetation, including, among others, common reed or phragmites, as defined in Section 325-3A (Brackish Wetlands) of the Town Code; and

WHEREAS, the subject property, also contains Town regulated tidal wetlands, including lands lying in the area inundated by tidal action and/or peak lunar tides, exhibiting salient or brackish soils, inter-tidal marshes, and littoral zones which support wetland indicative vegetation, as defined in Section 325-3C (Tidal Wetlands) of the Town Code; and,

WHEREAS, the wetlands on the subject property are headwaters for Carter’s Creek, an estuarine tributary to the Tiana and Shinnecock Bays; and,

WHEREAS, the subject property contains hydric soils, including poorly drained Atison sands, as well as a shallow groundwater table, as documented by test hole data provided by the applicant; and,

WHEREAS, the property is characterized by extensive open water areas, including a stream and creek, and lies within federally designated flood zone, FEMA Zone AE EI.8; and,

WHEREAS, Section 325-9 of the Town Code sets forth the applicable standards to be considered by the Conservation Board, in determining whether to approve the issuance of a Town wetland permit, after consideration of an application; and,

WHEREAS, such standards, pursuant to Section 325-9A, include a minimum wetland buffer zone of 100 feet for turn, fertilizers, pesticides, fungicides or similar treatments, landscaping or other clearing or disturbance of natural vegetation, 125 feet for structures, and 150 feet for septic systems; and,

WHEREAS, Subdivision B of Section 325-9, also provides that no wetlands permit shall be granted unless the Conservation Board finds that the following standards have been met: that the proposed project is compatible with the purposes of Chapter 325; that the maximum practicable buffer zone, sufficient to protect and preserve the wetland, has been established; that all reasonable mitigation measures have been taken to ensure that wetlands or their benefits will not be adversely affected; and that the proposed project will not diminish any wetland in size or quality, unless the Conservation Board finds that there is not a practicable alternative; and,

WHEREAS, the subject premises are unable to meet any fo the foregoing construction and buffer setback standards; and

WHEREAS, the Board is permitted to impose less that [sic] the aforesaid recommended setbacks, provided that the applicant has demonstrated that there are no practicable alternatives; and

WHEREAS, Section 325-9(D) sets forth a presumption of practicable alternatives, unless the applicant clearly demonstrates otherwise; and,

WHEREAS, Section 325-9(D)(2) requires applicants seeking the imposition of setbacks less than the recommended setbacks to submit alternative site

locations and configurations with the sufficient level of detail to correspond with the scope of the proposed project and the practicability of alternatives; and

WHEREAS, the applicants further bear the burden of demonstrating that the proposed project at the proposed location, as depicted on the alternative site locations and configurations, would have less adverse environmental impact than any practicable alternative that would meet the standards of Section 325-9; and

WHEREAS, practicable alternatives meeting the standards in Section 325-9 are presumed to have less adverse impacts on the wetlands in distinction to projects that do not meet the standards set forth in Section 325-9, except that in Section 325-9D (3), the applicants are permitted to demonstrate otherwise; and

WHEREAS, the Board is authorized to impose less than the recommended setbacks in Section 325-9, provided the applicants satisfy their burden of proof with respect to each of the standards set forth in Section 325-9D (4), with respect to maintenance of buffer zones; absence of impairment of both wetlands and the buffer area, with respect to wildlife habitat characteristics; the absence of impairment to wetland and surface waters; and the implementation of mitigating measures, contributing to the protection of wetlands and wetland benefits; and

WHEREAS, the wetlands on the subject property provide benefits, functions, and values recognized by Sections 325-1 (Purpose), and 325-2 (Findings) of the Town Code; and

WHEREAS, specifically, the Lupoli parcel features several acres of tidal creek and hardwood swamp as well as deciduous wetland and upland forest canopy, that shelters migratory songbirds and a variety of other wetland wildlife; and

WHEREAS, the wetlands and wetland buffers are exemplary, as they are largely undisturbed and support a wide diversity of native wetland plants; and

WHEREAS, the site supports regionally rare Atlantic White Cedars, and acts as a floodplain, headwaters, and essential natural filter, between Tiana's developed uplands and Carter's Creek; and

WHEREAS, Carter's Creek is an estuarine tributary to the Shinnecock Bay, which is an essential part of the New York State designated Long Island South Shore Estuary Reserve; and

WHEREAS, the Creek and its associated wetlands offer scenic open space, recreational benefits, crucial wildlife habitat and diverse native vegetation, as well as important finfish nursery areas; and

WHEREAS, preservation fo the on-site wetlands, as well as the adjacent forested buffers, is essential to protect these important wetland values and benefits, including safeguarding water quality and critical coastal natural resource values; and,

WHEREAS, the loss of wetlands, as well as the loss of buffer areas between wetlands and structures, such as residences, decks, septic systems, driveways, and the like, as well as the loss of buffer areas between wetlands and land disturbance, causes harm to wetlands and the beneficial activities accruing within the wetlands; and

WHEREAS, there is a relationship between the maintenance of existing wetlands, as well as the maintenance of buffers, to protect both the wetlands, as well as wildlife and surface water quality, and the setback of the proposed construction and land disturbance activities, on a parcel constrained by wetlands, hydric soils and a shallow groundwater table; and

WHEREAS, avoidance of wetland losses, as well as greater construction and buffer setbacks, would have less of an adverse impact on wildlife and surface water quality than loss of wetlands, as well as lesser construction and land disturbance setbacks; and

WHEREAS, a preliminary Environment Division report, evaluating the proposed project, dated August 10, 2001, was reviewed and accepted by the Conservation Board at their meeting on August 22, 2001; and

WHEREAS, the Conservation Board, as lead agency, classified the proposed project a Type II Action, pursuant to the State Environment Quality Review Act (SEQR) and Chapter 157 of the Town Code; and

WHEREAS, as a Type II Action, the proposed project is exempt from further review under SEQRA; and

WHEREAS, the Board found that holding a public hearing would aid the decision making process by providing additional relevant data; and

WHEREAS, public hearings were held on September 26, 2001, October 24, 2001, November 28, 2001, January 9, 2002, February 27, 2002, April 24, 2002, July 10, 2002, September 25, 2002, December 18, 2002, March 12, 2003, June 11, 2003, September 10, 2003, December 3, 2003, February 11, 2004, March 24, 2004, May 26, 2004, July 28, 2004, September 22, 2004, March 9, 2005, June 8, 2005, September 14, 2005, January 11, 2006, March 8, 2006, April 12, 2006, May 24, 2006, July 26, 2006, October 11, 2006, December 20, 2006, March 28, 2007, May 23, 2007, July 25, 2007, November 14, 2007, January 23, 2008, May 28, 2008, July 23, 2008, September 24, 2008, and January 28, 2009, during which testimony was received from the applicant, the Town Environment Division, and the public regarding, among others: project compatibility with Chapter 325; maximum practicable buffer zones, reasonable mitigation measures, including on-site and off-site mitigation; practicability of alternatives; impacts on wildlife; impacts on wetlands and surface water quality; and mitigative measures that contribute to the protection and enhancements of wetlands and wetland benefits; and

WHEREAS, the public hearing was closed on January 28, 2009; and

WHEREAS, as part of the public hearing records, supplementary reports were prepared and presented by the Environment Division, including a report

entitled "*Delineation of the Landward Extent of Wetlands on the Property of Matthew Lupoli, East Quogue, New York,*" dated January 6, 2006; and,

WHEREAS, during the public hearing process, the Board asked the applicant to submit an alternative project plan, including an alternative project plan, as well as a plan for the implementation of mitigative measures, that contribute the protection and enhancement of wetland and wetland benefits; to offset and/or compensate for the requested lesser wetland buffer and construction setbacks; and

WHEREAS, the applicant submitted to the Conservation Board on May 27, 2008 and on December 12, 2008, alternative project plans and surveys prepared by Karl W. Weisenbacher of Squires, Holder, Weisenbacher & Smith dated June 29, 1993, revised May 6, 2008 and revised October 20, 2008; and

WHEREAS, the applicant submitted to the Conservation Board, a revised survey prepared by Squires, Holden, Weisenbacher & Smith, dated June 29, 1993, last revised January 14, 2009, which was received by the Conservation Board on January 30, 2009, after the close of the public hearing, and, as, such, is not part of the public hearing record; and,

WHEREAS, the Environment Division prepared and presented, as part of the public hearing record, a report evaluating the project, entitled "*Evaluation of the Proposed Development of Property of Matthew Lupoli at 55 Jones Road, East Quogue, New York, in Relation to the Standards of Issuing a Town Wetlands Permit, Pursuant to Chapter 325 (Wetlands) of the Town Code,*" dated September 15, 2008, and later revised on December 1, 2008; and

WHEREAS, the Board found that the scale and configuration of the proposed construction and land disturbance activities could reasonable be further reduced, to increase wetland setbacks; and

WHEREAS, the Board finds that he applicant has failed to demonstrate and the Environment Division has failed to find that the proposed project is compatible with the preservation and protection of the affected wetlands, as well as the

purposes and findings of the Town Wetland Law, as described in Section 325-1 and 325-2 of Chapter 325; and

WHEREAS, the applicant has not come forward with sufficient project changes or new information, which would overcome or alter the applicability of the wetland permit issuance standards, contained in Section 325-9; and

WHEREAS, specifically, the applicant's proposal to construct the residence and access bridge would disturb and/or eliminate, approximately 3,400 square feet of wetlands and approximately 11,000 square feet of wetland buffer, after clearcutting the existing natural vegetation, building the proposed residence, and constructing the bridge; and

WHEREAS, no proposal for mitigating measures, including, among others, on-site or off-site compensatory mitigation, has been offered by the applicant, to offset the proposed wetland loss; and

WHEREAS, the wetland buffer setbacks have not been maximized by this project; and,

WHEREAS, for projects where reasonably expected adverse effects to wetland resources cannot otherwise be avoided or minimized, the applicant is required to compensate for such adverse effects by providing compensatory mitigation or other mitigation measures, to ensure that wetlands or their benefits will not be adversely affected; and

WHEREAS, the applicant has not satisfied this weighing standard for permit issuance, as the applicant has not come forward with sufficient project changes, or new information, which would overcome or alter the applicability of this wetland permit issuance standards; and

WHEREAS, mitigative measures are required by Chapter 325, to prevent or minimize degradation to wetlands, as well as potential negative impacts on the functions and benefits that wetlands provide, by reducing or compensating for adverse effects on wetlands; and

WHEREAS, while the applicant has situated the proposed land disturbance and construction activities on only a portion of the subject property, the applicant has not included, in his application, an assessment of the wetland functional attributes to be adversely affected by the project, nor has he described the appropriate and practicable steps that could and/or would be taken to reduce or mitigate reasonably expected adverse effects of the project, including, among others, generally, avoidance of wetland and wetland buffer areas; minimization of impacts; rectification of damage through repair, rehabilitation, or restoration; compensation for impacts; and/or other potential site specific permit conditions; and

WHEREAS, the applicant's proposal to clearcut natural vegetation and build a residence, equipped with a septic system, which would discharge effluent, at less than the required setbacks from wetlands, would likewise diminish wetland quality and be incompatible with protection of public health and welfare; and

WHEREAS, while the applicant has proposed a bridge crossing to lessen wetland impacts, the width and scope of bridge construction, as well as the planned disturbance of approximately 3,400 square feet of wetlands, combined with a loss of approximately 2,000 square feet of wetland buffer for the planned driveway, is excessive, especially in the absence of any compensatory mitigation for such wetland and wetland buffer losses; and

WHEREAS, the applicant has not provided a comprehensive analysis of alternatives, as required pursuant to Section 325-9D (1), (2) and (3), in order for the Conservation Board to determine that adverse impacts to wetlands have been sufficiently prevented or addressed, even though the applicant bears the burden of providing the Conservation Board with all the information necessary to make such a determination; and

WHEREAS, practicable alternatives, which the applicant has failed to address, include, among others, potential elimination of the bridge and substitution with a small parking area at the road, with a walking pedestrian bridge and/or pedestrian pathway to the proposed house, reduction of the width of the bridge,

reduction of the size of the house and provision for increased wetland construction setbacks; and

WHEREAS, possible mitigative measures which have not been addressed by the applicant, include potential establishment of a larger covenanted wetland preservation area and non-disturbance/non-fertilization buffer, covering all lands outside of the proposed structural improvements; native landscaping of the proposed disturbance area for the residence, upon the completion of construction; incorporation of gutters, leaders and downspouts connected to French drains rather than drywells, for catchment and filtration of runoff; and potential on-site or off-site compensatory mitigation; and

WHEREAS, the applicant has not proposed any mitigative measures to replace or compensate for wetlands damage, the wetland values and benefits of the on-site freshwater and tidal wetlands would be significantly diminished, as a result of loss of wildlife habitat, natural vegetation, biodiversity, and water quality; and

WHEREAS, the development of the subject property would negatively impact wildlife habitat values currently provided by the wetlands, through loss of vegetated habitat and wildlife, by clearing and construction, and as result of the indirect adverse effects of human presence, both in the wetlands and wetland buffer lands, during the construction period, as well as once the property has been developed; and

WHEREAS, no average buffer width, equivalent to the minimum required buffer zones set forth in Section 325-9A for land disturbance, has been proposed by the applicant, as required by Section 325-9D (4)(a); and, as previously noted, no on-site or off-site mitigation plan has been adequately described by the applicant, to justify a lesser overall buffer zone for the project, as part of the current project plan, and,

WHEREAS, the applicant has failed to submit sufficient proof that the project, as proposed, including the requested lesser wetland setbacks and proposed wetland and wetland buffer losses, would not diminish wetland quality not impair wetlands and surface waters; and

WHEREAS, the applicant has also failed to demonstrate that the scale and the configuration of the proposed construction and land disturbance activities could not be further reduced, to increase wetland setbacks; and

WHEREAS, the applicant has likewise failed to demonstrate that the proposed work and location would have a less adverse environmental impact, than any practicable alternative; and

WHEREAS, the applicant is required to establish a basis for the imposition of less than the required setbacks under Section 325-9(D); and

WHEREAS, the applicant bears the burden of proof to satisfy the requirements under Section 325-9(D); and

WHEREAS, the applicant has not satisfied all the requirements set forth in Section 325-9(D); and

WHEREAS, the Conservation Board finds that the proposed project is not compatible with the preservation, protection or enhancement of the present and potential future values of the on-site wetland and wetland buffer areas, nor is the project compatible with the wetland permit issuance standards set forth in Section 325-9 of the Town Code.

NOW THEREFORE BE IT RESOLVED, that in consideration of the above findings, the Wetlands Permit Application No. 01-43 of **Annette M. Lupoli**, for the property identified as SCTM NO. 0900-344-1-12.3 is hereby DENIED, as the project does not meet the standards for wetland permit issuance set forth in Chapter 325.

On March 26, 2009, the petitioners commenced this proceeding to annul, reverse and set aside the Board's determination. The Lupolis advance three claims: (1) that the respondent acted in bad faith in delaying the application process (*Petition*, ¶41); that respondent's February 25, 2009 resolution, denying the wetlands permit is not warranted by the facts, is in error, is illegal, unjust, void, irrational, arbitrary and

capricious, is unauthorized and violative of Town Code, the laws of the State of New York, and the United States and New York State Constitutions, is not in harmony with the general purpose and interest in public safety, health and welfare, is not based on substantial evidence and is an abuse of discretion vested in the Board (*Id* at ¶61); (2) they are aggrieved by the aforesaid determination of the Board in that the resolution denying a wetlands permit destroys the value of the subject parcel and denies petitioners the use of the subject parcel for residential purposes, which is the essential and only beneficial or productive use of the subject parcel and the only use to which the subject parcel is reasonably adapted; and (3) the wetlands permit requirements of Section 325-9 are illegal, unconstitutional and of no legal effect or force, in that it does not purport to set forth any standards for issuance of wetlands permits, and the requirements set forth in said section are inadequate and do not include standards to guide and control the respondent's exercise of discretion in determining what setbacks of structures, septic systems and other features are "practicable" for a given parcel of property.

The Board, in its Verified Answer, denies the material allegations of the Petition and interposes three affirmative defenses: (1) the Board's determination is supported by substantial evidence in the record and has a rational basis; (2) the Board made detailed findings of fact and rendered a determination consistent with the facts and law; and (3) the Board properly evaluated the application for a permit in light of the criteria set forth in Chapter 325. Respondent also seeks dismissal of the petition on the merits as well.

It is noted at the outset that while proceedings pursuant to CPLR article 78 preferably should be heard and determined in the county in the judicial district in

which the matter sought to be reviewed originated, or where the material events occurred (*Matter of Lefkowitz v. Beame*, 52 AD2d 925 [2<sup>nd</sup> Dept. 1976]), CPLR 506(b) specifically provides that “a proceeding against a body or officer shall be commenced in *any county within the judicial district* where the respondent made the determination complained of” (CPLR 506[b] [emphasis added] ). Since Nassau and Suffolk Counties are both within the tenth judicial district (NY Const., art. VI, § 6; Judiciary Law § 140), venue within Nassau County is permissible.

Contrary to the petitioners’ contention, the substantial evidence standard of review does not apply to the administrative determination at issue, since it was made after informational public hearings, as opposed to a quasi-judicial evidentiary hearing (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757-758 [1991]; *Matter of Halperin v City of New Rochelle*, 24 AD3d 768 [2<sup>nd</sup> Dept. 2005]). Thus, the question before this Court is whether the determination was affected by an error of law, or was arbitrary and capricious or an abuse of discretion, or was irrational (CPLR 7803 [3]; *Matter of Halperin v City of New Rochelle*, supra).

Based upon the record submitted herein, this Court finds that the decision of the Conservation Board of the Town of Southampton was neither arbitrary nor capricious but instead was a rational decision, unaffected by any errors of law.

Pursuant to Chapter 325 of the Town Code, Section 9 entitled “Standards for Issuing a Permit”, states in pertinent part, as follows:

- A. Permits shall delineate a specific buffer zone from the wetlands boundary for activities regulated by this chapter. The approving authority shall, where practicable, impose a minimum buffer zone of 100 feet for turf, fertilizers, pesticides, herbicides, fungicides or similar treatments, landscaping or other clearing or disturbance of natural vegetation, 125 feet for structures, and 150 feet for wastewater disposal

and/or sanitary systems; provided, however, that where such regulated activities are proposed on developed properties, the minimum buffer zone imposed shall, where practicable, be 75 feet for turf, fertilizers, pesticides, herbicides, fungicides or similar treatments, landscaping or other clearing or disturbance of natural vegetation, and 100 feet for structures; provided further, however, that where such setbacks are imposed landward of the wetland community of a constructed water recharge basin, the minimum buffer zone imposed shall be 25 feet for regulated activities. The approving authority shall impose greater buffer zones only where there is an affirmative showing on the record that the imposition of the minimum buffer zone would be insufficient, due to site-specific features, to protect and preserve the wetlands.

B. No wetlands permit *shall* be issued unless the applicant demonstrates and the approving authority finds that the following standards have been met:

(1) The proposed project is compatible with the purposes and findings listed in §§ 325-1 and 325-2 of this chapter.

(2) The maximum practicable buffer zone, sufficient to protect and preserve the wetland (as required by Subsection A above), has been established for all activities regulated by this chapter.

(3) All reasonable mitigation measures have been taken to ensure that wetlands or their benefits will not be adversely affected.

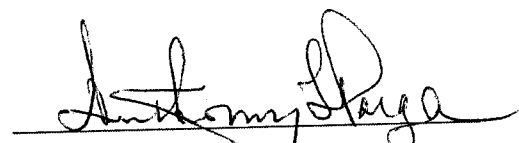
(4) The proposed project will not diminish any wetland in size or quality, unless the approving authority finds that the proposed activity is water-dependent or requires access to the wetland as a central element of its basic function and will result in the minimum possible alteration or impairment of the wetland or, if the proposed activity is not water-dependent, that there is no practicable alternative. (Emphasis Added).

It is undisputed that despite the eight year application process, petitioners failed to submit a mitigation plan to the Town Board at any point in time. In fact, even when the wetland delineation line was finalized and adopted on May 24, 2006, in the more than two years thereafter, petitioners failed to submit a mitigation plan with their proposals. Notably, the decision to amend the proposals and not finalize on one plan until January 2009 - more than 8 years since the original application - was discretionary and made at the whim of the petitioners.

Based upon a plain and simple reading of the 9 page denial determination of Application 01-43, it is apparent that the Board's decision was neither arbitrary, nor capricious (CPLR 7803 [3]). The Board cited a multitude of reasons for their denial determination including, *inter alia*, that the proposed plan did not submit any mitigating measures, including, among others, on-site or off-site compensatory mitigation to offset the proposed wetland loss and the applicant failed to carry his burden to provide a comprehensive analysis of alternatives required pursuant to Town Code §325-9(D) (1), (2) and (3) so that the Conservation Board could determine that the adverse impacts to the wetlands have been sufficiently prevented or addressed.

Accordingly, petitioners' application is denied.

Dated: June 17, 2009.



Anthony L. Parga, J.S.C.

**ENTERED**

JUN 19 2009

**NASSAU COUNTY**  
COUNTY CLERK'S OFFICE