

Schilegel v Shea

2010 NY Slip Op 32001(U)

July 29, 2010

Supreme Court, Suffolk County

Docket Number: 45122/08

Judge: Arthur G. Pitts

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

PRESENT: HON. ARTHUR G. PITTS

WILLIAM A. SCHLEGEL,

Petitioner,

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

-against-

MARTIN SHEA, as Chief Environmental Analyst
of the Town of Southampton Land Management
Environmental Division; SOUTHAMPTON
TOWN CONSERVATION BOARD, HARRY S.
LUDLOW, as Chairman of the Southampton Town
Conservation Board, GILBERT S. FOSTER,
THOMAS RICKENBACH, GEORGE HEINE,
JEREMIAH COLLINS, TERRENCE FLANAGAN
and ZEB YOUNGMAN, as Members of the
Southampton Town Conservation Board,

Respondents.

ORIG. RETURN DATE: 1/30/09
FINAL SUBMIT DATE: 5/6/10
MOTION SEQ. NO.002-MG

PLTF'S/PET'S ATTY:

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DEFT'S/RESP'S ATTY:

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Town of Southampton
by: Michael Sendlenski, Esq
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Upon the following papers numbered 1-86 to read on this motion article 78
Notice of Motion/OSC and supporting papers 1-7 Notice of Cross-Motion and supporting papers ; Affirmation/affidavit
in opposition and supporting papers 8-10; Affirmation/affidavit in reply and supporting papers 11-81; Other 82-84/85/86
~~(and after hearing counsel in support of and opposed to the motion)~~ it is,

ORDERED that the petition of petitioner William A. Schlegel for a judgment, pursuant to CPLR Article 78 annulling and setting aside the determination of respondents Martin Shea, Chief Environmental Analyst of the Town of Southampton Conservation Board dated November 19, 2008 which denied, by resolution, his application for a modification of a wetlands permit issued to the petitioner on February 26, 2003 on the grounds that said determination is illegal, arbitrary, capricious, unjust, contrary to law and an abuse of discretion is granted solely to the extent that a hearing is directed to be held before this Court at 11:00 am on September 16, 2010 at the Arthur M. Cromarty Court Complex, 210 Center Drive, Riverhead, New York to determine whether the respondent Southampton Town Conservation Board had jurisdiction and whether a wetlands permit was required prior to commencing construction on the subject premises.

Petitioner William A. Schlegel is the owner of a vacant bulkheaded parcel of land fronting Wells Creek identified on the Suffolk County Tax Map as 900-322-4-1.9 and known as 17 Windermere Close, Hampton Bays, Southampton, Suffolk County, New York. On February 26, 2003 the petitioner was issued a wetlands permit to construct, on the subject parcel, a two-story residence and attached garage with a footprint of approximately 2,540 square feet located 126 feet from the wetland boundary, 512 square feet of swimming pool located 125 feet from the wetland boundary and approximately 109 feet from wetlands on the parcel to the south, approximately 496 feet of a deck located at its closest point 125 feet from the wetland boundary and a previous driveway located at its closest point 136 feet from the wetland boundary. Said permit further provided for the installation of a septic system comprised of a 1,200 gallon septic tank eight (8) feet in diameter and two (2) feet deep, leaching pools located at their closest point 189 feet from the wetland boundary, the installation of a water service line located 155 feet from the wetland boundary and the clearing of approximately 5,800 square feet of natural vegetation to allow for the proposed construction.

By application dated March 11, 2008 the petitioner sought modification of the wetlands permit previously issued seeking to relocate the footprint of the approved swimming pool, deck, residence with attached garage, previous driveway and sanitary system at least 9.8 feet further north of the southern property boundary to provide a greater setback and privacy from the residence on the parcel to the south. As a result thereof, the swimming pool would be constructed approximately 100 feet from the subject property's wetlands and approximately 92 feet from the closest wetlands on the parcel to the south, the deck approximately 101 feet from the wetlands, the residence and garage approximately 105 feet from the wetlands, the driveway approximately 104 feet from the wetlands and the sanitary system approximately 182 feet from the wetlands.

By resolution dated November 19, 2008 the application for modification was denied by the respondent Conservation Board citing section 325 of the Southampton Town Code and finding in part that "the proposed alternative submitted required significant relief from the previously required wetland construction setbacks required pursuant to Wetland Permit No. 02-33 including a proposed swimming pool 18 feet closer to the wetlands on the subject parcel and approximately 8 feet closer to the wetlands on the parcel to the south, a proposed deck approximately 18 feet closer to the wetlands, and a proposed residence 15 feet closer to the wetlands" and that "pursuant to Section 325, the Conservation Board can only consider imposing less that (sic) the recommended setbacks, if sufficient demonstration has been made by the applicant that there are no practicable alternatives available on the site, which meet the setback set forth in Section 325-9A." The respondent Conservation Board concluded that the petitioner failed to meet his burden and by letter dated October 16, 2008 he indicated that the relief being sought was to provide a visual buffer from the existing improvements on the adjacent property to the south.

In support of the instant petition, the petitioner avers that the respondent Conservation Board wrongfully retained jurisdiction because it failed to apply the "bulkhead exemption" as set forth in section 325-4 (B)(9) of the Southampton Town Code :

(B) This chapter shall apply to all regulated activities

within the Town of Southampton except for the following:

- (9) Any regulated activity which is no closer than 50 feet to surface waters on a residential parcel improved with a functional bulkhead or rock revetment where the activity is generally perpendicular to a bulkhead or revetment 100 feet or more in length, and provided further that no other un-bulkheaded and/or un-revetted wetlands exist landward of such bulkhead or revetment, and provided further that such bulkhead or rock revetment was constructed or erected prior to August 13, 1993, and provided further that no activities related to construction take place closer than 50 feet to surface waters, and that a project-limiting fence be installed to contain disturbance, as recommended by the approving authority in its letter of nonjurisdiction. This provision applies only to those property owners on which the bulkhead is situated

The petitioner proffers that the subject property contains a 124 foot wooden bulkhead across the entire waterfront boundary and as such, the respondents wrongfully determined on the petitioner's initial application for a wetlands permit in 2002 that it had jurisdiction. In such application the petitioner submitted a survey dated April 24, 2001 which located and depicted stakes set by the Town of Southampton on June 14, 2001 which were used to indicate the edge of the wetlands on the subject site. Based upon such determination of the existence of wetlands on the property, the respondent Board issued a permit imposing a 125 foot setback from the bulkhead. It is this finding of the existence of wetlands on the property which forms the basis of the respondent Board's jurisdiction and its denial of a modification of the 2003 permit.

The petitioner submits that there are no wetlands on the subject property and as such, pursuant to section 325-4 (B) (9) of the Southampton Town Code the property is exempt from the requirement of a wetlands permit. In opposition thereto, the respondents allege that the property contains extensive wetlands consisting of phragmite dominating thickets landward of the bulkhead as well as on the adjoining property and that they extended across the width of the entire parcel. To support their position, at the public hearing held on the petitioner's application on July 9, 2008, respondent Martin Shea, the Town of Southampton's Chief Environmental Analyst testified that there were extensive wetlands landward of the creek which consists primarily of phragmites dominating wetland thickets and the property receives some flooding during storm events. However, in support of the within petition, the petitioner cites the respondent Conservation Board's resolution which found that "the seaward most portions of the premises is at elevation 4-5 feet, and the landward most portion of the premises is at elevation 10 feet the subject premises have a seasonal high water table of 2 feet below surface, by actual measurements." Based upon such findings of the Board that the seasonal high water table of the subject property is 2 feet below surface,

the petitioner proffers that phragmites cannot be considered a wetland indicator species because they are not located in at least 24 inches of water-logged soil as required.

“ In article 78 proceedings, 'the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; * * * 'the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence.' (Cohen and Karger, Powers of the New York Court of Appeals, s 108, p. 460; 1 N.Y.Jur., Administrative Law, ss 177, 185; see *Matter of Halloran v. Kirwan*, 28 N.Y.2d 689, 690, 320 N.Y.S.2d 742, 743, 269 N.E.2d 403 (dissenting opn. of Breitel, J.)). 'The approach is the same when the issue concerns the exercise of discretion by the administrative tribunals [34 N.Y.2d 231] The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious.' (Cohen and Karger, Powers of the New York Court of Appeals, pp. 460--461; see, also, 8 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 7803.04 Et seq.; 1 N.Y.Jur., Administrative Law, ss 177, 184; *Matter of Colton v. Berman*, 21 N.Y.2d 322, 329, 287 N.Y.S.2d 647, 650--651, 234 N.E.2d 679, 681). The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified * * * and whether the administrative action is without foundation in fact.' (1 N.Y.Jur., Administrative Law, s 184, p. 609). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts. *In Matter of Colton v. Berman* (Supra, p. 329, 287 N.Y.S.2d p. 651, 234 N.E.2d p. 681) this court (per Breitel, J.) said 'the proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law.' Where, however, a hearing is held, the determination must be supported by substantial evidence (CPLR 7803, subd. 4); and where a determination is made and the person acting has not acted in excess of his jurisdiction, in violation of lawful procedure, arbitrarily, or in abuse of his discretionary power, including discretion as to the penalty imposed, the courts have no alternative but to confirm his determination (CPLR 7803, subd. 3; *Matter of Procaccino v. Stewart*, 25 N.Y.2d 301, 304 N.Y.S.2d 433, 251 N.E.2d 802; but see *Matter of Picconi v. Lowery*, 35 A.D.2d 693, 314 N.Y.S.2d 606, affd. 28 N.Y.2d 962, 323 N.Y.S.2d 703, 272 N.E.2d 77). Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard. (*Matter of 125 Bar Corp. v. State Liq. Auth.*, 24 N.Y.2d 174, 178, 299 N.Y.S.2d 194, 197--198, 247 N.E.2d 157, 158--159; 1 N.Y.Jur., Administrative Law, s 184.)” (*Pell v. Board of Education*, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 839-840 [1974])

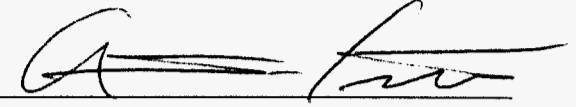
It is well settled that an agency has great discretion in deciding which evidence to accept and how much weight should be accorded particular documents and its determination in that respect is subject only to the legal requirement that the administrative finding being rationally based, or where appropriate, supported by substantial evidence. (see i.e. *Koan v. Popolizio*, 141 A.D.2d 339, 529 N.Y.S.2d [1st Dept 1988]) Where the determination of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, the court must accord such determination great weight.(*Palmer v. New York State Department of Environmental Conservation*, 132 A.D.2d 996, 518 N.Y.S.2d 523 [4th Dept 1987]) However, notwithstanding the giving of deference to the findings of the respondent Board, it is clear that there are substantial issues of fact as to whether the subject property contains wetlands landward of the bulkhead and as such whether the property is exempt from the requirement of a wetlands

permit. Accordingly, pursuant to the foregoing and under the circumstances presented herein, a hearing must be held to determine whether the respondent Board has jurisdiction in this matter

This shall constitute the decision and order of the Court.

So ordered.

**Dated: Riverhead, New York
July 20, 2010**



J.S.C.

CHECK ONE: FINAL DISPOSITION NON-FINAL DISPOSITION DO NOT SCAN