

**Matter of MCBBLA Family Trust v Incorporated Vil.  
of Poquott Planning Bd.**

2012 NY Slip Op 30921(U)

March 27, 2012

Supreme Court, Suffolk County

Docket Number: 17639/2011

Judge: Paul J. Baisley

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MEMORANDUM

SUPREME COURT - SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

COPY

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In the Matter of the MCBBLA FAMILY TRUST,

I.A.S. PART 36

By: Baisley, J.S.C.

Petitioner,

Dated: March 27, 2012

-against-

INDEX NO.: 17639/2011

MOT. NO.: 001 MOTD CDISPSUBJ

INCORPORATED VILLAGE OF POQUOTT  
PLANNING BOARD, ROGER FLOOD, CHAIRMAN,  
RONALD LONGACRE, JESSICA ZANCA, TED  
MASTERS, JOHN ROBINSON, CYNTHIA DAVIS  
and MARK WIGGINS, MEMBERS, and HENRY  
RYON, FORMER MEMBER,

**PETITIONER'S ATTORNEY:**  
SHLIMBAUM & SHLIMBAUM  
265 Main Street, P.O. Box 8  
Islip, New York 11751

Respondents,

**RESPONDENTS' ATTORNEY:**  
SOKOLOFF STERN LLP  
355 Post Ave., Suite 201  
Westbury, New York 11590

For Relief Pursuant to Article 78 of the  
New York Civil Practice Law and Rules.

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In this proceeding, petitioner seeks a judgment pursuant to CPLR Article 78 annulling and reversing a determination by respondent Incorporated Village of Poquott Planning Board denying its application for a permit to construct a dock.

Petitioner is the owner of property located at 110 Van Brunt Manor Road, in the Incorporated Village of Poquott (the "Village"), New York. The property fronts on Port Jefferson Harbor and is currently improved with a single-family residence. Petitioner seeks to construct a dock that will accommodate no more than two boats. The proposed 160-foot long dock consists of a four-foot wide, 117-foot long fixed timber catwalk with open grate decking that is elevated four feet above the water by eight-inch diameter timber pilings. In addition, there are four-foot by four-foot stairs, and a three-foot wide, 20-foot long ramp leading to a six-foot by 20-foot float and four tie off piles eight inches in diameter. The dock is to be located to the east of an existing rock jetty, which extends in a northeasterly direction from the shoreline and is shaped like a "seven" when viewed from the shoreline. The jetty and the dock will be closest to each other at the shoreline and will be farthest apart from each other at the corner end of the jetty and the end of the dock in the Harbor, thereby forming a "V"-shaped area of water between them.

Petitioner applied to the respondent Incorporated Village of Poquott Planning Board (the "Planning Board") in July 2010 for a permit to construct a dock. A public hearing on petitioner's application was held on March 14, 2011. At the conclusion of the hearing, the Planning Board left the record open for public comment until March 30, 2011 and for additional submissions from petitioner until April 11, 2011. On March 28, 2011 and April 8, 2011 petitioner submitted additional written

testimony and evidence in support of the application. Then, on June 13, 2011 the Planning Board voted on the application with four members voting to deny the application and two members voting to grant the application. The Planning Board adopted a determination dated June 13, 2011 denying petitioner's application.

Petitioner commenced the instant Article 78 proceeding challenging the Planning Board's determination as affected by errors of law, arbitrary and capricious, an abuse of discretion, and not supported by the substantial evidence on the record. Petitioner seeks a judgment annulling the Planning Board's determination, directing respondents to approve petitioner's application, and an award of costs and disbursements. Petitioner asserts that the proposed dock complies with all of the dock regulations of chapter 64 of the Code of the Village of Poquott (the "Code"). Petitioner argues that respondents improperly succumbed to generalized community pressure and denied its application merely based on the proposed location of the dock, which the Planning Board characterized as being only a few feet away from the existing rock jetty, and its configuration with the jetty, which the Planning Board characterized as creating a triangular/funnel shaped obstacle, widest seaward and extremely narrow at the shoreline.

According to petitioner, the Planning Board's findings that the proposed dock may jeopardize public safety, create a public nuisance or pose a hazard to navigation, that it will interfere with and hinder the public's access to surface waters around the rock jetty and obstruct fishing, that it will disturb or compromise the jetty or cause sediment movement or loss of habitat, and that it will have a cumulative adverse effect on the recreational use of the subject portion of the Harbor are all unsubstantiated. Petitioner claims that the findings are contradicted by a memorandum from the engineers for the Village, Nelson, Pope & Voorhis, LLC, by the issuance of permits for the dock by the New York State Department of Environmental Conservation (DEC) and the Department of State, and by the Planning Board's issuance of a negative SEQRA declaration. Petitioner also asserts that during the public hearing, respondents did not advise it of any of their concerns as raised in their determination and that as a result, it was deprived of its right to due process.

Petitioner explains that by letter dated March 28, 2011, its environmental protection and planning experts advised respondents that the dock will improve safety with its lights which will increase the visibility of the rock jetty to vessels, that the seaward 45 feet of the dock is approximately 30 feet from the jetty, allowing ample room for small vessels to maneuver, and that the fixed catwalk portion of the dock is elevated four feet above the mean high water level, thereby allowing room under the dock for the passage of canoes or kayaks between the pilings, even at high tide. As for public access and fishing, petitioner states that the project plans show that near the shoreline, where the dock is closest to the jetty, the water is quite shallow so that fishing opportunities do not exist and that toward the seaward end of the jetty, approximately 45 feet long, where the water is almost four feet deep and fishing would most likely occur, there is a distance of at least 30 feet between the jetty and the dock so that fishing may occur without any interference by the dock. Petitioner adds that the project plans also show that the most seaward end of the jetty extends 115 feet in the opposite direction of the dock, allowing fishing in that area without any interference with the dock. Petitioner also states that although the project plans indicate that a small portion of the jetty is included in the construction area, the jetty will not be impacted by any machinery or disturbed, compromised or altered by the construction or existence of the dock. Petitioner's experts told respondents that this could be assured through inspections by the Village or its engineers during or after construction and by the addition of a condition to the dock permit requiring restoration in the event of a disturbance. Petitioner further states that its experts explained the dock's open flow design to respondents to demonstrate that the dock will have no measurable effect on the

accretion or depletion of sand since the pilings are specifically designed to cause the least amount of resistance to water and sand. With respect to the Planning Board's finding of a cumulative effect that the dock would have with two other existing docks purportedly situated a short distance away, petitioner contends that its property is not near any docks, that the two existing docks referred to in the Planning Board's determination are approximately 465 feet and 625 feet from the proposed dock, and that there are at least two residential parcels between petitioner's property and the closest dock.

Petitioner further claims that respondent Henry Ryon ("Ryon"), who resides two houses away from petitioner's property and was a member of the Planning Board during consideration of petitioner's application, is adamantly opposed to construction of any private docks in the Village, as evidenced by an open letter to Village residents in 2000, and may have improperly influenced the other Planning Board members in their decision-making process. It argues that Ryon should have recused himself from all participation with respect to petitioner's application. According to petitioner, Ryon's participation deprived petitioner of its right to have an unbiased review of its application and so taints the proceedings that the Planning Board's determination must be annulled. Petitioner further argues that the denial of its application and the Planning Board's declaration that it will never approve a dock for petitioner's property deprives petitioner of its right to exercise its right of access to navigable waters, which includes the right to build a dock.

Respondents submit affidavits from Roger Flood, Ryon, Ronald Longacre, Mark Wiggins, John Robinson, and Ted Masters. In addition, they submit a certified return. Respondents contend that the residents' concerns raised at the public hearing as well as other concerns identified in the Planning Board's decision were amply supported by evidence and testimony in the record, and that petitioner was afforded an opportunity to respond to those concerns but instead mainly chose to repeat the contents of the Village Engineer's conclusory memorandum. In addition, respondents argue that although they determined that petitioner's application would not have a significant environmental impact pursuant to SEQRA, the Planning Board voted to deny the application based mainly on non-environmental concerns found in the Code's review criteria. They note that the Planning Board's decision focused mainly on navigational hazards to small craft and the cumulative adverse effect that the proposed dock would have, given its close proximity to two other docks and the rock jetty. Respondents concede that the Village's engineering firm determined in its October 20, 2010 memorandum that the proposed dock would largely comply with the technical specifications of the Code and that the dock would not be a hazard to navigation or obstruct the public's use. However, respondents contend that their understanding was that the memorandum was referring to navigational hazards in the nearby navigational channel and did not specifically address the issue of the shape of the dock creating a navigational hazard to small craft navigation along the shoreline. Although they agreed with the Village Engineer's finding that the proposed dock would not interfere with the navigation of large and commercial vessels inasmuch as the dock is to be 150 feet from the boundaries of the channel, the Planning Board found that the structure of the dock and its proximity to the jetty would pose a hazard to navigation for small vessels including canoes, kayaks, rowboats and especially sailboats, which was not addressed by the Village Engineer in his memorandum. Respondents note that many of the Planning Board members are long-time residents of the community and avid boaters, particularly with respect to small craft and sailboats in the subject location, and argue that their experience with the hazards of small boat navigation in that area qualified them to render an opinion on such hazards. In opposition to petitioner's claim that a small vessel could travel under the dock, respondents contend that the mast of a small sailboat trapped between the jetty and the dock would be unable to do so and in such an event, it would be difficult to beach the boat. They add that the cross-bracing design of the dock would provide limited areas for a boat to pass through.

Respondents also contend that to avoid the dock, small craft would be forced to navigate an additional 60 feet in deep water for a combined distance of 175 feet to navigate around both the dock and the jetty. Respondents emphasize their concern that the addition of the proposed dock less than 200 yards away from two other docks on the shoreline and right next to a rock jetty would cause a cumulative adverse effect on recreational navigation and discourage small boat navigation in that portion of the Harbor. They add that there is no indication in the memorandum that the Village Engineer considered the fact that there are two other large docks approximately 200 yards or less from the petitioner's proposed dock location.

As for other concerns raised, respondents explain that based on their observation, they determined that the proposed dock's close proximity to the jetty would create an attractive nuisance and interfere with the traditional use of the jetty for fishing, and that they were not satisfied that the construction of the dock would not disturb or compromise the jetty and wooden bulkhead, which act to stabilize the sediment in the area and preserve valuable coastline and habitat. According to respondents, the design of the dock did not minimize those adverse effects. They add that respondent Ryon resigned prior to the June 13, 2011 Planning Board meeting and did not participate in the vote or the drafting of the decision on petitioner's application.

Respondents also concede that on or about November 5, 2010, the Army Corps of Engineers indicated in a form response that inasmuch as the project was minor in nature, any federal approval could be given by letter of permission, and that petitioner received a "General Concurrence" from the Department of State on or about March 4, 2011. However, they contend that any approvals by the DEC, Department of State and Army Corps of Engineers do not preclude the Planning Board's review under the Code. They also argue that the denial of petitioner's application did not violate any riparian rights inasmuch as the right to access navigable water is subject to the Village's police power and its power to regulate land use in its jurisdiction, and that other modes of accessing navigable waters remain to petitioner.

A local planning board has broad discretion in deciding applications, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion (*see Matter of Ifrah v Utschig*, 98 NY2d 304, 746 NYS2d 667 [2002]; *Matter of Davies Farm, LLC v Planning Bd. of Town of Clarkstown*, 54 AD3d 757, 864 NYS2d 84 [2d Dept 2008]; *Matter of Gallo v Rosell*, 52 AD3d 514, 859 NYS2d 675 [2d Dept 2008]). A planning board's determination "should be sustained upon judicial review if it was not illegal, has a rational basis, and is not arbitrary and capricious" (*Matter of Gallo v Rosell*, 52 AD3d at 515, 859 NYS2d at 676; *see Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 259 [1995]; *Matter of Rivero v Voelker*, 38 AD3d 784, 832 NYS2d 616 [2d Dept 2007]). When reviewing the determinations of a local planning board, "courts consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination" (*Matter of Sasso v Osgood*, 86 NY2d at 385 n2, 633 NYS2d at 264 n2). In making its determination, a board may rely upon the personal knowledge and familiarity with the area possessed by its members (*see Matter of Thirty West Park Corp. v Zoning Bd. of Appeals of City of Long Beach*, 43 AD3d 1068, 843 NYS2d 106 [2d Dept 2007]). Generalized or unsubstantiated complaints from neighbors, unsupported by empirical or expert evidence, are generally insufficient for a board to base its decision (*see Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 886 NYS2d 442 [2d Dept 2009], *lv denied* 13 NY3d 716, 895 NYS2d 316 [2010]). In contrast, a board's reliance upon specific, detailed testimony of neighbors based on personal knowledge does not render a determination the product of generalized and conclusory community opposition (*see id.*).

Petitioner's application was for a special use permit to construct a dock (see *Matter of Logiudice v Southold Town Bd. of Trustees*, 50 AD3d 800, 855 NYS2d 620 [2d Dept 2008]). A special permit authorizes the use of property in a manner expressly permitted by the applicable zoning ordinance under certain stated conditions (see *Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 195, 746 NYS2d 662 [2002]; *Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238, 243, 331 NYS2d 645 [1972]; *Matter of G & P Investing Co. v Foley*, 61 AD3d 684, 684, 877 NYS2d 143 [2d Dept 2009]; see also *Matter of Navaretta v Town of Oyster Bay*, 72 AD3d 823, 825, 898 NYS2d 237 [2d Dept 2010]). While the reviewing board retains some discretion to evaluate each application for a special use permit, to determine whether applicable criteria have been met and to make commonsense judgments in deciding whether a particular application should be granted, such determination must be supported by substantial evidence (see *Matter of Twin County Recycling Corp. v Yevoli*, 90 NY2d 1000, 665 NYS2d 627 [1997]). Although scientific or expert testimony is not required in every case to support a determination, the board may not base its decision solely on generalized community objections (see *id.*; *Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, *supra*).

Some of the findings of the Village Board of Trustees are listed in Code §64-2 and they include, "A. ... the increase in residential development along [the Village's] shoreline has led to an increase in the number of applications for the construction of private docks ... F. ... A proliferation of docks and their associated boats causes overcrowding of waterfronts and water bodies and can result in visual pollution ... G. Docks which are long enough to reach water of sufficient depth for large boats can be hazardous to navigation if they encroach upon a navigational channel or if they draw boats into shoals because of their presence. Long docks can also be an impediment to the enjoyment of recreational boaters and anglers who desire to navigate along the shoreline. ... The desire for the construction of docks and other structures must be weighed against the environmental value and sensitivity of the waterfront and against the rights of the boating public to navigate."

Village Code §64-9 provides that the Planning Board:

in reviewing, granting, denying, limiting or conditioning applications and permits shall consider the following criteria, in addition to any other criteria specified in this chapter or otherwise.

A. The dock shall be located on the property in such a manner as to minimize the obstruction of surface water, hazards to navigation, obstruction of use of public lands and waters, to maximize spacing and minimize length of docks and any adverse effects to the environment or natural resources, and the Village may require the dock to be constructed in a different location or manner to accomplish this.

B. The dock shall not be permitted in areas of high vessel traffic or vessel congestion where there is a likelihood that the dock will jeopardize public safety or create a public nuisance.

C. The dock shall be designed and sited so as to minimize habitat fragmentation, loss of habitat, and to minimize interference with public access to recreational and other resources.

D. The dock shall be designed and sited so as to not hinder public access to public lands and surface waters or passage along the shoreline and so as not to interfere with public easements and rights-of-way.

E. Docks on adjacent properties create a cumulative effect, and, therefore, the design, construction and location shall be evaluated to minimize cumulative adverse effects.

F. In areas of high traffic, congestion, multiple uses of water surface, or where needed to protect public safety, a dock and its associated floats and piles shall be required to have adequate lighting and markings designed and installed in such manner as to minimize light pollution and so as not to create a nuisance. Lighting on or around docks must be constructed and installed so that it is directed and shines in a downward direction and can not contain an unshielded bulb which can be seen on an adjoining property. Lights not having to do with safety must be oriented so that they are not seen and also are off when the dock is not in use and must be otherwise installed so as only to illuminate the dock.

The following are listed among the standards for docks pursuant to Code §64-8:

“A. A dock shall not extend beyond the point at which the water depth is four feet at mean low water, and the dock length shall not exceed the lesser of 195 feet, or 15% of the width of the waterway on which it is located ...; B. (1) A dock shall only be constructed on a residentially zoned lot that has riparian rights, and there shall be only one such dock on each such residential lot, ...; E. The width of a dock may not exceed four feet, and a dock and its accessories, structures and improvements must be elevated a minimum of four feet above the mean high water and a minimum of four feet above grade when traversing any tidal or freshwater wetlands, and in no way shall obstruct passage of a boat in the waterway in which the dock is located or pedestrian traffic along and below the mean high water mark or obstruct or violate any public easement or right of way that is of record.”

The Village Engineer determined in his October 20, 2010 memorandum to the Village Building Department that “[t]he proposed dock is adjacent to an existing jetty and will not obstruct passage of boats. The landward edge of the dock will start at the landward edge of the average high water mark allowing pedestrian traffic along the beach above” the average high water mark. With respect to the Code §64-9 review criteria, the Village Engineer determined in his memorandum that “[t]he dock is located next to a jetty and will not extend seaward of this structure. The location appears to be appropriate for minimizing obstructions, hazard to navigation, and would not appear to obstruct use of public land or water.” He also found that the proposed dock would not obstruct the nearby Setauket Harbor Channel, and that its location would minimize habitat fragmentation, loss of habitat, interference with public access, and would not hinder access to public lands and/or the shoreline. Regarding possible cumulative adverse effects, the Village Engineer expressly stated that there are currently no docks on adjacent properties and that the proposed dock location appears appropriate. In conclusion, the Village Engineer indicated that “[b]ased on a review of the plans and material provided by the applicant, the proposed dock complies with the Standards and Review Criteria outlined in the Village Code, subject to consideration of open grate decking due to adjoining vegetation wetlands and the engineers specification of material and certification of the lifespan of these materials.”

The Court finds that the record lacks sufficient evidence to support the rationality of the Planning Board's determination (*see Matter of In-Towne Shopping Ctrs., Co. v Planning Bd. of Town of Brookhaven*, 73 AD3d 925, 901 NYS2d 331 [2d Dept 2010]). The record does not support the community's or Planning Board members' concerns over hazards to small vessels, hindering public access, creation of a public nuisance, and cumulative adverse effects which were cited by the Planning Board as grounds for denying petitioner's application (*see Matter of Bagga v Stanco*, 90 AD3d 919, 934 NYS2d 493 [2d Dept 2011]; *Matter of Marcello v Humenik*, 222 AD2d 677, 635 NYS2d 676 [2d Dept 1995]). There is no evidence in the record demonstrating that small vessels currently navigating along the shoreline are forced into and hit the rock jetty or that the presence of the rock jetty draws small vessels into shoals. Inasmuch as the proposed dock will extend approximately the same distance seaward from the shoreline as the rock jetty and run almost parallel to it, there is no evidence to support the finding that small vessels will enter the area between the jetty and the dock and become trapped or that they will be forced to travel in deeper water to avoid the combined rock jetty and proposed dock. In addition, the two existing docks located two and three residential lots away, respectively, from petitioner's lot cannot be characterized as being located on adjacent properties and thus do not create a cumulative effect. Moreover, there is no evidentiary support for the Planning Board's finding that the proposed dock will hinder the public's access to surface waters around the jetty, obstruct fishing and lead to potentially dangerous activities such as jumping from one structure to the other. Furthermore, in an effort to mitigate concerns about erosion from construction work near the wooden bulkhead, petitioner has offered that inspections by the Village or its engineers be conducted during or after construction as well as the addition of a condition to the dock permit requiring restoration in the event of a disturbance.

Accordingly, the petition is granted solely to the extent that the determination by the Planning Board is annulled and the matter is remitted to the Planning Board for approval of petitioner's application.

Settle judgment.

PAUL J. BAISLEY, JR.

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J.S.C.