

**Strecker v Incorporated Vil. of Quogue**

2012 NY Slip Op 31562(U)

June 7, 2012

Supreme Court, Suffolk County

Docket Number: 11-34370

Judge: Arthur G. Pitts

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MEMORANDUM

**COPY**

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 43

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ROBERT STRECKER; JAYNE STRECKER,  
the ROBERT J. STRECKER REVOCABLE  
TRUST; and the JAYNE STRECKER  
REVOCABLE TRUST,

Plaintiffs-Petitioners,

for Judgment pursuant to Articles 30 and 78 of  
the Civil Practice Law and Rules, and pursuant  
to Article 15 of the Real Property Actions and  
Proceedings Law,

- against -

The INCORPORATED VILLAGE OF QUOGUE;  
and Peter Sartorius, Randy Cardo, Jeanette Obser,  
Kimberley Payne & Ted Necarsulmer, in their  
official capacities as the BOARD OF TRUSTEES  
OF THE INCORPORATED VILLAGE OF  
QUOGUE,

Defendants-Respondents.

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By: Pitts, J.S.C.  
Dated: June 7, 2012  
Index No. 11-34370  
Mot. Seq. # 001 - MG;CDISPSUBJ  
# 002 - MD

Return Date: November 28, 2011 (#001)  
Return Date: February 23, 2012 (#002)  
Adjourned: February 23, 2012

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This hybrid Article 78 proceeding and action for declaratory and injunctive relief seeks, among other things, a judgment annulling and reversing a determination of defendant/respondent Board of the Trustees of the Village of Quogue denying an application for a permit to install bulkhead, declaring that a certain unnamed canal is a navigable body of water, and enjoining defendants/respondents from interfering with plaintiffs/petitioners riparian rights. Also before the Court is a motion by a neighboring landowner, 178 Dune Road, LLC, for leave to intervene as a respondent.

In 2003, plaintiff/petitioner Robert Strecker allegedly acquired title to real property located in defendant/respondent Incorporated Village of Quogue known as 9 Bay View Drive, Quogue, New York. Improved with a two-story family residence and an inground swimming pool, the western boundary of the property abuts an unnamed canal flowing north and south through a tidal marsh area into Quogue Canal,

which leads to Quantuck Bay. Across the unnamed canal is an improved parcel of real property known as 34 Quogo Neck Lane, Quogue that was purchased in 2010 by 178 Dune Road, LLC. The unnamed canal, which locally is referred to as the West Canal, was created by dredging material from the wetlands of various parcels of land located on Quogo Neck Lane. It is noted that, while the record does not indicate when the dredging occurred, such canal is depicted on a subdivision map filed in 1968 in connection with the development of the property along Bay View Drive. In 2006, Robert Strecker allegedly transferred his fee interest in the Bay View Drive property to plaintiffs/petitioners the Robert J. Strecker Revocable Trust and the Jayne Strecker Revocable Trust, and both Robert and Jayne Strecker allegedly have the authority to terminate their respective trusts and revert title to the property to themselves.

On May 13, 2011, Robert Strecker submitted an application to the Village of Quogue Building Department for a permit to construct a 30' x 40' bulkheaded boat slip on the southwestern portion of the 9 Bay View Drive property (hereinafter referred to as the Strecker property). The proposed project, designed to provide mooring for a recreational boat, involves the excavation of material from the site of the boat slip, and the installation of vinyl sheet bulkheading and a wooden walkway. Approximately five years before submitting the permit application to the Village, the New York State Department of Conservation (DEC) granted Strecker a permit to excavate a 30' x 40' area to 4 feet below low water in the tidal wetlands on his property to create a boat slip, as well as to install new bulkheading and a walkway. In January 2011, the DEC permit previously issued to Strecker, which expired by its terms on March 16, 2011, was extended to March 15, 2016. A public meeting regarding Strecker's application was conducted on June 24, 2011 by defendant/petitioner Board of Trustees of the Incorporated Village of Quogue. Strecker's attorney, Lee Snead, made a presentation to the Board of Trustees on behalf of the permit application. During such presentation, Strecker's attorney explained the proposed boat slip would be located on the Strecker property, not in the canal, and presented evidence showing numerous bulkheaded boat slips have been constructed on the three canals in the area. Joseph Nemeth, an attorney representing John Giacobelli, the sole owner of 178 Dune Road, LLC, made a presentation in opposition to the permit, arguing that Strecker necessarily would have to excavate his client's property to construct the bulkhead and would commit a trespass every time he navigated a boat on the canal. Consultants hired by Giacobelli, namely, Charles Bowman of Land Use Ecological Services, Inc. and Floyd Carrington of Raynor, Marks & Carrington Surveying, also spoke at the public hearing against the permit application.

By decision dated July 15, 2011, the Board of Trustees denied Strecker's application for a permit to install the bulkhead that would create the proposed boat slip. The Board, relying upon the 1968 filed subdivision map, initially states in its decision that the western boundary of Strecker's property "does not abut or border the dredged canal, the dredged canal being located within private property consisting of several parcels, which parcels are bounded on the west by Quogo Neck Lane." The decision recounts the evidence submitted at the public hearing, stating, among other things, that "[i]t appears there is no point along the subject canal where the public could leave or enter the subject canal other than the point of beginning at the northerly line of Quogue Canal," and that surveys submitted in support of and in opposition to the application show "the mean high water line of the canal is now located on or to the east of the westerly line of [Strecker's] property." It further states that 178 Dune Road, LLC's submission of a survey and photographs was "for the apparent purpose of showing . . . that construction of the proposed boat slip will of necessity either involve dredging to the west of the westerly line of applicant's parcel or result in a strip

of land between the westerly line of applicant's parcel and the water in the canal in the area of the proposed boat slip." The Board then declares in its decision that it "need not consider or determine at this time the issues addressed by the surveys and other evidence submitted by the applicant and the objectant," as the "dispositive" issue on the application is whether Strecker "has the right to use the subject canal for navigation."

Despite having asserted that it need not consider evidence submitted at the public hearing on issues such as whether the western boundary of the Strecker property abuts West Canal, the Board next states in its decision that evidence showing the canal was man-made and "created on private property by the owners of such property," together with Strecker's "failure" to present evidence showing multiple points of public access to such canal, "support a conclusion that the subject canal is not a navigable body of water subject to a public easement under the cases cited in the 3/4/11 memo of the Village Attorney." The decision goes on to state that the Board may consider, "as part of the interests of the people in the Village of Quogue, whether [Strecker] has shown that he has the right to use the subject canal for navigation." According to the decision, Strecker "failed to make a prima facie showing that the subject canal is a navigable body of water subject to public easement." Finally, it states that the permit application is denied, without prejudice, since a "very substantial question exists" as to whether Strecker "has the right to use the subject canal for navigation," and "this administrative proceeding is not the appropriate forum for a determination of such issue."

Subsequently, plaintiffs/petitioners Robert Strecker, Jayne Strecker, the Robert J. Strecker Revocable Trust, and the Jayne Strecker Revocable Trust (hereinafter petitioners) commenced this hybrid Article 78 proceeding and action for declaratory and injunctive relief against the Village of Quogue and its Board of Trustees. As to the request for relief under Article 78, petitioners seek a judgment annulling and reversing the Board of Trustees' decision denying the bulkhead permit as arbitrary and capricious. Petitioners argue, in part, that the Board of Trustees failed to apply the criteria set forth in the Village Code when determining the application for a bulkhead permit and improperly made a determination as to petitioners' riparian rights in West Canal. As to the causes of action for declaratory relief, petitioners seek declarations that West Canal is a navigable body of water; that owners of the Strecker property are riparian owners and, as such, possess a right of access to the canal; that the Board of Trustees lacks the authority to determine whether West Canal is a navigable body of water; and that the Board of Trustees has no authority to consider the navigability of the adjoining body of water when determining an application for a bulkhead permit. In addition, petitioners seek a permanent injunction enjoining the Village and the Board of Trustees (hereinafter respondents) from "contesting, impeding, slandering or otherwise interfering with their riparian rights of access to West Canal," and from prosecuting them for trespass in connection with their use of the canal.

In opposition to the petition/complaint, respondents argue that petitioners failed to make a prima facie showing that West Canal is a navigable body of water. More particularly, respondents contend that as petitioners failed to show that a tidal stream flowed through the area before the canal was dredged, or that there are multiple points for public access to it, the subject canal cannot be considered a navigable body of water. Concomitantly, they also argue that, contrary to the assertions by petitioners' attorney, the Board did not determine the subject canal is not a navigable body of water or that the public and petitioners do not have the right to use the canal for navigation. Rather, according to respondents, the Board properly denied the

permit application because Strecker failed to make a prima facie showing that the public has the right to use the canal for navigation. Respondents reason that if the public does not have the right to use the canal for navigation, petitioners do not have the right to use the canal and, consequently, constructing the bulkheaded boat slip “would unlawfully violate and interfere with the rights and interests of the owners of the various parcels on which the canal is located.” Finally, respondents argue this Court lacks jurisdiction to make declarations as to whether the canal is navigable and whether petitioners have riparian rights, since the action fails to include necessary parties, namely, the owners of the properties on Quogo Neck Lane through which the canal flows.

The court’s role in reviewing an administrative decision is not to decide whether the agency’s determination was correct or to substitute its judgment for that of the agency, but to ascertain whether there was a rational basis for the determination (*see Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 626 NYS2d 1 [1995]; *Matter of Warder v Board of Regents*, 53 NY2d 186, 440 NYS2d 875 [1981]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 356 NYS2d 833 [1974]). In the context of an Article 78 proceeding, a court may annul an administrative determination if it was arbitrary and capricious, affected by an error of law, or lacked a rational basis (*see Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 570 NYS2d 474 [1991]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 356 NYS2d 833 [1974]; *Matter of Pile Found. Constr. Co., Inc. v New York City Dept. of Educ.*, 84 AD3d 963, 921 NYS2d 903 [2d Dept 2011]). “Arbitrary action is without sound basis in reason and is generally taken without regard to the facts” (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 231, 356 NYS2d 833), and a “decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious” (*Matter of Charles A. Field Delivery Serv.*, 66 NY2d 516, 517, 498 NYS2d 111 [1985]; *see Matter of Menachem Realty Inc. v Srinivasan*, 60 AD3d 854, 875 NYS2d 237 [2d Dept 2009]; *Matter of Lucas v Board of Appeals of Vil. of Mamaroneck*, 57 AD3d 784, 870 NYS2d 78 [2d Dept 2008]). Further, it is fundamental that when reviewing a determination that an administrative agency alone is authorized to make, the court must judge the propriety of such determination on the grounds invoked by the agency; if the reasons relied on by the agency do not support the determination, the administrative order must be overturned (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758, 570 NYS2d 474; *see Matter of National Fuel Distrib. Corp. v Public Serv. Commn. of the State of N.Y.*, 16 NY3d 360, 922 NYS2d 224 [2011]; *Matter of Filipowski v Zoning Bd. of Appeals of Vil. of Greenwood Lake*, 77 AD3d 831, 909 NYS2d 530 [2d Dept 2010]; *Matter of Stone Landing Corp. v Board of Appeals of Vil. of Amityville*, 5 AD3d 496, 773 NYS2d 103 [2d Dept 2004]).

Pursuant to Section 77-1 of the Code of the Village of Quogue, no person may erect or construct a bulkhead or dock on property or in adjoining waters of property located within the Village without first obtaining a permit from the Village’s Board of Trustees. Section 77-1 further provides that permit shall be granted if the Board of Trustees determines the issuance thereof “shall not be contrary to the public health, safety or interests of the people of the Village of Quogue and, in the case of a bulkhead, will aid in arresting and preventing damage to property in the Village resulting from floods or erosion.” In addition, Section 77-2 of the Code requires permission from the Board of Trustees to erect or construct a bulkhead in excess of four feet above the mean high water mark, and the Board of Trustees may not issue such permission unless it finds, after a public hearing, that the erection of such bulkhead “is in the public interest and is necessary

because of the physical characteristics of the location involved or the nature of tidal action or similar considerations.”

Here, the Board of Trustees failed to determine Strecker’s application for a permit to install bulkheading on the subject property based on the criteria set forth in Sections 77-1 and 77-2 of the Village Code (*see Matter of Kaufman v Incorporated Vil. of Kings Point*, 52 AD3d 604, 860 NYS2d 573 [2d Dept 2008]; *Matter of Millpond Mgt., Inc. v Town of Ulster Zoning Bd. of Appeals*, 42 AD3d 804, 839 NYS2d 355 [3d Dept 2007]; *Matter of Hannett v Scheyer*, 37 AD3d 603, 830 NYS2d 292 [2d Dept 2007]). Rather, it improperly imposed a requirement that Strecker establish riparian rights in the unnamed canal before it would entertain the application to install bulkheading on the western boundary of his property. The Board of Trustees also did not address evidence presented at the public hearing by Strecker’s attorney that bulkheads have been constructed on various parcels abutting the canals in the area (*see Matter of Knight v Amelkin*, 68 NY2d 975, 510 NYS2d 550 [1986]; *Matter of Campo Grandchildren Trust v Colson*, 39 AD3d 746, 834 NYS2d 295 [2d Dept 2007]; *cf. Matter of Olson v Scheyer*, 67 AD3d 914, 889 NYS2d 245 [2d Dept 2009]). Accordingly, the petition is granted to the extent that the July 15, 2011 determination is annulled and the matter is remitted to the Board of Trustees for a new determination on Strecker’s application for a permit to erect a bulkhead on the subject property.

The causes of action for declaratory and injunctive relief, however, are dismissed. Declaratory judgment actions are a means for establishing the respective legal rights of the parties to a justiciable controversy (*see* CPLR 3001; *Rockland Power & Light Co. v City of New York*, 289 NY 45, 43 NE2d 803 [1942]; *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 890 NYS2d 16 [1st Dept 2009], *lv denied* 15 NY3d 703, 906 NYS2d 817 [2010]). “The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or future obligations” (*James v Alderton Dock Yards*, 256 NY 298, 305, 176 NE 401 [1931]). The remedy of a declaratory judgment is appropriate “in cases where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved” (*Dun & Bradstreet, Inc. v City of New York*, 276 NY 198, 206, 11 NE2d 728 [1937]). Similarly, a permanent injunction is an extraordinary remedy that will not be granted absent a clear showing by the party seeking such relief that irreparable injury is threatened and that no other adequate remedy at law exists (*see Gaynor v Rockefeller*, 15 NY2d 120, 256 NYS2d 584 [1965]; *Kane v Walsh*, 295 NY 198, 66 NE2d 53 [1946]; *Parry v Murphy*, 79 AD3d 713, 913 NYS2d 285 [2d Dept 2010]; *McDermott v City of Albany*, 309 AD2d 1004, 765 NYS2d 903 [3d Dept 2003], *lv denied* 1 NY3d 509, 777 NYS2d 19 [2004]; *Staver Co. v Skrobisch*, 144 AD2d 449, 533 NYS2d 967 [2d Dept 1988], *appeal dismissed* 74 NY2d 791, 545 NYS2d 106 [1989]).

Instead of seeking determinations as to the parties’ respective legal rights, the causes of action for declarations that West Canal is a navigable body of water and that owners of the Strecker property have riparian rights seek findings of fact inappropriate for a declaratory judgment action (*see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 890 NYS2d 16). Further, determinations by this Court on petitioners’ causes of action for declarations as to the Board of Trustees’ authority to determine the navigability of a waterway and to consider the navigability of the abutting body of water when deciding applications for permission to construct bulkheads would constitute impermissible advisory opinions (*see Hirschfeld v Hogan*, 60 AD3d 728, 874 NYS2d 585 [2d Dept 2009], *lv denied* 14 NY3d 706, 899 NYS2d 754 [2010]; *see generally New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 399 NYS2d 621

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[1977]). Petitioners also failed to show that, under the existing circumstances, it is necessary to resort to a declaratory judgment action (*see James v Alderton Dock Yards*, 256 NY 298, 176 NE 401; *Hesse v Speece*, 204 AD2d 514, 611 NYS2d 308 [2d Dept 1994]). Additionally, as the Board of Trustees must decide anew Strecker's permit application, the cause of action for a permanent injunction is dismissed as premature (*see Matter of Angiolillo v Town of Greenburgh*, 21 AD3d 1101, 801 NYS2d 629 [2d Dept 2005]).

Finally, as the petition is granted and the actions for declaratory and injunctive relief are dismissed, the motion by 178 Dune Road, LLC for leave to intervene as a respondent is denied as moot.

Submit judgment.

  
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J.S.C.

CHECK ONE:      XX   FINAL DISPOSITION           NON-FINAL DISPOSITION