

<b>Fee v Zoning Bd. of Appeals of Town of E. Hampton</b>
2012 NY Slip Op 32295(U)
August 24, 2012
Supreme Court, Suffolk County
Docket Number: 11-37366
Judge: John J.J. Jones Jr
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MEMORANDUM

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SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 10

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KEVIN FEE and KATHLEEN FEE,  
  
Petitioners,

By: JOHN J.J. JONES, JR., J.S.C.  
Dated: August 24, 2012

- against -

Index No. 11-37366  
Mot. Seq. # 001 - MotD; CDISPSUBJ

ZONING BOARD OF APPEALS of the TOWN  
OF EAST HAMPTON,

Return Date: 1-12-12  
Adjourned: 5-23-12

Respondents.

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In this Article 78 proceeding petitioners seek a judgment vacating and annulling a November 7, 2011 determination of the respondent Zoning Board of Appeals of the Town of East Hampton which denied a Natural Resources Special Permit pursuant to § 255-4-20 of the Town Code.

Petitioners are the owners of property located at 95 East Lake Drive, Montauk in the Town of East Hampton having purchased same in 2002. The property encompasses both upland and underwater land acreage on Montauk Lake and is presently improved by a 4600 square foot single family residence and accessory structures. After obtaining the necessary approvals and permits, including those granted by the New York State Department of Environmental Conservation ("the DEC") and the respondent Zoning Board of Appeals of the Town of East Hampton ("the ZBA") in 2004 and 2005 respectively, the petitioners completed the construction of a new residence and accessory structures. An updated certificate of occupancy for same was issued on October 16, 2009 by the Town of East Hampton. Petitioners now seek to construct a dock which will consist of a 159' x 4' fixed dock, a 12' x 3' ramp, and a 20' x 6' float with associated mooring pilings. The premises at one time was improved with a fixed dock measuring 70' x 4' which may have been constructed in the 1950s or 1960s. In a letter dated April 16, 2003, Donald T. Sharkey, Chief Building Inspector for the Town of East Hampton, indicated that in connection with the petitioners' premises, "[he had] reviewed the 1984 aerial photograph ... and it [was his] opinion that the dock [was] eligible for a Building Permit under Section 255-4-8, Emergency and Minor Maintenance Exceptions, of the East Hampton Town Code."

In or about September 2010 petitioners submitted an application with the DEC for the

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reconstruction, replacement and/or redesign of the pre-existing fixed dock and were issued a permit by the DEC on or about February 28, 2011. Thereafter, in an application dated January 7, 2011 and filed January 11, 2011, petitioners applied to the respondent ZBA for a Natural Resources Special Permit (“NRSP”) to construct the dock.<sup>1</sup> The Town’s Planning Department completed an environmental assessment form on June 17, 2011 which stated in pertinent part “[t]he property had been improved with an approximately 70 ft. long fixed dock since prior to 1984 and the existing structure is severely deteriorated. Pursuant to § 255-5-5H (1) of the Town Code, a NRSP may authorize the reconstruction of a lawfully pre-existing fixed dock or its replacement with a new fixed dock. Consequently, this application does not require a variance from the Special Permit standards for docks, which can only authorize a floating dock on properties that do not contain a lawfully pre-existing dock. ... The shoreline is a unique land form and the new dock has been proposed within the footprint of the existing dilapidated dock within this area.”

A Public Hearing Notice for July 26, 2011 at 7:30 p.m. was published by the respondent ZBA which indicated that petitioners were seeking a Natural Resources Special Permit pursuant to § 255-4-20 of the Town Code in order “to construct a 159' x 4' fixed dock, a 12' x 3' ramp and a 20' x 6' float with associated mooring pilings on a parcel of land containing tidal wetlands and surface waters and located within the Town’s jurisdiction of freshwater wetlands”. The public hearing was held at the said time and date, at which time discussion was entertained with regard to the interpretation of the Town Code’s use of the term “pre-existing fixed dock” in relation to § 255-4-20 and the previous grant of an NRSP for the property abutting petitioners’ premises, as well as the precedents which might be established by the granting of the permit to the petitioners. The ZBA issued its Determination on November 7, 2011, denying the approval of the NRSP pursuant to § 255-4-20 and the construction of a 159' x 4' fixed dock, a 12' x 3' ramp, and a 20' x 6' float with associated mooring pilings. It stated, in pertinent part, “[t]he Board finds that the apparent prior presence of a fixed dock and the current existence of the dilapidated remnants of that former dock lead the Board to find that the property is not, and has not been for a prolonged period, improved with a dock. ... The Board finds that the remnants of the dock that was once on-site are no longer functional as a dock and have not been for an unknown, yet significant amount of time. As such, the board [*sic*] finds that there is no lawfully pre-existing fixed dock at this location. With no lawfully pre-existing dock, the Board may not authorize a permit for the proposed fixed dock under the provisions of Town Code § 255-5-51H(1).”

Town Code § 255-5-51H provides as follows:

Because of their number and complexity, the specific standards and safeguards applicable to natural resources special permits under § 255-5-50 hereof are set forth in this section. These standards and safeguards shall apply to every natural resources special permit as though set forth in their entirety in § 255-5-50.

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<sup>1</sup>Subsequent to these proceedings, on February 2, 2012, petitioners were issued a permit for the proposed dock from the United States Army Corps of Engineers.

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H. Docks. No dock, pier, wharf, of similar structure (hereafter, “dock”) may be authorized by natural resources special permit on residential property or underwater lands adjacent thereto, unless the dock complies with the following standards or limitations, which are in addition to the other standards enumerated in this article for issuance of a natural resources special permit, including those specified with regard to coastal structures in Subsection E above:

(1) If the property in question is already improved with a lawfully preexisting fixed dock, a natural resources special permit may authorize the reconstruction of that dock or its replacement with a new fixed dock.

Petitioners commenced the instant article 78 proceeding challenging the ZBA’s determination, alleging that it was arbitrary, capricious, contrary to law, and an abuse of discretion. Petitioners seek a judgment vacating and annulling the determination and directing respondent to approve their application. Petitioners argue that respondent acted outside of its statutory authority when it failed to adhere to the written determination of its building inspector since no “aggrieved person” had challenged his determination that there was a pre-existing dock at the premises. In essence, they argue, the ZBA’s determination effectively constituted a *de novo* review/appeal of the building inspector’s prior determination, which was outside the authority granted to the ZBA by statute. Additionally, petitioners claim that the respondent’s determination that the petitioners did not have a lawfully pre-existing dock is incorrect and that the petitioners’ application met the requirements of the Town Code for the granting of their NRSP.

In opposition to the petition, respondent argues that it was required to determine if the petitioners’ property was improved with a lawfully pre-existing fixed dock at the time of the public hearing on July 26, 2011, and not as of 2003 (when their building inspector indicated that the dock was eligible for a permit for renovation or rebuilding). The respondent concedes that a pre-existing dock “may have” existed on the property in 2003, however it contends that petitioners abandoned its use citing §255-1-40 of the East Hampton Town Code, which states in pertinent part at section “D” that “[a] nonconforming use which is abandoned shall be deemed to have ceased to exist for all purposes hereunder and shall not thereafter be carried on. Such abandonment of a nonconforming use shall occur: ... [i]n the case where the use occupied a building or structure designed primarily to accommodate or facilitate such use, when the use is discontinued for any reason for a period of 36 consecutive months or voluntarily for 18 months.” Thus, respondent claims that the failure of petitioners to obtain an NRSP for approximately nine years after the letter was issued by the building inspector, constituted a voluntary abandonment of the structure on their part. Finally, respondent challenges the petition on the basis that the applicant failed to demonstrate that it complied with all of the requirements of §255-5-40 and §255-5-51 (H)(4) of the East Hampton Town Code.

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];

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*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.*).

Petitioners' application was for a special use permit to reconstruct 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.*; see also *Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, *supra*).

Here, the criteria to reconstruct a dock was established as stated in the Town Code of the Town of East Hampton. It specifically permitted the reconstruction or the replacement of a dock with a new dock, where the property in question is already improved with a lawfully preexisting fixed dock. The town code makes no provision for the duration of the existence of the preexisting dock, nor does it indicate the time within which it must be replaced or reconstructed. There is no question that petitioners' premises was improved by a fixed dock and that the building inspector indicated that it fell within the special use section of the code permitting its reconstruction or replacement. It is also clear that the respondent permitted the replacement or reconstruction of a dock by the petitioners' neighbors where the preexisting dock appeared, from the record, to have been in similar disuse or disrepair as petitioners' dock, prior to the neighbor's application to reconstruct same. Thus, in this instance, the determination by the respondent ZBA denying petitioners' application for a NRSP is arbitrary and

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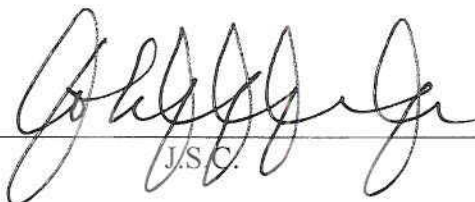
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capricious. The evidence presented indicates that a lawful preexisting dock was located on petitioners' property and that its replacement or reconstruction should be authorized pursuant to the Town Code. The concerns of the neighbors and witnesses at the hearing would be best met by an amendment to the Code and not by an arbitrary and capricious determination concluding that a preexisting dock was not "pre-existing" because it had not been functional for an unknown but significant length of time. Such a determination is nothing short of arbitrary and capricious.

In addition, respondent was without authority to raise an issue with regard to the findings of the building inspector or the issue of the existence of a lawfully preexisting dock at the time of the public hearing (*see Matter of McDonald's Corp. v Kern*, 260 AD2d 578, 688 NYS2d 613 [2d Dept 1999]; *see also Barron v Getnick*, 107 AD2d 1017, 486 NYS2d 528 [4th Dept 1985]), as the hearing was scheduled to determine whether to issue a Natural Resources Special Permit pursuant to § 255-4-20 of the Town Code for the reconstruction or replacement of the dock. The focus should have been on whether the dock, as proposed, complied with any other applicable portions of the Town Code or other environmental rules or regulations.

Accordingly, the petition is granted to the extent that the determination by the Zoning Board of Appeals of the Town of East Hampton is annulled and the matter is remitted to the Zoning Board of Appeals of the Town of East Hampton for approval of petitioners' application.

Submit Judgment.



J.S.C.