

**Matter of Osinski v Board of Trustees of the Vil. of
Greenport**

2014 NY Slip Op 32450(U)

August 12, 2014

Supreme Court, Suffolk County

Docket Number: 14-1466

Judge: Peter H. Mayer

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This opinion is uncorrected and not selected for official publication.

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 17

<p>In the Matter of the Application of</p> <p>MICHAEL OSINSKI,</p> <p style="text-align: right;">Petitioner,</p> <p>For a judgment pursuant to Article 78 of the Civil Practice Law and Rules,</p> <p style="text-align: center;">- against -</p> <p>THE BOARD OF TRUSTEES OF THE VILLAGE OF GREENPORT,</p> <p style="text-align: right;">Respondent.</p>	<p>By: Mayer, J.S.C.</p> <p>Index No. 14-1466 Mot. Seq. # 001 - MotD</p> <p>Return Date: 2-28-14 Adjourned: 3-18-14</p>
<p>SAHN WARD COSCHIGNANO & BAKER, PLLC Attorney for Petitioner/Plaintiff 333 Earle Ovington Boulevard, Suite 601 Uniondale, New York 11553</p>	<p>JOSEPH W PROKOP, ESQ. Attorney for Respondent/Defendant 267 Carlton Avenue, Suite 301 Central Islip, New York 11722</p>

In this hybrid Article 78 proceeding and declaratory judgment action, petitioner/plaintiff Michael Osinski, who owns and operates an oyster farm, seeks a judgment annulling that portion of a resolution of respondent/defendant Board of Trustees of the Village of Greenport, dated December 23, 2013, which, in granting his application for a wetlands permit for the construction of a fixed dock and other related activities, limits his “commercial activities . . . to that [which] is already permitted” and provides for a further review of the application in the event of “any alteration by the Army Corps of Engineers.” Petitioner/plaintiff further seeks, inter alia, a judgment declaring he is entitled under previously issued permits to grow oysters over a three-acre area in Greenport Harbor and “Widow’s Hole,” using up to 200 floating and bottom-resting shellfish cages, baskets and purses placed at water depths greater than 15 feet below the mean water line. For the reasons stated herein, the petition is granted, and the causes of action for declaratory relief are severed and continued.

Petitioner/plaintiff Michael Osinski (hereinafter petitioner) is the owner of seven acres of property in the Village of Greenport, 4½ acres of which is underwater land. Located in residential neighborhood along the shoreline of the Peconic Bay, petitioner’s property is bounded on the east by Greenport Harbor, with part of the land located under the water; the western portion of the property includes a marsh area and part of a creek commonly referred to as Widow’s Hole. It is improved with a

single-family residence, detached garage, deck and patio, as well as with a fixed dock that extends into Widow's Hole and two floating docks. Shortly after purchasing his property in 1999, petitioner allegedly decided to try cultivating oysters on the underwater land, and sought permits from the New York State Department of Environmental Conservation (DEC), the United States Army Corps of Engineers, and the Village of Greenport to engage in shellfish harvesting. In May 2003, respondent/defendant Village of Greenport Board of Trustees (hereinafter the Board) adopted a resolution supporting petitioner's applications, "as submitted to state and federal agencies," to place cages for shellfish harvesting on his underwater land.

In 2003, petitioner was granted a permit by the US Army Corp of Engineers, pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 USC § 403), to "[p]lace up to 200 floating and bottom resting plastic and metal shellfish cages, baskets and purses of various sizes on the bottom of Greenport Harbor and Widow's Hole at water depths greater than 15 feet below the plane of mean low water over an area of 3 acres," and to mark the farming area with privately maintained buoys. Petitioner and his family have successfully built up the oyster farm operation over the past decade, and currently raise over 100,000 oysters each year from seed using floating upweller systems. In September 2012, petitioner's property was accepted into Suffolk County's Agricultural District 1, which was established under Article 25-AA of the Agriculture & Markets Law to conserve, protect and encourage the development of agricultural land.

Seeking to shift the bulk of his oyster farm operations from Widow's Hole to Greenport Harbor, petitioner filed applications with the DEC and the Army Corp of Engineers for permission to remove part of an existing jetty and to construct a 6' x 140' fixed dock from his property into Greenport Harbor, which would include a 26' x 26' over-water platform, a splash guard system, upweller piping, a floating dock, and a ramp. Petitioner also sought permission to conduct repairs on the existing jetty, to remove two wood pilings, and to replace the floating dock located in Widow's Hole with a new floating dock. In June 2013, the DEC issued petitioner permits authorizing the construction of the fixed dock, over-water platform, splash guard, upweller piping, platform and ramp, as well as repairs to the existing jetty.

Subsequently, in August 2013, petitioner filed an application with the Village of Greenport for a tidal wetlands permit for the construction of the fixed dock and over-water platform in Greenport Harbor, and for the repairs to the dock in Widow's Hole, which allegedly was damaged by Superstorm Sandy. A public hearing regarding petitioner's application was held by respondent Board of Trustees of the Village of Greenport on November 25, 2013. Petitioner spoke at the hearing in support of his application. Numerous residents of the Village also spoke on the application, with many neighbors expressing opposition to the oyster farming activities conducted on petitioners's premises. The Board discussed petitioner's application for a wetlands permit at a working meeting held on December 16, 2013, and then again at a public meeting on December 23, 2013, at which time a motion was made to approve a resolution granting petitioner's application for a wetlands permit. Following a discussion regarding the activities at petitioner's oyster farm, the Board passed a resolution approving a wetlands permit with an "amendment" that reads as follows:

The commercial activities would be limited to that that [sic] is already permitted by the Village of Greenport and that any

alteration by the Army Corp of Engineers would result in the Village Board being allowed a further review of the application.

It is noted that by letter dated September 20, 2013, the contracting company retained by petitioner was advised by the Army Corp of Engineers that it could not process petitioner's permit application until it received copies of the DEC permits for the proposed activities and the Board's approval of the project.

Subsequently, petitioner commenced this hybrid Article 78 proceeding and action for declaratory relief challenging the Board's "amendment" to the resolution approving his application for a wetlands permit. The petition/complaint seeks a judgment annulling the "amendment" attached to the December 23, 2013 resolution approving petitioner's application for a wetlands permit. It further seeks a judgment declaring petitioner's right to "place up to two hundred (200) floating and bottom resting plastic and metal shellfish cages . . . on the bottom of Greenport Harbor and Widow's Hole . . . over and area of 3 acres," as well as a judgment declaring the "amendment" violates Agriculture and Markets Law § 305-a. Petitioner argues, among other things, that the so-called amendment to the resolution approving the wetlands permit for the project is vague, as the phrase "commercial activities" is undefined and farming is not a commercial activity under the Environmental Conservation Law. He further asserts the Board exceeded its authority by including the amendment in a resolution determining a wetlands permit, and that such amendment was imposed by the Board without any prior notice or opportunity for him to be heard. Moreover, petitioner argues that the amendment is arbitrary, capricious, and unsupported by substantial evidence in the record, and constitutes an improper attempt by the Board to restrict permitted aquaculture activities on his property.

The Board's answer to the petition/complaint contains 16 objections in point of law to the claim for Article 78 review. However, just two of the objections are specific to allegations asserted by petitioner against the Board. Likewise, while the answer asserts 16 affirmative defenses, 12 of them set forth only boilerplate language. As to the remaining affirmative defenses, the twelfth affirmative defense alleges the resolution granting the wetlands permit "was not intended to amend the prior approval of the Board," and the fourteenth affirmative defense alleges there is no justiciable controversy, as petitioner's application for a permit was granted. Similar to the twelfth affirmative defense, the Board's fifteenth affirmative defense asserts that the resolution "does not limit any legal activity of petitioner . . . [and] does not unreasonably restrict or regulate farming activities in any manner." Finally, the sixteenth affirmative defense alleges petitioner was given notice of the public hearing and no additional or different notice was required, since the amendment "does not amend the 2003 approval or the relief granted in the 2003 approval." It is noted that the Board did not submit an affidavit, affirmation or memorandum of law in opposition to the petition/complaint.

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 Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 259 [1995]; *Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 626 NYS2d 1 [1995]; *Matter of Warder v Board of Regents of Univ. of State of N.Y.*, 53 NY2d 186, 440 NYS2d 875 [1981]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 356 NYS2d 833 [1974]). In the context of an Article

78 proceeding brought to review an administrative determination of a quasi-legislative, quasi-administrative body like a zoning board or the board of trustees of a village, a court may annul the determination only if it was arbitrary and capricious, affected by an error of law, or irrational (*see Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 570 NYS2d 474 [1991]; *Matter of Cowan v Kern*, 41 NY2d 591, 394 NYS2d 579 [1977]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 356 NYS2d 833; *Matter of Baker v Village of Elmsford*, 70 AD3d 181, 891 NYS2d 133 [2d Dept 2009]; *Matter of Moy v Board of Town Trustees of Town of Southold*, 61 AD3d 763, 877 NYS2d 186 [2d Dept 2009]; *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 809 NYS2d 98 [2d Dept 2005]). “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). Further, it is fundamental that when reviewing a determination 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 determination must be overturned (*Matter of National Fuel Gas Distrib. Corp. v Public Serv. Commn. of the State of N.Y.*, 16 NY3d 360, 368, 922 NYS2d 224 [2011]; *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758, 570 NYS2d 474; *see Ignaczak v Ryan*, 79 AD3d 881, 912 NYS2d 658 [2d Dept 2010]; *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 142-6 of the Code of the Village of Greenport, petitioner was required to obtain a special permit from the Village to perform construction and other regulated activities in the wetlands area of his property. Village Code § 142-8 provides that the Board has the power to deny, approve or approve with conditions applications for a wetlands permit. Contrary to the conclusory assertions in the answer, the so-called amendment at issue in this proceeding, in fact, imposes a condition on petitioner’s property. The issue before this Court, then, is whether the imposition of such condition in connection with the wetlands permit was arbitrary and capricious or irrational.

A condition may be imposed on the use of property if there is a reasonable relationship between the problem sought to be alleviated and the application concerning the property (*see Matter of Pleasant Val. Home Constr. v Van Wagner*, 41 NY2d 1028, 395 NYS2d 631 [1977]; *Matter of Greencove Assoc., LLC v Town Bd. of Town of N. Hempstead*, 87 AD3d 1066, 929 NYS2d 325 [2d Dept 2011]; *Matter of Matter of Turkewitz v Planning Bd. of City of New Rochelle*, 24 AD3d 790, 809 NYS2d 113 [2d Dept 2005], *lv denied* 6 NY3d 713, 816 NYS2d 749 [2006]; *McKennett v Hines*, 289 AD3d 246, 734 NYS2d 200 [2d Dept 2001]). Although tasked with determining whether to grant petitioner a wetlands permit for the proposed construction activities in Greenport Harbor and Widow’s Hole, the Board did not impose a condition calculated to mitigate any potential adverse environmental impacts to the tidal wetlands (*cf. Matter of Greencove Assoc., LLC v Town Bd. of Town of N. Hempstead*, 87 AD3d 1066, 929 NYS2d 325; *F.L.D. Constr. Corp. v Williams*, 122 AD2d 189, 504 NYS2d 726 [2d Dept], *lv dismissed* 68 NY2d 996, 510 NYS2d 565 [1986]). In fact, the minutes of the Board meetings conducted on November 25, December 16 and December 23, 2013 reveal that the possible environmental consequences of the proposed construction project on the tidal wetlands were not raised during the discussions regarding petitioner’s application. Rather, it appears the Board improperly succumbed to the pressure from petitioner’s neighbors to limit his farming activities as incompatible

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with the residential nature of the area (*see Matter of Matter of Pleasant Val. Home Constr. v Van Wagner*, 41 NY2d 1028, 395 NYS2d 631; *Matter of Moy v Board of Town Trustees of Town of Southold*, 61 AD3d 763, 877 NYS2d 186).

Thus, absent any evidence the proposed project may have adverse environmental consequences, the Board's determination to issue the wetlands permit with a condition limiting petitioner's "commercial activities" and making it subject to further review upon "any alteration by the Army Corps of Engineers" is arbitrary and capricious (*see Matter of Moy v Board of Town Trustees of Town of Southold*, 61 AD3d 763, 877 NYS2d 186; *cf. Matter of Zupa v Board of Trustees of Town of Southold*, 54 AD3d 957, 864 NYS2d 142 [2d Dept 2008]). The Court notes that though the answer asserts the intent of the "amendment" was not to regulate or restrict petitioner's farming activities, the vague and imprecise nature of the language creating such a condition emphasizes the capriciousness of the Board's determination. Accordingly, the petition is granted and the portion of the wetlands permit limiting petitioner's "commercial activities" and making the application subject to further review depending upon "any alteration" by the Army Corps. of Engineers is annulled.

However, absent a dispositive motion addressed to petitioner's claims for declaratory relief, the causes of action for such relief are severed and continued. "[W]here no party makes a request for a summary determination of the causes of action which seek to recover damages or declaratory relief, it is error for the Supreme Court to summarily dispose of those causes of action" (*Matter of Rosenberg v New York State Off. of Parks, Recreations & Historic Preserv.*, 94 AD3d 1006, 1008, 943 NYS2d 123 [2d Dept 2012]; *see Matter of Lake St. Granite Quarry, Inc. v Town/Village of Harrison*, 106 AD3d 918, 966 NYS2d 123 [2d Dept 2013]). Therefore, it is

ORDERED that counsel for the parties shall appear before the undersigned for a preliminary conference at 9:30 a.m. on September 23, 2014.

Dated: August 12, 2014



J.S.C.