

Savino v Board of Trustees of the Town of Southold
2014 NY Slip Op 32718(U)
October 14, 2014
Sup Ct, Suffolk County
Docket Number: 33788/2013
Judge: Jr., Andrew G. Tarantino
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SUPREME COURT - PART 50
COUNTY OF SUFFOLK - STATE OF NEW YORK

COPY

PRESENT

HON. ANDREW G. TARANTINO, JR.
A.J.S.C.

Index No. 33788/2013
Orig. Date: 1/7/2014
Adj. Date: 7/14/2014
Motion Dec. 001: MotD

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MICHAEL SAVINO and DANA SAVINO,

Petitioners,

**ORDER ANNULING
DECISION OF THE
TOWN BOARD**

-against-

**BOARD OF TRUSTEES OF THE TOWN OF
SOUTHOLD,**
Respondent.

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Upon consideration of the Order to Show Cause to review, void, annul, and overturn the decision of the Respondent Board of Trustees of the Town of Southold ["the Board" or "the Respondent"], dated November 13, 2013, the Verified Petition, the petitioners' memorandum of law, and supporting exhibits A through J, the Respondent's Answer and Return, the Respondent's memorandum of law, the Respondent's supplemental affirmation and exhibit A, and the petitioners' reply affirmation, it is now

ORDERED that after hearing counsel for the parties and after consideration of the papers filed in support and in opposition thereto, this application (seq 001) by the petitioners, Michael Savino and Dana Savino ["the Petitioners"], pursuant to Article 78, annulling the decision of the Town Board of Trustees for the Town of Southold dated November 13, 2013, is granted, and it is further

ORDERED that the application is remitted to the Southold Town Board of Trustees for reconsideration consistent with the provisions of the entirety of applicable provisions of §275 of the Town Code of the Town of Southold, and the prior approval of the Department of Environmental Conservation ["DEC"], within 45 days of the date that this Short Form Order is served with Notice of Entry, and it is further

ORDERED that counsel for Petitioners shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to CPLR §§2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

The instant proceeding seeks relief pursuant to CPLR Article 78 annulling the Decision and Resolution of the Southold Town Board of Trustees dated 11/13/2013 which denied, without prejudice, petitioners' application for an amendment of their Wetlands permit no. 2303 seeking to repair and replace an existing 100 linear foot bulkhead with a 38 foot north return and a 64 foot south return, removal and replacement of a gazebo, deck reconstruction, and add 275 yards of topsoil at their property at 1945 Bayview Avenue, Mattituck. The denial of this

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approval precluded the petitioners from reconstructing their bulkhead and appurtenant structures which were damaged as a result of Super Storm Sandy ["Sandy"].

According to the Verified Petition, on December 26, 2012, Petitioners applied to the Trustees for an administrative permit to repair and replace their existing bulkhead and dock that had been damaged by Sandy. Petitioners claim they have a pre-existing wetlands permit for an existing bulkhead 100 feet across the property that was approved by the Trustees upon application by a prior owner on September 24, 1971.

The petitioners also contend that on June 20, 1987, the Trustees issued a second permit to another prior owner, Trustees Permit No. 2303, for the following: timber dock 4' x 35' with fixed elevated walk extending from the existing bulkhead, 4' x 16' hinged ramp, 6' x 50' float, two (2) 6' x 31' floats, a Gazebo, and a 30' x 100' deck (*see* Petitioners' Exhibit D; *see also* Respondent Town's Return, photographs at 0023, 0041-43, 0055). On November 22, 1988, the Trustees amended the permit allowing ten foot extensions to the existing floating docks.

Petitioners contend that pursuant to § 275-5 B (1) of the Southold Town Code, their application to rebuild their bulkhead and reconstruct the deck, dock and appurtenant structures should have been granted by a mere administrative review, an expedited review process without a public hearing (*see* Town Code §275-5 B (2)(i); (2)(1)). The petitioners contend that by denying the administrative permit, the Respondent Town acted irrationally, arbitrarily and capriciously and seek an annulment of the Trustees' determination.

Petitioners also maintain the decision to deny the permit when the Department of Environmental Conservation, which has concurrent jurisdiction, had already issued its permit for the proposed replacement/reconstruction project was arbitrary and capricious. The Trustees sought recommendations from the Southold Town Conservation Advisory Council and the Local Waterfront Revitalization ["LWRP"] Program Coordinator. Without any further discussion, the Trustees' determination states that the LWRP Program Coordinator issued a recommendation that the application be found exempt from the Local Waterfront Revitalization policy standards. Although the Conservation Advisory Council adopted a unanimous resolution that it did not support the petitioners' application, the Council's position was apparently based, at least in part, on the fact that the square footage of the floating docks exceeded "the Code." The Board's determination makes no reference to the basis of the Conservation Advisory Council's recommendation.

The Trustees' determination dated November 13, 2013, states that the Board recommended potential modifications to the proposed construction that would have a less deleterious effect on the wetlands and adjacent areas. The only suggested "modification" reflected in the minutes of the Board meeting that took place on October 16, 2013, was the following made by then Board President Jim King:

"the bulkhead could be moved landward about ten feet to try and reestablish some of the wetland areas..... Our concern is, I don't even know how this was ever permitted to begin with. And I think this is a time we can maybe fix something that should be fixed, by backing that in ten feet and re-establishing that wetland along there."

Several additional comments were made by Board members at the October 16th hearing suggesting that the petitioners consider backing [the bulkhead] up ten feet landward. The discussion concluded with Trustee King's recommendation to the petitioners "[j]ust give us some time to work our way through it. And please consider what we suggested on moving that whole structure ten feet landward. Environmentally, it really would be a nice thing to do."

At the second Board meeting on November 13, 2013, President King reaffirmed the Town's desire to have the petitioners move their bulkhead and adjoining dock ten feet back. "That's where I'm coming from on this. I think it would be a tremendous gain of wetlands for us."

The Town maintains that the petitioners are not entitled to the expedited, administrative review process. Pursuant to a Town Code provision adopted in 2004, the Town may issue an administrative permit for remodeling, renovation, or rebuilding of a bulkhead that had previously been given a wetlands permit by the Trustees, provided that there would be no harm to the wetland. Town Code § 275-12 authorizes the Town to issue a permit only where, inter alia, the issuance of a permit for operations will not substantially adversely affect the wetlands of the Town, adversely affect fish, shellfish or other beneficial marine organisms, aquatic wildlife and vegetation or the natural habitat thereof, and otherwise adversely affect the health, safety and general welfare of the people of the Town.

Tidal wetlands are defined by the Southold Town Code, §275-2:

(1) All lands generally covered or intermittently covered with, or which border on, tidal waters, or lands lying beneath tidal waters, which at mean low tide are covered by tidal waters to a maximum depth of five feet, including but not limited to banks, bogs, salt marsh, swamps, meadows, flats or other low-lying lands subject to tidal action;

(2) All banks, bogs, meadows, flats, tidal marsh and beaches subject to such tides and upon which grows or may grow some or any of the following: smooth cordgrass (*Spartina alterniflora*), salt hay grass (*Spartina patens*), blackgrass (*Juncus gerardii*), saltwort (*Salicornia* spp.), sea lavender (*Limonium* spp.), marsh elder (*Iva frutescens*), groundsel (*Baccharis halimifolia*), or marshmallow (*Hibiscus* spp.).

The parties do not dispute that the requested construction adjoins tidal wetlands. The Town argues that the petitioners are not entitled to an administrative permit for the replacement of the bulkhead, as distinguished from a wetland permit, because the administrative permit review only applies to pre-existing structures that have been previously approved by issuance of a Trustees' wetland permit. The Town denies that the Trustees issued a permit for the construction of the bulkhead in 1971 because at that time, no permit was required. In fact, the previous owner was advised by letter from the Board's then Chairman that no permit was required because the structure was entirely on the owner's property and was not on "tidal waters".

On the issue of whether the petitioners were entitled to an administrative permit as to the

bulkhead, the Court agrees with the Town that 1) a wetlands permit was not previously issued for the bulkhead, and 2) as to the replacement of the bulkhead, the petitioners were required to obtain a wetlands permit under the Town Code.

Town Code § 275-3, adopted in 2004, requires a permit to reconstruct the entire bulkhead. Excepted from the permit requirement is the ordinary and usual maintenance or repair on a wetlands-permitted structure (of the same dimensions) of a functional building, dock, pier, wharf, jetty, groin, dike, dam or other water-control device or structure (Code § 275-4 [1] [e]). The petitioners' application requires a wetlands permit because the request is for the replacement of the existing bulkhead as distinguished from mere maintenance and repair.

However, with respect to whether the petitioners should have received the required permit, the Trustees conducted several site inspections of the property and held a public hearing on the application on October 16, 2013, and again on November 13, 2013. The Trustees concluded that the bulkhead had been located in a healthy, active wetland that included a flourishing oyster population and that rebuilding the bulkhead in the same location would be detrimental to the wetlands. The Board also questioned whether the prior bulkhead may have been constructed on public bottom and therefore encroached on public land.¹ The Trustees admit they suggested, but did not require, that Petitioners consider relocating the bulkhead ten feet landward which the Board contends would protect the intertidal marsh and prime oyster habitat.

When the petitioners refused to consider moving the bulkhead landward, their application was denied without prejudice. The "without prejudice" designation would allow Petitioners to apply to rebuild the bulkhead in a different location if they elected to do so.

The "without prejudice" denial of the application begs the question as to whether the "suggestion" that the application would only be approved if the petitioners agreed to move the bulkhead ten feet landward was arbitrary, capricious, and without a rational basis (*see Fuentes v. Planning Bd. of Village of Woodbury*, 82 A.D.3d 883, 918 N.Y.S.2d 213 [2d Dept. 2011]).

Respondent also submitted the affidavit of Trustee Bredemeyer, a Trustee of 14 years duration, the Board's current President, and a retired marine researcher for Suffolk County's Bureau of Marine Resources. The only reference in Bredemeyer's affidavit about the Trustees' suggestion of moving the bulkhead ten feet landward is a single conclusory statement at the end of the affidavit, "[t]he Trustees merely pointed out to the Petitioners that moving the bulkhead landward ten feet would benefit the wetlands in the area and reestablish the tidal zone."

No factual recitations or findings of fact were set forth in the resolution and no analysis

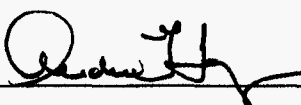
¹ Such a conclusion would be in direct contradiction to the letter from the Trustees to the prior owner in 1971 stating, "It is the determination of this Board that the bulkhead is essential to prevent further erosion, and there is no permit or fee required as this bulkhead is to be entirely on your own property, as specified in your application, making it beyond the jurisdiction of the Board of Town Trustees." (Petitioners' Exhibit C). In addition, the Trustee President's affidavit also unequivocally reaffirms that no permit was issued in 1971 because the bulkhead was located on private property- not the Trustees' lands.

was provided in the resolution outlining the deliberations of the Town Board in reaching its determination that the current location of the bulkhead is detrimental to the wetlands. Importantly, no explanation was proffered as to why the applied-for structure would adversely impact the wetlands, the shellfish, aquatic life and vegetation, but moving the structure landward by ten feet would not. The implication of the comments made by President King at the hearing was that by denying the application to rebuild the existing bulkhead, the Town would be in a position to reclaim land once thought to be privately owned if the petitioners agreed to push back the bulkhead landward by ten feet.

Given the fact that there is no reasoning whatsoever included in the Town Board's denial of the petitioners' application why replacing the existing bulkhead would threaten the integrity of the wetlands but moving the bulkhead landward would not, the determination is arbitrary and without a rational basis and therefore, must be annulled. Accordingly, the matter is remitted to the Town Board for reconsideration of the application in accordance with the applicable provisions of the Town Code as set forth herein.

Dated: Riverhead, New York

Dated: OCT 14 2014



ANDREW G. TARANTINO, JR., A.J.S.C.

 FINAL DISPOSITION

 XX NON-FINAL DISPOSITION