Matter of DeFalco v DeChance
2014 NY Slip Op 32848(U)
November 5, 2014
Sup Ct, Suffolk County
Docket Number: 13-11268
Judge: Joseph A. Santorelli
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

INDEX No. 13-11268
CAL No.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 4-24-13
SUBMIT DATE 10-30-14

In the Matter of the Application of:

MICHAEL DEFALCO,

Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Law & Rules,

-against-

PAUL M. DECHANCE, Chairman, KERI PERAGINE, Vice Chairman, TERRY KARL, JAMES WISDOM, KEVIN McCARRICK, GEORGE PROIOS, and HOWARD BERGSON, constituting the Zoning Board of Appeals of the Town of Brookhaven, and the ZONING BOARD OF APPEALS of the Town of Brookhaven, and the TOWN OF BROOKHAVEN,

Respondents,

-and-

CRAIG SCHLOSSBERG,

Intervenor.

LAW OFFICES OF RICHARD I. SCHEYER, ESQ.
Attorneys for Petitioner
110 Lake Avenue South, Ste 46
Nesconset, NY 11767

ANNETTE EADERESTO, ESQ.
BROOKHAVEN TOWN ATTORNEY
By: Todd Lewis, Esq.
Attorneys for Respondents
1 Independence Hall
Farmingville, NY 11738

J. LEE SNEAD, ESQ.
Attorneys for Intervenor
144 South Country Rd, PO Box 489
Bellport, NY 11713

Mot. Seq. # 08 - MD
11 - MD
12 - MD
13 - MD
14 - MD
15 - MD

In this CPLR Article 78 proceeding petitioner Michael DeFalco seeks to annul that portion of the determination of the respondent Zoning Board of Appeals dated March 22, 2013, which while granting his application for an area variance required DeFalco to reduce his lot coverage and increase his side yard set back.

Currently there are six motions before this Court for determination. The first, delineated as motion #8, is the Article 78 petition. The second, delineated as motion #11, is a motion by Schlossberg to compel

the chief building inspector of the Town of Brookhaven to revoke Building Permit No. 13B091790, dated September 19, 2013. The third, delineated as motion #12, is a motion by DeFalco to quash a subpoena duces tecum. The fourth, delineated as motion #13, is a motion by the Town Respondents to quash a subpoena duces tecum. The fifth, delineated as motion #14, is a duplicate motion to motion #12 by DeFalco to quash a subpoena duces tecum. The sixth, delineated as motion #15, is a motion by Schlossberg to compel compliance with certain non-judicial subpoenas duces tecum dated September 9, 2014.

The petitioner Michael DeFalco is the owner of a parcel of real property located at 401 Ocean Walk on Fire Island in the Town of Brookhaven, hereinafter referred to as "Town". The property is located within the Fire Island Freshwater Wetlands and a Coastal Erosion Hazard Area. The property, which the petitioner acquired in 2010, is located within the boundaries of the Fire Island National Seashore, hereinafter referred to as "the Seashore", and is nonconforming pursuant to the Federal Zoning Standards for Fire Island National Seashore, 36 CFR Part 28, and the Town of Brookhaven Zoning Code, Chapter 85, Article XVI, "Great South Beach in Fire Island National Seashore." The property is improved with a one-story residence, front, side and rear decking, and an above-ground swimming pool. All of the existing structures together account for a lot occupancy of 42.6%. The petitioner sought to construct a second story addition to the existing residence with a balcony, swimming pool, additional decking around the pool and an eight foot fence on both side yards. In 2009, the petitioner applied to the Town for a wetlands permit. The Town Department of Planning, Environment and Land Management denied the application on the grounds that the proposed construction in a primary dune area was incompatible with the standards of Chapter 76 of the Town Code. The petitioner appealed to the Board of Zoning Appeals of the Town of Brookhaven, hereinafter referred to as "the Board", which granted the permit subject to certain conditions on July 23, 2010. Thereafter, the petitioner applied to the Board for area variances, including a front yard setback and side yard variances for the proposed second story balcony and residence addition. The petitioner also sought permission for an eight foot fence instead of six feet and permission to exceed the 35 percent lot occupancy to 42.6 percent. After a public hearing held before the Board on May 12, 2011, at which the petitioner's agent testified in support of the application, the Board issued a determination that granted the requested second-story addition, second-story balconies on the north and south, a 6-foot high fence and wall on both side yards, 37% lot occupancy, and the proposed deck addition approved at 6 feet with total side yards of 16 feet.

In its findings of fact, the Board states that the existing one-story dwelling measures 1,224 square feet and accounts for approximately 19% of the lot occupancy. In addition, the Board notes that the existing accessory amenities account for 23.6% of the lot occupancy for a total of 42.6% lot coverage. Thus, the accessory structures alone accounted for more than the 35% lot occupancy permitted by the zoning regulations. The Board further states that petitioner no longer enjoys the protection of the Certificates of Compliance, as he is seeking to significantly alter the existing dwelling, the non-conforming and existing setbacks and lot occupancy.

As to petitioner's request for a variance to build second-story balconies, the Board found that there was significant evidence of conformity and it would not have any undesirable change in the character of the community. Moreover, the Board indicated that the front yard and total side yard setbacks would not have a negative impact on the nature and character of the community or be a detriment to neighboring properties. In approving the request for a variance, the Board concluded that the proposed second-story balconies on

the north side and south side of the structure would not create a detriment to the health safety or welfare of the community. With respect to petitioner's proposal for the second story addition, the Board found that the proposed structure would not have an undesirable change to the nature and character of the community. It states that while the request for a 15.4 foot front yard setback, 6.7 foot minimum side yard setback and 16.9 foot total side yard setback would result in a 23%, 44% and 44% relaxation, respectively, the impact of this would be significantly mitigated by the fact that these set backs are already established by the existing dwelling.

However, as to petitioner's request for permission to construct two additions to the existing deck on the south side of the existing dwelling, the Board found that the request to maintain 0.5 foot and 1.5 foot minimum side yards for a total of 2 feet would have an undesirable impact on the nature and character of the community. It stated that the 2 feet of total side yard where 30 feet is required would result in a 94% relaxation of the Codes requirements. It further stated that the proposed decking would essentially consume the entire width of the property, extending from the eastern to western property line for 58 consecutive feet on a lot that maintains 60 feet in width. The Board concluded that the size of this decking and its configuration would have a negative impact on the fragile environmental and physical conditions of the area.

As to the petitioner's lot occupancy, the Board noted that petitioner proposed to remove decking on the east and west side of the dwelling and replace it with the proposed decking on the south side of the dwelling, therefore proposing to maintain 42.6% lot occupancy where 35% lot coverage is permitted. The Board found that as petitioner is seeking to significantly alter the existing dwelling, the lot occupancy that currently exists on the subject lot is no longer protected by the Town of Brookhaven certificates. The Board noted that while petitioner is seeking to maintain the same lot coverage as presently exists on the parcel, any hardship suffered by petitioner was self-created in nature since the proposed structural alterations to the dwelling did not return the parcel to the Code required lot coverage of 35%. The Board concluded that petitioner's request to maintain 42.6% lot coverage is not the minimum relief necessary and would have a negative effect on the health, safety and welfare of the community. In addition, the Board found that the detriment would be mitigated by the granting of 37% lot coverage as an alternative to petitioner's request.

With respect to petitioner's proposal to construct an 8-foot fence where a 6-foot fence is permitted, the Board found that while petitioner submitted four prior grants to prove conformity, only one case involved a grant for an 8-foot fence. The Board stated that one grant from 2009 provides insufficient precedent to prove conformity and that the 8-foot fence was situated along the road side of the parcel, whereas the subject request would run along the side property lines towards the ocean front. The Board concluded that this request would have a negative impact on the nature and character of the community and create a detriment to neighboring property owners. The petitioner then filed an Article 78 proceeding, ***In the Matter of DeFalco v. DeChance, et. al.***, under Index No. 17102/2011, seeking to set aside the determination of the respondent Zoning Board of Appeals to the extent that it required petitioner to reduce his lot coverage and increase his side lot set back.

The intervenor Craig Schlossberg is the owner of an adjoining parcel of property located at 402 Ocean Walk. He commenced a hybrid proceeding, ***In the Matter of Schlossberg v. Brookhaven, et. al.,*** under Index No. 19598/2011, pursuant to Article 78 to annul the Zoning Board's determination. Schlossberg contended that the Board failed to comply with the State Environmental Quality Review Act (SEQRA)

because no environmental review was conducted in connection with the petitioner's application. He also alleged that the Board failed to perform appropriate reviews under Chapter 76 and Chapter 81 of the Town Code and that the determination to grant the variances lacked a rational basis. This Court in ***In the Matter of Schlossberg v. Brookhaven, et. al.***, Index No. 19598/2011, by Order dated August 6, 2012, (LaSalle, J.), held, *inter alia*, that "while the Board claims that a SEQRA review was conducted, the record contains no evidence that any such determination was made... The Board may still properly find that the application is a Type II action but the record contains no evidence that the Board made any such finding... Accordingly, the petition is granted, the determination is annulled and the matter is remitted to the Board for a new determination." Further, this Court in ***In the Matter of DeFalco v. DeChance, et. al.***, Index No. 17102/2011, (LaSalle, J.), held that "in view of this Court's determination in the Schlossberg proceeding, the instant petition is moot... Accordingly, the petition is denied and the proceeding is dismissed."

Subsequent to this Court's determinations, the petitioner's matter was re-heard by the Board, and a decision was rendered on March 22, 2013 which included a SEQRA Type II determination, adopted the Findings outlined in its original decision of May 12, 2011, and granted the petitioner's application with the previous modifications. DeFalco then commenced this Article 78 proceeding, ***In the Matter of DeFalco v. DeChance, et. al.***, under Index No. 11268/2013, seeking to set aside the determination of the respondent Zoning Board of Appeals to the extent that it required petitioner to reduce his lot coverage and increase his side lot set back. Schlossberg also commenced a hybrid proceeding, ***In the Matter of Schlossberg v. Brookhaven, et. al.,*** under Index No. 10041/2013, pursuant to Article 78 to annul the Board's determination. In the latter proceeding Schlossberg contends that the Board failed to comply with the State Environmental Quality Review Act (SEQRA) because the Board did not perform any additional environmental review in connection with the petitioner's application and merely declared the project to be a Type II action. Schlossberg also raises these issues in his answer as intervenor in this matter. Schlossberg was given intervenor status by decision dated April 15, 2014. That decision also denied a preliminary injunction and held that

> Schlossberg has failed to establish the likelihood of ultimate success on the merits. Significant to this conclusion the Court notes that after exhaustive and thorough proceedings the Zoning Board of Appeals granted the permits to DeFalco on two occasions. The Court is also satisfied that the Board satisfactorily addressed the SEQRA as directed by Justice LaSalle in his decision in the prior proceeding.

It is well settled that local zoning boards have broad discretion in considering applications for variances, 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 Fuhst v Foley***, 45 NY2d 441, 410 NYS2d 56 [1978]; ***Matter of Miller v Town of Brookhaven Zoning Bd. of Appeals***, 74 AD3d 1343, 904 NYS2d 199 [2d Dept 2010]). Thus, the determination of a zoning board will be upheld if it is rational and not arbitrary and capricious (*see* ***Matter of Sasso v Osgood***, 86 NY2d 374, 633 NYS2d 259 [1995]; ***Matter of JSB Enters., LLC v Wright***, 81 AD3d 955, 917 NYS2d 302 [2d Dept 2011]; ***Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh***, 68 AD3d 62, 886 NYS2d 442 [2d Dept 2009]). A determination is rational "if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition" (***Matter of Caspian v Zoning Bd. of Appeals***, *supra, quoting* ***Matter of Halperin v City of New Rochelle***,

24 AD3d 768, 772, 809 NYS2d 98, 105 [2d Dept 2005]; *see **Matter of JSB Enters., LLC v Wright**, supra*).

In making its determination whether to grant an area variance, a zoning board of appeals is required, pursuant to Town Law § 267-b (3), to engage in a balancing test, weighing the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted (*see **Matter of Pecoraro v Board of Appeals of Town of Hempstead***, 2 NY3d 608, 781 NYS2d 234 [2004]; ***Matter of Ifrah v Utschig***, *supra*; ***Matter of Sasso v Osgood***, *supra*). The board must consider whether (1) an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by granting the area variance; (2) the benefit sought by the applicant can be achieved by some other method, feasible for the applicant to pursue, other than an area variance; (3) the requested variance is substantial; (4) the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood; and (5) the alleged difficulty was self-created (*see **Matter of Pecoraro v Board of Appeals**, supra* at 613, 781 NYS2d at 236-237; ***Matter of Ifrah v Utschig***, *supra* at 307-308, 746 NYS2d at 668-669). A zoning board is "not required to justify its determination with supporting evidence with respect to each of the five factors, so long as its ultimate determination balancing the relevant considerations was rational" (***Matter of Steiert Enters. v City of Glen Cove***, 90 AD3d 764, 767, 934 NYS2d 475, 478 [2d Dept 2011], *quoting **Matter of Merlotto v Town of Patterson Zoning Bd. of Appeals***, 43 AD3d 926, 929, 841 NYS2d 650, 652-653 [2d Dept 2007]).

Here, the Board's determination was not arbitrary and capricious. In making its determination, the Board considered all of the statutory factors and used the requisite balancing test. The Federal Zoning Standards and the Brookhaven Town Code applicable to the Seashore prohibit any alteration or expansion of a nonconforming use other than to bring it into conformity with the current zoning requirements (36 CFR § 28.11; Brookhaven Town Code §§ 85-166 [A], 166 [C] [1]). In granting petitioner's application, the Board noted that the zoning regulations only permit a total lot occupancy of 35% and that petitioner's existing lot occupancy was 42.6%. While petitioner's dwelling took up 19% of the total existing lot occupancy, the Board noted that the "excessive accessory structures" took up 23.6% of the lot occupancy by themselves. With regard to the side yard setback, the Board noted that the zoning regulations require 30 feet, while petitioner currently maintains 2 feet of total side yard. The Board also reasonably recognized "existing sensitive environmental conditions," implicitly reflecting the location of the petitioner's property within the environmentally sensitive Fire Island National Seashore (36 CFR Part 28; Brookhaven Town Code Chapter 85, Article XVI). Both the Code and the Federal Zoning Standards are intended to protect and conserve the Fire Island barrier beach and its natural resources (*id.*). Thus, the Board's action in requiring a reduction of the overall lot occupancy to 37%, second-story addition with balcony, deck additions with total side yards of 16 feet was rational and balanced the interest of petitioner with those of the Fire Island National Seashore community (*see **Matter of Switzgable v Board of Zoning Appeals of Town of Brookhaven***, 78 AD3d 842, 911 NYS2d 391 [2d Dept 2010]).

Petitioner contends that the Board's determination revoked his current certificates of occupancy and compliance with respect to the existing dwelling and structures on his property, thereby effecting an unconstitutional taking of his property and violating his due process right to a hearing in the process. However, as the Board's determination did not affect petitioner's right to continue to live on his property with the dwelling and structures thereon as is, petitioner's argument is rejected. The Board merely determined that if petitioner decided to make his proposed alterations on the property, he would have to

bring his lot occupancy and side yard setbacks into closer conformity with the current zoning requirements.

To the extent that petitioner argues that his current certificates of occupancy and compliance in certain structures on the property establish his vested right in those structures, it has been held that a landowner's "vested right[ ] in a nonconforming structure existing at the time a prohibitory code provision is enacted, does not extend to subsequent construction" (***Matter of Rembar v Board of Appeals of Vil. of E. Hampton***, 148 AD2d 619, 620, 539 NYS2d 81, 83 [2d Dept 1989]). Brookhaven Town Code § 85-166 (A) clearly states that "no building or land shall be used and no building shall be erected or structurally altered except in conformity with the provisions of this article." In addition, a zoning board of appeals "c[an] properly decide that additional variances would impose too great a burden and strain on the existing community" or "find that previous awards had been a mistake that should not be again repeated," as a board is "not bound to perpetuate earlier error" (***Cowan v Kern***, 41 NY2d 591, 596, 394 NYS2d 579 [1977]). Furthermore, "[a] zoning board may, where appropriate, impose reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property, and aimed at minimizing the adverse impact to an area that might result from the grant of a variance or special permit" (***Matter of Gentile v Village of Tuckahoe Zoning Bd. of Appeals***, 87 AD3d 695, 696, 929 NYS2d 167, 169 [2d Dept 2011] [internal quotation marks omitted]). Accordingly, the Board's determination requiring petitioner to reduce his lot coverage from 42.6% to 37% and to increase the side yard setbacks to a total of 16 feet was not arbitrary and capricious and was amply supported by the record.

It is well settled that "judicial review of a SEQRA determination is limited to determining whether the challenged determination was affected by an error of law, or was arbitrary and capricious, an abuse of discretion, or was the product of a violation of lawful procedure" (***Matter of East End Property Co. v Kessel***, 46 AD3d 817, 820 [2d Dept 2007] *quoting* ***Matter of Village of Tarrytown v Planning Board of Village of Sleepy Hollow***, 292 AD2d 617, 619 [2d Dept 2002]; *see* ***Akpan v Koch***, 75 NY2d 561, 570 [1990]). Courts "may review the record to determine whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (***Matter of East End Property Co. v Kessel***, supra *quoting* ***Matter of Jackson v New York State Urban Dev. Corp.***, 67 NY2d 400, 417 [1986]). In this regard, "it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively" (***Matter of East End Property Co. v Kessel***, *supra quoting* ***Matter of Jackson v New York State Urban Dev. Corp.***, *supra*). Further, SEQRA mandates literal compliance with its procedural requirements and substantial compliance is insufficient to discharge the responsibility of the agency under the act (see ***Matter of East End Property Co. v Kessel***, *supra*; ***Matter of Group for S. Fork v Wines***, 190 AD2d 794 [2d Dept 1993]).

An agency must undertake an initial review to determine whether a proposed action is subject to SEQRA (*see* 6 NYCRR 617.6[a][1]; ***London v Art Commission of City of NY,*** 190 AD2d 557 [1st Dept 1993]). This involves an assessment of whether the action is a "Type I" or "Unlisted" action, which requires environmental review (*see* 6 NYCRR 617.6[a]), or a "Type II" action in which case the agency has no further responsibilities under SEQRA (*see* 6 NYCRR 617.5; ***London v Art Commission of City of NY***, *supra*). Although the expansion of a single family residence and the granting of variances are considered Type II actions (*see* 6 NYCRR 617.5[c][9],[12],[13]; ***Matter of Levine v Town of Clarkstown***, 307 AD2d 997 [2d Dept 2003]), the property in this case is located within the Fire Island Freshwater Wetlands and a Coastal Erosion Hazard Area. Thus, the project impacts environmentally sensitive land. In such cases, a

more detailed preliminary inquiry may be necessary when an administratively predetermined Type II classification conflicts with "a competing environmental impact" (***Matter of Hazan v Howe***, 214 AD2d 797 [3d Dept 1995] quoting ***Matter of Town of Bedford v White***, 155 Misc2d 68, 71 *affd*, 204 AD2d 557 [2d Dept 1994]). The Board was required to at least make an initial assessment as to whether the proposed action was subject to SEQRA (*see* ***Matter of Lucas v Village of Mamaroneck***, 57 AD3d 786 [2d Dept 2008]; ***Matter of Wood v Zoning Bd of Appeals***, 51 AD3d 680 [2d Dept 2008]).

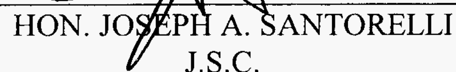
Here, Schlossberg contends that the Board failed to comply with SEQRA because it did not conduct a sufficient environmental review of DeFalco's application upon the rehearing. Respondent Town of Brookhaven alleges that the Board did a "careful analysis and review on remand of the facts and law (which) caused it to rationally determine that the DeFalco proposed construction of his single family dwelling and/or amenities in issue was a SEQRA Type II action." The Town further notes that "the residential construction herein was approved by the Town's Planning, Environment and Land Management Division, the New York State Environmental Protection Agency and, in part, by the Town's Zoning Board." The Town further argues that "the proposed construction at the DeFalco property was twice completely analyzed and reviewed by the Town's Department of Planning, Environment and Land Management and approved after the applicant made revisions moving amenities further north of the dunes... the matter was reviewed and approved by the State Environmental Protection Agency... the approvals were never timely challenged by either petitioner in an Article 78." The Board's decision, dated March 20, 2013, held that "the Board adopts a Type II SEQRA finding, as the application does not appear to present a significant impact to the environmentally sensitive area and no further environmental review appears warranted." This determination by the Board was not affected by an error of law, arbitrary and capricious, an abuse of discretion, or the product of a violation of lawful procedure.

All remaining objections to the Board's determinations have been examined and have been found to have not been arbitrary or capricious in nature.

This Court, based upon all of the foregoing, holds that each determination made by the Zoning Board of Appeals for the Town of Brookhaven was not arbitrary or capricious. Accordingly, the petition is denied and the proceeding is dismissed.

All other motions currently before the Court under this index number are denied as moot, this Court having herein dismissed the petition.

The foregoing shall constitute the decision and Order of this Court.



Dated: November 5, 2014

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION