

Trustees of the Freeholders v Zoning Bd. of Appeals of Town of E. Hampton
2015 NY Slip Op 30414(U)
February 26, 2015
Supreme Court, Suffolk County
Docket Number: 38647/2012
Judge: William B. Rebolini
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MEMORANDUM

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

The Trustees of the Freeholders and
Commonality of the Town of East Hampton,

Petitioner,

Motion Sequence No.: 003; MD; CD
SUBJ

Motion Date: 2/13/13
Submitted: 1/28/15

-against-

Index No.: 38647/2012

The Zoning Board of Appeals
of the Town of East Hampton,
Joshua Young and Christine Lemieux,

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Respondents.

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The Zoning Board of Appeals
of the Town of East Hampton:

Clerk of the Court

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In this proceeding, petitioner, the Trustees of the Freeholders and Commonality of the Town of East Hampton ("the Trustees"), seeks a judgment pursuant to CPLR article 78 vacating and annulling a final determination dated November 30, 2012 by respondent Zoning Board of Appeals of the Town of East Hampton which granted variances and a Natural Resources Special Permit to respondents Joshua Young and Christine Lemieux for the construction of a 147-linear foot stone armor revetment backed by a 32-foot vinyl seawall.

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Respondents Joshua Young and Christine Lemieux (“respondents Young and Lemieux”) are the owners of a parcel of real property located at 157 Mulford Lane, Amagansett, New York. The parcel is located in the Hamlet of Amagansett, Town of East Hampton, New York and has a Suffolk County Tax map number of 0300-084.00-02.00-006.000. The subject property has a lot size of 15,960 square feet, is bordered on the north by Gardiner’s Bay, and contains tidal and freshwater wetlands, barrier dunes, surface waters, and beach vegetation. The property is located in the A Residence zoning district and in the Coastal Erosion Overlay District Zone 2 and the Flood Hazard Overlay District. Respondents Young and Lemieux purchased the property in late 2009, at which time the property was improved with a one-story, approximately 1,200-square-foot single family residence with 964-square-foot of decking that were constructed prior to the adoption of the zoning code.

Respondents Young and Lemieux filed an application in the fall of 2011 with the respondent Zoning Board of Appeals of the Town of East Hampton (“ZBA”) seeking a Natural Resources Special Permit (“NRSP”) pursuant to Town of East Hampton Zoning Code (“Town Code”) § 255-4-20 and a variance from Town Code § 255-3-85 to demolish the existing residence and construct a new 1,719-square-foot residence on pilings in a more landward location and to construct a 115 linear foot stone armor revetment coastal erosion control structure with a 32 foot vinyl seawall return along the northern, seaward, and western portions of the subject property. Town Code § 255-3-85 prohibits the construction, placement or installation of new erosion control structures in Coastal Erosion Overlay District Zone 2. By determination dated April 9, 2012, the ZBA denied that portion of the application for the proposed coastal erosion structure, and granted that portion of the application to demolish the existing house and construct a new 1,719-square-foot residence on pilings in a more landward location. In its determination, the ZBA noted that the direction of the littoral drift was from east to west along the shoreline and that there has been chronic erosion pre-dating Young and Lemieux’s ownership and significant erosion between 2001 and 2010. The ZBA found, however, that the construction of the proposed revetment had a high potential of accelerating erosion to the west, and that respondents Young and Lemieux had not fully explored all alternative configurations and materials, such as a sand cube geotextile revetment, and had not demonstrated that erosion control could not be adequately accomplished through a coastal erosion project as defined by the Town Code.

Respondents Young and Lemieux subsequently filed a new application with the ZBA in June 2012 for variances and an NRSP for a proposed 147-foot stone armor revetment which was a modification, pursuant to a request from the New York State Department of Environmental Conservation (DEC), of the original proposal in that the proposed vinyl sheet pile return was relocated six feet off the eastern property line and the vinyl sheet pile return was faced, or fortified, with partial rock armor. The DEC had issued a permit for the revised structure on May 3, 2012. The Trustees submitted a letter dated September 27, 2012 to the ZBA with respect to this second application advising, among other things, that the proposed stone armor revetment would extend approximately 14 feet below the mean high water mark thus requiring the Trustees’ approval and requested that any ZBA approval of the second application be conditioned upon receipt of a Trustee Permit. A public hearing was held on October 2, 2012. The ZBA granted the second application

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by determination dated November 30, 2012. Notably, said determination indicated in its New York State Environmental Quality Review Act (SEQRA) determination that the lead agency was the ZBA, that the SEQRA classification was unlisted, and that there was a negative declaration finding. The revised surveys, most recently revised on May 1, 2012, submitted with said application indicate that a portion of the northeast corner of the new proposed revetment extends north, seaward, of the mean high water line as located on September 14, 2011.

The Trustees subsequently commenced the instant CPLR article 78 proceeding challenging the ZBA's November 30, 2012 determination as arbitrary and capricious, contrary to law, and an abuse of discretion. In their petition, the Trustees claim that they represent the original government of East Hampton, created by King James II through the Dongan Patent dated December 9, 1686, that they govern the Commonlands between the western border of the Town of East Hampton and the eastern edge of Napeague, that "the Commonlands include the Bottomlands, Beaches and Intertidal zones" as well as "the Commonlands between the high water line and low water line along Gardiner's Bay (Napeague Bay)." In addition, the Trustees assert that their "ownership and governance of the Commonlands between the high water and low water marks along Gardiner's Bay is one of the reasons Petitioner has the requisite legal standing to commence and maintain this Special Proceeding." The Trustees also assert that the deed history for the respondents Young and Lemieux's property confirms that the northernmost boundary has at all times been delineated by "the high water line of Gardiner's Bay."

The Trustees challenge the November 30, 2012 determination on grounds including that 1) the subject 147-foot stone armor revetment is substantially similar to the coastal erosion structure that was denied by the ZBA in its prior determination; 2) the ZBA acted ultra vires by illegally permitting respondents Young and Lemieux to erect a substantial portion of the subject 147-foot rock revetment seaward of the "high water line" of Gardiner's Bay (Napeague Bay) and therefore seaward of the northern boundary of the Young property on property that is not part of their lot as defined in the Town Code; 3) the determination granted a variance and an NRSP based in whole or in part on the ZBA's erroneous findings that the existing residence on the respondents Young and Lemieux's property was in "imminent danger" and that the threatened loss, destruction or severe damage to the existing residence cannot reasonably be prevented by some "alternative means" to permitting the construction of a coastal erosion structure when in fact the ZBA had previously granted them the necessary relief to demolish the existing residence and construct a new 1,719-square foot residence on pilings in a more landward location; 4) the ZBA failed to identify the relevant areas of environmental concern associated with the 147-foot rock revetment, take a "hard look" at them, and make a "reasoned elaboration" of the basis for its negative declaration in violation of SEQRA; and 5) the ZBA failed to set forth any change in law or circumstances that warranted a departure from its denial of the prior application for a nearly identical rock revetment seven months earlier.

The ZBA served its answer on January 13, 2014. The ZBA's answer asserts objections in point of law that its determination was rational and based on substantial evidence; that the Trustees are estopped from claiming that the ZBA's approval of the subject revetment was arbitrary and

capricious inasmuch as the Trustees approved a revetment located to the east of the subject property and took no action with respect to an unpermitted rock revetment immediately to the east of the subject property despite full knowledge of its existence; and that the subject revetment is not on the Trustees' property. Respondents Young and Lemieux served their answer on or about May 20, 2014 together with their Memorandum of Law in Opposition to the Petition dated May 20, 2014.

In a CPLR article 78 proceeding to review a determination of a zoning board of appeals, a zoning board's interpretation of its zoning ordinance is entitled to great deference, and judicial review is limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion (*see Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613, 781 NYS2d 234 [2004]; *Matter of East Hampton Indoor Tennis Club, LLC v Zoning Bd. of Appeals of Town of E. Hampton*, 83 AD3d 935, 937, 921 NYS2d 308 [2d Dept 2011]; *Brancato v Zoning Bd. of Appeals of City of Yonkers, N.Y.*, 30 AD3d 515, 515, 817 NYS2d 361 [2d Dept 2006]). A zoning board's determination shall be upheld if it is rational and not arbitrary and capricious (*see Matter of Sasso v Osgood*, 86 NY2d 374, 384-85, 633 NYS2d 259 [1995]; *Matter of Bassano v Town of Carmel Zoning Bd. of Appeals*, 56 AD3d 665, 868 NYS2d 677 [2d Dept 2008]). 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 Halperin v City of New Rochelle*, 24 AD3d 768, 772, 809 NYS2d 98 [2005]; *see Matter of Ifrah v Utschig*, 98 NY2d 304, 308, 746 NYS2d 667 [2002]). "When reviewing the determinations of a Zoning 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 374, 384 n. 2, 633 NYS2d 259 [1995]; *see Matter of Matejko v Board of Zoning Appeals of Town of Brookhaven*, 77 AD3d 949, 949, 910 NYS2d 123 [2d Dept 2010]; *see also Matter of Campbell v Town of Mount Pleasant Zoning Bd. of Appeals*, 84 AD3d 1230, 1231, 923 NYS2d 699 [2d Dept 2011]). It so follows that the determination of a zoning board should be sustained upon judicial review if it is not illegal or arbitrary and capricious, and it has a rational basis (*see Matter of Sasso v Osgood*, 86 NY2d at 384, 633 NYS2d 259; *Matter of Carrano v Modelewski*, 73 AD3d 767, 899 NYS2d 634 [2d Dept 2010]).

Here, the determination of the ZBA to grant the second application by respondents Young and Lemieux for an NRSP to permit the construction of a 147-linear foot stone armor revetment backed by a 32-foot vinyl seawall was neither arbitrary nor capricious, had a rational basis, and was supported by substantial evidence (*see generally Matter of Hach v Zoning Bd. of Appeals of Town of East Hampton*, 287 AD2d 500, 731 NYS2d 219 [2d Dept 2001]; *Matter of Bond v Zoning Bd. of Appeals of Town of East Hampton*, 272 AD2d 612, 708 NYS2d 635 [2d Dept 2000]). With respect to the allegation that the newly proposed structure was substantially similar to the one that failed to receive approval by the ZBA, the ZBA noted in its November 30, 2012 determination that unlike the original proposed revetment, the current proposed "U"-shaped structure, consisting of a 90 linear foot stone armor revetment running along the shoreline with 25 linear feet of stone armor return on the western side and 32 linear feet of vinyl sheet piling return with stone toe armor on the eastern side of the property, had received a permit from the DEC. The public hearing on October 2, 2012 revealed that the revetment had been redesigned to mitigate wave action and dispersion

towards the neighboring property to the east, which currently has a revetment that was not approved by the Town. The ZBA explained that its prior “denial of the NRSP and variance request were based, in large part, on the failure of the applicant to obtain the necessary permit from the NYSDEC, as well as, adequately demonstrate to the Board that the neighboring property owner to the east would not be negatively impacted by the construction of the requested revetment.” It noted that the concerns regarding the neighboring property to the east, the Klenke property, had been addressed in that the revetment was redesigned to include the placement of rocks in front of the vinyl return on the east side of the subject property so as to dissipate wave energy. In addition, the ZBA found that the possible use of alternative configurations and materials, such as a sand cube geotextile revetment, had been explored by the applicants as their engineer indicated at the October 2, 2012 public hearing that the two properties located east of the subject property had made several attempts at soft solutions to mitigate erosion, which attempts failed.

Moreover, the applicants’ engineer as well as the Town’s engineer commented at the public hearing on the first application that the house is in imminent danger of destruction by storm action, and at the public hearing on the second application the Town’s engineer indicated that a soft erosion control structure would not last very long in the subject area and the applicants’ engineer opined that based on the proffered photographs “every high tide is an immediate need” and that even when the house is relocated, “it’s either 34 or 37 feet back from where it is now, and at the high rate of erosion, it’s just a matter of years before he’s back in the same situation.” Town Code § 255-5-51 (F)(2) provides that

If the application involves a new coastal erosion control structure in Coastal Erosion Overlay Zone 1, 2 or 3, the applicant shall demonstrate that: (i) the erosion control structure is immediately necessary to prevent the loss or destruction of a principal building or structure on the applicant's lot, or to prevent severe damage to such building or structure, (ii) the threatened loss, destruction, or severe damage to a principal building or structure cannot reasonably be prevented by some alternative means, such as relocating the building or structure or undertaking a coastal restoration project, as defined herein, and (iii) the erosion control structure is of the minimum size, design, and physical extent needed to prevent the threatened loss, destruction, or severe damage.

The ZBA found that even though the house is to be moved landward, “its ultimate loss can only be prevented by the shoring up of the lot with the revetment.” Thus, said determination was not, as alleged by the Trustees, based solely on the hearing or findings with respect to the first application concerning the dangers to the current existing residence and not regarding potential dangers to a landward reconstructed residence. Also, the ZBA did explain the change in circumstances that warranted a departure from its denial of the prior application for a differently designed rock revetment seven months earlier and therefore, it did not, as alleged by the Trustees, fail to adhere to its own precedent.

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As for SEQRA, the ZBA indicated in its determination that “[n]o potentially significant adverse environmental impacts resulting from the proposed project have been identified. A Negative Declaration is hereby made pursuant to SEQRA and Chapter 128 of the East Hampton Town Code.” Here, the record demonstrates that the ZBA considered the relevant areas of environmental concern, the public was provided ample opportunity during the public hearing to offer comments and address any potential adverse environmental impacts, and experts engaged in lengthy and meaningful consideration of the various environmental concerns, such that the ZBA’s determination to issue a negative declaration was not arbitrary and capricious and did not constitute an abuse of discretion (*see Matter of Ellsworth v Town of Malta*, 16 AD3d 948, 792 NYS2d 227 [3d Dept 2005]). Although it is generally preferred that the ZBA set forth a reasoned elaboration for the basis of its determination, the degree of detail with which each factor must be discussed varies with the circumstances of each case, and the record herein is adequate to determine that the ZBA, as lead agency, strictly complied with SEQRA procedures (*see id.*).

Pursuant to Town Code § 91-3, the definition of Trustee Beaches, owned and managed by the Trustees, include beaches adjacent to Gardiners Bay (*see* Town Code § 91-3 [B]). Beach is defined in Town Code § 91-3 as “[a]ll land lying between a body of fresh- or salt water and the base of a bluff or dune. In cases where there is no bluff or dune present, then the “beach” shall be all land lying between such body of water and the naturally occurring beach grass or the upland vegetation if no naturally occurring beach grass is present.” The Court notes that the Town Code makes no distinction between Town-owned and Trustee-owned “[b]eaches, dunes, bluffs, and the vegetation that grows thereon,” in its designation of natural resources in need of special protection (*see* Town Code § 255-4-12 [C]). The Town Code requires the issuance of an NRSP with respect to “any beach,” which would include Trustee beaches, if the activity involved “[b]uilding, constructing, erecting, reconstructing, enlarging, altering, or placing any structure or other improvement whatsoever in or upon land.” (*see* Town Code § 255-4-20 [B][1][c]). Most importantly, the Town Code gives the ZBA “exclusive and complete jurisdiction over the administration of such permit in accordance with the provisions of this section. In reviewing any application for a natural resources special permit, the Board of Appeals may refer the matter to the Planning Department and the Town Trustees (where applicable) for a recommendation.” (*see* Town Code § 255-5-51 [A]). Based on the foregoing, the Trustees do not have jurisdiction to issue an NRSP under the instant circumstances where a portion of the proposed structure is purportedly on Trustee beach land, only to make a recommendation at the discretion of the ZBA. In addition, the Town Code does not require the ZBA to accept or adhere to the Trustees’ recommendation. Thus, the ZBA could properly reject the recommendation by the Trustees in their letter dated September 27, 2012 that any ZBA approval of the second application be conditioned upon receipt of a Trustee permit. The Trustees’ available relief under the circumstances is sanctions pursuant to Town Code § 255-4-100 (C) for failure to obtain a Trustee permit. The Court therefore finds that the ZBA did not act ultra vires by permitting respondents Young and Lemieux to erect a purportedly substantial portion of the subject 147-foot rock revetment seaward of the “high water line” of Gardiner’s Bay (Napeague Bay).

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Accordingly, the petition is denied and the proceeding is dismissed.

Submit judgment.

Dated: 2/26/2015

William B. Rebolini
HON. WILLIAM B. REBOLINI, J.S.C.