

**Reeve v Board of Zoning Appeals of the Town of
Riverhead**

2015 NY Slip Op 30639(U)

April 17, 2015

Supreme Court, Suffolk County

Docket Number: 14-12417

Judge: W. Gerard Asher

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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 32

JOHN F. REEVE, SANDRA REEVE, and 18
WHITES LANE, LLC.,

By: W. Gerard Asher, J.S.C.
Dated: April 17, 2015

Petitioners,

Index No. 14-12417
Mot. Seq. #001 - MD; CDISPSUBJ

- against -

BOARD OF ZONING APPEALS OF THE
TOWN OF RIVERHEAD, WILLIAM ANDES
and MARTIN SILVER,

Return Date: 7/15/14
Adjourned: 11/25/14

Respondents.

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In this article 78 proceeding, the petitioners challenge a May 22, 2014 determination of the Zoning Board of Appeals of the Town of Riverhead (ZBA) rescinding a building permit, renewals of the building permit, and a certificate of occupancy issued by the Town's building inspector with respect to the construction of a residential dock on a long, narrow strip of the petitioners' property known as Lot 16.9. The petitioners' property is located at 18 White's Lane, Aquebogue, New York. William Andes is the owner of property located at 12 White's Lane, which adjoins the petitioners' property. Martin Silver is the owner of property located at 131 Leafy Way, Riverhead, New York, directly across a body of water known as Reeves Creek from the petitioners' property.

The petitioners' property has a rather complex and convoluted history. As can best be gleaned from the papers submitted, it appears that John Reeve and Sandra Reeve acquired the property, a 2.498-acre waterfront parcel then known in its entirety as Lot 16, in 1994; that shortly before the Reeves took title to the property, the Town assessor evidently requested that the Suffolk County Real Property Tax Service Agency apportion Lot 16 in accordance with a 1973 deed, which described three separate



parcels; that one day after the Reeves took title, the apportionment was completed by retiring Lot 16 and creating Lots 16.1, 16.2, and 16.3 (the last of which is now Lot 16.9); that Lot 16.1 was subsequently reconfigured, assembled with Lot 16.2, and retired to create Lot 16.6; that sometime prior to 2007, the Reeves applied to the Planning Board of the Town of Riverhead to transfer a 1,255-square-foot portion of their property from Lot 16.6 to Lot 16.3 in order to make Lot 16.3 wider near the water's edge, so as to accommodate the future construction of a dock; that on or about February 1, 2007, the Planning Board approved the lot line transfer, increasing the area of Lot 16.3 to 3,440 square feet; that by deed dated May 31, 2007, title to the newly reapportioned Lot 16.3 was transferred from John Reeve and Sandra Reeve to John Reeve; that the Suffolk County Real Property Tax Service Agency, instead of reconfiguring Lots 16.6 and 16.3 in the manner contemplated by the May 31, 2007 deed, mistakenly created a new smaller lot known as Lot 16.8 (presumably the portion of Lot 16.6 that was transferred to Lot 16.3) and reassigned what remained of Lot 16.6 as Lot 16.7; that when the mistake was realized, Lots 16.8 and 16.3 were merged to create Lot 16.9; and that by deed dated August 2, 2010, title to Lot 16.9 was transferred from John Reeve to 18 Whites Lane, LLC, of which the Reeves are members.

On April 10, 2010, the Conservation Advisory Council of the Town of Riverhead (CAC) adopted a resolution recommending that the Town Board approve "the construction of a 45 foot long by 4 foot wide fixed pier; a 10 foot long by 4 foot wide walk ramp; and a 20 foot long by 6 foot wide float (as per Town Code § 47-21C5)" on Lot 16.3. It is undisputed that the Town Board promptly issued the recommended dock permit, although the record is devoid of proof that this permit was ever extended beyond its initial one-year term (*see* Code of the Town of Riverhead § 47-25). Subsequently, on June 16, 2010, the Town's building inspector issued a building permit to Sandra Reeve for the construction of an "accessory structure" described as a "4x7 ramp, 4x51 fixed dock, 4x15 ramp on 6x30 float." One-year renewals of the building permit were issued to John Reeve on June 17, 2011 and July 26, 2012.

It appears that construction began in or about May 2013. According to William Andes, when he first noticed surveyor's flags on the subject lot in mid-April 2013, he filed a freedom of information request with the Town's building department, as a result of which he first discovered that a building permit had been issued. On June 11, 2013, Andes filed an appeal with the ZBA, seeking review of the building inspector's determination to issue the building permit and the subsequent renewals ("the Andes appeal"). A second appeal was filed by Martin Silver on July 29, 2013 ("the Silver appeal"). On August 2, 2013, a certificate of occupancy was issued relative to the dock and related improvements. On August 28, 2013, Andes and Silver filed a joint appeal with the ZBA, seeking review of the building inspector's determination to issue the certificate of occupancy ("the joint appeal").

Following the consolidation and joint hearing of the appeals over a series of dates from August through November 2013, the ZBA issued a May 22, 2014 determination, sustaining the appeals to the extent of determining (i) that Lot 16.9 was "not single and separate and was, in fact, illegally created in contravention of the provisions of the Riverhead Town Code," (ii) that the building permit and subsequent renewals for the construction of the dock and related improvements "were improperly issued and are deemed void," and (iii) that the certificate of occupancy was likewise "deemed void." In its accompanying findings and conclusions, the ZBA outlined the bases for its determination, in relevant

part, as follows:

3. What is clear from the record of this proceeding is that notwithstanding that Suffolk County Real Property Tax Service Agency apportioned and split the original lot 16 per the direction of the Riverhead Assessor, this split was not approved by the Town of Riverhead Planning Board in 1994 or any time thereafter. Therefore, the original described parcel known as tax lot 16 on the 1994 deed into the Reeves was contemporaneously and/or subsequently illegally subdivided into smaller parcels in contravention of the provisions of the Town of Riverhead Town Code. Therefore, the subject parcel, lot 16.9, is not a legally recognized lot by the Town of Riverhead. Furthermore, it would be the opinion of the ZBA that the action taken by the Planning Board in 2007 is without force and effect because the parcels which were the subject of the lot line alteration application were not legally created lots pursuant to the provisions of the Riverhead Town Code and therefore any approvals granted were granted in reliance upon incorrect assertions set forth in the applications before it and had the Planning Board been advised, or had known, that lots 16.1, 16.2 & 16.3 (and any all other lots arising there from) were illegally created, it would not have entertained the original application.

4. Even if the subject property (lot 16.9) was a legally recognizable lot pursuant to the provisions of the Riverhead Town Code, the building permits were not properly issued as per the provisions of Chapter 52 of the Code entitled "building construction" and Chapter 47 of the Code entitled "Docks, moorings, basins and ramps". First, Chapter 52-6 entitled "Application for building permit" sets forth at subsection (H) that "where such application is made by a person other than the owner, it shall be accompanied by an affidavit of the owner or applicant that the proposed work is authorized by the owner and that the applicant is authorized to make such application." The record clearly shows that the original building permit and subsequently issued renewal permits were not issued to the actual owners of the subject property at the time of application and issuance of each permit, and there are no owner affidavits authorizing the applicants to make such applications on behalf of the owners. Second, Chapter 47-23 requires the issuance of a dock permit by the Town Board to construct a dock on upland residential property appurtenant to tidal waters. The form of application and the review thereof is governed by Chapter 47-24. The standards are set forth in Chapter 47-21(C), safety requirements are set forth in Chapter 47-21(E), and miscellaneous considerations are set forth in Chapter 47-21(K). Specifically, Chapter 47-21(C) sets forth the standards for residential docks and subsection (2) thereof limits one dock on a residential lot that has a riparian right. Chapter 47-25 entitled "Termination of Permit" sets forth that a permit is void if not used within one year from the date of issuance and it shall not be extended except upon a showing of good cause upon written application. The issuance of a building permit for the construction of a residential dock would thus require an existing permit from the Town Board to permit the dock pursuant to Chapter 47. In accordance therewith and the record herein, the dock permit was issued under false pretense or premise as the subject property is not a legally recognizable lot, and even if it was, the record reflects that the dock permit expired (and was not extended) well before improper issuance of renewal building permit (#ZB37740) dated July 26, 2012 and actual construction. Furthermore, because lot 16.9 is not a legally recognizable lot and is actually part of original lot 16, and there are already residential docks existing there, no additional residential docks can be constructed. Finally, the CAC approval was applied for, and granted to John & Sandra Reeve, not the owners of lot 16.9, and therefore improperly granted.

5. A Certificate of Occupancy was issued to John Reeve pursuant to renewal building permit #37740 dated August 2, 2013 for improvements described as “4x7 ramp, 4x51 fixed dock, 4x15 ramp on 6x30 float”. The CAC approved “the construction of a 45 foot long by 4 foot wide fixed pier; a 10 foot long by 4 foot wide walk ramp; and a 20 foot long by 6 foot wide float (as per Town Code § 47-21C5)”. The dimensions of the float and dock per the certificate of occupancy exceed the CAC approval and therefore, even assuming the dock permit was valid, the building department should have directed the owner back to the CAC before issuing a certificate of occupancy. The certificate of occupancy was therefore improperly issued because the building permits had been improperly issued, the dock permit had expired, and the improvements constructed were not in conformance with the CAC approval. While not included as a basis for determining the Certificate of Occupancy to have been improperly issued, it may have been issued after the expiration of the renewal building permit which had expired July 27, 2013.

The ZBA also denied the Silver appeal as untimely. This proceeding followed.

The petitioners claim that the ZBA’s determination, to the extent that it sustained the Andes appeal and the joint appeal, is irrational, arbitrary and capricious, and contrary to law. In support of their claim, the petitioners contend (i) that the Andes appeal was untimely, since it was not filed, as required under Town Law § 267-a, within 60 days after either February 1, 2007 (the date on which the Planning Board approved the lot on which the dock is situated), April 10, 2010 (the date on which the CAC adopted a resolution recommending the approval of the petitioners’ application for a dock permit) or June 16, 2010 (the date on which the building inspector issued the original building permit), (ii) that the ZBA lacked jurisdiction to render its determination because the placement and standards for residential docks are governed exclusively by the CAC and by the Town Board under chapter 47 of the Code of the Town of Riverhead, and (iii) that the ZBA has no authority to rescind, overturn or refuse to abide by an uncontested determination by the Planning Board, as here, approving a lot line transfer, notwithstanding that a resulting lot may be substandard for building purposes.

In a proceeding pursuant to CPLR article 78 to review a determination of a zoning board of appeals, the board’s interpretation of its zoning ordinance is entitled to great deference (*Matter of Brancato v Zoning Bd. of Appeals of City of Yonkers, N.Y.*, 30 AD3d 515, 817 NYS2d 361 [2006]), and judicial review is limited to ascertaining whether the action taken by the board is illegal, arbitrary and capricious, or an abuse of discretion (*Matter of Ifrah v Utschig*, 98 NY2d 304, 746 NYS2d 667 [2002]). In applying the “arbitrary and capricious” standard, a court looks only to whether the determination lacks a rational basis, *i.e.*, whether it was without sound basis in reason and without regard to the facts (*Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 809 NYS2d 98 [2005], *appeals dismissed* 6 NY3d 890, 817 NYS2d 624, *lv denied* 7 NY3d 708, 822 NYS2d 482 [2006]). A determination will be deemed rational so long as it has some objective factual basis, and does not rest entirely on subjective considerations such as general community opposition (*id.*). The burden is on the petitioner to show that there is no rational basis for the board’s determination (*Matter of Grossman v Rankin*, 43 NY2d 493, 402 NYS2d 373 [1977]). A court may not substitute its judgment for that of the board (*Matter of Ball v New York State Dept. of Env’tl. Conservation*, 35 AD3d 732, 826 NYS2d 698 [2006]).

Initially, as to the ZBA's implicit finding that the Andes appeal was timely filed on June 11, 2013, the court rejects the petitioners' claim that the determination lacks a rational basis. Even where a zoning board fails to set forth specific findings of fact, its determination will not be invalidated if "it can be ascertained from a review of the record that the decision * * * had a rational basis" (*Matter of Fischer v Markowitz*, 166 AD2d 444, 445, 560 NYS2d 496, 497 [1990]). Here, based on the hearing testimony of William Andes and other evidence presented for the ZBA's consideration, it appears that he was not aware that a building permit had issued until he saw the results of his freedom of information request sometime in May 2013; he also testified that prior to mid-April, there was no physical evidence of anticipated construction on the property, such as materials stockpiled or machinery delivered, and that the building permit was not posted on the property until the first week of July. Notwithstanding Town Law § 267-a, which provides that an appeal "shall be taken within sixty days after the filing of any order, requirement, decision, interpretation or determination of the administrative official," it is settled law that where a party seeks revocation of building permit issued to another, the time to appeal begins to run only when he or she may reasonably be said to have received notice of its issuance (*Matter of Iacone v Building Dept. of Oyster Bay Cove Vil.*, 32 AD3d 1026, 821 NYS2d 654 [2006]; *Matter of Farina v Zoning Bd. of Appeals of City of New Rochelle*, 294 AD2d 499, 742 NYS2d 359 [2002]). As it was well within the ZBA's discretion to credit such proof and to conclude that Andes could not reasonably be charged with actual or constructive knowledge of the issuance of the permit until May 2013, the court declines to upset the ZBA's tacit determination as to the timeliness of his appeal.

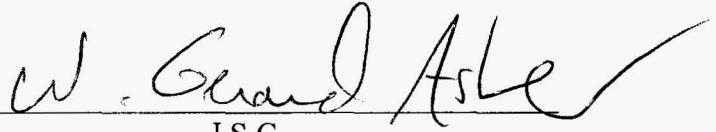
The petitioners' further claim that the ZBA was without jurisdiction in this matter is either circular, self-defeating or both. Whether, as the petitioners contend, the CAC and the Town Board have exclusive jurisdiction over the placement and standards of residential docks is ultimately irrelevant for purposes of this proceeding, as the matters under review are determinations by the Town's building inspector, which are clearly reviewable by the ZBA (Town Law § 267-a [4]; Code of the Town of Riverhead § 108-76). The petitioners might have attempted to obtain all required approvals solely from federal, state, and local authorities over whom the ZBA exercises no appellate jurisdiction; plainly, however, they did not.

The petitioners' final argument is likewise insufficient to merit the relief they seek. Even assuming, as they contend, that Lot 16.9 was not illegally subdivided or that the action taken by the Planning Board in 2007 is now immune from scrutiny, the ZBA also found that "even if it was [a legally recognizable lot], the record reflects that the dock permit expired (and was not extended) well before improper issuance of renewal building permit (#ZB37740) dated July 26, 2012 and actual construction"—the implication being, the building permit having been invalidly renewed, that construction took place and that the certificate of occupancy was issued after the building permit had expired by its terms. When a board sets forth multiple reasons for its determination, any one of which is rationally based, the determination will be sustained (*Matter of Logiudice v Southold Town Bd. of Trustees*, 50 AD3d 800, 855 NYS2d 620 [2008]). The petitioners, notably, do not challenge or otherwise address this finding, except insofar as they generally question the authority of the building inspector and the ZBA to regulate the construction of docks—a question which, as noted previously, is irrelevant for purposes of this proceeding.

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

Submit judgment.



J.S.C.