

Savino v Board of Trustees of the Town of Southold
2015 NY Slip Op 30813(U)
May 11, 2015
Supreme Court, Suffolk County
Docket Number: 33788/2013
Judge: Jr., Andrew G. Tarantino
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At **PART 50** of the Supreme Court in and
for the County of Suffolk, at One Court
Street, Annex Building, Riverhead, New
York, on MAY 11 2015.

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

-----x

Index No. 33788/2013

MICHAEL SAVINO and DANA SAVINO,
Plaintiff(s)

Motion seq. 002: MD
Orig. Date: 2/10/2015
Adj. Date: 2/24/2015

-against-

**ORDER DENYING RELIEF
AND DISMISSING PETITION**

**BOARD OF TRUSTEES OF THE TOWN OF
SOUTHOLD,**
Defendant(s).

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Upon consideration of the motion by way of Order to Show Cause for an order compelling the respondent Board of Trustees of the Town of Southold ["the Trustees"], to issue a wetlands permit to the petitioners Michael Savino and Dana Savino [collectively "Savino" or "the petitioners"], the supporting affirmation and exhibits, and the Town's affirmation in opposition and supporting exhibits, it is now

ORDERED that the motion is denied and the petition is dismissed.

To the extent that the facts have been set forth in the Court's prior Order dated October 14, 2014, ["the prior Order"], they will not be repeated here except to inform the instant decision. Very briefly, Savino commenced an Article 78 proceeding to challenge the Trustees' determination denying a permit to repair and replace an existing 100 linear foot bulkhead with a 38' north return and a 64' south return, removal and replacement of a gazebo and deck reconstruction and the addition of 275 yards of topsoil to the petitioners' property located at 1945 Bayview Avenue, Mattituck, Town of Southold, New York, dated November 13, 2013. The denial of the permit was without prejudice.

The "without prejudice" designation centered around a suggestion that Savino consider moving the bulkhead ten feet landward in an effort to promote and protect the intertidal marsh and

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prime oyster habitat. The suggestion to move the bulkhead landward was renewed on behalf of the Trustees at a public hearing conducted on December 10, 2014, after the issuance of the Court's October decision.¹ In the Court's view, in its initial opposition to the Article 78 proceeding, the Trustees proffered an insufficient rationale for the notion that a bulkhead extending eastward eighteen feet into Mattituck Creek would run counter to the environmental concerns expressed in § 275 of the Town Code justifying a denial, but a bulkhead extending eight feet eastward into the Creek would not. Hence, the Court remitted the matter back to the Trustees for their reconsideration. To the extent that the petitioners understood the October, 2014, Order to mandate the issuance of a permit by the Trustees, that was not the Court's intention or direction.

Moreover, in the initial application, while not dispositive, the Court found that there was an insufficient explanation for why the DEC issued a wetlands permit for the proposed project, and the Trustees denied a permit, albeit without prejudice. Moreover, a letter from the Trustees to a prior owner in 1971 acknowledging that the bulkhead was beyond the Trustees' jurisdiction, and entirely on the land belonging to the prior owner, contradicted the Trustees' as yet undocumented suspicion that the subject bulkhead *might* be on Trustee land.

This Court did not mean to suggest, and did not state, that once the DEC issued a permit, the Town was automatically bound to do likewise. The fact that State and local laws touch upon the same area, without more, is insufficient to support a determination that the State law has preempted the entire field of regulation in a given area (*Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d at 97, 524 N.Y.S.2d 8, 518 N.E.2d 903; *People v. New York Trap Rock Corp.*, 57 N.Y.2d at 378, 456 N.Y.S.2d 711, 442 N.E.2d 1222). The test is not whether the local law prohibits conduct which is permitted by State law, because that test is much too broad (*see People v. Cook*, 34 N.Y.2d at 109, 356 N.Y.S.2d 259, 312 N.E.2d 452; *see also New York State Club Assn. v. City of New York*, 69 N.Y.2d at 221, 513 N.Y.S.2d 349, 505 N.E.2d 915). Rather, the courts look to whether the State has acted upon a subject, and whether in so acting has evidenced a desire that its regulations should preempt the possibility of varying local regulations (*People v. Cook*, 34 N.Y.2d at 109, 356 N.Y.S.2d 259, 312 N.E.2d 452).

The DEC permit here states on its face that the "Permittee is responsible for obtaining any other permits that may be required to carry out the activities that are authorized by [the DEC] permit." However, as the Trustees and the DEC appeared to have parallel environmental concerns and objectives in connection with the permit sought by the petitioners, the Court's intent was to simply require the Trustees to consider that the DEC had in fact issued a permit.

Thus, with these issues and the permit discrepancy in mind, in an Order annulling the

¹ By the Assistant Town Attorney: "After this decision was received by our office I called and spoke to you and provided you with an offer that the Trustees had indicated they would consider, which included a quitclaim deed and pulling back the bulkhead, um, approximately ten feet. That offer was just very recently rejected, and consequently we are now here to reopen the hearing for additional testimony as per the Court's decision." (Board of Town Trustees, Town of Southold, Minutes, Wednesday, December 10, 2014, p. 2 [hereinafter "Minutes, p _"]).

determination of the Trustees, the Court remitted the matter back to the Trustees for their *reconsideration* consistent with the applicable provisions of Southold Town Code §275, and the DEC's prior approval of the bulkhead replacement.

For that reason, the Court rejects the Trustees' argument that the instant application is jurisdictionally defective as Savino did not commence a new Article 78 proceeding challenging the determination to deny the permit made after reconsideration and dated December 23, 2014. Tellingly, at the public hearing conducted on December 10, 2014, the Town's attorney began the meeting by stating,

“Just to further clarify the record with respect to the decision [of October 14, 2014], it's the interpretation of our office and our attorneys that the reconsideration is in fact what is occurring today. We are reopening the hearing and allowing for additional testimony to be taken.” (Minutes, p.2).

Thus, in the Court's view, it was proper for Savino to make the instant application under the same index number within the same proceeding.²

Turning to the merits, the Trustees contend that they reconsidered the petitioners' application at a public hearing conducted on December 10, 2014, wherein they considered new and additional evidence. At the hearing the Trustees examined deeds and surveys that are annexed to their opposition papers here tending to show that the existing bulkhead was built on Trustee land. The following deeds showed that the bulkhead extends eighteen feet beyond petitioners' easterly property line which borders Mattituck Creek: Byrne to Oswald/Johnnidis 12/16/1985, Oswald/ Johnnidis to Salice 12/15/1986, Salice to Savino 3/15/1999; Savino to Savino Trust 12/7/2012. Two subsequent transfers to Savino-related owners in 2012 also describe the northerly property line as running 160 feet from the westerly property line to the easterly creek-front line.³ An inspection of all but one deed have the same legal description.

After the Trustees denied the permit on November 13, 2013, on December 14, 2013, the petitioners secured a new deed that extended the length of the northerly property line, thereby moving the easterly property line to the bulkhead. The 2013 deed was a subject discussed at the public hearing on December 10, 2014. According to the petitioners' attorney,

“With all due respect, we have deeds. We've got title insurance that proves we own this property. There was a mistake in a deed that had been filed, they are missing a

² The October 14, 2014 clearly indicates that it is a “Non-final Disposition”.

³ The Court notes, without deciding, that the deeds tend to establish that since the Trustees own the bottom of Mattituck Creek, they own the land between the Savinos' easterly property line and the bulkhead.

course in the description. Since then it was amended. Right now we are getting an affidavit to substantiate, because we suspected this would be an issue, through my conversations with the Town attorney. They own the property. It would be incumbent upon the Board to prove to us that we don't own it. And we do own it by a deed that was before the Supreme Court. So we don't think that is an issue." (Minutes, p. 3).

It was clear that at the hearing, the Trustees considered the issue of ownership to be a significant factor in their determination and they believed it was up to the petitioners to prove ownership (Minutes, p. 10). In opposition to the instant application, the Trustees contend that the permit was denied the second time on the dual grounds that the bulkhead is located on Trustee land and, in any event, does not comply with the standards set forth in §275 of the Town Code (Trustee Affirmation in opposition, ¶ 7).

A survey dated November 6, 1986, purports to show the petitioners' easterly property line and the bulkhead is not on the petitioners' property. Rather, it is located on filled creek bottom. The bulkhead depicted on the survey is located approximately 18 feet east of the petitioners' property line. At the hearing the petitioners' attorney claimed that the 2013 deed extending the northerly property line to the bulkhead was a correction deed because the previous deeds were missing a course in the description (Minutes, p. 3). Counsel promised that he would provide the Trustees with an affidavit from the petitioners' title company indicating that the petitioners are insured for the additional area when they changed the course description in the December 2013 deed. It is uncontradicted that the petitioners never supplied an affidavit from the title company to that effect either to the Trustees, or on this application. Petitioners' counsel declined to enter anything into the record at the December, 2014 hearing including the petitioners' title insurance policy (Minutes, p. 10). The minutes of the Board meeting that took place on December 23, 2014, indicate that petitioners never received the promised affidavit from the title company before they rendered their determination denying the permit.

At the December 10th hearing, the Trustees also addressed the 1971 letter from a Trustee to a prior owner to the effect that the Trustees did not own the land where the bulkhead was located. The Trustees surmised that the error likely occurred as a result of upland created by the deposit of dredge spoils on the foreshore leading to the erroneous conclusion by several landowners that their property lines had been extended (Minutes, pp. 5, 10-12). The Trustees argue that because all but one of the deeds and surveys demonstrate that the Trustees own the land where the bulkhead is located, they had a rational basis to deny the petitioners' permit and their determination should be upheld.

Alternatively, §275 of the Town Code, entitled "Standards for Issuance of permit", provides:

The Trustees may adopt a resolution directing the issuance of a permit to perform operations applied for only if it determines that such operations will not substantially:

- A. Adversely affect the wetlands of the Town.

- B. Cause damage from erosion, turbidity or siltation.
- C. Cause saltwater intrusion into the fresh water resources of the Town.
- D. Adversely affect fish, shellfish or other beneficial marine organisms, aquatic wildlife and vegetation or the natural habitat thereof.
- E. Increase the danger of flood and storm-tide damage.
- F. Adversely affect navigation on tidal waters or the tidal flow of the tidal waters of the Town.
- G. Change the course of any channel or the natural movement or flow of any waters.
- H. Weaken or undermine the lateral support of other lands in the vicinity.
- I. Otherwise adversely affect the health, safety and general welfare of the people of the Town.
- J. Adversely affect the aesthetic value of the wetland and adjacent areas

At the hearing the Trustees testified that they did a site visit in December, 2014, took photographs, and observed that the bulkhead juts out at least ten to fifteen feet beyond the native shoreline over the wetlands and is prohibiting the *Spartina alterniflora* vegetation and the oyster bank that exists in front of and to both sides of the bulkhead. They believe that withdrawal of the bulkhead ten feet landward would restore the productive creek bottom and return its functionality (Minutes, pp. 3-4). The removal of the bulkhead would allow the productive oyster beds to repopulate as the area returns to a functional wetland (Minutes, p. 4). The bulkhead as it exists would create turbidity or damage due to siltation that would impair the ability for marine organisms to properly feed. The Trustees noted that if the bulkhead is moved back, the wetland will come back, the *Spartina* will grow, the wetland will be healthy, and there will be more shellfish supporting the food chain of that environment. At the December 10, 2014 hearing, Trustee Bredemeyer stated his extensive credentials as a former member of the Suffolk County Health Department's Marine unit. The petitioners presented no evidence at the hearing to show that replacing the bulkhead would have no environmental impact.

Finally, regarding the fact that the DEC issued a permit for the bulkhead replacement, the DEC did not consider the ownership issues of the creek bottom. The Trustees also noted that the DEC's criteria are less stringent than the Trustees' who are concerned with "environmental matters through the lens of public ownership and public benefit." (Minutes, pp. 7-8).

