

**Matter of Kelleher v New York State Dept. of Env'tl.
Conservation**

2015 NY Slip Op 31099(U)

June 24, 2015

Supreme Court, Suffolk County

Docket Number: 02631/2009

Judge: Jerry Garguilo

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.

COPY

SHORT FORM ORDER

INDEX NO. 02631/2009

**SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 47 - SUFFOLK COUNTY**

PRESENT:

**HON. JERRY GARGUILO
SUPREME COURT JUSTICE**

**DECISION AFTER
ARTICLE 78 HEARING**

In the Matter of the Application of DENIS P.
KELLEHER and CAROL KELLEHER,

**ORIG. RETURN DATE: 3/6/2009
FINAL SUBMISSION DATE: 6/10/2015
MOTION SEQ#001
MOTION: CASEDISP**

Petitioners,

**PETITIONERS' ATTORNEY:
ESSEKS, HEFTER & ANGEL, LLP
108 EAST MAIN STREET
P.O. BOX 279
RIVERHEAD, NEW YORK 11901
631-369-1700**

For a Judgment under Article 78 of the Civil
Practice Law and Rules relating to a Decision dated
December 24, 2008 of the New York State
Department of Environmental Conservation

**RESPONDENT'S ATTORNEY:
ERIC T. SCHEIDERMAN,
NEW YORK STATE ATTORNEY GENERAL
120 BROADWAY, 26TH FLOOR
NEW YORK, NEW YORK 10271
212-416-8479**

-against-

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Respondent.

The Petitioners, by way of an Article 78 proceeding seek a judgment relating to a decision dated December 24, 2008 of the New York State Department of Environmental Conservation. The Court conducted a three (3) day evidentiary hearing on December 9th, 12th and 16th, 2014.

The Petitioner, Carol Kelleher is the owner of a parcel of real property approximately seventeen thousand three hundred thirty four (17,334) square feet in area located at 115 Westminster Road, Water Mill, in the Town of Southampton, County of Suffolk, State of New York. Said property is described by Suffolk County Tax Map Number 0904-102-01-62 (hereinafter referred to as the "property"). The Petitioner, Denis Kelleher is the husband of Carol Kelleher. It is undisputed that Carol Kelleher acquired the property from a Calvin S.

RR

Frost, Jr. and Anne J. Frost by deed dated March 12, 1999 and recorded in the Suffolk County Clerk's office at Liber 11954, cp. 488 on March 31, 1999.

The Respondent, The New York State Department of Environmental Conservation (DEC) has jurisdiction pursuant to Article 25 of the Environmental Conservation Law (ECL) to issue tidal wetlands permits. The DEC also has the authority to grant variances from Tidal Wetlands- Land Use Regulations (6 NYCRR 661), where there are practical difficulties in carrying out any of the provisions of section 661.6 (Development Restrictions).

The property borders on Calf Creek, a tributary of Mecox Bay. Because of its proximity to wetlands, in order to improve the subject property, Petitioners were required to obtain permits from the Town of Southampton Conservation Board, the Town of Southampton Zoning Board of Appeals, the Suffolk County Department of Health Services, and the DEC.

During the hearing it was established that the Southampton Conservation Board approved Petitioners' Wetlands Permit Application by a resolution dated May 26, 2004. Furthermore, as a condition of granting the Wetlands Permit, the Town Conservation Board required that the proposed house be built in the northeast corner of the property. As such, it was necessary for Petitioners to also apply for variance relief for the house from the Town of Southampton Zoning Board of Appeals ("ZBA"). By decision dated December 2, 2004, the ZBA granted Petitioners the relief requested. It appeared that all of the necessary permits from the Town of Southampton were in place and that the Suffolk County Department of Health Services' ("SCDHS") application was awaiting the issuance of a permit from DEC.

Sometime in August of 2003, the Petitioners applied to the DEC to obtain a Tidal Wetlands Permit for the house, septic system and driveway. Thereafter, during March of 2005 during which revisions to the application were made by Petitioners at the request of the DEC, the DEC accepted, as complete, Petitioners' application to construct the one family dwelling, sanitary system and driveway at the subject property. The following year, by notice dated April 29, 2006, the DEC denied Petitioners' application for a Tidal Wetlands Permit. Thereafter, Petitioners' timely requested a hearing on their application before an Administrative Law Judge. A public hearing on the application was held on July 15 and 16 of 2008, before Administrative Law Judge, Edward Buhrmaster of the DEC.

This proceeding is brought pursuant to Article 78 of the Civil Practice Law and Rules

and ECL § 25-0404 for, among other things, a judgment (a) annulling a certain DEC decision dated December 24, 2008, (b) directing the DEC to issue the permit and variances sought by Petitioners or, alternatively (c) finding that, as a result of the DEC's decision dated December 24, 2008, the property was effectively taken without compensation. The Court was provided with a copy of the aforementioned decision.

The property is located wholly within a residential zone of the Hamlet of Water Mill, Town of Southampton, County of Suffolk, State of New York, and it is alleged by Petitioners it can only be improved with a single family residence. Petitioners' claim that the property cannot reasonably be used for any other purpose.

The Petition seeks judgment as follows:

(1) Judgment annulling the decision of Respondent, New York State Department of Environmental Conservation dated December 24, 2008;

(2) Directing Respondent, New York State Department of Environmental Conservation to issue the permit and variance sought by Petitioners for the property;

(3) Alternatively, should the Court fail to grant the relief requested determining that the action of Respondent, New York State Department of Environmental Conservation, resulted in a taking of Petitioners' property without the payment of compensation therefore, and directing pursuant to Environment Conservation Law § 25-0404, that Respondent commence condemnation proceeding to acquire Petitioners' property or issue the requested permit; and

(4) In the event that the Court deems that the action of Respondent, New York State Department of Environmental Conservation resulted in a taking of Petitioners' property, that Petitioners be awarded temporary taking damages in an amount determined by the Court.

As noted above, a hearing was held before this Court on December 9, 12 and 16, 2014 pursuant to § 25-0404 of the Environmental Conservation Law ("ECL"), which provides that:

In the event that the court may find that the determination of the commissioner constitutes the equivalent of a taking without

compensation, and the land so regulated otherwise meets the interest and objectives of this act, it may, at the election of the commissioner, either set aside the order or require the commissioner to acquire the tidal wetlands or such rights in them as have been taken, proceeding under the power of eminent domain.

Therefore, the question before the Court was whether a December 24, 2008 determination by the New York State Department of Environmental Conservation (“DEC”)-which denied Petitioners a Tidal Wetlands Permit to construct a single house on their property in Water Mill, New York-constituted the equivalent of a taking without compensation.

The basic test applied to this takings claim is the “ad hoc, factual inquiry” known as the “Penn Central Test,” which includes consideration of three main factors: economic impact, interference with investment-backed expectations, and the character of the governmental action. *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646 (1978).

The Petitioner submitted a text book case proffering evidence as to every element of their taking claim. As pointed out in Petitioners’ post hearing Memorandum, they (Petitioners), establish, through their own appraiser who opined as to a 98% diminution in value and even though the DEC’s appraiser acknowledged an 80% diminution, that the DEC’s permit denial resulted in a severe economic impact and left the property with a “bare residue” of its value.

Furthermore, Petitioners claim to have established that their “distinct investment-backed expectation” to build a home on this property, for which they paid substantial value at Four Hundred Fifty Thousand Dollars (\$450,000), was “objectively reasonable.” Lastly, Petitioners claim to have demonstrated, through evidence showing that the surrounding area in question is almost completely developed (other than Petitioners’ property), that the “character of the governmental action,” i.e., a complete denial of practical use of the property, imposed a disproportionate burden on Petitioners with no reciprocity of advantage.

Standing alone, it appears that Petitioners submitted a persuasive claim and a persuasive case. However, the history as submitted by the Respondent paints a series of mistakes that lead the Petitioners to a very bad deal.

Before Petitioners purchased the property, they owned a summer house on the ocean in the Village of Sagaponack, in the Town of Southampton. In 1994, five (5) years before buying the property the Petitioner, Denis Kelleher, applied to the DEC for a Tidal Wetlands Permit to extend an existing bulkhead and restore the dunes at his former (Sagaponack) house. That permit was granted.

Unfortunately, in 1998, the Sagaponack house was washed into the ocean during a powerful storm. Petitioners sought other property in Southampton for a summer house. Thereafter, they purchased the property in 1999 from Calvin Frost. In 2000, the purchase price of the property was Four Hundred Fifty Thousand Dollars (\$450,000) which Petitioner financed with a purchase money mortgage and subsequently satisfied. As noted above, the subject property is 17,743 square feet. It borders Calf Creek, an inlet from Mecox Bay, and is covered with significant amounts of phragmites, and other vegetation associated with wetlands.

It is undisputed that 25% of the property consists of Tidal Wetlands that are subject to regulation under the Tidal Wetlands Act.

Here is where the history gets somewhat sticky. The seller, Calvin Frost owned another vacant lot on Westminster Road, adjacent to the lot he sold to Petitioners. Mr. Frost applied to the DEC in the mid 1990s for a Tidal Wetlands Permit to construct a house on the adjacent vacant lot. Frost submitted a sight plan to the DEC with a house that was less than the required 75 feet from the wetland boundary and two cesspools that were less than the required 100 feet from the boundary. He therefore needed variances from the wetland development restrictions. The DEC staff objected and Frost eventually abandoned his permit applications. As pointed out by the Respondent, this was a matter of public record that would have been available to the Kellehers at the time they purchased the property. In 1998, one year before his sale to the Petitioners, Frost sold the adjacent lot to Nevitt Jenkins for Two Hundred Forty Thousand Dollars (\$240,000). This lot has remained vacant.

In terms of "investment backed expectation" it is undisputed that the Kellehers' due diligence in connection with the acquisition of the property was appallingly deficient. Denis Kelleher used a real estate agent in his purchase of the property he "did the deal through him." Before buying the property, the only due diligence that the Petitioner Denis Kelleher exercised was to ask the broker if he could build a house on the property. According to Mr. Kelleher, the broker told him someone in the Town of Southampton had told the broker that Mr. Kelleher could probably build on the property. Mr. Kelleher retained counsel to

represent him in connection with the acquisition of the property. That lawyer, Denis Kelleher, Jr., the Petitioners' son, is a criminal defense lawyer and had no experience in real estate transactions or land use law. Had he done so, perhaps the contract of sale would have been conditioned upon the placement of appropriate permits and/or discovery governmental restrictions.

No one is arguing that the Petitioners are categorically barred from attempting to assert a takings claim by the mere fact that they purchased the property post regulation, and the DEC has never contended otherwise. However, as post regulation purchases, Petitioners bare the burden of proving that there was some compelling reason for them to expect that they could build a house on a parcel of land that was too small to meet health-based septic system set back requirements, as well as other regulatory requirements, or that the DEC would grant them an extreme variance from a regulation it promulgated to ensure that pathogens and other deleterious substances do not leech into wetlands from the septic system lichfield and contaminate the creek, the bay and the shell fish that live there. The compelling reason appears to be a comment form a Broker who has a stake in seeing the transaction consummated.

It is therefore the decision of this Court that the Petitioners have failed to meet their burden and all relief sought is ***DENIED***.

The foregoing constitutes the decision and ***ORDER*** of this Court.

Dated: June 24, 2015


HON. JERRY GARGUILO, JSC