

**Chafos v Zoning Bd. of Appeals of the Town of E.  
Hampton**

2017 NY Slip Op 32693(U)

October 2, 2017

Supreme Court, Suffolk County

Docket Number: 16-5511

Judge: William G. Ford

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MEMORANDUM

COPY

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 38

JOHN CHAFOS

By: Hon. William G. Ford  
Justice of the Supreme Court

Petitioner,

For an Order pursuant to CPLR Article 78,  
annulling the Determination of the Zoning  
Board of Appeal, directing respondent to grant  
Petitioner's requests for relief and for other  
Appropriate Relief,

Index No. 16-5511

Mot. Seq. # 001 - MD; CDISPSUBJ

Return Date: 7-11-16

Adjourned: 7-6-17

- against -

ZONING BOARD OF APPEALS OF THE  
TOWN OF EAST HAMPTON,

Respondents.

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In this Article 78 proceeding, the petitioner seeks a judgment annulling and setting aside those portions of a May 3, 2016 determination of respondent Zoning Board of Appeals of the Town of East Hampton, which denied portions of an application for a natural resources special permit and for certain area variances. For the reasons set forth herein, the petition is denied and the proceeding is dismissed.

The petitioner, John Chafos, is the owner of adjoining residential waterfront properties overlooking Block Island Sound in the hamlet of Montauk, Town of East Hampton, known as 112 Soundview Drive and 116 Soundview Drive. Located in a district zoned Residence B, which requires a minimum lot size of 20,000 square feet, each property abuts the beach and is improved with a single-family residence, a garage, wood decking, bulkheading, brick walkways and brick patios. The property known as 116 Soundview Drive (designated on the Suffolk County Tax Map as District 300, Section 4, Block 2, and Lot 6), the subject of this special proceeding, is an

undersized lot that measures 19,963 square feet. The property known as 112 Soundview Drive (designated on the Suffolk County Tax Map as District 300, Section 4, Block 2, and lot 7), which is situated east of 116 Soundview Drive, also is undersized, measuring 18,457 square feet. Both properties include beach vegetation, wetlands and bluffs, and are within the Town's Coastal Erosion Overlay Zone 4.

In 2011, the Town of East Hampton granted a natural resources special permit pursuant to section 255-4-20 of the Code of the Town of East Hampton (hereinafter Town Code) to the petitioner for the construction of a shore-hardening rock revetment and bulkhead in the dune on 112 Soundview Drive; the prior owners of 116 Soundview Drive also were granted permission to construct a revetment. Thereafter, the petitioner purchased 116 Soundview Drive, and built a stone revetment that spans the width of both properties. He also constructed brick walkways and patios on the properties without prior approval from the Town. As to the subject property, the petitioner constructed a landward brick patio and a 4-foot-wide brick walkway on the eastern side of the property, as well as a seaward brick patio and a brick walkway leading to such patio, which increases in width at the back of the property. The addition of the brick patios and walkways increased the total lot coverage of the subject property to 9,978 square feet.

In July 2015, the petitioner filed an application with the Zoning Board of Appeals of the Town of East Hampton (hereinafter the ZBA) seeking a natural resources special permit and certain variances from the Town Code for the brick structures constructed on 116 Soundview Drive. More specifically, as to the area variances, the petitioner requested a variance from Town Code § 255-4-40, reducing the required 75-foot setback from the bluff crest to 58.5 feet for a brick patio constructed seaward of a 1,117 square foot wooden deck in the back of the house; a variance from Town Code § 255-4-30, reducing the required 100-foot setback from the wetlands to 95 feet for the same patio; and a variance from Town Code § 255-11-10, reducing the required 10-foot side yard setback to zero for a brick walkway constructed along the western boundary of the property. An application for a natural resources special permit and for variances also was filed by the petitioner for the 112 Soundview Drive property. Public hearings on the petitioner's applications were conducted by the ZBA on February 2, 2016.

By decision dated May 3, 2016, the ZBA denied the portions of the petitioner's application seeking variances and a natural resources special permit for 116 Soundview Drive for the brick walkway constructed on the western side of the property and the brick patio constructed seaward of an existing wooden deck, but granted a natural resources special permit for the landward brick patio. As part of its findings of fact, the ZBA determined that the landward brick patio is in harmony with the Town's zoning code and will not interfere with the reasonable use and enjoyment of the adjoining properties or with important natural features on the land. Conversely, it determined that the seaward brick patio located on the western side of the property and walkway leading to such patio will have an adverse impact on the physical or environmental conditions of the neighborhood,

that the requested area variances were substantial, and that granting the requested variances for such structures would create a detriment to the neighboring property. According to the ZBA, the patio constructed on the seaward portion of the property and the brick walkway leading to such patio, which increases in width as it progresses along the western side of the residence, eventually expanding to cover the full width of the side yard that abuts the parcel of residential property situated west of 116 Soundview Drive, are unnecessary, as extensive wooden decking already exists on the seaward side of the property, and a brick patio and walkway were constructed on the eastern side of the residence. The ZBA determined the current lot coverage for 116 Soundview Drive – just 3 square feet under the maximum 50% lot coverage permitted under the Town Code for property zoned Residence B – improperly maximizes the coverage on an environmentally sensitive parcel of land which should have minimum structural coverage and “exceeds that which is appropriate for a lot containing beach vegetation, bluffs and wetland.” Finally, the ZBA determined that the hardship claimed by the petitioner was self-created, and that no mitigating factors were offered to offset the substantial nature of the requested variances.

Subsequently, the petitioner commenced this Article 78 proceeding for a judgment reversing and annulling those portions of the ZBA’s May 2016 determination denying a natural resources special permit and variances for the seaward brick patio and the brick walkway on the western side of the subject property, and directing that the requested permit and variances be granted. The petitioner alleges the ZBA’s determination with respect to such portions of his application was illegal, arbitrary and irrational. More specifically, the petitioner asserts that the ZBA, having previously granted his application for a natural resources special permit and variances for similar brick structures constructed on 112 Soundview Drive, failed to follow its own precedent and arbitrarily denied the portions of his application for a natural resources special permit and variances for the seaward brick patio and the brick walkway to such patio. Submitted in support of the petition are copies of the written determinations issued by the ZBA for the subject property and 112 Soundview Drive, and copies of surveys prepared in connection with the petitioner’s applications to the ZBA submitted in 2015.

A local zoning board has broad discretion in considering applications for area variances (*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234 [2004]; *Matter of Cowan v Kern*, 41 NY2d 591, 394 NYS2d 579 [1977]), and its interpretation of local zoning ordinances is entitled to great deference (see *Matter of Toys “R” Us v Silva*, 89 NY2d 411, 654 NYS2d 100 [1996]; *Matter of Gjerlow v Graap*, 43 AD3d 1165, 842 NYS2d 580 [2d Dept 2007]; *Matter of Brancato v Zoning Bd. of Appeals of City of Yonkers, N.Y.*, 30 AD3d 515, 817 NYS2d 361 [2d Dept 2006]). A court, however, may set aside a zoning board’s determination if the record reveals that the board acted illegally or arbitrarily, abused its discretion, or succumbed to generalized community pressure (*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234; *Matter of Cacsire v City of White Plains Zoning Bd. of Appeals*, 87 AD3d 1135, 930 NYS2d 54 [2d Dept], *lv denied* 18 NY3d 802, 938 NYS2d 859 [2011]). In

applying the arbitrary and capricious standard, a court inquires whether the determination under review had a rational basis (*Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 772, 809 NYS2d 98 [2d Dept 2005]). 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; see *Matter of Ifrah v Utschig*, 98 NY2d 304, 308, 746 NYS2d 667 [2002]). The decision of an administrative agency “which neither adheres to its own prior precedent nor indicates a reason for reaching a different result on essentially the same facts is arbitrary and capricious” (*Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 517, 498 NYS2d 111 [1985]; see *Knight v Amelkin*, 68 NY2d 975, 510 NYS2d 550 [1986]; *Matter of c/o Hamptons, LLC v Zoning Bd. of Appeals of Vil. of E. Hampton*, 98 AD3d 738, 950 NYS2d 386 [2d Dept 2012]; *Matter of Lucas v Board of Appeals of Vil. of Mamaroneck*, 57 AD3d 784, 870 NYS2d 78 [2d Dept 2008]).

Pursuant to Town Law § 267-b (3) (b), a zoning board considering a request for an area variance must engage in a balancing test, weighing the benefit to the applicant if the variance is granted against the detriment to the health, safety and welfare of the surrounding neighborhood or community (*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234; *Matter of Ifrah v Utschig*, 98 NY2d 304, 308, 746 NYS2d 667; *Matter of Conway v Van Loan*, 152 AD3d 768, 58 NYS3d 598 [2d Dept 2017]; *Matter of Borrok v Town of Southampton*, 130 AD3d 1024, 14 NYS3d 471 [2d Dept 2015]). A zoning board also must consider whether the granting of an area variance will produce an undesirable change in the character of the neighborhood or a detriment to neighboring properties; whether the benefit sought by the applicant can be achieved by some other feasible method, rather than a variance; whether the requested variance is substantial; whether granting the variance will have an adverse impact on the physical or environmental conditions in the neighborhood; and whether the alleged difficulty is self-created (Town Law § 267-b [3] [b]; see *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234; *Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 239 [1995]; *Matter of Conway v Van Loan*, 152 AD3d 768, 58 NYS3d 598). Further, a zoning board is not required to justify its determinations with evidence as to each of the five statutory factors, as long as its determinations “balance the relevant considerations in a way that is rational” (*Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 73, 886 NYS2d 442 [2d Dept 2009]; see *Matter of Traendly v Zoning Bd. of Appeals of Town of Southold*, 127 AD3d 1218, 7 NYS3d 544 [2d Dept 2015]; *Matter of Merlotto v Town of Patterson Zoning Bd. of Appeals*, 43 AD3d 926, 841 NYS2d 650 [2d Dept 2007]).

The ZBA’s denial of the portions of the petitioner’s application seeking a natural resource special permit and area variances for the seaward brick patio and the brick walkway leading to such patio on the western side of the subject property had a rational basis, and was not arbitrary or capricious (see *Matter of Kramer v Zoning Bd. of Appeals of Town of Southampton*, 131 AD3d 1170, 16 NYS3d 832 [2d Dept 2015]; *Matter of Foti v Town of E. Hampton, N.Y., Zoning Bd. of*

*Appeals*, 61 AD3d 1057, 876 NYS2d 137 [2d Dept 2009]; *Matter of Merlotto v Town of Patterson Zoning Bd. of Appeals*, 43 AD3d 926, 841 NYS2d 650; *Matter of Ram v Town of Islip*, 21 AD3d 493, 801 NYS2d 40 [2d Dept 2005]). Here, the ZBA performed the necessary balancing test when assessing the petitioner's application, and its finding that the detriment to the neighborhood if the variances are granted outweighed the benefit to the petitioner is supported by evidence in the record. The ZBA rationally determined that the claimed hardship was self-created, and that the variances at issue were substantial in nature and would have an adverse impact on the environmental conditions in the neighborhood, as the brick patio was constructed within the 75-foot bluff setback area of the beach, seaward of the extensive wooden decking in the rear of the residence, and as the addition of the brick patios and walkways increased to nearly 50% the total lot coverage on the subject property. Additionally, its finding that the presence of the brick walkway at issue is a detriment to neighboring property is rational, as the width of such walkway expands to 10 feet, resulting in no side yard setback from the parcel of property abutting the western boundary of the subject property. Moreover, the ZBA's finding that the subject patio and walkway are unnecessary is properly based on evidence that the petitioner constructed a second brick patio and a brick walkway on the eastern landward side of the property, and that such walkway affords outside access to the rear of the residence.

Furthermore, the petitioner failed to establish the requests for a natural resources special permit and variances for the subject seaward brick patio and walkway constructed on 116 Soundview Drive were based on essentially the same facts as the application for a natural resources special permit and variances for the 112 Soundview Drive property granted by the ZBA in April 2016 (*see Matter of Harris v Zoning Bd. of Appeals of Town of Carmel*, 137 AD3d 1130, 27 NYS3d 660 [2d Dept 2016]; *Matter of Monroe Beach, Inc. v Zoning Bd. of Appeals of City of Long Beach, N.Y.*, 71 AD3d 1150, 898 NYS2d 194 [2d Dept 2010]; *Matter of Hurley v Zoning Bd. of Appeals of Vil. of Amityville*, 69 AD3d 940, 893 NYS2d 277 [2d Dept 2010]). Rather, the evidence shows the ZBA rationally determined that the significant differences in the size and location of the brick structures installed on the petitioner's properties warranted different determinations on his applications. As indicated above, while the ZBA determined the additional brick structures constructed by the petitioner brought the total lot coverage on the 116 Soundview Drive property to 9,978 square feet – just three square feet less than the maximum 50% total lot coverage permitted under the zoning provisions for properties in a Residence B district – it determined the new structures increased the total lot coverage on the 112 Soundview Drive property to 8,286 square feet, 942 square feet less than the maximum permitted coverage (*see* Town Code § 153-11-10 [Residence Districts – Table of Dimensional Regulations, Part II]). The ZBA also determined, in part, that while the requested variances for the 112 Soundview Drive property are substantial, the brick patio located landward of the residence will cause no disturbance to the bluff crest or the wetlands, and will have no negative impact on the environmental and physical conditions in the neighborhood. It additionally found that the brick walkway constructed on the western side of the property, which runs to the property line, should cause “no detrimental impact” to the neighboring property, as it is owned by the petitioner. The argument that the ZBA's determination was arbitrary, therefore, is rejected (*see Matter of*

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*Harris v Zoning Bd. of Appeals of Town of Carmel*, 137 AD3d 1130, 27 NYS3d 660; *Matter of Kramer v Zoning Bd. of Appeals of Town of Southampton*, 131 AD3d 1170, 16 NYS3d 832; *Matter of Spandorf v Board of Appeals of Vil. of E. Hills*, 167 AD2d 546, 562 NYS2d 215 [2d Dept 1990]).

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

Submit Judgment.

Dated: October 2, 2017  
Riverhead, New York



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**WILLIAM J. FORD, J.S.C.**