

**260 BC, LLC v Zoning Bd. of Appeals of the Town of
E. Hampton**

2021 NY Slip Op 32056(U)

September 28, 2021

Supreme Court, Suffolk County

Docket Number: 2886/2018

Judge: Joseph A. Santorelli

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ORIGINAL

SHORT FORM ORDER

INDEX No. 2886/2018
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
IAS PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 5-25-18
SUBMIT DATE 8-19-2021
Mot. Seq. # 01 - MD

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260 BC, LLC and FURTHER LANE
HOMEOWNERS DUNE & WILDLIFE
CONSERVATION ASSOC., INC.,

Petitioners,

-against-

THE ZONING BOARD OF APPEALS OF
THE TOWN OF EAST HAMPTON, JOHN
WHELAN (Individually, and in his capacity as
Chairman of and a member of the Zoning Board
of Appeals of the Town of East Hampton),
ROY DALENE (Individually, and in his
capacity as a member of the Zoning Board of
Appeals of the Town of East Hampton),
THERESA BERGER (Individually, and in his
capacity as a member of the Zoning Board of
Appeals of the Town of East Hampton), and
SAMUEL KRAMER (Individually, and in his
capacity as a member of the Zoning Board of
Appeals of the Town of East Hampton),

Respondents.

For a Judgment pursuant to CPLR Article 78.

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Upon the following papers e-filed as numbers 3, 7 - 13, 15 - 22, 35 - 40, & 43 on this motion pursuant to Article 78.

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In this article 78 proceeding, the petitioners seek to set aside the determination of the respondent Zoning Board of Appeals of the Town of East Hampton (“Board”), dated April 24, 2018. The respondents oppose this application in all respects.

Petitioner 260 BC, LLC, is the owner of real property located at 264 Further Lane, East Hampton, New York. Petitioner Further Lane Homeowners Dune & Wildlife Conservation Assoc., Inc., hereinafter referred to as “HOA”, is the owner of real property located as 266 Further Lane, East Hampton. The petitioners sought a special permit to construct an elevated pedestrian walkway over the dune for the purposes of accessing the ocean beach. The intervenor Taya Thurman as Trustee of the Taya Thurman Trust and Taya Thurman Secondary Residence Trust, hereinafter referred to as “Thurman”, is the owner of real property abutting the petitioners premises located at 280, 282, and 284 Further Lane, East Hampton, New York. The petitioners claim that the New York State Department of Environmental Conservation, hereinafter referred to as “DEC”, “found the application to be fully compliant with controlling State law and would result in no adverse environmental impact.” The Zoning Board of Appeals of the Town of East Hampton, hereinafter referred to as “ZBA”, denied the application. The petitioners then filed this Article 78 proceeding, seeking to vacate and reverse the determination of the ZBA as arbitrary, capricious, and abuse of discretion and contrary to law.

In its findings of fact, the Board states that

The Board finds that the proposed project does not meet standard set forth in §255-5-51D of the Town Code. As by Planning Department in its technical analysis memorandum and at the public hearing, the proposed elevated walkway will negatively impact the Aeolian processes and therefore degrade the dune land forms as well as the type and distribution of vegetation thereon. Moreover, the project also fails to meet the required standard because there are alternative designs that would and do provide adequate access to the beach. The Board notes that the reestablishment of the existing footpath that appears to have been used on property since at least 1962 is a reasonable alternative to the boardwalk. The Planning Department maintains that the continued use of the footpath is the most appropriate form of providing pedestrian access to the beach. While elevated boardwalks are recommended in certain instances, such as highly trafficked areas like a public beach, the subject board would only be used by a limited number of single family residence and will not be open to the public. The Board finds that clearly a footpath would provide adequate access to the beach and maintain the integrity of the unique and valuable natural resources found in the Atlantic Double Dunes.

The Board also noted that the properties involved “consist of 2 parcels that are part of the recently filed subdivision ‘The Estates of Further Lane’ which created the 12.07 acre Reserved Area on which a majority of the walkway has been proposed.” The Board set out the history and prior legal challenges involving these lots stating

Portions of this property were reviewed by the Zoning Board in 2013 (prior to its subdivision) when the Board upheld a determination of the Senior Building Inspector and denied a NRSP for two parallel concrete retaining walls comprising 762 linear ft. The Board's determination (filed 1/18/13) was upheld by the Suffolk County Supreme Court but was also remitted back to the Zoning Board for further clarification. The Appellate Division upheld the Supreme Court with regard to the Board's determination, but overturned the Supreme Court's requirement that the applicant return to the Zoning Board for clarification.

The Board cited the Technical Analysis Memorandum, hereinafter referred to as "TAM", submitted by Brian Frank, Chief Environmental Analyst for the Town of East Hampton's Planning Department. In the TAM it was noted that

the application fails to meet the general Special Permit standards of § 255-5-40 and the specific Natural Resources Special Permit Standards of § 255-5-51 and recommends denial of the project as proposed. As observed by Mr. Frank in his TAM, Further Lane has been the location of some of the largest and most expensive residential estates for decades and despite the presence of this development, there have been very few applications for any direct alterations or structural improvements to this dune land habitat. Aerial photographs depict that simple footpaths have traditionally provided beach access for the residences bordering this dune land. A majority of these footpaths consist of bare sand and a few include sections of at grade wooden boardwalks, predominantly established prior to the adoption of the Town Code's 1984 NRSP regulations.

The Board also stated that "that the applicant has failed to meet §255-5-40A, D, K & M" and explained that it found "the nature of the proposed elevated walkway to be incompatible with the one of the Town's most important natural habitats" and "the characteristics of the site are such that the proposed use may not be introduced without undue disturbance or disruption to important natural features".

The East Hampton Town Code §225-4-20 states

No person shall undertake any of the activities listed herein without first having obtained a natural resources special permit therefor, pursuant to Article V of this chapter:...

D. Dunes

(1) Within 150 feet of the dune crest on all lands which lie along the Atlantic Ocean east of Map No. 174, Montauk, and within 100 feet of the dune crest on all other lands:

(a) Clearing or grading land.

(b) Digging, dredging, or excavating land, or depositing fill or other material upon land.

- (c) Building, constructing, erecting, reconstructing, enlarging, altering, or placing any structure or other improvement whatsoever in or upon land.
- (2) On or within any dune, wherever located, clearing, grading, filling, cutting, removing, or otherwise altering the dune, or undertaking any other activity enumerated in Subsection D(1) above.

It is well settled that local zoning boards have broad discretion in considering applications for special permits and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion (see *Matter of Ifrah v Utschig*, 98 NY2d 304, 746 NYS2d 667 [2002]; *Matter of Fuhst v Foley*, 45 NY2d 441, 410 NYS2d 56 [1978]; *Matter of Miller v Town of Brookhaven Zoning Bd. of Appeals*, 74 AD3d 1343, 904 NYS2d 199 [2d Dept 2010]). Thus, the determination of a board will be upheld if it is rational and not arbitrary and capricious (see *Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 259 [1995]; *Matter of JSB Enters., LLC v Wright*, 81 AD3d 955, 917 NYS2d 302 [2d Dept 2011]; *Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 886 NYS2d 442 [2d Dept 2009]). 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 Caspian v Zoning Bd. of Appeals*, *supra*, quoting *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 772, 809 NYS2d 98, 105 [2d Dept 2005]; see *Matter of JSB Enters., LLC v Wright*, *supra*).

In *Matter of Nathan v Bd. of Appeals of Town of Hempstead*, 125 AD3d 866, 866-867 [2d Dept 2015], the Court held that

A "special exception gives permission to use property in a way that is consistent with the zoning ordinance, although not necessarily allowed as of right" (*Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 195, 774 NE2d 727, 746 NYS2d 662 [2002]). The burden on an owner in seeking a special exception permit is, therefore, "considerably less" than the burden on an owner seeking a use variance (*Matter of Ouderkirk v Board of Appeals of Town of Bethlehem*, 58 AD2d 667, 667, 395 NYS2d 527 [1977]; see *Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238, 243, 282 NE2d 606, 331 NYS2d 645 [1972]). An applicant for a special exception permit need only show that it has complied with every legislatively imposed condition on the permitted use (see *Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d at 195; *Matter of Roginski v Rose*, 97 AD2d 417, 417, 467 NYS2d 252 [1983], *affd* 63 NY2d 735, 469 NE2d 527, 480 NYS2d 206 [1984]). If the applicant fails to comply with any of the conditions set forth in the ordinance, the zoning authority may deny the application (see *Matter of Wegmans Enters. v Lansing*, 72 NY2d 1000, 1001-1002, 530 NE2d 1292, 534 NYS2d 372 [1988]).

Here, the Board's determination was not arbitrary and capricious. The petitioners have failed to demonstrate that the requested walkway is a "coastal structure" as defined by §255-1-20 in that it was being constructed for coastal erosion control. Based upon the petitioners' failure to prove that the walkway was

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being constructed for coastal erosion control, together with the determination that “the nature of the proposed elevated walkway to be incompatible with the one of the Town's most important natural habitats” and “the characteristics of the site are such that the proposed use may not be introduced without undue disturbance or disruption to important natural features”, the Board was correct in denying the special permit. Accordingly, the petition is denied and the proceeding is dismissed.

The foregoing shall constitute the decision and Order of this Court.

Dated: September 28, 2021



HON. JOSEPH A. SANTORELLI
J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION