

Calogiras v Town of Southampton Bd. of Appeals

2013 NY Slip Op 33456(U)

December 5, 2013

Supreme Court, Suffolk County

Docket Number: 07108/2013

Judge: William B. Rebolini

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MEMORANDUM

COPY

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK**

Peter Calogiras, Louis Calogrias Tape, LLC
and Ellen Sea, LLC,

Petitioners,

-against-

Town of Southampton Board of Appeals, Herbert
E. Phillips, Chairperson, Adam Grossman, Vice-
Chairperson; Ann Nowak, Member, Keith Tuthill,
Member; David Reilly, Member; Brian Desesa,
Member, Denise O'Brien, Member; Town of
Southampton and Jon Cohen a/k/a Jon R. Cohen
and Karen Kostroff a/k/a Karen Kostrof,

Respondents.

Clerk of the Court

Motion Sequence No.: 001; MD; CD
SUBJ

Motion Date: 4/19/13

Submitted: 8/28/13

Index No.: 07108/2013

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In this CPLR Article 78 proceeding, petitioners seek a judgment vacating and annulling the resolution adopted by respondent Town of Southampton Zoning Board of Appeals (ZBA) on February 7, 2013, which granted respondents, John Cohen and Karen Kostroff's ("respondents") application for the following variances, pursuant to the Southampton Town Code:

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1. §330-11, to allow a front yard setback of 20.5 feet instead of the required 30 feet for a proposed dwelling;
2. §330-11, dune crest setback relief of 23 feet where 125 feet are required;
3. §330-76(D) and §83 (C), to allow a proposed deck to be located within a required side yard;
4. §138-17(c)(1), to allow reconstruction of a non-conforming building within an erosion hazard.

This relief was applied for to allow the applicants, respondents John Cohen and Karen Kostroff to demolish the existing dwelling, currently located on top of the dune crest, and to construct a new two story residence 23 feet north of the existing footprint. Public hearings for the application were held on November 1, 2012 and December 6, 2012.

The property in question is identified on the Suffolk County Tax Map as #900-385-20 and 66.10. Lot 20 and is located at 71 Dune Road in the hamlet of Quogue. Testimony was presented that the area, including the two lots that make up the residence, was originally created in 1964 in an "L" Business Beach zoning district, where 20,000 square feet were required. The zoning was later changed to an R-80 zoning district which rendered the lot nonconforming. Lot 20, where the old residence was built, and where the new residence will be built, has been held in single and separate ownership since the zoning was changed. Members of the respondent ZBA also stated on the record that, to their personal knowledge, this lot and a number of others emanating from a previous owner are held in single and separate ownership. Lot 10 is a "flagpole" lot which allows access to the site. The property is 25,392 square feet and is improved with a single family residence. Under ZBA Decision No. D6990A, dated April 20, 1984, setback relief was granted for a dwelling and a deck with a 20-foot side yard setback on the west. The residence now existing on the lot was built prior to the addition of Chapter 138 of the Town Code, which governs coastal erosion hazard areas. The size of the new house to be constructed was originally planned to be 3,447. However, the respondents thereafter reduced the size of the proposed house to 2,990 square feet, which slightly reduced the requested setbacks. It is noted that a reduced front yard setback of 30 feet was granted by the Coastal Hazard Administrator by a memo dated November 15, 2012.

Testimony at the public hearings was given to the effect that, while new construction seaward of the erosion hazard area is not permitted pursuant to the Town Code, the respondents have no conforming building envelope. Specifically, the Coastal Erosion Hazard line is located almost in the "flagpole," and as such, it is impossible to locate the house entirely north of that line. Thus, relief is required from the zoning code in order to build on the lot. The respondents, therefore, proposed to demolish the existing damaged dwelling and reconstruct a new residence, 23 feet north of its current location. The new construction would exceed FEMA elevation standards and would include the replacement of the old septic system, which is partially exposed and located in the dunes, with a conforming system on the driveway. In addition to this, since the existing house is located on top of the dune crest, the proposed new location would allow the respondents to retreat the new proposed residence landward and restore the dune system, a benefit to respondents, the community and the environment.

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Respondents' counsel also pointed out that the proposed structures conform to all other provisions of the Town Code, including height and pyramid regulations, and maintain or exceed all existing setbacks. Respondents are also seeking relief to locate the proposed deck within the required side yard pursuant to Town Code 330-76D and 330-83C, while maintaining the required setbacks. Respondents' counsel further asserted that although the petitioners' property is currently vacant, were they to build with conforming setbacks, they would have a 90-foot setback, situating the houses 116 feet apart, mitigating any alleged impact. Evidence was also introduced that the proposed house was consistent with the size of other houses in the neighborhood and, in fact, is much smaller in size than many of them.

Mr. Aram Terchunian testified on behalf of the respondents and submitted "before" and "after" Hurricane Sandy photos, showing that the dune is currently at about 12 feet (at the rear of the dune). He also presented a dune restoration plan which would be shared across the premises and with the two adjoining properties. He said that the planned restoration would possibly even improve the dune system, since the retreat of the house off the dune allows them to build a larger dune in its place.

Evidence was also placed in the record that the respondent ZBA had granted similar relief in two prior cases. In "Matter of Feshbach", Decision No. D012531, dated April 16, 2009, the applicants were allowed to demolish a residence in the coastal erosion hazard area, retreat landward and construct a new dwelling because there was no nonconforming location on the property where a new dwelling could be built north of the coastal erosion line. The approval was conditioned upon the applicant repairing, restoring, and re-vegetating the dune. In "Matter of Lawin", Decision No. 12837, dated February 3, 2011, here also, the applicant was allowed to demolish a residence in the coastal erosion hazard area, retreat landward and construct a new dwelling because there was no nonconforming location on the property where a new dwelling could be built north of the coastal erosion line. This approval was also conditioned upon the applicant repairing, restoring, and re-vegetating the dune. This property is adjacent to the subject property.

The ZBA also received a letter from C. Theresa Masin, a Town of Southampton environmental analyst, dated December 5, 2012, noting the following: (i) the primary dune has been destroyed as a result of hurricane Sandy; (ii) the existing structure did sustain some damage from the hurricane; (iii) nearly the entire parcel lies seaward of the Coastal Erosion hazard line, and, as such, the Division recommends the new residence be constructed as far landward of the existing residence as possible; (iv) any grant of relief should be conditioned upon the submission of a dune restoration plan for approval by the Environment Division prior to the issuance of a building permit; and (v) a native re-vegetation plan for all areas disturbed by the construction must be included in the dune restoration plan.

Petitioners have an ownership interest in two (vacant) properties adjacent to the subject property. Counsel for one of the principals appeared in opposition. Petitioners' counsel asserted that the proposed house will block his clients' view; is nearly twice the size of the existing house; and, is not permitted, as new construction in the Coastal Erosion Hazard Area. It was further asserted that

the applicants cannot meet the five part test for zoning relief, and that they cannot benefit from the single and separate status, as the premises have not been held in single and separate ownership in a residential district. Peter Calogrias, one of the petitioners, asserted, among other things, that the proposed “retreat” is of no consequence as there is currently no significant dune.

By decision dated February 7, 2013, the ZBA granted the requested relief from the zoning code and section 138-17C(1) of the Town Code (nonconforming building in the Coastal Erosion Hazard Area) to allow the demolition of the existing single family dwelling and the retreat and construction of a new single family dwelling south of the coastal erosion line. This approval was conditioned upon the applicants submitting a dune restoration plan for approval prior to the issuance of a building permit, which will include repairing, restoring, and re-vegetating the dune in all disturbed areas, and the addition of dune sand and beach grasses to increase the overall stability of the dune system. It was also conditioned on respondents merging lots 20 and 66.1.

The court’s role in reviewing an administrative decision is not to decide whether the agency’s determination was correct or to substitute its judgment for that of the agency, but to ascertain whether there was a rational basis for the determination (*see Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 239 [1995]; *Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 626 NYS2d 1 [1995]; *Matter of Warder v Board of Regents of Univ. of State of N.Y.*, 53 NY2d 186, 440 NYS2d 875 [1981]). It is fundamental that when reviewing a determination that an administrative agency alone is authorized to make, the court must judge the propriety of such determination on the grounds invoked by the agency; if the reasons relied on by the agency do not support the determination, the administrative order must be overturned (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758, 570 NYS2d 474 [1991]; *see Matter of National Fuel Gas Distrib. Corp. v Public Serv. Commn. of the State of N.Y.*, 16 NY3d 360, 922 NYS2d 224 [2011]; *Matter of Filipowski v Zoning Bd. of Appeals of Vil. of Greenwood Lake*, 101 AD3d 1001, 956 NYS2d 183 [2d Dept 2012]; *Matter of Alfano v Zoning Bd. of Appeals of Vil. of Farmingdale*, 74 AD3d 961, 902 NYS2d 662 [2d Dept 2010]). Further, the court “may not weigh the evidence or reject the choice made by the zoning board ‘where the evidence is conflicting and room for choice exists’” (*Matter of Calvi v Zoning Bd. of Appeals of City of Yonkers*, 238 AD2d 417, 418, 656 NYS2d 313 [2d Dept 1997]).

In reviewing an administrative determination, a court must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious (*see Matter of Peckham v Calogero*, 12 NY3d 424, 863 NYS2d 751[2009] *Matter of Deerpark Farms v Agricultural and Farmland Prot. Bd.*, 70 AD3d 1037, 896 NYS2d 126 [2d Dept 2010]). An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts (*see Matter of Peckham v Calogero*, *supra*; *Matter of Deerpark Farms v Agricultural and Farmland Prot. Bd.*, *supra*; *Matter of Manko v New York State Div of Housing & Community Renewal*, 88 AD3d 719, 930 NYS2d 72 [2d Dept 2011]).

A local zoning board has broad discretion in considering applications for area variances and interpretations of local zoning codes (*see Matter of Pecorano v Board of Appeals of Town of*

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Hempstead, 2 NY3d 608, 781 NYS2d 234 [2004]; *Matter of Cowan v Kern*, 41 NY2d 591, 394 NYS2d 579 [1977]; *Matter of Marino v Town of Smithtown*, 61 AD3d 761, 877 NYS2d 183 [2d Dept 2009]), and its interpretation of the local zoning ordinances is entitled to great deference (see *Matter of Toys “R” Us v Silva*, 89 NY2d 411, 418-419, 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]; *Matter of Ferraris v Zoning Bd. of Appeals of Vil. of Southampton*, 7 AD3d 710, 776 NYS2d 820 [2d Dept 2004]). A court, however, may set aside a zoning board’s determination if the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or succumbed to generalized community pressure (see *Matter of Pecorano 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 . . . [A] determination will not be deemed rational if it rests entirely on subjective considerations, such as general community opposition, and lacks an objective factual basis” (*Matter of Kabro Assoc., LLC v Town of Islip Zoning Bd. of Appeals*, 95 AD3d 1118, 1119, 944 NYS2d 277 [2d Dept 2012]; see *Matter of Ifrah v Utschig*, 98 NY2d 304, 746 NYS2d 667 [2002]; *Matter of Cacsire v City of White Plains Zoning Bd. of Appeals*, 87 AD3d 1135, 930 NYS2d 54; *Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 886 NYS2d 442 [2d Dept 2009], *lv denied* 13 NY3d 716, 895 NYS2d 316 [2010]).

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 (see *Matter of Pinnetti v Zoning Bd. of Appeals of Vil. of Mt. Kisco*, 101 AD3d 1124, 956 NYS2d 565 [2d Dept 2012]; *Matter of Jonas v Stackler*, 95 AD3d 1325, 945 NYS2d 405 [2d Dept 2012], *lv denied* 20 NY3d 852, 957 NYS2d 689 [2012]; see also *Matter of Pecorano v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234; *Matter of Ifrach v Utschig*, 98 NY2d 304, 746 NYS2d 667; *Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 259). 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 Pinnetti v Zoning Bd. of Appeals of Vil. of Mt. Kisco*, supra; *Matter of Alfano v Zoning Bd. of Appeals of Vil. of Farmingdale*, 74 AD3d 961, 902 NYS2d 662; see also *Matter of Danieri v Zoning Bd. of Appeals of Town of Southold*, 98 AD3d 508, 949 NYS2d 180 [2d Dept], *lv denied* 20 NY3d 852, 2012 NY Slip Op 91377 [2012]; *Matter of Schumacher v Town of E. Hampton, N.Y. Zoning Bd. of Appeals*, 46 AD3d 691, 849 NYS2d 72 [2d Dept 2007]). However, 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; see *Matter of*

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Merlotto v Town of Patterson Zoning Bd. of Appeals, 43 AD3d 926, 841 NYS2d 650 [2d Dept 2007]).

Pursuant to §138- 26 of the Southampton Town Code the Zoning Board of Appeals is designated as the Coastal Erosion Hazard Board of Review and has the authority to: “A. Hear, approve, approve with modification or deny requests for variances or other forms of relief from the requirements of this chapter.”

§138- 22 of the Southampton Town Code states:

The Town recognizes that strict application of the standards and restrictions of this chapter may cause difficulty or hardship. When this can be shown, such standards and restrictions may be varied or modified provided that the following criteria are met, which criteria the Town Board has determined, in accordance with Town Law § 267-b (3), properly balance the burdens on and benefits to the property owner and the health, safety and welfare of the general community. The applicant has the burden of demonstrating the following:

- A. All development other than erosion protection structures and hazard-area flood proofing:
- (1) No new building or other structure may be constructed in an erosion hazard area.
 - (2) No reasonable, prudent, alternative site is available.
 - (3) All responsible means and measures to mitigate adverse impacts on natural systems and their functions and values have been incorporated into the activity's design at the property owner's expense
 - (4) The development will be reasonably safe from flood and erosion damage.
 - (5) The variance requested is the minimum necessary to overcome the practical difficulty or hardship which was the basis for the requested variance.
 - (6) Where public funds are utilized, the public benefits must clearly outweigh the long-term adverse effects.
 - (7) No natural protective feature will be polluted, functionally impaired or lost, or placed in peril thereof, and any degradation or diminution of natural protective features must be minimized to the fullest extent feasible.
 - (8) The proposed work and location will have a less adverse environmental impact than any available practicable alternative.
 - (9) For all development other than reconstruction of a lawfully preexisting principal residence structure that has been damaged by accidental cause such as fire, flooding or erosion, alternative designs entailing smaller buildings or structures or diminished or reconfigured areas of use are determined not to be effective in preventing loss of or potential damage to designated natural features, or the only such designs are found to be infeasible or unlawful.

- (10) A primary purpose of this chapter is to require over time that structures in the erosion hazard area (e.g., in the primary and secondary dunes) or in nonconforming locations in the adjacent area be relocated to conforming locations in the adjacent area. Therefore, the cumulative maximum addition to ground coverage of all additions to a lawfully preexisting nonconforming residence:
- (a) In the erosion hazard area may not exceed the limit allowed pursuant to § 138-12B(1)(e) and § 138-12B(2)(c) of up to but less than 25%; and
 - (b) In the adjacent area may not exceed the limit allowed pursuant to § 138-14D, which limit is up to 25% or, in certain circumstances, up to 50%.

In its decision, the ZBA first reviewed the variance criteria set forth in §136- 26. The ZBA found, based on the evidence before it, that there was no buildable area north of the CEHA line, even with the 23-foot retreat from the existing house location, which resulted in a difficulty or hardship to the respondents; that no reasonable alternative existed; all means and measures to mitigate adverse impacts on natural systems have been incorporated into the design; the proposed work and location will have less environmental impact than any available alternative; and that the vast majority of houses in the area are of equal or larger size. Finally, the ZBA found that “the opportunity to retreat structures farther landward and away from the dune provides a significant environmental benefit, as does the replacement of the existing septic system landward of the dune.” It is again noted that there was also ZBA precedent for variances to retreat and build in the CEHA in the “Matter of Feshbach” and “Matter of Lawin” decisions.

The ZBA then engaged in the area variance balancing test set forth in Town Law 267-b(3)(b). The ZBA found the variances will not cause an undesirable effect on the character of the neighborhood nor create a detriment to the surrounding property owners, finding among other things, that retreating the structures landward, with re-vegetation and dune restoration, will benefit the neighborhood and also result in FEMA compliant structures. It further found that the benefit to the applicant cannot be achieved by some method feasible for the respondents to pursue, other than area variances; that the variances are not substantial. The relief sought is the minimum necessary to achieve their stated goal, while also retreating and complying with FEMA and County regulations. Finally, it found that the hardship is not self-created. It is noted that the lot existed prior to the imposition of the coastal erosion hazard line.

In challenging the decision the petitioners first allege that the ZBA had no authority to grant the requested variances. This is plainly contradicted by the language of sections 138-26 and 138-22 of the Southampton Town Code. As already noted, pursuant to §138- 26 of the Southampton Town Code the Zoning Board of Appeals, as the Coastal Erosion Hazard Board of Review, has the authority to: “Hear, approve, approve with modification or deny requests for variances or other forms of relief from the requirements of this chapter.” Section 138- 26, as already noted gives the ZBA broad variance powers if the restrictions of that chapter cause difficulty or hardship. It is further

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noted that Southampton Town Code § 138-17C (1) states, in relevant part: "if a building in or structure located wholly or partly in an erosion hazard area requires reconstruction, it must be relocated, redesigned and/or reengineered to meet all setbacks, structural and other requirements of this chapter." Thus, given the existing constraints facing the respondents, the 23 foot retreat landward for the proposed dwelling, which will now be FEMA compliant as to height, the relocation of the septic system to comply with Suffolk County Health Department regulations, and the restoration of the dune, both grants relief to the respondents, while maximizing the possible benefit to the neighboring properties. The decision, as noted above, is consistent with its prior precedent in the Feshbach and Lawin decisions.

With regard to the requested area variances, the Court of Appeals has noted that a zoning board has the authority to grant an area variance from any requirement in the zoning regulations (*see Real Holdings Corp v Lehigh*, 2NY3d 297, 788 NYS2d 438 [2004]). Thus, even if the subject lot was not held in single and separate ownership, which the petitioners have failed to establish, the ZBA would have the authority to grant the requested area variances.

The petitioners also claim that the ZBA's action herein will reduce surrounding property values, violate FEMA and Suffolk County regulations, but have submitted no evidence to support these claims. Petitioners reference to this Court's prior decision in the matter of *Petrello v Board of Trustees of the Village of Sagaponack* (Index No. 11-26159) has no relevance to this matter, since it deals with areas "adjacent to" the Coastal Erosion Hazard Area, which are not at issue herein.

The decision of respondent ZBA herein is both rational and based on substantial evidence in the record, and, as such, should not be disturbed.

In light of the foregoing, the relief sought in the petition is denied and this proceeding is dismissed.

Settle judgment.

Dated:

12/5/2013


HON. WILLIAM B. REBOLINI, J.S.C.