Matter of Deutsch v Zoning Bd. of Appeals of the Town of Riverhead
2014 NY Slip Op 32086(U)
July 30, 2014
Sup Ct, Suffolk County
Docket Number: 13-7854
Judge: Jerry Garguilo

[* 1]

COPY

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 47

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In the Matter of the Application of

ERIC ALEXANDER DEUTSCH, MICHAEL MCLAUGHLIN, LAURENCE MERRITT, GLENN R. WOODHULL, and DEAHREVIR, LLC,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules,

- against -

THE ZONING BOARD OF APPEALS OF THE TOWN OF RIVERHEAD, THE PLANNING BOARD OF THE TOWN OF RIVERHEAD and PATRICK SHIELS,

Respondents.

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By: Garguilo, J.S.C.
Dated: July 30, 2014

Index No. 13-7854
Mot. Seq. # 001 - MD

Return Date: 4-24-13
Adjourned: 2-28-14

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In this hybrid article 78 proceeding/declaratory judgment action, the petitioners/plaintiffs Eric Alexander Deutsch, Michael McLaughlin, Laurence Merritt, Glen R. Woodhull and Deahrevir, LLC ("petitioners") seek judgment annulling the decision of defendant Riverhead Zoning Board of Appeals ("ZBA") dated February 14, 2013 granting the application of respondent Patrick Shiels' ("Shiels") for a variance under the Town's Coastal Erosion Areas ordinance (Section 12-20 of the Town Code of the Town of Riverhead) on the grounds that said determination is beyond the ZBA's lawful jurisdiction, is affected by errors of law and is arbitrary and capricious.

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In the petition/complaint, petitioners, first claim that the respondent ZBA lacked jurisdiction to hear the subject application pursuant to Section 12-20 of the Town Code of the Town of Riverhead. The second claim alleges that the February 14, 2013 decision of the ZBA, acting as the Coastal Erosion Hazard Board of Review ("CEHRB"), which granted a variance was unsupported, irrational, arbitrary and capricious. The third claim seeks a declaration of rights of the parties with regard to a 1984 restrictive covenant requiring that any new residential structure must be set back at least 100 feet from the average crest of the bluff. Petitioners seek an injunction permanently enjoining respondent Shiels from constructing a home setback less than 100 feet from the average crest of the bluff. Each of the individual petitioners has an ownership interest in one or more properties abutting the subject property. The petitioners do not challenge the respondent ZBA's grant of a side yard variance.

Respondent, Patrick Shiels is the owner of the subject residential parcel located at 474 Sound Shore Road in the Town of Riverhead. The property, which was improved by a house and a separate artist cottage, is part of a four lot subdivision approved by the Riverhead Planning Board on May 17, 1984. The approval was subject to several conditions, including the filing of restrictive covenants. A Declaration of these covenants was filed in the office of the Suffolk County Clerk on September 20, 1984 in Liber 9644 at page 290. The Declaration states, in relevant part:

> 2) Any new residential structures constructed at the subject premises shall be set back 100 feet from the average crest of the bluff on said premises.
>
> 3) Any application to modify or vary the terms of these conditions and covenants shall be made to the Planning Board of the Town of Riverhead.

In 2004, respondent Shiels applied for a building permit to reconstruct and expand the existing residence and remove the artist cottage. All necessary approvals were obtained, including a building permit and a variance from the respondent ZBA. Neighboring property owners, two of whom are also petitioners herein, filed an Article 78 proceeding, Albert E. Pensis, Glenn R. Woodhull and Alexander Deutsch v Town of Riverhead Zoning Board of Appeals and Patrick Shiels, under Suffolk County Supreme Court Index No 04-16289. That proceeding was dismissed by a memorandum decision of the Hon Ralph J. Costello dated March 30, 2005.

After construction was begun, neighboring property owners filed an Article 78 proceeding, Pensis v Planning Board of the Town of Riverhead and Patrick Shiels under Suffolk County Supreme Court Index No 08-44745. This proceeding challenged the Planning Board's resolution that amended the Coastal Erosion Hazard Permit it had previously issued to incorporate a bluff restoration plan and extended the permit. By order of the Hon. Joseph Farneti, dated December 29, 2009, the court denied respondents' motions to dismiss the proceeding and set aside the Planning Board's resolution as violative of the Open Meetings Law. The decision also restrained and enjoined the respondent Shiels from constructing any residence or part thereof at the subject property, absent a proper legal basis to proceed. As a result of this decision, the prior approvals the respondent Shiels had received expired, and he filed a new application to construct the same residence at the same proposed location on the property. Since the proposed home would be in the "Bluff Area", a variance was required. Pursuant to Chapter 12-14 of the Town Code of the Town of Riverhead, Coastal Erosion Hazard Areas, ("CEHA"),

development in bluff areas is prohibited without a variance. The applicant also sought a side yard variance allowing 16 feet, instead of the required 25 feet.

The public hearing on the application began at a ZBA meeting on December 20, 2012, continued on January 10, 2013 and concluded on January 24, 2013. Peter Danowski, the attorney for the applicant spoke on behalf of the application. Douglas Adams, a professional engineer testified and submitted an affidavit in support of the application. Mr. Adams testified that the existing location (where the prior residence was located) is the best place on the property, from the standpoint of being least invasive, as it is already an established, level site. He expanded upon his testimony in his affidavit stating that clearing and preparing any portion of the property south of the artist studio (near the former residence) for construction of even a very small footprint would require clearing and grading of a significantly larger area to provide access to the residence. A significant amount of vegetation would have to be removed, and 3,000 to 4,000 cubic yards of fill would have to be brought in. These activities would also cause an erosion risk. In a later affidavit, Mr. Adams stated that the proposed site would be least invasive, considering the clearing, excavation, stability, access, quality of life and cost. Construction of a residence at any other location would result in significantly more engineering effort, destruction of naturally existing features and dramatically increased cost. He did not agree with the neighbors' expert that areas exist above the CEHA line where the proposed residence could be built. Shiels also submitted the affidavit of Jeffrey Seeman, an environmental consultant, who stated that he had observed no erosion in the vicinity of the proposed residence, that the gully area to the south of the artist studio would be an inappropriate location for a residential structure and would increase the possibility of erosion and substantially alter and reduce existing natural vegetation cover. The respondent board also received a memorandum from Joseph Hall, an environmental planner from the Planning Department, dated August 15, 2012 which discussed the application. Five board members also visited the subject site. The memo concluded that "[t]he applicant has essentially no practical ability to locate outside the jurisdiction of Chapter 12 given the location of the CEHA and the physical nature of the site."

In opposition, the neighbors submitted the affidavit of Drew Bennett, a professional engineer, who opined that, in his professional engineering opinion, a residence could be built on this site landward of the CEHA line either on a foundation, on poured concrete piers or on timber piles. He further stated that the residence proposed could be located on several places on the site, including landward of the CEHA line, without the need for any fill to be brought to the site. He concluded that the residence should be located landward of the CEHA line and that there is no engineering reason that such a location is not a reasonable, prudent, alternative site, safe from flood and erosion damage. Also submitted was the affidavit of Nathan Taft Corwin, a licensed surveyor, to set forth how the CEHA line is measured, as well as how to measure a point 100 feet from the average crest of the bluff (as required by the filed restrictive covenant). Finally, the neighbors submitted the affidavit of Stephan Lamanski, a professional engineer, who opined that there is suitable topography and adequate area within which to build the same house landward of the CEHA line in the area marked by a 40 foot contour line on the 1983 Young and Young map of the site. The same design features would allow the placement of a house in compliance with Chapter 12 of the Code. Anthony Tohill, counsel for Mr. Deutsch, introduced photographic evidence showing that by October of 2006 the original house had been demolished except for a portion of the western wall of the house. A further photograph, from September of 2010 shows that no remnant

of the original remained, only partial footings for a new house.

On February 14, 2013 the respondent ZBA, acting in its capacity as the Coastal Erosion Hazard Board of Review voted to approve the respondent Shiels' application for a CEHA variance, without conditions. The respondent ZBA, acting in its capacity as the Zoning Board of Appeals approved the requested side yard of 16 feet instead of the required 25 feet. The ZBA also issued findings of fact with regard to its decision. The respondent ZBA, acting in its capacity as the CEHRB found no merit to the opponent's jurisdictional arguments stating that Town Law 267-a and Riverhead Town Code 108-71 (establishing the ZBA) apply only to the actions of the ZBA and not that board acting as the CEHRB and no referral is required for that board to entertain an application for relief. The board also stated, with regard to the argument that declaratory relief is required from the Planning Board, that, even assuming that such relief was needed, it would not be a barrier to the CEHRB to hear and decide the subject application.

The next issue before the CEHRB was whether the applicant met the criteria for variance relief set forth in Town Code 12-20. In that regard the CEHRB found that the applicant met its burden:

> Contrary to the opponents argument, there is no reasonable, prudent alternative site location on the property other than the location proposed by the applicant. The area proposed is the only flat area where a residence could be located, is the general location of the former residence on the site, and as such that already required that the partially completed foundation be built into the hill to the west. In fact, it is likely that the removal of the partially completed foundation will likely cause more damage than completion of the structure upon the existing partial foundation. In opposition, opponent's only argue that there is a reasonable prudent alternative site to the very south of the property. The area they propose would require construction into a steep hill and gully. The testimony of their expert was unconvincing and lacked credibility. To construct a residence on the subject property where the opponents propose would neither be reasonable nor prudent. We find that based upon all evidence in the record and based upon personal inspection and observation, that no reasonable, prudent alternative site exists other than where the applicant proposed. We further find that all responsible means and measures to mitigate adverse impacts on natural systems and their functions and values have been incorporated into the design, that the development will be safe from flooding and erosions, and that the variance requested is the minimum necessary to overcome the hardship. As stated previously, the only reasonably prudent area is quite small and leaves the applicant with little wiggle room at all. Removal of the existing partially constructed foundation and re-construction of the same or even smaller footprint will likely cause more disturbance and possible damage to the bluff area than to allow the applicant to complete the project where originally proposed. The town planning department stated it succinctly, "[T]he applicant has essentially no practical ability to locate outside the jurisdiction of Chapter 12 given the location of the CEHA and the physical nature of the site."

It is noted at the outset that the so-called "ARIES photograph" attached as an exhibit to the

petitioners' reply affidavit, is not admissible and will not be considered, since it was not submitted during the application process or at the public hearings and, thus, was not part of the record before the respondent ZBA (***Kaufman v Inc. Vil. of Kings Point***, 52 AD3d 604, 607 [2d Dept 2008]; ***Merlotto v Town of Patterson Zoning Bd.***, 43 AD3d 926, 841 NYS2d 641 [2d Dept 2007]; ***Manzi Homes v Trotta***, 286 AD2d 737, 730 NYS2d 451 [2d Dept 2001]).

In matters of statutory interpretation, the primary consideration is to discern and give effect to the Legislature's intention (*see* ***Yatauro v Mangano***, 17 NY3d 420, 426, 931 NYS2d 36, 955 NE2d 343 [2011]). The text of a provision "is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning" (***Matter of DaimlerChrysler Corp. v Spitzer***, 7 NY3d 653, 660, 827 NYS2d 88, 860 NE2d 705 [2006] (*see also* ***Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities***, 19 NY3d 106, 120, 945 NYS2d 613, 968 NE2d 967 [2012]). Additionally, the court should inquire "into the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history" (***Nostrom v. A.W. Chesterton Co.***, 15 NY3d 502, 507, 914 NYS2d 725, 940 NE2d 551 [2010] [internal quotation marks and citation omitted]). Finally, it is well settled that a statute must be construed as a whole and that its various sections must be considered with reference to one another (see ***Friedman v Connecticut Gen. Life Ins. Co.***, 9 NY3d 105, 115, 846 NYS2d 64, 877 NE2d 281 [2007]).

Section 12-24 of the Riverhead Town Code states:

> The Town of Riverhead Zoning Board of Appeals is hereby 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.
> B. Hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by the Administrator and/or Code Enforcement Official (CEO) in the enforcement of this chapter, including any order requiring an alleged violator to stop, cease and desist.

Section 12-20 of the Riverhead Town Code states:

> Strict application of the standards and restrictions of this chapter may cause practical difficulty or unnecessary hardship. When this can be shown, such standards and restrictions may be varied or modified, provided that the following criteria are met:
>
> A. No reasonable, prudent, alternative site is available.
> B. 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.
> C. The development will be reasonably safe from flood and erosion damage.

> D. The variance requested is the minimum necessary to overcome the practical difficulty or hardship which was the basis for the requested variance.
> E. Where public funds are utilized, the public benefits must clearly outweigh the long-term adverse effects.

Section 12-30 of the Riverhead Town Code states:

> The authority for administering this chapter is hereby conferred upon the Administrator. The Administrator has the power and duty to:
>
> A. Apply the regulations, restrictions and standards or other provisions of this chapter.
> B. Explain to applicants the map which designates the land and water areas subject to regulation and advise applicants of the standards, restrictions and requirements of this chapter.
> C. Review and take appropriate actions on completed applications.
> D. Issue and sign all approved permits.
> E. Serve as the primary liaison with the New York State Department of Environmental Conservation.
> F. Keep official records of all permits, inspections, inspection reports, recommendations, actions of the Coastal Erosion Hazard Board of Review and any other reports or communications relative to this chapter or request for information from the New York State Department of Environmental Conservation.
> G. Perform normal and customary administrative functions required by the Town Code relative in and relating to this chapter.
> H. Have, in addition, the powers and duties as are established in or reasonably implied from this chapter as are necessary to achieve its stated purpose.

A review of the above statute and case law establishes the lack of merit of the petitioners' claim that the respondent ZBA, acting as the Coastal Erosion Hazard Board of Review, did not have jurisdiction to hear respondent Shiels' application, as the ZBA only has appellate jurisdiction. The ordinance clearly delineates the powers and duties of the ZBA and Planning Board thereunder. Section 12-30 grants the Planning Board the role and authority of administrator of the Coastal Erosion Hazard Areas, which includes review of completed applications and issuance of approved permits. It does not, however, have the power to hear and grant variances under the CEHA statute. Section 12-24 B of the code grants the ZBA, acting as the Coastal Erosion Hazard Board of Review, the power to hear and decide appeals with regard to the acts of the Planning Board as administrator (Emphasis added). Section 12-24 B of the code grants the ZBA, acting as the Coastal Erosion Hazard Board of Review, the power to hear, approve, approve with modification or deny requests for variances or other forms of relief from the requirements of this chapter. Thus, contrary to the claims of the petitioners, the Code grants to the ZBA, in clear and unequivocal language, the jurisdiction to hear variance applications, acting as the

Coastal Erosion Hazard Board of Review. Petitioners' invocation of Town Law 267-a and Town Law 267-a and Riverhead Town Code 108-71 is unavailing, since they limit respondent ZBA's jurisdiction to appellate matters when they are acting as the ZBA, they do not affect the grant of jurisdiction to the ZBA to act as the CEHRB. Thus, the claim of lack of jurisdiction is dismissed.

Next petitioners challenge the decision of the ZBA/CEHRB which granted a variance to the respondent Shiels from Section 12-14 to allow him to construct a single-family home in the Coastal Erosion Hazard Area, alleging that the Board's decision was unsupported by facts, irrational, arbitrary and capricious. 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 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 [2d Dept 2004]; ***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 [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], *lv denied* 13 NY3d 716, 895 NYS2d 316 [2010]).

Here the respondent ZBA/CEHRB found that respondent Shiels met all of the criteria set forth in Section 12-20 of the Code to obtain a variance. In essence, the board accepted the opinions of the expert witnesses for the applicant and rejected those of the experts for the opponents of the application. The Board specifically rejected the testimony of the opponents' main expert, finding that his testimony was "unconvincing and lacked credibility". " Where there is conflicting expert testimony, deference must be given to the discretion and commonsense judgments of the zoning board" (***Matter of White Castle Sys., Inc. v Board of Zoning Appeals of Town of Hempstead***, 93 AD3d 731, 732, 940 NYS2d 159 [2d Dept 2012]). The respondent Board, therefore, made its determination based upon facts in the record and, thus, had a rational basis for its decision. Furthermore, since there is a rational factual basis for its determination, it cannot be found to be arbitrary and capricious (*see* ***Matter of Calvi v Zoning Bd. of Appeals of City of Yonkers***, *supra*; ***Matter of Pecorano v Board of Appeals of Town of Hempstead***, *supra*. Accordingly, petitioners' second claim that the ZBA's decision was arbitrary, capricious and irrational is denied.

Accordingly, to the extent that the petitioners seek judgment annulling and reversing the decision of defendant ZBA dated February 14, 2013 which granted the application of respondent Patrick Shiels for a variance under the Town's Coastal Erosion Areas ordinance, such relief is denied.

Turning to the third claim, petitioners Deutsch, Merritt and McLaughlin seek a judgment declaring the rights of the parties concerning a restrictive covenant which encumbers each of the four lots of a subdivision granted by the Town of Riverhead Planning Board in 1984, including the property which is the subject of this proceeding. Respondent Shiels property was designated as lot 3 of that subdivision. Petitioner Merritt owns lot one of that subdivision, petitioners Merritt and McLaughlin own lot 2 and petitioner Deutsch owns lot 4. The restrictive covenant, on its face, requires that any new residential structure constructed at the subject premises shall be set back 100 feet from the average crest of the bluff on said premises. It also requires that any application to modify or vary the terms of these conditions and covenants shall be made to the Planning Board of the Town of Riverhead. The parties have not yet completed discovery in this plenary action on the issues concerning whether or not the respondents are bound by the terms of the 1984 restrictive covenant.

Therefore, the petitioner's remaining claim for relief for a declaratory judgment and permanent injunction is hereby severed and continued against the respondents (*see* ***Schonbrun v Board of Zoning Appeals of Town of N. Hempstead***, 239 AD2d 508, 658 NYS2d 961 [2d Dept 1997]). The owner/respondent is cautioned that this decision incorporates no finding that the proposed construction does not violate the restrictive covenant.

Settle judgment.

Jerry Garguilo 7/30/14

J.S.C.

HON. JERRY GARGUILO