

<b>Schlossberg v Board of Zoning Appeals of the Town of Brookhaven</b>
2018 NY Slip Op 33456(U)
December 21, 2018
Supreme Court, Suffolk County
Docket Number: 2017-3105
Judge: William J. Condon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 41 - SUFFOLK COUNTY

**PRESENT:**

Hon. WILLIAM J. CONDON  
Justice Supreme Court

MOTION DATE 7-11-17  
ADJ. DATE 5-3-18  
Mot. Seq. # 001 - MD

-----X  
CRAIG SCHLOSSBERG and ESTELLE  
SCHLOSSBERG,

Plaintiffs,

- against -

BOARD OF ZONING APPEALS OF THE  
TOWN OF BROOKHAVEN, RONALD  
LINDSEY, PAUL M. DECHANCE, JAMES  
WISDOM, HOWARD BERGSON, RONALD  
LINDSEY, WAYNE ROGERS, RICK CUNHA,  
and CHARLES LAZAROU, COLLECTIVELY,  
CONSTITUTING BOARD OF ZONING  
APPEALS OF TOWN OF BROOKHAVEN,

Defendants.  
-----X

J. LEE SNEAD, ESQ.  
Attorney for Plaintiff  
144 South Country Road, POB 489  
Bellport, New York 11713

ANNETTE EADERESTO, ESQ.  
BROOKHAVEN TOWN ATTORNEY  
Attorney for Defendant Brookhaven Town  
One Independence Hill  
Farmingville, New York 11738

JASPAN SCHLESINGER LLP  
Attorney for Defendants  
300 Garden City Plaza  
Garden City, New York 11530

Upon the following papers numbered 1 to 6 read on this motion\_\_\_: Notice of Motion/ Order to Show Cause and supporting papers \_\_\_; Notice of Cross Motion and supporting papers \_\_\_; Answering Affidavits and supporting papers \_\_\_; Replying Affidavits and supporting papers \_\_\_; Other \_\_\_; it is,

**ORDERED**, that Petitioners' application to this Court for an Order making a determination that Respondent acted in a manner which contradicted current law and was arbitrary and capricious in its ruling and further remanding the matter to hearing before Respondent is denied.

Petitioners, Craig Schlossberg and Estelle Schlossberg, bring this petition pursuant to CPLR Art. 78 against Respondent, the Board of Zoning Appeals of the Town of Brookhaven, seeking relief in the form of mandamus directing Respondent to consider Petitioners' application for a dune walk over for their property at 402 Ocean Walk in the hamlet of Fire Island Pines, Town of Brookhaven. Respondent denied the application. The instant proceeding arises out of an attempt by Petitioners to build a dune walkover for the subject premises at 402 Ocean Walk in The Fire Island Pines, Town of Brookhaven, County of Suffolk, State of New York.

As a result of the 2012 Superstorm Sandy, the United States Army Corp of Engineers ("USACE"), initiated a project which involved restoration of the beach and creation of a dune through Fire Island communities. In order to accomplish this plan, an easement area for construction was established which required the taking of property and the moving of structures in the easement area in order to build the seventy-seven foot wide dune. Cost sharing agreements were made among Suffolk County ("County"), the New York State Department of Environmental Conservation ("DEC") and the USACE for building the dune, replenishment of the beach and the cost of relocating structures. Owners were compensated for any property taken under eminent domain proceedings in order to build the dune. Federal funds were to be used to compensate homeowners for condemnation of property. The relocation of existing structures were designed to minimize the loss to homeowners so as to minimize the amount the Federal Government would have to spend in condemnation. Property owners were to follow a two-step application process for approval to relocate, raise and rebuild structures taken under eminent domain. Property owners needed to apply for a Coastal Erosion Hazard Permit ("CEHP") and a building permit from the Town of Brookhaven. If either permit was denied, the property owner was to appeal to the Board of Zoning Appeals ("BZA").

Petitioners applied for a Coastal Erosion Hazard Permit with DEC asking to perform nine activities. Of those nine activities to be performed, most of the proposals were granted to petitioner under the CEHP, including a new access walk. Petitioners applied for a building permit with the Town of Brookhaven. The building permit application submitted by petitioner requested certification of structures on the Property which existed prior to

Superstorm Sandy. Several requests made in the application were denied, including the construction of a dune walkover as it violated the minimum rear yard setback restrictions pursuant to Town Code § 85-381(F) and (G). The lot occupancy under the proposed building permit was increased from 49.7% to 51.6%, remaining in violation of the 35% limit under federal and local limits. The increase in lot coverage is largely the result of the proposed walkover. Petitioners are seeking only to overturn the BZA determinations which denied the proposed addition.

Under Town Law §267-b, a five-factor balancing test is required when considering an area variance. Factors to be considered are whether an undesirable change to the neighborhood would be produced, could the benefit sought be achieved by some other method, was the variance substantial, would there be an adverse effect on physical or environmental conditions and was the difficulty self-created. BZA found the variance requested was substantial. The permit application as submitted was for a proposed lot coverage of 51.6% where the limit under federal and state regulation is 35%. There has been no evidence presented that indicates the dune walkover is a preexisting structure to mitigate the substantial nature of the relief requested. The Fire Island Pines Property Owners Association (the "Association"), while not specifically opposing application of the Petitioner, has expressed general opposition to dune walkovers based upon the undesirable changes in neighborhood character created by the construction of such. Where dune walkovers had existed, the Association has supported efforts to replace them, regardless of the effect on lot coverage. However, the Association has expressed reservations about the adverse impact on the environmental conditions and the aesthetics of the beachscape from the construction of dune walkovers where they did not previously exist, as in Petitioners' case. The benefits sought by the dune walkover can be achieved by other means. Petitioner maintains access to the beach by the public walkways, therefore the dune walkover is not required.

Petitioners have argued the County approved the construction of the dune walkover for Petitioners and the prior approval of dune walkovers to other property owners demands the approval of Petitioners' application by the BZA. The County interest in approving the dune walkovers has little to do with any of the five factors in Town Law, but is driven by an economic analysis aimed at reducing the cost of condemnation. The County made it clear that the approval of walkovers was intended to increase the value of the properties so that the government takes less value from property owners thereby reducing the cost of taking the property to the government. The design submitted sought to minimize the amount the County would have to pay in taxpayer funds in order to compensate property owners and if dune walkovers were not provided there would be a greater expense to the County in compensating property owners. The County further deferred to the BZA on the question of any undesirable change in the neighborhood as a result of the dune walkovers and concedes

the walkover is not the only method to achieve beach access. While the Town has approved dune walkovers in other cases, those cases are to be distinguished from Petitioners. The BZA approved dune walkovers where such walkovers pre-existed and where a lot variance was not required. The only application where an increase in lot coverage was granted resulted in a coverage of 36.1%, a variance of 1.1%, far less than the variance proposed by Petitioner.

In a proceeding pursuant to CPLR Article 78, it is the role of the Court to review whether a determination by a municipal body or agency was made in violation of lawful procedure, was effected by an error of law, or was arbitrary and capricious. It is further settled law that in a proceeding seeking judicial review of administrative action that the Court cannot substitute its judgment for that of the agency responsible for making the determination but must ascertain only whether there is a rational basis for the decision or whether it was arbitrary or capricious (*Flacke v Onondoga Landfill Sys, Inc.*, 69 NY2d 355 (1987)). The Court must ascertain only whether there is a rational basis for the decision or whether the administrative agency was arbitrary and capricious. Under this standard, a determination should not be altered unless the record shows the agency's action was arbitrary, unreasonable, irrational or indicative of bad faith (*Halperin v City of New Rochelle*, 24 AD3d 768 (2nd Dept 2005) citing *Matter of Pell v Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cty.*, 34 NY2d 222(1974)). The Court finds there is a rational basis and substantial evidence to support the BZA decision to deny Petitioners application for a dune walkover. This Court does not find the BZA decision to be arbitrary and capricious. The BZA was thorough in its review of Petitioners' application for a dune walkover and considered all aspects of the proposal. Petitioners argue that BZA was arbitrary and capricious in its denial of the proposed walkover as it had granted similar walkovers to other homeowners. However, these applications are distinguished from Petitioners as each of those applications were a request to replace a pre-existing walkover or where the granting of a walkover would not significantly increase the lot occupancy. Petitioners are requesting to build a dune walkover where a stairway to the beach once existed. Petitioner has presented no evidence that a dune walkover existed prior to their application and the addition of a walkover results in a lot coverage substantially over the 35% limit established by the federal and state governments. The substantial overage of lot coverage is further supported by the findings of the Fire Island Nation Seashore Superintendent. Petitioner maintains USACE, the County and DEC have approved and support the building of the dune walkover, however, the County and DEC concede a monetary interest in approving the dune walkover for Petitioner, as the building of the walkover will reduce the total compensation to be made to Petitioner for condemnation of property. While there is no proposed alternative to the dune walkover, Petitioners maintain the benefit of beach access through the public walkway. While this will result in additional cost to the County, it does not justify the granting of the application and, therefore the application is denied.

The foregoing constitutes the decision and Order of the Court.

Dated: 12/21/18

*William J. Condon*  
Hon. WILLIAM J. CONDON  
Justice Supreme Court

  X   FINAL DISPOSITION           NON-FINAL DISPOSITION