

**Matter of Mecox Bay Civic Assoc., Inc. v
Southampton Town Conservation Bd.**

2013 NY Slip Op 30642(U)

March 29, 2013

Sup Ct, Suffolk County

Docket Number: 28465-11

Judge: Denise F. Molia

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Index No.: 28465-11

SUPREME COURT - STATE OF NEW YORK I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA,
Justice

In The Matter of MECOX BAY CIVIC
ASSOCIATION, INC., TED VITTORIA, IRVING
GESZEL, PATRICK T. BURKE, MARY T.
KIRKHAM f/k/a MARY T. BURKE, and
LIONSGATE LLC,

Petitioner,

For A Judgment pursuant to Article 78 of the Civil
Practice Law and Rules,

- against -

SOUTHAMPTON TOWN CONSERVATION
BOARD, THE TOWN OF SOUTHAMPTON and
MECOX SAILING ASSOCIATION, INC.,

Respondents.

CASE DISPOSED: NO
MOTION R/D: 9/21/11
SUBMISSION DATE: 3/2/12
MOTION SEQUENCE No.: 001 MD
002 MG

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Upon the following papers filed and considered relative to this matter:

Order to Show Cause dated September 7, 2011; Emergency Affidavit dated September 6, 2011; Exhibit A annexed thereto; Verified Petition dated September 6, 2011; Verified Answer dated October 3, 2011; Affidavit of William W. Esseks dated October 5, 2011; Exhibits A through D; Affidavit of Garrett L. Gray dated November 16, 2011; Exhibits A through C annexed thereto; Reply Affirmation dated November 18, 2011; Respondent's Memorandum of Law; Notice of Motion dated October 5, 2011; Affirmation in Support dated October 5, 2011; Exhibits A through I annexed thereto; Petitioners' Memorandum of Law; and upon due deliberation; it is

ORDERED, that the petition of Mecox Bay Civic Association, Inc., Ted Vittoria, Irving Geszel, Patrick T. Burke, Mary T. Kirkham f/k/a Mary T. Burke, and Lionsgate LLC, pursuant to CPLR Article 78, for a judgment (a) vacating and annulling the August 24, 2011 decision of the

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respondent Southampton Town Conservation Board approving the application of the Town of Southampton as being arbitrary, capricious, and not supported by substantial evidence; and (b) vacating and annulling the June 8, 2011 negative declaration issued by the Southampton Town Conservation Board pursuant to SEQRA as being arbitrary and capricious and a product of improper segmentation under SEQRA, is denied and dismissed; and it is further

ORDERED, that the motion by defendants, pursuant to CPLR 3211(a)(3) and (7), for an Order dismissing the action in its entirety against all respondents on the grounds that the petitioner lacks standing to sue and that the petition fails to state a cause of action for which relief can be granted, is granted.

The property that is the subject of this proceeding is a part of Mecox Bay Park, which is located east of Bay Lane, Water Mill, and is bounded to the south by Mecox Bay. Mecox Bay Park consists of approximately 10.17 acres and is the historical site of the Mecox Bay Yacht Club. The property is improved by a 192 square foot building, which is now abandoned, but has existed on the property for more than seventy years and was previously used by the Mecox Bay Yacht Club for boathouse storage. The property is owned by the Town of Southampton (“Town”), which on June 16, 2010, issued a request for proposals for the “Operation of a Not-for-Profit Sailing Association at the Mecox Bay Park. The respondent Mecox Sailing Association, Inc. (“MSA”) submitted a proposal to the Town.

In May 2011, the Town, on behalf of itself and MSA, submitted an application to the Southampton Town Conservation Board (“Board”) for a Wetlands Permit to permit MSA to restore, repair or possibly reconstruct the boathouse storage building, and to clear approximately 1800 square feet of “existing nuisance and mostly herbaceous vegetation” on the property. MSA maintains that the area to be cleared does not constitute tidal wetlands. On June 8, 2011, the Board issued a Negative Declaration under SEQRA with respect to the application, finding no significant anticipated impacts, largely due to the fact that the renovation/reconstruction of the structures on the property would be within their existing footprints, and the proposed clearing would be limited. The Negative Declaration also noted that there are no anticipated impacts to air quality and no water demand for the project, expressly noting that no restroom facilities are planned for the site. On July 16, 2011, the New York State Department of Conservation issued a wetlands permit for the project.

After a public hearing on August 24, 2011, at which the respondents were represented by counsel and submitted opposition, the Board issued a permit as well as a written resolution containing sixty enumerated findings and conclusions with respect to the application. The findings included a recognition that the proposed project was consistent with Town Code provisions pertaining to Wetlands Permits, and designed to minimize alteration or impairment of the wetland. The resolution also addressed the issue of sanitary facilities and discussed the basis for the reduction in setback requirements of the storage building.

The petitioners have opposed the application on a number of grounds, including (1) that the Board should not have issued the permit because there are no sanitary facilities at the property; (2) that the Board should not have issued the permit because it was presented with

insufficient information regarding the number of people expected to use the site; (3) that the grant of the permit was premature because the project was subject to review by the United States Army Core of Engineers and the New York State Department of State; and (4) that the Town did not demonstrate entitlement to relaxation of the setback requirements in the Code. After the permit was issued, the petitioners obtained a temporary restraining order, prohibiting the Town and MSA from clearing any tidal wetlands located in Mecox Bay Park, pending an application for a permanent injunction on the clearing and renovation provided for in the permit issued by the Board.

The respondents, Southampton Conservation Board and the Town of Southampton, have opposed the petitioners' motion and have moved to dismiss the action in its entirety on the grounds that the petitioners lack standing to commence the action, and the petition fails to state a cause of action for which relief can be granted. The respondents have submitted the Return for the subject application.

The primary objections raised by the petitioners concern the lack of restrooms to accommodate patrons, members or guests using the property, including the reconstructed boathouse building, as well as traffic concerns for persons who may attend future regattas held at the site. It is noted that the determination under review in the instant proceeding is not a zoning determination, but rather a permit applied for and issued under a local law, Chapter 325 (Wetlands) of the Southampton Town Code, which is more localized and limited in scope than a review of a determination under a zoning code. Specifically, the permit issued by the Board is for structures and not uses, such as in a zoning code.

The subject property retains its historical use as a public park, without the existence for sanitary facilities. The Town Code contains no requirement that park facilities must contain restroom facilities. Rather, the regulation of sanitary systems is an issue preempted by the Suffolk County Department of Health. Since no sanitary facilities are proposed for the MSA application, consideration of such is not within the Board's purview. The application that was before the Board did not seek a change in the sanitary facilities situation that has been in existence to date. With regard to potential traffic concerns, such impact was not part of the review of the project before the Board. Similarly, the use of the park for regattas is not for consideration for the Conservation Board permit.

The respondents seek to restrain the Town from taking any action to clear any portion of the affected area. To obtain preliminary injunctive relief, a movant must establish (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balancing of the equities in the movant's favor (see, CPLR 6312(c); Rowland v. Dushin, 82 A.D.3d 738, 917 N.Y.S.2d 702; S.J.J.K. Tennis, Inc. v. Confer Bethpage, LLC, 81 A.D.3d 629, 916 N.Y.S.2d 789. Such relief is a drastic remedy and "will not be granted unless clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing such an undisputed right rests upon the movant. First Nat'l Bank of Downsville v. Highland Hardwoods, Inc., 98 A.D.2d 924, 926, 471 N.Y.S.2d 360, 363. The respondents have not established that they have met the criteria for the imposition of preliminary injunctive relief.

In reviewing the Return of the application, proceedings, and Board determination, the petitioners have not established that they have a likelihood of succeeding on the merits. The documentary evidence demonstrates that the Board was in full compliance with the mandates of SEQRA, conformed their determination to the dictates of Chapter 325 of the Southampton Town Code governing the issuance of Wetlands permits, and compiled a substantial record upon which they issued a reasoned determination supported by the evidence in such record. It is noted that prior to the Board's SEQRA review, the project had previously been reviewed and approved by the New York State DEC. The petitioners failed to challenge the SEQRA determination of the DEC.

The petitioners have been unable to show that they would suffer irreparable harm if preliminary injunctive relief is not granted. The portion of the project reviewed by the respondent Board concerns itself only with tidal wetlands issues. The area for which the Board has approved clearing is a small portion of the overall project as proposed by MSA. Indeed, the Town has indicated that if the petitioner was granted injunctive relief, the Town would have no objection to immediately revegetating and restoring the area cleared to its original condition. Under such circumstances, the petitioner would not be irreparably harmed.

Neither have the petitioners demonstrated that the equities balance in their favor. To meet this requirement, the petitioners must show that the "irreparable injury to be sustained is more burdensome to the plaintiff than the harm caused to defendant through imposition of the injunction." McLaughlin Piven Vogel v. Nolan & Co., 114 A.D.2d 165, 174, 498 N.Y.S.2d 146, 152. Moreover, "[i]n ruling on a motion for a preliminary injunction, the courts must weigh the interests of the general public as well as the interests of the parties to the litigation." DePina v. Educational Testing Service, 31 A.D.2d 744, 745, 297 N.Y.S.2d 472, 474. In this matter, the interests of the general public are strong, inasmuch as an injunction would impair the use of a functioning municipal park.

With regard to the determination of the subject application, the respondent Board's interpretation of a local ordinance is entitled to great deference, and "judicial review is generally limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion." Falco Realty, Inc. v. Town of Poughkeepsie Zoning Board of Appeals, 40 A.D.3d 635, 636 835 N.Y.S.2d 398, 399. Courts will not review code interpretations "de novo" but rather will defer to a board's interpretation unless that interpretation is unreasonable or irrational. See, Frishman v. Schmidt, 61 N.Y.2d 823, 473 N.Y.S.2d 957; Ferraris v. Zoning Bd. of Appeals, 7 A.D.3d 710, 776 N.Y.S.2d 820.

Here, the Board's resolution issuing the wetlands permit contains sixty findings of fact and is detailed and comprehensive. The Board expressly stated that it had reviewed and considered the evidence advanced by the petitioners in opposition to the application. The resolution also found that the proposed project "has been designated to minimize alteration or impairment of the wetland, by minimizing clearing and disturbance."

The Board's Negative Declaration pursuant to SEQRA, which found that there would be no significant impacts on the environment as a result of the application, is also entitled to

deference. See, City of Rye v. Korff, 249 A.D.2d 470, 671 N.Y.S.2d 526, *appeal denied*, 92 N.Y.2d 808, 678 N.Y.S.2d 593. In its Negative Declaration, the Board identified numerous areas of potential “impacts to environmental quality, wetlands, aesthetic and scenic resources and community character of the Town”, as well as impacts to rare, threatened and endangered species, hazardous materials, water demand, traffic, air quality, increased noise, and public health. The record supports the Board’s claim that it took the requisite “hard look” at and analyzed these concerns prior to rendering its determination that the potential impacts would not be significant or adverse.

Under the circumstances presented and upon a review of the subject application, the Return of the proceedings and the Board’s written determination, the petitioners have failed to demonstrate that the Conservation Board’s decision and negative SEQRA declaration were arbitrary, capricious or unsupported by substantial evidence. Accordingly, the petition is denied and the Order to Show Cause is dismissed.

The foregoing constitutes the Order of this Court.

Dated: March 19, 2013

Hon. Denise F. Molia

HON. DENISE F. MOLIA A.J.S.C.