

**Trustees of Freeholders of Commonality of Town of
E. Hampton v Zoning Bd. of Appeals of Town of E.
Hampton**

2013 NY Slip Op 32484(U)

October 2, 2013

Supreme Court, Suffolk County

Docket Number: 38647/2012

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK**I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
JusticeThe Trustees of the Freeholders of Commonality
of the Town of East Hampton,

Plaintiff,

-against-

The Zoning Board of Appeals of the Town of East
Hampton, Joshua Young and Christine Lemieux,

Defendants.

Index No.: 38647/2012Motion Sequence No.: 003; ContinuedMotion Date: 2/13/13Submitted: 6/26/13Motion Sequence No.: 004; MDMotion Date: 3/13/13Submitted: 6/26/13Attorney for Plaintiff:Maclachlan & Eagan, LLP
241 Pantigo Road
East Hampton, NY 11937Defendants Pro Se:Joshua Young
157 Mulford Lane
Amagansett, NY 11930Christine Lemieux
157 Mulford Lane
Amagansett, NY 11930Attorney for DefendantsThe Zoning Board of Appeals
of the Town of East Hampton:Smith, Finkelstein, Lundberg,
Isler and Yakaboski, LLP
456 Griffing Avenue
Riverhead, NY 11901Clerk of the Court

Upon the following papers numbered 1 to 23 read upon these motions to dismiss the petition:
Notice of Motion and supporting papers, 1 - 13; Answering Affidavits and supporting papers, 14 -
15; 16 - 21; Replying Affidavits and supporting papers, 22 - 23; it is



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ORDERED that this motion by the respondents for an order dismissing the petition is denied.

In this proceeding, petitioner, the Trustees of the Freeholders and Commonality of the Town of East Hampton (the Trustees), seeks a judgment pursuant to CPLR article 78 vacating and annulling a final determination dated November 30, 2012 by respondent Zoning Board of Appeals of the Town of East Hampton which granted variances and a Natural Resources Special Permit to respondents Joshua Young and Christine Lemieux for the construction of a 147-linear foot stone armor revetment backed by a 32-foot vinyl seawall.

Respondents Joshua Young and Christine Lemieux (respondents Young and Lemieux) are the owners of a parcel of real property located at 157 Mulford Lane, Amagansett, New York. The parcel is located in the Hamlet of Amagansett, Town of East Hampton, New York and has a Suffolk County Tax map number of 0300-084.00-02.00-006.000. The subject property has a lot size of 15,960 square feet, is bordered on the north by Gardiner's Bay, and contains tidal and freshwater wetlands, barrier dunes, surface waters, and beach vegetation. The property is located in the A Residence zoning district and in the Coastal Erosion Overlay District Zone 2 and the Flood Hazard Overlay District. Respondents Young and Lemieux purchased the property in late 2009, at which time the property was improved with a one-story, approximately 1,200-square-foot single family residence with 964-square-foot of decking.

Respondents Young and Lemieux filed an application in the fall of 2011 with the respondent Zoning Board of Appeals of the Town of East Hampton (ZBA) seeking a Natural Resources Special Permit (NRSP) pursuant to Town of East Hampton Zoning Code (Town Code) § 255-4-20 and a variance from Town Code § 255-3-85 to demolish the existing residence and construct a new 1,719-square-foot residence on pilings in a more landward location and to construct a rock revetment coastal erosion control structure along the northern, seaward, and western portions of the subject property. Town Code § 255-3-85 prohibits the construction, placement or installation of new erosion control structures in Zone 2. By determination dated April 9, 2012, the ZBA denied that portion of the application for the proposed coastal erosion structure, and granted that portion of the application to demolish the existing house and construct a new 1,719-square-foot residence on pilings in a more landward location. Respondents Young and Lemieux subsequently filed a new application with the ZBA in June 2012 for variances and a NRSP for the subject 147-foot stone armor revetment. The Trustees submitted a letter dated September 27, 2012 to the ZBA with respect to this second application advising, among other things, that the proposed stone armor revetment would extend approximately 14 feet below the mean high water mark thus requiring the Trustees' approval and requested that any ZBA approval of the second application be conditioned upon receipt of a Trustee Permit. The ZBA granted the second application by determination dated November 30, 2012. Notably, said determination indicated in its New York State Environmental Quality Review Act (SEQRA) determination that the lead agency was the ZBA, that the SEQRA classification was unlisted, and that there was a negative declaration finding.

The Trustees subsequently commenced the instant CPLR article 78 proceeding challenging

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the ZBA's November 30, 2012 determination as arbitrary and capricious, contrary to law, and an abuse of discretion. In their petition, the Trustees claim that they represent the original government of East Hampton, created by King James II through the Dongan Patent dated December 9, 1686, that they govern the Commonlands between the western border of the Town of East Hampton and the eastern edge of Napeague, that "the Commonlands include the Bottomlands, Beaches and Intertidal zones" as well as "the Commonlands between the high water line and low water line along Gardiner's Bay (Napeague Bay)." In addition, the Trustees assert that their "ownership and governance of the Commonlands between the high water and low water marks along Gardiner's Bay is one of the reasons Petitioner has the requisite legal standing to commence and maintain this Special Proceeding." The Trustees also assert that the deed history for the respondents Young and Lemieux's property confirms that the northernmost boundary has at all times been delineated by "the high water line of Gardiner's Bay."

The Trustees challenge the November 30, 2012 determination on grounds including that 1) the subject 147-foot stone armor revetment is substantially similar to the coastal erosion structure that was denied by the ZBA in its prior determination 2) the ZBA acted ultra vires by illegally permitting respondents Young and Lemieux to erect a substantial portion of the subject 147-foot rock revetment seaward of the "high water line" of Gardiner's Bay (Napeague Bay) and therefore seaward of the northern boundary of the Young property on property that is not part of their lot as defined in the Town Code; 3) the determination granted a variance and a NRSP based in whole or in part on the ZBA's erroneous findings that the existing residence on the respondents Young and Lemieux's property was in "imminent danger" and that the threatened loss, destruction or severe damage to the existing residence cannot reasonably be prevented by some "alternative means" to permitting the construction of a coastal erosion structure when in fact the ZBA had previously granted them the necessary relief to demolish the existing residence and construct a new 1,719-square foot residence on pilings in a more landward location; 4) the ZBA failed to identify the relevant areas of environmental concern associated with the 147-foot rock revetment, take a "hard look" at them, and make a "reasoned elaboration" of the basis for its negative declaration in violation of SEQRA; and 5) the ZBA failed to set forth any change in law or in circumstances that warranted a departure from its denial of the prior application for a nearly identical rock revetment seven months earlier.

Respondents now move to dismiss the petition upon the objection in point of law that the documentary evidence indicates that petitioner has no standing inasmuch as the approved revetment is not located on property owned by the Trustees and thus the Trustees cannot claim special damages. They assert that the Trustees' sole basis for standing is their claim that they own the area between the high and low tide lines of Gardiner's Bay north of the subject property and that the approved revetment would extend onto their property. Respondents claim that the Trustees lack standing to commence this proceeding inasmuch as the land under water directly to the north of, and abutting, the subject property, known as tax lots 3 and 4 on the Suffolk County Tax Map, is not owned by the Trustees. Instead, lot 3 is owned by the Town of East Hampton, having acquired it from Gerald and Barbara Preiser in 2003, and lot 4 is privately owned by Gary Ryan, who acquired it in 2007 from

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Betty Sullivan as trustee of the Betty S. Sullivan Revocable Trust. In addition, respondents assert that the approved revetment is located significantly south of the subject property's common boundary with lots 3 and 4, and that although lots 3 and 4 are currently flooded, the record owners retain title to the land. In support of their motion, respondents submit the notice of petition, petition and the subject determination, the aforementioned Suffolk County Tax Map, the deeds of lots 3 and 4, and the survey of the subject property prepared for respondents Young and Lemieux indicating the location of the proposed stone revetment. Respondents Young and Lemieux submit their attorney's affidavit in support concurring with and joining in the motion to dismiss.

In opposition to the motion, the Trustees contend that their standing to commence and prosecute this special proceeding can be established on numerous bases, not just common-law standing as an "aggrieved person," as respondents claim. With respect to common-law standing, the Trustees contend that they are an "aggrieved person" as they will suffer a direct injury different from the public at large. They argue that respondents Young and Lemieux's survey shows that the proposed revetment is to be located within the Trustees' Commonlands, and the Trustees are the largest land owner in the immediate vicinity, and said injury falls within the "zone of interest" sought to be promoted or protected by provisions of the Town Code and State Law relating to the protection and preservation of coastal areas and enforcement of and adherence to procedures relating to proposed actions within coastal areas, including the proposed installation of hard structures northward of the mean high water line of Gardiner's Bay. In addition, the Trustees contend that respondents Young and Lemieux were required to seek and obtain a permit from the Trustees for the proposed revetment inasmuch as, based on the aforementioned survey, a substantial portion of the proposed revetment is to be located within the Trustees' "Commonlands" jurisdiction. They also argue that the Suffolk County Tax Map, on which respondents rely, depicts two tax lots north of the subject property which are currently completely under water and thus no longer exist.

Moreover, the Trustees contend that the ZBA was statutorily required to provide the Trustees with the opportunity to participate in the assessment of whether the proposed revetment was consistent or inconsistent with the Chapter 150 of the Town Code known as the "Town of East Hampton Local Waterfront Revitalization Program Consistency Review Law" (LWRP) inasmuch as the Planning Department effectively deemed the proposed revetment to be inconsistent with the LWRP pursuant to Town Code § 150-50. The Trustees further contend that they have standing under the Town Code and SEQRA based on their status as a duly elected governmental agency, that is, an "involved agency" under SEQRA pursuant to 22 NYCRR § 617.2 (s), or at the very least an "interested agency" under SEQRA pursuant to 22 NYCRR § 617.2 (t). In support of their opposition, the Trustees submit a portion of the Findings and Objectives section of the resolution adopting coastal erosion overlay district legislation (Chapter 150 of the Town Code), said chapter, and aerial photographs of the subject property.

In reply, respondents argue that the Trustees cannot deny that the sole basis alleged in the petition for standing is ownership of the area between the high and low tides (Public Trust property) adjacent to the subject property, and that the deeds and tax maps establish that the Trustees do not

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have title to the adjacent properties. In addition, respondents argue that there is no legal authority to support the Trustees' position that the submerged lots no longer exist, particularly since the aerial photographs clearly show a house in the water on Ryan's parcel. Respondents also argue that inasmuch as the Trustees do not own the adjacent property, they cannot benefit from a presumption of injury different from the public at large by the ZBA determination. They further argue that, in any event, the Trustees' alleged ownership of the area between the high and low tide lines would not entitle them to the presumption of special damages inasmuch as said area, which is constantly in flux, cannot be lost or damaged by any accretion or erosion that could occur as a result of the installation of the revetment. Respondents add that neither Chapter 150 of the Town Code nor SEQRA provide the Trustees with any independent basis for standing, and that inasmuch as title to the land adjacent to the subject property is not owned by the Trustees, their powers, rights and privileges have not been diminished in contravention of the Findings and Objectives section of the resolution adopting Chapter 150 of the Town Code. Respondents also note that Chapter 150 gives no right of enforcement of its provisions to the Trustees and that the board reviewing the application, here the ZBA, is only required to consider the Planning Department's recommendation and is not required to condition its decisions based on the approval of any other agency, including the Trustees. Respondents emphasize that the Trustees did not seek to be the agency in charge of making the LWRP findings with respect to this property and thus waived its agency position, and that Town Code §§ 150-50 (C) and (H) relied on by the Trustees do not provide them any statutory right or independent basis to challenge the ZBA's decisions. Lastly, respondents argue that to demonstrate standing for SEQRA challenges, the Trustees must show special injury not suffered by the public at large; that SEQRA does not provide an "involved agency," which by definition pursuant to 6 NYCRR § 617.2 (s) has the ability to issue approvals for the project, with any independent basis for standing to sue another "involved agency" inasmuch as it cannot be aggrieved by the decision of another "involved agency" as it will also be reviewing the same application; and that the Trustees do not acquire standing merely as an "interested agency" under SEQRA.

On a motion pursuant to CPLR 7804 (f) to dismiss a petition upon an objection in point of law, only the petition is to be considered and all of its allegations are deemed to be true (*see Matter of Zaidins v Hashmall*, 288 AD2d 316, 732 NYS2d 870 [2d Dept 2001]; *Matter of De Paoli v Board of Educ.*, 92 AD2d 894, 459 NYS2d 883 [2d Dept 1983]; *see also Matter of Long Is. Contractors' Assn. v Town of Riverhead*, 17 AD3d 590, 793 NYS2d 494 [2d Dept 2005]). "The standing of a party to seek judicial review of a particular claim or controversy is a threshold matter which, once questioned, should ordinarily be resolved by the court before the merits are reached" (*Hoston v New York State Dept. of Health*, 203 AD2d 826, 611 NYS2d 61 [3d Dept 1994], *lv denied* 84 NY2d 803).

Generally, standing to challenge an administrative action requires a showing that the action will have a harmful effect on the challenger in that the challenger will suffer direct injury or aggrievement different from that suffered by the public at large, and that the interest or injury asserted is within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted (*see Society of Plastics Indus. v County of*

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Suffolk, 77 NY2d 761, 773-774, 570 NYS2d 778 [1991] *Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 10, 377 NYS2d 451 [1975]). A nearby property owner may have standing to challenge a proposed zoning change because an adverse effect or aggrievement may be inferred from proximity thereby enabling a nearby property owner to maintain an action without proof of actual injury (*Matter of Sun-Brite Car Wash v Board of Zoning & Appeals*, 69 NY2d 406, 413-414, 515 NYS2d 418 [1987]; see *Zupa v Paradise Point Assn., Inc.*, 22 AD3d 843, 803 NYS2d 179 [2d Dept 2005]). The proximity alone permits an inference that the challenger possesses an interest or injury different from other community members. However, close proximity alone is insufficient to confer standing. A close neighbor must also demonstrate that their interest is within the “zone of interest” protected by the zoning laws to establish standing to enjoin a zoning ordinance violation (*id.*). Standing to raise a SEQRA claim involves the following variation: a SEQRA challenger must “demonstrate that it will suffer an injury that is environmental and not solely economic in nature” (*Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, 76 NY2d 428, 433, 559 NYS2d 947 [1990]; see *Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 687, 642 NYS2d 164 [1996]). Such an injury may arise not only from proximity to the area that is the subject of or affected by the administrative action but also from aesthetic or environmental well-being derived from use or visits to the area (see *Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 890 NYS2d 405 [2009]; see also *In re Shepherd*, 103 AD3d 901, 905-906, 960 NYS2d 171 [2d Dept 2013]).

Here, the certified survey indicates that the portion of the proposed revetment lying north of the mean high water mark is on the private property of respondents Young and Lemieux and adjacent to the northerly submerged properties deeded to the Town of East Hampton and Ryan. The petition asserts that the Town of East Hampton Planning Department in the Environmental Assessment Form (EAF) prepared with respect to the prior application found, among other things, that the construction of the proposed revetment had a high potential of accelerating the erosion to the west of the subject property and had the potential to cause significant adverse impacts to the primary dune system, the beach and the wetlands adjoining the subject property. The petition further asserts that in the EAF prepared with respect to the second application, the Planning Department reiterated many, if not all, of the concerns raised in the prior EAF. The Trustees by alleging potentially significant adverse impacts to the beaches that are under their control as part of the “the Commonlands” in the western and eastern proximity of the proposed revetment claimed “direct harm, injury that is in some way different from that of the public at large” and established their standing to challenge the approval of the proposed revetment (see *In re Shepherd*, 103 AD3d 901, 905-906, 960 NYS2d 171; *Matter of Agoglia v Benepe*, 84 AD3d 1072, 924 NYS2d 428 [2d Dept 2011]; *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773-774, 570 NYS2d 778). Said demonstration obviated any need of the Trustees to show that the proposed revetment was to be located on their lands north of the high water line of Gardiner’s Bay, or that their “Commonlands” actually abutted the subject property on its northerly side. Thus, the issues of the existence or current ownership of lots 3 and 4 are rendered irrelevant. In addition, the Trustees established standing under SEQRA inasmuch as their alleged injuries fell within the zone of interests to be protected by SEQRA as well as the Town’s LWRP and zoning laws (see *Matter of Youngewirth v Town of Ramapo Town Bd.*, 98 AD3d 678, 950 NYS2d

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157 [2d Dept 2012]; *Matter of Shapiro v Town of Ramapo*, 98 AD3d 675, 950 NYS2d 154 [2d Dept 2012], *lv to appeal dismissed* 20 NY3d 994, 959 NYS2d 123 [2013]). Based on the foregoing, the motion to dismiss is denied.

The respondents shall serve their answer to the petition within five days after service upon them of a copy of this order with notice of its entry, after which time any party may renote the matter for hearing pursuant to CPLR 7804 (f). Upon the service and filing of such notice, that party shall also serve upon the clerk of the special term a copy of this order, and the clerk, upon receipt, shall assign the petition a new motion sequence number without requiring the payment of a new motion fee.

Dated: 10/2/2013


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

_____ FINAL DISPOSITION _____ X _____ NON-FINAL DISPOSITION