

**Matter of Wagner v Zoning Bd. of Appeals of the
Town of E. Hampton**

2014 NY Slip Op 33327(U)

December 15, 2014

Supreme Court, Suffolk County

Docket Number: 13-25165

Judge: Jerry Garguilo

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This opinion is uncorrected and not selected for official publication.

MEMORANDUM

COPY

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 47

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 In the Matter of the Application of :
 :
 DAVID WAGNER, :
 :
 : Petitioner, :
 :
 For a Judgment under Article 78 of the :
 Civil Practice Law and Rules :
 :
 - against - :
 :
 ZONING BOARD OF APPEALS OF THE :
 TOWN OF EAST HAMPTON :
 :
 : Respondent. :
 -----X

By: Garguilo, J.S.C. *gh*
 Dated: December 15, 2014
 Index No. 13-25165
 Mot. Seq. # 001- MD; CDISPSUBJ
 Return Date: November 15, 2013
 Adjourned: June 25, 2014

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In this CPLR article 78 proceeding, petitioner David Wagner ("Wagner") seeks to annul the determination dated August 19, 2013 of respondent Zoning Board of Appeals of the Town of East Hampton ("the ZBA") which denied Wagner's application for a Natural Resources Special Permit pursuant to Town Code § 255-4-20 for the construction of a proposed approximately 90-linear-foot erosion control structure on his property, as arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, and made in excess of the ZBA's jurisdiction.

Wagner owns a parcel of property located at 237 Kings Point Road in the Town of East Hampton, New York in an area known as Clearwater Beach. The parcel is designated on the Suffolk County Tax Map as 0300-024.00-01.00-032.000. It is in the B Residence zoning district, in the Coastal Erosion Overlay District Zone 4, and in the FEMA VE Velocity X flood zones. The property has approximately 90 feet of frontage along Gardiners Bay to the north, is improved with a one-story residence, and has a lot area of 29,643 square feet as measured to the mean high water line and a lot area of 24,963 square feet as measured to the top of the bluff fronting Gardiners Bay. The lot adjacent to the east of his property, owned by Virginia Schmidt ("Schmidt"), is the only other unprotected property and further east there is an indentation of the shoreline and the bluff disappears and there is a low, sheltered area known as Low Hollow. Wagner filed an application with the ZBA for a Natural Resources Special Permit ("NRSP") pursuant to Town Code § 255-4-20 for the construction of a proposed approximately 90-linear-foot erosion control structure on his

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property that would be located 35 feet landward of the mean high water line and consist of: i) an eight-foot high, eight-inch thick concrete retaining wall angled approximately 10 degrees to absorb impact and reduce deflection with tie-backs to large concrete bin blocks to provide additional lateral support, ii) a four-foot by two-foot wide poured concrete footing with concrete key and 10 six-foot timber piles for wall support, and iii) two to three ton native stones placed at the toe of the revetment to reduce wave impact, reflection and scour. The project also involves the import of approximately 300 cubic yards of clean, locally sourced sand to fill the void between the revetment and the remaining bluff meeting the remaining landward bluff to be stabilized with native plantings and the import of beach compatible sand for an 18-inch layer of sand with beach grass plantings covering the toe stones. The proposed revetment is to be set back significantly from the adjacent westerly bulkhead. The ZBA declared itself lead agency under SEQRA and classified the proposed project as an unlisted action. Schmidt also applied for an NRSP to install an identical revetment to function together with Wagner's as a single 180-foot concrete revetment.

A public hearing on Wagner's application was held on June 4, 2013. Petitioner, his expert engineer Drew Bennett, and his neighbors spoke in support of the application at said hearing. By determination dated August 19, 2013 the ZBA denied Wagner's application for a NRSP. Notably, the ZBA also denied the Schmidt application.

By his petition, Wagner asserts that his property is located in the Coastal Erosion Overlay District Zone 4 for which, according to Town Code § 255-3-82 (D), erosion control structures in many cases are the sole remaining protection against flooding and erosion. He informs that the entire shoreline immediately to the west of his property, approximately 2,545 linear feet or nearly half a mile, is entirely protected by bulkheads, rock revetments or their combination and that the approximately 270 linear feet of bulkheads fronting three lots immediately to his west was the result of a unified application by his westerly neighbors to the ZBA, which was approved by resolution dated August 2, 1995. Wagner emphasizes that the ZBA found in 1995 that attempts to buttress the bluffs with clean fill, a "soft solution," was costly and ineffective. In addition, Wagner asserts that the continuous half-mile of bulkheaded shoreline to the west leaves his property vulnerable to increased erosion as it is the first unprotected lot located downdrift from said properties and informs that he sent a letter to the ZBA when it was considering his neighbors' application of his property's vulnerability and his expectation that if their application were granted that a future application by him would also be granted by the ZBA. Wagner also asserts that in the fall of 2012 his property's bluff area sustained substantial damage during Superstorm Sandy, which caused severe scouring around the return on the eastern edge of the bulkhead of the adjacent westerly property washing away approximately 20 feet of Wagner's coastal bluff, leaving an approximately 12-foot high escarpment along Gardiner's Bay, and threatening his cesspool and residence.

Wagner argues that the ZBA determination is arbitrary and capricious in that they required a showing by him that "soft solutions" had actually failed, which is not a requirement of the Town Code, that in any event, the ZBA had determined in 1995 that "soft solutions" attempted by the westerly neighbors were ineffective; that the frequency of erosion is not a consideration for a NRSP under Town Code § 255-5-51; that the ZBA admitted that the prior-approved bulkheads were exacerbating factors for the erosion but did not weigh this factor in Wagner's favor; that the ZBA raised concerns with the design of the proposed revetment in a conclusory fashion based solely on its lack of familiarity with it; and that the Wagner and Schmidt applications demonstrated that there would not be significant adverse impacts to easterly properties.

In a CPLR article 78 proceeding to review a determination of a zoning board of appeals, a zoning board's interpretation of its zoning ordinance is entitled to great deference, and judicial review is limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion (*see Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613, 781 NYS2d 234 [2004]; *Matter of East Hampton Indoor Tennis Club, LLC v Zoning Bd. of Appeals of Town of E. Hampton*, 83 AD3d 935, 937, 921 NYS2d 308 [2d Dept 2011]; *Brancato v Zoning Bd. of Appeals of City of Yonkers, N.Y.*, 30 AD3d 515, 515, 817 NYS2d 361 [2d Dept 2006]). A zoning board's determination shall be upheld if it is rational and not arbitrary and capricious (*see Matter of Sasso v Osgood*, 86 NY2d 374, 384-85, 633 NYS2d 259 [1995]; *Matter of Bassano v Town of Carmel Zoning Bd. of Appeals*, 56 AD3d 665, 868 NYS2d 677 [2d Dept 2008]). A determination is rational "if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition" (*Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 772, 809 NYS2d 98 [2005]; *see Matter of Ifrah v Utschig*, 98 N.Y.2d 304, 308, 746 NYS2d 667 [2002]). "When reviewing the determinations of a Zoning Board, courts consider 'substantial evidence' only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination" (*Matter of Sasso v Osgood*, 86 NY2d 374, 384 n. 2, 633 NYS2d 259 [1995]; *see Matter of Matejko v Board of Zoning Appeals of Town of Brookhaven*, 77 AD3d 949, 949, 910 NYS2d 123 [2d Dept 2010]; *see also Matter of Campbell v Town of Mount Pleasant Zoning Bd. of Appeals*, 84 AD3d 1230, 1231, 923 NYS2d 699 [2d Dept 2011]). It so follows that the determination of a zoning board should be sustained upon judicial review if it is not illegal or arbitrary and capricious, and it has a rational basis (*see Matter of Sasso v Osgood*, 86 NY2d at 384, 633 NYS2d 259; *Matter of Carrano v Modelewski*, 73 AD3d 767, 899 NYS2d 634 [2d Dept 2010]).

Initially, the Court finds that the ZBA had jurisdiction to render said determination inasmuch as Town Code § 255-5-51 (A) provides that NRSP's "shall be issued by the Board of Appeals, which agency shall have exclusive and complete jurisdiction over the administration of such permit in accordance with the provisions of this section."

Town Code § 255-5-51 (F) provides:

Erosion control structures. No natural resources special permit shall be issued for the construction, placement, installation, repair, reconstruction, replacement, or alteration of an erosion control structure unless the application for such permit, in addition to complying with the general requirements for issuance of special permits and the requirements of the preceding subsection regarding coastal structures, and subject to the provisions of § 255-3-85 hereof, satisfies the following requirements:

(1) If the application involves a new erosion control structure, the applicant shall demonstrate that erosion control on the project site cannot adequately be accomplished by means of a coastal restoration project, as defined herein, with periodic renourishment or renewal of sand or other materials.

(3) The construction, installation, or other work proposed for the erosion control

structure, as well as future repair, maintenance and restoration of the same, shall not:

- (a) Interfere with the littoral transport of sand or other sediment, so as to cause substantial damage to or measurable increase in erosion of the project site or downdrift beaches, dunes, bluffs, or shoreline.
 - (b) Cause the loss of identified habitat for important wildlife or native vegetation, including marine life or marine habitat.
 - (c) Exacerbate flood damage by generating floodborne flotsam.
- (4) The erosion control structure shall be designed and constructed according to generally accepted engineering principles, such that the structure will have a reasonable probability of controlling erosion on the project site for a period of at least 30 years.

A review of the determination dated August 19, 2013 reveals that the ZBA was concerned about the effects and effectiveness of the unique proposed poured-in-place concrete erosion control structure with rebar set in a separate concrete footer, that has never been used in any residential areas of the Town, rather than the commonly-used navy-style bulkhead. (Notably, the New York State Department of Environmental Conservation had expressed a similar concern in its letter dated July 16, 2013 to Wagner's engineer stating "[s]taff has concerns regarding the use of concrete as a material for wall construction, and also for certain aspects of the sea wall design. In particular, staff is concerned for potential undermining of the wall and structural failure because of inadequate ground penetration and discontinuity at elevation +3.5MSL [joint between wall and footing].") The ZBA noted after review of photographs submitted into the record that the subject property's west side rather than its east side appeared to be eroding, which they ascribed to the existing adjoining westerly bulkhead and return, and that an erosion control structure was unnecessary inasmuch as the erosion to the subject property was episodic and not chronic as it occurred as a result of one super storm, Hurricane Sandy. In addition, the ZBA found that the proposed structure together with the easterly neighbor's proposed structure had a significant potential to completely diminish the values of the beach and bluff system and to increase erosion on the project site or on downdrift unarmored properties. Moreover, the ZBA indicated that the Town Code had changed since Wagner's neighbors to the west applied for and received approval to build their bulkheads and that Wagner and his experts had not satisfied the current Town Code requirements as they failed to sufficiently demonstrate with specific information that "soft solutions" such as sand refurbishment, sand bags or coconut logs had been attempted by either Wagner or his neighbors and would not be effective.

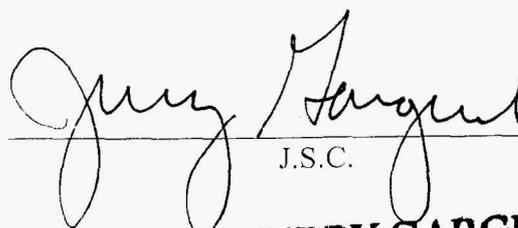
Here, the determination of the ZBA to deny Wagner's application for a NRSP was neither arbitrary nor capricious, had a rational basis, and was supported by substantial evidence (*see Matter of Foti v Town of East Hampton, NY, ZBA*, 60 AD3d 1057, 876 NYS2d 137 [2d Dept 2009]; *cf. Matter of Hach v Zoning Bd. of Appeals of Town of East Hampton*, 287 AD2d 500, 731 NYS2d 219 [2d Dept 2001]; *Matter of Bond v Zoning Bd. of Appeals of Town of East Hampton*, 272 AD2d 612, 708 NYS2d 635 [2d Dept

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2000]). Based on the letter from the DEC to Wagner's engineer, the ZBA's concerns regarding the use of concrete were not unfounded and went beyond mere unfamiliarity. Moreover, the ZBA's explanation for denying Wagner's application despite having granted his westerly neighbors NRSP's in 1995 was rational and satisfactory (see *Matter of Foti v Town of East Hampton, NY, ZBA, supra*). The westerly neighbors had all sought to build a common timber bulkhead which would be armored at the toe by one to three ton stones. The Town Code in 1995 provided that an NRSP required "an explicit finding by the local agency that similar results are impossible at the subject site through the use of nonstructural erosion control techniques and practices" (see former Town Code § 153-5-50 [6]), whereas the current Town Code puts the onus on the applicant to show "that erosion control on the project site cannot adequately be accomplished by means of a coastal restoration project, as defined herein, with periodic renourishment or renewal of sand or other materials" (see Town Code § 255-5-51 [F] [1]). The ZBA indicated that the subject property is in the Coastal Erosion Overlay District Zone 4, "[w]ithin this zone the loss of natural resources and features such as bluffs, dunes, and beaches means that in many cases erosion control structures provide the only remaining protection against flooding and erosion" (see Town Code § 255-3-82 [D]). But the Town Code does not automatically mandate the construction of erosion control structures in said district and instead requires the issuance of a NRSP (see Town Code § 255-3-85 [B][4]), which requires satisfaction of the aforementioned requirements of Town Code § 255-5-51 (F). The ZBA found the project site of Wagner and Schmidt to be different in terms of erosion from that of the westerly neighbors, as admitted by Wagner in his letter to the ZBA in 1995. Thus, the ZBA's failure to adhere to or incorporate the findings in the 1995 determination that the attempts by Wagner's westerly neighbors to bring in clean fill as a soft solution had failed at great expense did not render its determination arbitrary and capricious. The ZBA considered the extent of Wagner's current loss, as found by the ZBA to be an average of 15 feet in the western half of the property with no change along the eastern property line, as well as the potential reoccurrence of loss, chronic as compared to episodal, in its determination as to whether an erosion control structure is warranted. The extent of and the frequency of erosion are relevant considerations for the issuance of an NRSP.

Accordingly, the petition is denied and the proceeding is dismissed.

Submit judgment.


J.S.C.

12/15/14

HON. JERRY GARGUILO