

**403 Ocean Walk, LLC v Board of Zoning Appeals of  
the Town of Brookhaven**

2018 NY Slip Op 33455(U)

December 21, 2018

Supreme Court, Suffolk County

Docket Number: 17-2689

Judge: William J. Condon

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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

403 OCEAN WALK, LLC,  
  
Plaintiff,  
  
- 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

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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.

Petitioner, 403 Ocean Walk, LLC, brings this petition pursuant to CPLR Art. 78 by order to show cause against Respondent, the Board of Zoning Appeals of the Town of Brookhaven, seeking relief in the form of mandamus directing Respondent to consider Petitioner's application for a dune walk over for their property at 4 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 Petitioner to build a dune walkover for the subject premises at 4 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").

Petitioner applied for a Coastal Erosion Hazard Permit with the DEC asking to perform seven activities. Of those seven activities to be performed, five were granted to petitioner under the CEHP, including the proposed dune walkover. On or about October 19, 2016 Petitioner 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. The permit application submitted did not indicate that a walkover had been present on the Property and no evidence has been presented indicating the prior existence of a walkover. The building permit was further denied for the construction of the southern deck and for the walkover because it violated the minimum side and rear yard setback restrictions pursuant to Town Code § 85-381(F) and (G), as well as for lot coverage violation. While lot occupancy under the proposed building permit was reduced from 72.6% to 68.8%, it remained in

violation of the 35% limit under federal and local limits. Petitioner did not assert what the lot occupancy would be with only the dune walkover as Petitioner did not submit a new building permit application for just the dune walkover, which Petitioner could have done. Petitioner is seeking only to overturn the BZA Determinations for the proposed walkover but has not submitted a revised application for the walkover, nor a survey or lot coverage for the walkover.

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. The difficulty was not self-created, as the changes that are necessary were precipitated by Superstorm Sandy, a natural event. In applying the remaining four factors, the BZA found the variance requested was substantial. The permit application as submitted was for a proposed lot coverage of 68.8% 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 Petitioner's 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. Petitioner has argued the County approved the construction of the dune walkover for Petitioner and the prior approval of dune walkovers to other property owners demands the approval of Petitioner's 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. While the Town has approved dune walkovers in other cases, those cases are to be distinguished from Petitioner. 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 judgement 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 Petitioner's 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 Petitioner's application for a dune walkover and considered all aspects of the proposal. Petitioner argues the 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. Petitioner is 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, Petitioner maintains 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.

The foregoing constitutes the decision and Order of the Court.

Dated: 12/21/18

William J. Condon

Hon. William J. Condon  
Justice Supreme Court

FINAL DISPOSITION     NON-FINAL DISPOSITION