

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

In the Matter of the Application of
Vincent Matassa,

Petitioner,

For a Judgment under Article 78 of the
Civil Practice Law and Rules

-against-

Board of Trustees of the Village of Greenport,

Respondent.

Motion Sequence No.: 003; CD; SUBJ

Motion Date: 12/14/16

Submitted: 3/22/17

Index No.: 09067/2015

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Clerk of the Court

In this article 78 proceeding, petitioner seeks a judgment vacating and annulling the resolution adopted by respondent Board of Trustees of the Village of Greenport ("Trustees") on January 28, 2015, which denied petitioner's application to repair and extend by eight feet an existing dock assembly off the southern edge of petitioner's property in order to maintain navigable access to surface waters of Greenport Harbor, and for the installation of a dolphin piling 18 feet from the end of the dock.

The petition contains three causes of action. The first cause of action alleges that the Trustees exceeded their jurisdiction in denying the wetlands permit. The second cause of action alleges that the Trustees' determination was irrational and unlawful, as it did not provide any legitimate basis for their decision. The third cause of action alleges interference with petitioner's riparian right to wharf out to navigability, and that the respondent's decision was arbitrary and capricious. The first cause of action was dismissed pursuant to an order of this Court dated July 8, 2016.

Petitioner applied to the Board of Trustees of the Village of Greenport for a wetlands permit pursuant to Chapter 142 of the Greenport Village Code, entitled "Wetlands, Floodplains and Drainage" ("Wetlands Code"), to repair and extend the existing dock by approximately eight feet, and to install a dolphin piling 18 feet from the end of the dock. The Village adopted Chapter 139, entitled Waterfront Consistency Review, in 1988 and a Local Waterfront Revitalization Plan in 1996. The purpose of Chapter 139 is to implement the consistency review regulations and procedures for the Village of Greenport Local Waterfront Revitalization Program, thereby incorporating environmental factors and consideration of coastal resources into existing planning and decision making processes. The Village adopted Chapter 142, which established the Village's jurisdiction over its wetland areas, including Sterling Creek, in 1976. Section 142-5(C) of the Village Code provides that construction of a dock in the Village requires the issuance of a special permit known as a wetlands permit by the Board of Trustees. Section 142-8(B) of the Village Code provides that any application for a wetlands permit must be forwarded to the Conservation Advisory Council ("CAC") for review and recommendation for action to the Board of Trustees. This section also requires the Trustees to hold a public hearing on the application, render a decision thereon, and issue written findings of facts and conclusions.

Petitioner is the owner of the property which is the subject of this proceeding, as well as an adjoining lot. The upland portions of these properties on which residential structures are or will be located are situated in the unincorporated Greenport area of the Town of Southold, while the existing docks for such properties are located in Sterling Creek, which is located in the Village of Greenport. Prior to the subject application, petitioner applied for a permit to demolish and replace the single-family home on the property, for which he received conditional approval from the Town of Southold on January 23, 2013. Petitioner filed an application with the New York State Department of State for a consistency review of the proposed dock. The application requested permission to "to extend the existing dock catwalk on the property by roughly eight feet to maintain navigability to and from the dock." No mention was made of the proposed dolphin piling. The Department of State issued a consistency letter dated March 7, 2013. The petitioner also filed a permit application with the New York State Department of Environmental Conservation ("DEC") with regard to the proposed dock. A permit was issued by the DEC on April 2, 2013 for reconstruction, extension and repair of existing legally constructed, functional open-pile catwalks up to 4 feet in width, and to install or replace ramps and floats with associated float pilings and up to two mooring piles. The permit language does not include the proposed dolphin piling. However, the plans attached to the permit do show the dolphin pilings. The short Environmental Assessment Form filed as part of the application did not list respondent as an involved agency. Petitioner also applied to the US Army Corps of Engineers ("ACE") for a permit to build the dock pursuant to the Federal Rivers and Harbor Act (33 USC § 403). The initial application also failed to list the dolphin piling as part of the application. However, the permit issued by the ACE for the dock does include the dolphin piling. The petitioner filed a wetlands permit application with the Village on November 12, 2012, stating that the proposal was to replace the existing dock and extend the dock "roughly eight feet" in order to maintain safe navigation to and from the dock assembly; installation the dolphin piling was, once again, not mentioned. Subsequently, a revised plan dated March 21, 2013 was filed showing the dolphin piling.

The Trustees, by resolution dated May 28, 2013, scheduled a public hearing on the application for June 24, 2013, and gave proper public notice thereof. The CAC reviewed the application, and, by letter, notified the Trustees that a site inspection had been conducted and sent a list of requests for additional information, which was supplied. The CAC thereafter recommended that petitioner's application be denied. The public hearing on the application began on June 24, 2013, continued on July 22, 2013, and concluded on December 22, 2014. At the December 22, 2014 public hearing, a representative of petitioner spoke on behalf of the application, testifying that the eight-foot dock extension was necessary to meet DEC regulations, and that the current dock did not do so. At low tide, the current dock only provides a water depth of 1.4 to 1.9 feet at low tide, whereas the proposed dock would have a minimum water depth at 2.5 feet at low tide and would meet DEC requirements for navigability. A neighboring property owner opposed the application and showed the Trustees a photograph of a "For Sale" sign at the subject property offering a new home with a "deepwater dock." The neighbor further testified that the boat petitioner proposed to dock there drew four feet of water, and that it and other large boats, which could be accommodated using the dolphin pile, would cause environmental damage to the creek bed. On January 28, 2015, the Trustees voted to deny the petitioner's application. No written findings of facts and conclusions were issued by the Trustees as required by Section 142-8(B) of the Village Code.

The court's role in reviewing an administrative decision is not to decide whether the agency's determination was correct or to substitute its judgment for that of the agency, but to ascertain whether there was a rational basis for the determination (*see Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 239 [1995]; *Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 626 NYS2d 1 [1995]; *Matter of Warder v Board of Regents of Univ. of State of N.Y.*, 53 NY2d 186, 440 NYS2d 875 [1981]). It is fundamental that when reviewing a determination that an administrative agency alone is authorized to make, the court must judge the propriety of such determination on the grounds invoked by the agency; if the reasons relied on by the agency do not support the determination, the administrative order must be overturned (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758, 570 NYS2d 474 [1991]; *see Matter of National Fuel Gas Distrib. Corp. v Public Serv. Commn. of the State of N.Y.*, 16 NY3d 360, 922 NYS2d 224 [2011]; *Matter of Filipowski v Zoning Bd. of Appeals of Vil. of Greenwood Lake*, 101 AD3d 1001, 956 NYS2d 183 [2d Dept 2012]; *Matter of Alfano v Zoning Bd. of Appeals of Vil. of Farmingdale*, 74 AD3d 961, 902 NYS2d 662 [2d Dept 2010]). Further, the court "may not weigh the evidence or reject the choice made by the zoning board 'where the evidence is conflicting and room for choice exists'" (*Matter of Calvi v Zoning Bd. of Appeals of City of Yonkers*, 238 AD2d 417, 418, 656 NYS2d 313 [2d Dept 1997]). In reviewing an administrative determination, a court must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious (*see Matter of Peckham v Calogero*, 12 NY3d 424, 863 NYS2d 751 [2009]; *Matter of Deerpark Farms v Agricultural and Farmland Prot. Bd.*, 70 AD3d 1037, 896 NYS2d 126 [2d Dept 2010]). An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts (*see Matter of Peckham v Calogero, supra*; *Matter of Deerpark Farms v Agricultural and Farmland Prot. Bd., supra*; *Matter of Manko v New York State Div of Housing & Community Renewal*, 88 AD3d 719, 930 NYS2d 72 [2d Dept 2011]).

Petitioner's third cause of action alleges interference with petitioner's riparian right to wharf out to navigability. "Riparian rights are the rights of a land owner, with property adjacent to navigable waters, to access the water for navigation, fishing and other such uses" (*Schuss v Palmisano*, 51 AD3d 766, 768, 857 NYS2d 709 [2d Dept 2008]; see *Town of Oyster Bay v Commander Oil Corp.*, 96 NY2d 566, 571, 734 NYS2d 108 [2001]; *Tiffany v Town of Oyster Bay*, 234 NY 15 [1922]; *Klein v Aronshtein*, 116 AD3d 670, 983 NYS2d 298 [2d Dept 2014]). The right of access comprehends the reasonable, safe and convenient use of the foreshore for navigation, fishing and such other purposes as commonly belong to the riparian owner, exercised in a reasonable manner (*Tiffany v Town of Oyster Bay*, *supra*; *Kearns v Thilburg*, 76 AD3d 705, 708, 907 NYS2d 310 [2d Dept 2010]). "The scope of what is a reasonable, safe and convenient use of the upland owner's riparian rights has been gradually defined on a case-to-case foundation" (*Town of Hempstead v Oceanside Yacht Harbor, Inc.*, 38 AD2d 263, 264, 328 NYS2d 894 [2d Dept 1972], *aff'd* 32 NY2d 859, 346 NYS2d 529 [1973]; see *City of New York v Gowanus Indus. Park, Inc.*, 65 AD3d 1071, 866 NYS2d 407 [2d Dept 2009]).

The only evidence submitted to the Trustees with regard to navigability was submitted by the petitioner. Petitioner's environmental consultant testified that the current dock only provides a water depth of 1.4 to 1.9 feet at low tide, whereas the proposed dock would have a minimum water depth at 2.5 feet at low tide, and would meet DEC requirements for navigability and avoid churning up the creek bottom. Respondent failed to provide evidence to the contrary, and only states in conclusory terms that the current dock is sufficient for navigation purposes. As such, respondent's decision is arbitrary and capricious, since it is not based on substantial evidence (see *Matter of Filipowski v Zoning Bd. of Appeals of Vil. of Greenwood Lake*, *supra*; *Matter of Peckham v Calogero*, *supra*). Petitioner is entitled to the issuance of a permit allowing him to extend the current dock by eight feet to allow access to navigable waters. However, this finding does not require the Trustees approve his application as a whole. Thus, the matter must be remanded to the Trustees to issue a permit for the extension of the dock to navigable waters and for further proceeding on the remaining portion of the petitioner's application.

Accordingly, the determination by respondent Board of Trustees of the Village of Greenport dated January 28, 2013 is vacated and annulled, and the matter is remitted to the Board of Trustees for the issuance of permit for the extension of the dock to navigable waters and for further proceedings on the remaining portion of the petitioner's application.

Submit judgment.

Dated:

July 12, 2017


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

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