

**SUPREME COURT - STATE OF NEW YORK**  
**I.A.S. TERM, PART 23, SUFFOLK COUNTY**

**Present:**

**HON. EMILY PINES**

Original Motion Date: 03-30-2009  
Motion Submit Date: 05-14-2009  
Motion Sequence No.: 001 MG

*CASEDISP*

Attorney for Petitioners  
Stephen R. Angel, Esq.  
Esseks, Hefner & Angel, LLP  
108 East Main Street  
PO Box 279  
Riverhead, New York 11901

Attorney for Respondent  
Daniel L. Adams  
Southampton Town Attorney  
By: Kathryn V. Garvin, ATA  
116 Hampton Road  
Southampton, New York 11968

\_\_\_\_\_ X  
**In the Matter of the Application of  
KENNETH LYNCH and VERA LYNCH,**

**Petitioners,**

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

**-against-**

**BOARD OF TRUSTEES OF THE  
FREEHOLDERS & COMMONALTY OF THE  
TOWN OF SOUTHAMPTON, Suffolk  
County, New York,**

**Respondent.**

\_\_\_\_\_ X

**ORDERED**, that the Verified Petition seeking to annul respondents' determination denying petitioners' permit application is granted; and it is further

**ORDERED**, that this matter is remitted to respondent to approve petitioners' application to construct a 165 foot long by 4 foot wide upland walkway, a 55 foot long by 4 foot wide elevated pier, a 16 foot long by 3 foot wide ramp, and a 20 foot long by 6 foot wide float perpendicular to the pier and ramp, secured by four (4) guide piles, subject to appropriate conditions.

In this Article 78 proceeding, the Court is faced with a determination by respondents which conflicts with that of multiple other governmental agencies and the landowners now caught in the conundrum resulting from such conflict which effectively prevents them from building a means of access to the waterway. This is now the fifth Article 78 proceeding involving an attempt by petitioners, KENNETH LYNCH and VERA LYNCH ("petitioners") to construct certain structures located on the Shinnecock Canal, Village of Quogue, Town of

Southampton, Suffolk County, New York (the “subject premises”). The parties’ familiarity with the lengthy procedural history is assumed and it is also set forth in this Court’s Decision and Order dated June 11, 2008. However, the Court notes that this most recent proceeding arises out of the respondents’ determination of January 5, 2009, denying petitioners’ permit application to construct a 165 foot long by 4 foot wide upland walkway, a 55 foot long by 4 foot wide elevated pier, a 16 foot long by 3 foot wide ramp, and a 20 foot long by 6 foot wide float perpendicular to the pier and ramp, secured by four (4) guide piles (the “dock”).

In compliance with this Court’s June 11, 2008 Order, respondents held another hearing on petitioners’ application on September 3, 2008. At that time, petitioners presented the testimony of David Fox and Roy Haje, who had testified in support of the prior applications, as well as an additional witness, George Koch. Petitioners sought permission to construct the aforementioned dock, which had been previously approved by the New York State Department of Environmental Conservation (“DEC”), the United States Army Corps of Engineers (“Army Corps”) and the Department of State, which issued a letter of coastal consistency. Captain George Koch testified regarding his extensive maritime education and experience and his familiarity with the area of the subject premises. He stated that he visited the area on August 18, 2008 and made a number of observations during the course of the visit including that the width of the channel in the area was relatively wide, about 100 feet. Captain Koch stated that there were two bulkheads to the west of petitioners’ property and approximately four docks on the south side of the channel, two of which were extremely close to the charted channel. He observed about eight (8) vessels during his visit which he believed were all observing the speed limit and an additional boat that was proceeding faster, but reduced speed when he observed the speed limit sign. Captain Koch also testified that he did not believe the existing or potential currents in the area would have an adverse impact on the proposed dock. Captain Koch further stated that he did not believe that there would be any danger of boaters traveling from the narrower portion of the canal to approach the shoreline close enough to be in danger of striking the dock. He opined that because the water is shallower in that area, boaters would be unlikely to be traveling too close to the dock and the existence of the bulkheads would also deter boaters from getting too close. Additionally, Captain Koch advised that the posted speed limit in that area is only 6 miles per hour and at such speed, it would be difficult to get into trouble. Ultimately, he stated that he did not believe that the proposed dock would create a hazard to navigation in that vicinity. During this testimony, Trustee Schultz reflected that many people don’t observe the 6 mile per hour speed limit and questioned Captain Koch, who admitted, that if permitted, an indented boat slip would be preferable but that the proposed dock would not be a safety hazard. Trustee Schultz further asked whether the Trustees had the ability to make the determination “arbitrarily”.

Petitioners' counsel asked whether installing a light on the dock as a warning would be helpful and Trustee Warner agreed that it would as well as installing a navigation aid in that area. Trustee Warner also admitted, when asked, that he was unaware of anyone having smashed into the bulkheads that currently exist. At the conclusion of the hearing, it was agreed that petitioners would install markers, to demonstrate where the dock would be located, respondents would visit the site and the hearing was adjourned to an undetermined future date.

The hearing continued on December 5, 2008 at which time petitioners' counsel advised that they received an amended permit from DEC to permit rotating the floating part of the dock so that it would be set back closer to the shore. Trustee Semlear testified that he and Trustee Warner visited the subject premises and believed that some of the arguments propounded by petitioners at the earlier hearing were valid; to wit, that the existing bulkhead created a shadow that would tend to push boaters out past the proposed dock and that the proposed dock would not cause a navigation hazard. Trustee Tymann was not present at the December 5, 2008 hearing and Trustee Havemeyer stated that he had not yet visited the site and the hearing was again adjourned.

Once again the hearing continued on January 5, 2009 with all the Trustees being present at that time. Trustee Tymann stated that he still had concerns about navigation issues and Trustee Schultz stated that he believed it was setting a dangerous precedent to grant the application. Trustee Schultz further stated that he believed this was the "worst place to put a dock" that he had seen in his tenure on the Board. Trustee Warner stated, as he did at the earlier meetings that when he visited the site, he observed that the bulkhead from the golf course on the west actually makes a shadow line and would have the effect of pushing boats off around where the proposed dock would be located. He also recommended the installation of a light on the dock, marking on the navigation charts (if possible) and removal of the dock in the winter. Trustee Havemeyer testified that he visited the site and stated that he didn't believe the proposed dock would be safe given the conditions of the current and boat traffic and he further believes that DEC was wrong to deny the indented boat slip. Trustee Tymann further stated that he believed consistency in the canal was important, that the Board generally disfavors docks in this canal and the solution is an indented boat slip, notwithstanding DEC's denial of the application. Petitioners' counsel reiterated that they agreed to put in channel markers and remove the dock in the winter and that the approval of this dock would not set a precedent because it is site specific.

At the conclusion of the hearing, the Board voted, 3-2 to deny the application. Trustees Semlear and Warner voted to approve the dock on a seasonal basis with a light installed on the dock. As a result, petitioners commenced the within Article 78 proceeding.

Petitioners argue that the determination of the Board denying their application was arbitrary and capricious and not supported by the evidence in the record and must be annulled. Specifically, petitioners assert that, in support of their application, they submitted permits from DEC and the Army Corps of Engineers approving the requested dock, map and surveys of the canal together with the testimony of the surveyors together with the testimony of Captain Koch, all of which demonstrated that there was no navigational concern with locating the dock where they proposed. They argue that this testimony and evidence was not rebutted by respondents in that there was no expert or lay opposition to the application but rather the only evidence was of the Bay Constable, Ted Sadleir, who testified at an earlier hearing that the dock may be acceptable if aids to navigation were installed and the dock was reconfigured. Petitioners assert that they followed the Bay Constable's recommendations prior to the final hearings and thus, all of the evidence supports their application.

Petitioners further argue that the concerns enunciated by the Board members who voted against the application, lack a rational basis in the record. Specifically, petitioners assert that the Board members' votes were based merely on their personal preferences, which are insufficient to sustain the determination. Instead, petitioners note that there is no regulation prohibiting the installation of docks in the area requested and in fact, several other docks exist in the immediate vicinity and respondents did not address this discrepancy in their determination. Moreover, petitioners assert that the Trustee who voted against the application acknowledged that DEC would not permit the indented boat slip, but that DEC was erroneous in its determination and their determination should not bind respondents. Additionally, petitioners argue that respondents wholly ignored the mitigation measures they agreed to adopt, which were recommended by the Bay Constable at the earlier hearing. Moreover, petitioners assert that while the respondent Board members were permitted to consider matters within their personal knowledge, they must disclose same in their determination, and that was not done in this case. Finally, petitioners assert that they are entitled to certain riparian rights as owners of waterfront property, including the right of access to navigable water. Here, they argue that this right of access includes the right to build a dock or pier which allows access, and the respondents' preference for an indented boat slip cannot be used to deny petitioners' their right to "wharf out".

In the Verified Answer, respondents set forth Objections in Point of Law, which petitioners argue must likewise be rejected. Specifically, the first Objection in Point of Law states that petitioner failed to comply with conditions precedent to commencement of this action, which petitioners argue is inapplicable because there are no conditions precedent to commencement of an Article 78 proceeding. Likewise, petitioners argue that the Objection in Point of Law alleging that the proceeding was barred by the statute of limitations must also

be rejected because the proceeding was commenced within four months of the determination on January 5, 2009, in accordance with CPLR §217(a). Additionally, petitioners assert that the Objection in Point of Law claiming that the claims are barred by the doctrines of collateral estoppel and res judicata must be rejected as the claims are based on the denial at the January 5, 2009 hearing. Thus, petitioners urge the Court to reject all of the Objections in Point of Law set forth in the Verified Answer.

In opposition, respondents submit a Verified Answer and Return and Memorandum of Law and argue that their determination was neither arbitrary nor capricious and was fully supported by a rational basis in the record. Respondents assert that their determination, based upon the expertise and knowledge of the individual Board members that the proposed dock would be a hazard to navigation, was not arbitrary and capricious. Respondents argue that they have the responsibility of regulating the Town's waterways in the interest of the safety of its residents, and as such, acted within the scope of their authority in denying the application. They claim that petitioners did not refute the evidence that the proposed dock was unsafe, but merely offered to mitigate the dangers, which, in respondents' opinion, were insufficient. Notably, respondents' rely on testimony from Trustees Warner and Semlear (who ultimately voted in favor of the application), from an *earlier* hearing, wherein they expressed certain safety concerns. Respondents repeatedly urge the Court to recognize that their determination that the proposed dock created a navigation hazard was supported by the record and that they properly relied upon the experience of the individual Board members in rendering their determination. Respondents argue that they were not required to put forth any "expert" testimony and claim that the testimony of Captain Koch was without probative value. Instead, respondents propound that the testimony of the Trustees regarding the speed of the current and the danger in the area should be given substantial weight. Moreover, respondents argue that the fact that DEC denied petitioners' application for construction of a boat slip, presumably the preferred means of access, does not render their determination arbitrary and capricious. Lastly, respondents argue that, notwithstanding petitioners' riparian rights, it is empowered to regulate the construction of docks and structures that would be a danger to the public. Based on the foregoing, respondents request that the Court deny the petition.

In reply, petitioners argue that respondents rely on evidence outside the record of the proceedings and moreover, relied on the statements and comments by Trustees Warner and Semlear who ultimately voted in favor of the application, provided petitioners agreed to install lighting and navigational aids and remove the dock in the winter. Petitioners assert that if in fact, respondents were relying on the knowledge and experience of the individual Board members, it should have voted to approve the application, since they had previously stated that Trustees Warner and Semlear had a lot of experience working on the water in this

area. Additionally, petitioners note that the Bay Constable had previously opined that the navigation aids, lighting and removal of the dock in the winter could help alleviate the perceived concerns, and petitioners adopted these recommendations. Petitioners further comment that there was no evidence of any boater ever colliding with the neighboring bulkhead, and that, according to Trustee Warner, a boater heading east would strike the bulkhead prior to approaching the proposed dock. In sum, petitioners argue that respondents' conclusion that the proposed dock is a hazard to the public was based entirely on "irrational speculation, arbitrary rejection of any mitigation, and a preference for an indented boat slip" and the petition must be granted and respondents be directed to issue the permits.

In a proceeding brought pursuant to CPLR Article 78, the Court's role is limited as proscribed by §7803. As relevant to this case, the question to be raised is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion...". **CPLR §7803(3)**. Where the determination by the municipal agency has a rational basis, it should be sustained upon judicial review. **Greenfield v. Board of Appeals of Village of Massapequa Park**, 21 A.D.3d 556, 800 N.Y.S.2d 728 (2d Dept. 2005); **Ram v. Town of Islip**, 21 A.D.3d 493, 801 N.Y.S.2d 40 (2d Dept.2005). The Court may not substitute its judgment for that of the board unless the determination is arbitrary and capricious or an abuse of discretion. **Gillen v. Smithtown Library Board of Trustees**, 254 A.D.2d 486, 679 N.Y.S.2d 634 (2d Dept. 1998). In rendering a determination, the Board may rely upon the personal knowledge and familiarity with the area of its members and the basis of that knowledge must be set forth on the record. **Thirty West Park Corp., v. Zoning Board of Appeals of Long Beach**, 43 A.D.3d 1068, 843 N.Y.S.2d 106 (2d Dept. 2007).

Additionally, it is well settled that a riparian owner has the right of access to a navigable river or body of water which his land abuts, and such right "includes the right of passage to and from the waterway with reasonable safety and convenience." **Mascolo v. Romaz Properties, Ltd.**, 28 A.D.3d 617, 813 N.Y.S.2d 765 (2d Dept. 2006); **citing, Town of Oyster Bay v. Commander Oil Corp.**, 96 N.Y.2d 566, 734 N.Y.S.2d 108, 759 N.E.2d 1233. **See also, 627 Smith St. Corp., v. City of New York**, 289 A.D.2d 472, 735 N.Y.S.2d 555 (2d Dept. 2001). This right includes the power to build a pier, dock or wharf. **Town of Hempstead v. Oceanside Yacht Harbor, Inc.**, 38 A.D.2d 263, 328 N.Y.S.2d 894 (2d Dept. 1972).

In the case at bar, it is clear that the respondents relied on the personal knowledge and experience of the individual members in reaching its conclusion that the proposed dock was a navigation hazard and denying the application. While under certain circumstances this

might be enough, in this case, the Court finds that reliance solely on the knowledge and experience of the Board members is insufficient, is arbitrary and capricious and lacks a rational basis in the record. Here, notably, respondents rely in their papers on testimony from the two Board members, Warner and Semlear, who ultimately were satisfied with the mitigation measures adopted by petitioners, and voted to approve the application. Moreover, the Court cannot ignore the fact that the DEC has denied petitioners' application for an indented boat slip, the expressed preference of respondents and has approved the dock, together with approval from the Army Corps of Engineers (and their consent to the placement of aid to navigation), and statement of coastal consistency from the Department of State. The testimony of petitioners' witness, Captain Koch, acknowledged by Trustees Warner and Semlear, was that the shadow created by the bulkhead of the adjoining golf course would tend to push boaters further away from the location of the proposed dock. Respondents did not refute this testimony and admitted they had no knowledge of any boaters ever colliding with the bulkhead. Additionally, respondents' witness from the earlier hearing, Bay Constable Ted Sadleir, acknowledged that the installation of lighting and reconfiguration of the dock would lessen the dock's impact on navigation. Petitioners also noted the presence of other docks in the canal and further agreed to remove their dock in the winter. The conclusory allegations that boaters tend to speed in the canal, creating a hazard, is insufficient to support the denial of the application. Finally, the Objections in Point of Law set forth in the Verified Answer are wholly without merit as petitioners timely commenced this Article 78 proceeding and there is no condition precedent to filing same. Moreover, since the proceeding is based on the denial of the application on January 5, 2009, it is not barred by the principles of res judicata or collateral estoppel.

Based on the foregoing, and upon a review of all the evidence in the record, the Court concludes that the respondents' determination denying petitioners' application was arbitrary and capricious and lacking a rational basis. The Petition is therefore, granted and the January 5, 2009 determination is hereby vacated and annulled and the matter is remitted to the Board for the issuance of a permit to petitioners for the construction of a 165 foot long by 4 foot wide upland walkway, a 55 foot long by 4 foot wide elevated pier, a 16 foot long by 3 foot wide ramp, and a 20 foot long by 6 foot wide float perpendicular to the pier and ramp, secured by four (4) guide piles, subject to appropriate conditions.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: July 16, 2009  
Riverhead, New York

  
\_\_\_\_\_  
EMILY PINES  
J. S. C.