

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 17

COPY

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In the Matter of the Application of

278, LLC, formerly known as 260A LLC,

Petitioner,

For a Judgment Pursuant to Article 78 of the
Civil Practice Law & Rules,

- against -

THE ZONING BOARD OF APPEALS of the
TOWN OF EAST HAMPTON,

Respondent,

- and -

TAYA THURMAN as Trustee of the TAYA
THURMAN TRUST and TAYA THURMAN
SECOND RESIDENCE TRUST,

Intervenors-Respondents.

By: Mayer, J.S.C.
Dated: July 22, 2014

Index No. 13-4979
Mot. Seq. # 001 - MotD; CDISPSJ

Return Date: 3-20-13
Adjourned: 4-15-14

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The petitioner commenced this CPLR article 78 proceeding seeking a judgment vacating and annulling the final determination of the Zoning Board of Appeals of the Town of East Hampton (ZBA)

dated January 18, 2013, which, among other things, denied its application to overturn a certain determination of the Town of East Hampton Senior Building Inspector (Building Inspector) and for a Natural Resources Special Permit (NRSP permit). The petitioner owns a parcel of water-front property on the south shore of Long Island, New York, located at 278 Further Lane, East Hampton (the premises). On or about September 2008, the petitioner constructed retaining walls (walls) towards the southerly border of its property and continuing along a portion of the easterly border of its property. Said walls run parallel to each other approximately four feet apart. The premises is vacant with the exception of the walls that are the subject of this special proceeding. On or about January 29, 2009, the Town of East Hampton (Town) issued citations alleging that the walls were illegally constructed in violation of the Town Code because the petitioner failed to obtain a building permit and a certificate of occupancy, a NRSP permit from the ZBA, and the requisite approval from the Architectural Review Board. The litigation was settled by requiring the petitioner, among other things, to file and pursue an application before the ZBA for the retaining walls on the premises.

On or about May 4, 2009, the petitioner filed an application with the ZBA seeking a NRSP permit for the premises, and giving notice of its application to the intervenors-respondents Taya Thurman as Trustee of the Taya Thurman Trust and Taya Thurman Secondary Residence Trust (Thurman). Thurman owns the water-front property which is adjacent to, and east of, the premises and alleges that the entire wall structure, including that portion running along the easterly border of the premises along the shared property line, was illegally constructed. The ZBA advised the petitioner that approval of the walls would require an application to, and permit from, the Architectural Review Board (ARB), and a variance to enable the issuance of a building permit. It appears that the petitioner filed an application with ARB, but did not follow through to obtain the subject permit. On or about July 20, 2009, the petitioner file an application with the ZBA for a variance “to permit the retention of an accessory structure, a wall, where there is no principal structure.”

Thereafter, it appears that the petitioner requested a determination from the Senior Building Inspector regarding the definition of “accessory structure” under the Town Code. By letter dated March 23, 2010, the senior building inspector issued a determination that “Upon extensive review of the Code and past practices, it has been determined by this Office that fences, walls and berms are NOT accessory structures as they do not meet the criterion of the definition in §255-11-10. Building Permits generally are only required for fences, walls and berms when Architectural Review Board approval is necessary due to height, or if the property is situate in an Agricultural Overlay District or requires a Natural Resource Special Permit from the Zoning Board of Appeals.”

In April 2010, the petitioner questioned the limit of NRSP jurisdiction, and asserted that only “the western-most portion of the walls” were subject to review. By letter dated April 13, 2012, the Building Inspector issued a determination that he had “determined that a substantial portion of the wall was constructed in a location containing dune land/beach vegetation as defined by the East Hampton Town Code and would therefore require a NRSP prior to the issuance of a Building Permit.” The letter also stated that “[i]n an area such as this, I would require a lot inspection to determine the applicability of NRSP jurisdiction prior to the issuance of a Building Permit.” On April 30, 2012, the petitioner filed an appeal with the ZBA of the Building Inspector’s determination dated April 13, 2012. A public hearing on the petitioner’s three applications was held on November 20, 2012.

At the public hearing, the petitioner submitted the testimony of an expert, David Klinch (Klinch), who indicated that he visited the premises in 2005, 2006 and 2007 at the request of the petitioner in order to determine the natural features on the property. He testified that he “initially looked at the site, which included looking at the vegetation, doing some transects, making lots of sketch maps, and doing soil borings ...” He stated that, at that time, he did not know what project the petitioner was contemplating, and that he walked in the area where the walls are now, and observed “beach grass and other species that are in the code that are indicative of a jurisdictional duneland, and ... dunes” downslope from that area. Klinch further testified that he was next called back to the premises in 2008 “at the time the wall construction was beginning,” that the upland area had been “flattened” and the eastern portion of the wall had been “raised by several feet,” and that the “wall helps, in fact, to flatten out the building envelope.” He indicated that he “flagged” a line of beach vegetation, and that the walls were “awful close” to, but not in, a dune or upon any beach vegetation, although there were “shovel-fulls of sand and soils upon it.” He stated that he did not write a report regarding his findings until 2010 because he “hadn’t been asked to,” and that he did so “to support the work on [another parcel of petitioner’s property immediately west of the premises] (adjacent property).”

In his report dated April 8, 2010, Klinch states that “[b]ased on my numerous visits ... before the Walls were constructed, it is my opinion that beach vegetation including beach grass was observed at varying distances south of the location of the existing Walls,” and that “[s]pecifically, during my visit ... in September 2008, I observed the landward extent of beach vegetation ... to be south of the Walls.” He indicates that, based on numerous soil test pits, the soil characteristics of the location of the walls demonstrates that the walls were not constructed in an area that contains dunes. In his report, Klinch opines that (1) with the exception of the approximately 10 most western feet of the walls, which appear to be located within 150 feet of a wetland, the walls were not constructed within 150 feet of a wetland, (2) the walls were not constructed in an area that can properly be characterized as a dune, and (3) no beach vegetation was disturbed by the construction of the walls.

In addition, the ZBA was addressed by the petitioner’s attorney who stated that the walls were erected based upon discussions between an agent of the petitioner and the Building Inspector at the time, who allegedly advised the agent that relief from the ZBA or any other board was not required, and that a building permit was not required to construct the walls. Counsel also submitted an affidavit from the petitioner’s agent, David Weaver, who states that in April 2008, said Building Inspector told him that no permit of any kind would be necessary, as long as the walls were constructed no more than four feet above natural grade and did not encroach onto beach vegetation, which would require an NRSP pursuant to §255-4-20 of the East Hampton Town Code. Counsel further stated that only a 14-foot section of one wall and a nine-foot section of the other which are within the required setback for freshwater wetlands located on the petitioner’s adjacent property require a NRSP permit, and that the current Building Inspector’s determination that a substantial portion of the walls were constructed in dune land or beach vegetation is vague and inherently arbitrary and capricious.

The intervenors-respondents and easterly property owners, Thurman, submitted the testimony of an environmental consultant, Bruce Anderson (Anderson), who testified that he reviewed photographs, Klinch’s report, and surveys submitted by the petitioner, and that based on his analysis and an inspection of adjacent areas he found that the walls were constructed in an area of beach vegetation and “over the dunes.” He stated that he also made a comparison between the Earthwork Volume Detail with Photo

with the Project Area 2010 Photo Overlay prepared by F. Michael Hemmer, L.S., P.C. (Hemmer), dated November 20, 2012, and that in his opinion said documents verify that a substantial portion of the walls were constructed in dune lands. He indicated that said documents also indicate that a substantial amount of fill was used to re-grade the premises. Anderson further testified that Klinch's opinion that the walls are not located in the dunes is not based on contemporaneous documentation but information after the walls were in the process of construction, that the soil pit sites used by Klinch do not run east and west along the line where the wall was constructed, but north and south to avoid "sandy areas." He stated that based on Hemmer's work the topographical data indicates that the walls are in excess of 13 feet tall.

Hemmer testified that he prepared the documentation reviewed by Anderson, and that the information dated 2007 came from government agencies. He stated that, in checking his work against the surveys submitted by the petitioner, it is his opinion that the "horizontal registration ... is correct," and that his documentation correctly represents the topographical conditions at the premises both before and after the construction of the walls.

Counsel for Thurman also addressed the ZBA and stated that walls higher than six feet are not permitted in a residential district, and that these walls are connected by a frame and represent a "monolithic pour of concrete" designed to hold an enormous amount of fill. He contends that the walls do not qualify for a NRSP permit because there is evidence that the dunes on which they sit were "degraded" when they were installed.

Brian Frank (Frank), Chief Environmental Analyst with the Town Planning Department, testified that he visited the premises after the walls were constructed, and that he observed invasive species of vegetation in the vicinity of the walls indicating that construction of the walls has not been benign. He stated that aerial photographs show beach vegetation where the walls are located, and that picking out "transitional areas" from photographs is not ideal so "the only question in the Planning Department's mind is ... how much of the north-south section of the wall is NRSP jurisdiction." In addition, he indicated that photographs show that the walls "went through duneland," specifically the Atlantic Double Dunes Preserve (ADD), a designated New York State Significant Coastal Fish and Wildlife Habitat. Frank further testified as to the reasons why the Planning Department thinks that the walls are not eligible for a NRSP pursuant to the standards in Town Code §255-5-51, and that any NRSP permits recently granted by the ZBA were based upon valid reasons not present here. He stated that the identification of duneland pursuant to the Town Code is based on the presence of protected species of beach vegetation, not soil test borings, that nothing in Klinch's report contemporaneously documents the pre-existing conditions at the location of the walls, and that the petitioner's surveys indicate that the flagging of the limits of beach vegetation on the premises was done after the walls had been under construction, if not completed. Frank further testified that the process for protecting dunes and beach vegetation involves a lot inspection after an application is filed with the Planning Department, which then issues an advisory to the Building Inspector as to whether a NRSP permit is required. He opines that he finds it incredible that, with a project of this magnitude and the experts involved, no one suggested a lot inspection be done to document the issues, that the petitioner failed to do its due diligence here, and that if proper procedures had been followed "[w]e wouldn't be here." He stated that the "profile of the walls" submitted by the petitioner shows that the height of the walls are above grade by as little as 2', 3" or as much as 6', 11" at different points, but there is no indication whether said measurements are from natural grade and it is highly probable that the walls are more than four feet tall.

Frank further testified that he objects to the supposition that the Planning Department formulated all of its opinions from aerial photographs, as he had visited the premises and observed beach heather, earth stars, lichens “and other things that you find in the secondary dune.”

In its final determination dated January 18, 2013 (determination), the ZBA indicates that the purpose of the application was “[t]o allow two concrete retaining walls ... of approximately 762 linear feet to remain on a parcel of land ...,” that the relief sought was an appeal of the Building Inspector’s determination, the issuance of a NRSP permit, and a variance pursuant to a certain enumerated section of the Town Code. The determination states that to be eligible for the issuance of a NRSP, the petitioner must show that the walls are compatible with the purposes of Town Code §§ 255-1-11 and 255-4-10 and satisfy the criteria set forth in Town Code §§ 255-5-40, 255-5-50 and 255-5-51. By a majority vote with one dissent, the ZBA denied the requested relief.

In its determination, the ZBA found, among other things, that “a substantial portion of the wall was constructed within a location containing dune land and beach vegetation,” and that:

the walls were constructed within the northern limits of the Atlantic Double Dunes, a coastal headland that contains a sensitive and unique complex of ecological communities comprised of beaches, barrier dunes, inter-dune swales, and secondary dunes. The Atlantic Double Dunes are a designated New York State Significant Coastal Fish and Wildlife Habitat and have been described as one of the largest remaining areas of undeveloped barrier beach and back dune ecosystems on Long Island.

Regarding the petitioner’s contention that the previous Building Inspector had approved the construction of the walls in August 2008, the ZBA found that “it does not appear that the Chief Building Inspector at the time was ever invited to or visited the subject property. The Chief Building Inspector merely recited the instances when a building permit would be required. It does not appear that the Chief Building Inspector had any personal knowledge, based on direct observation as to what was occurring at the subject parcel.” In addition, the ZBA notes that by letter dated June 5, 2007, the Town’s Director of Natural Resources advised the petitioner that, “[r]emoving, devegetating or otherwise disturbing the treed dune (the most landward dune formation of the so-called ‘Double Dunes’ area) will require a Natural Resources Special Permit from the Zoning Board of Appeals.” Thus, the majority of the ZBA found that the petitioner “was at least on notice that an NRSP may have been required and should have sought same before beginning any construction activities.”

The determination includes a finding that the petitioner failed to demonstrate how the subject project complied with Town Code §255-5-51D, which states:

D. Preservation of natural resources. All structures and uses, other than coastal structures, shall be located on upland and shall be located so that no natural resource, feature, or system designated in § 255-4-12 hereof will be diminished in size, polluted, degraded, or lost, or placed in peril thereof, in order to establish such structure or use. If there is inadequate upland for the structure or use proposed, minimal exceptions to the

requirements of this section may be authorized in the permit, but only after:

- (1) Alternative reasonable uses of the property are determined not to exist; and
- (2) Alternative designs entailing smaller buildings or structures, reduced yard or other setbacks, or diminished or reconfigured areas of use are determined not to be effective in preventing loss of or potential damage to designated natural features, or the only such designs are found to be infeasible or unlawful.

The majority of the ZBA found that the petitioner “did not show that alternative reasonable uses of the property or alternative designs or configurations were considered as required by §255-5-51D.”

Finally, the ZBA found that the use, as proposed, would not be in harmony with and promote the general purposes of the Town Code’s zoning provisions, and it concluded that “because the requested NRSP is denied consideration of the requested variance pursuant to §255-1 I -20C is hereby moot.” The ZBA upheld the Building Inspector’s determination of April 13, 2012, denied the petitioner’s request for a NRSP pursuant to Town Code §255-4-20, and denied permission “[t]o allow two concrete retaining walls, comprising a total of approximately 762 linear feet to remain on a parcel of land containing dune land, beach vegetation, freshwater wetlands, primary dunes, and beaches.” In a written dissent, one member disagrees with the ZBA’s decision to uphold the Building Inspector’s determination and to deny the NRSP permit on the ground, essentially, that it is based on photographs and that there is no evidence the walls are in NRSP jurisdiction.

It is well settled that in a special proceeding seeking judicial review of administrative action, the Court must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious (*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]; *Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 514 NYS2d 689 [1987]; *Matter of Warder v Board of Regents of Univ. of State of N.Y.*, 53 NY2d 186, 440 NYS2d 875 [1981]). In applying the “arbitrary and capricious” standard, a court looks only to whether the determination lacks a rational basis, *i.e.*, whether it was without sound basis in reason and without regard to the facts (*Matter of Peckham v Calogero*, 12 NY3d 424, 863 NYS2d 751[2009]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 356 NYS2d 833 [1974]; *Matter of Manko v New York State Div of Housing & Community Renewal*, 88 AD3d 719, 930 NYS2d 72 [2d Dept 2011]). In reviewing an administrative action a court may not substitute its judgment for that of the agency responsible for making the determination (*see Matter of Sasso v Osgood, supra*; *Matter of Chemical Specialties Mfrs. Assn. v Jorling, supra*; *Flacke v Onondaga Landfill Sys., supra*; *Matter of Warder v Board of Regents of Univ. of State of N.Y., supra*). 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] quoting *Matter of Toys “R” Us v Silva*, 89 NY2d 411, 654 NYS2d 100 [1996]).

Here, the Court finds that the ZBA's determination was rational, and was not arbitrary and capricious. It is undisputed that there is no contemporaneous documentation which reveals either the landward extent of the dune land/ADD or the limits of beach vegetation on the premises. The ZBA was presented with conflicting expert opinions as to the pre-existing conditions at the location where the walls were constructed as well as conflicting testimony as to that issue. Where there is conflicting expert opinion, "deference must be given to the discretion and commonsense judgments of the board" (*Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 746 NYS2d 662 [2002]), and a board's reliance on its experts does not render its determination arbitrary, capricious, or lacking in a rational basis (*Matter of Ball v New York State Dept. of Env'tl. Conservation*, 35 AD3d 732, 826 NYS2d 698 [2d Dept 2006]; *Matter of Gladstone v. Zoning Bd. of Appeals of Inc. Vil. of Southampton*, 13 AD3d 445, 785 NYS2d 697 [2d Dept 2004]). In addition, issues of credibility are within the sole province of the board to resolve (*Matter of Green 2009, Inc. v Weiss*, 114 AD3d 788, 980 NYS2d 510 [2d Dept 2014]; *Matter of Jones v Zoning Bd. of Appeals of the Town of Oneonta*, 90 AD3d 1280, 934 NYS2d 599 [3d Dept 2011]).

Nonetheless, the ZBA has not clearly delineated what portion of the walls running north and south along the easterly border of the premises is within NRSP jurisdiction. Frank testified that this issue is the only open question within the Planning Department. The ZBA's determination denying a total of "approximately 762 linear feet" of the walls to remain on the premises does not resolve the issue. In addition, the determination makes no findings and conclusions regarding the petitioner's application for a variance from Town Code §255-11-20C "to permit the retention of an accessory structure, a wall, where there is no principal structure," stating that "because the requested NRSP is denied consideration of the requested variance ... is hereby moot." Therefore, the status of any portion of the walls which are not within the ambit of NRSP jurisdiction has not been determined.

In addition to challenging the determination's findings and conclusions regarding the Building Inspector's determination and the denial of a NRSP permit, the petitioner challenges "the ZBA's failure to render a determination on the issue whether the retaining walls required a variance to be located on a parcel of property that did not contain a principal structure." The petitioner contends that, on March 23, 2010, "the Building Inspector provided a written determination confirming that the subject walls were "NOT" an accessory structure within § 255-11-20 (C) of the Town Code," and that "in this matter, no appeal or [challenge] was ever filed, and therefore the Building Inspector's determination that no variance was required is final and binding." While it is undisputed that the Building Inspector has the authority to make interpretations as to the meaning and applicability of the Town Code's zoning provisions, subject only to the authority of the ZBA to review, it is determined that the Building Inspector did not make a determination regarding the subject walls. A plain reading of the March 23, 2010 letter indicates that walls generally are not considered accessory structures. However, the letter clearly indicates that certain walls require a building permit when ARB approval is necessary due to height, if the property is situate in an Agricultural Overlay District, or requires a NRSP permit.

Setting aside the issue of whether the petitioner is entitled to a NRSP permit herein, there is evidence in the record that the walls are of a height requiring ARB approval, and it appears that the premises is located in an Agricultural Overlay District, making it likely that a portion of the walls are similarly located. While the Town Code provisions governing the issuance of a NSRP permit are concerned with the location of structures within dune lands and areas of beach vegetation, the Town

Code provision regarding the subject variance application is concerned with both location and the details of the proposed structure. It is determined that the Court cannot grant complete relief to the parties (*see Matter of Ovadia v Office of Indus. Bd. of Appeals*, 19 NY3d 138, 946 NYS2d 86 [2012]; *see eg. Hawkins v Berlin*, 118 AD3d 496, ___ NYS2d ___, 2014 WL 2609331 [1st Dept 2014]; *Matter of Christian Airmen, Inc. v Town of Newstead Zoning Bd. of Appeals*, 115 AD3d 1319, 983 NYS2d 173 [4th Dept 2014]; *Matter of County of Herkimer v Village of Herkimer*, 109 AD3d 1166, 971 NYS2d 764 [4th Dept 2013]). The ZBA has not issued any findings and conclusions regarding the height of the walls, or whether they lie in an Agricultural Overlay District. Thus, it has not been determined whether the petitioner must obtain a variance regarding the construction of any portion of the walls.

Accordingly, it is determined that the matter is remitted to the ZBA for further proceedings in accordance with this decision.

Settle judgment.


Peter H. Mayer 8/4/14
J.S.C.