

SHORT FORM ORDER

INDEX NO.: 57/2018

**SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY**

PRESENT:

Hon. Sanford Neil Berland, A.J.S.C.

DANIEL AKESON and PHILIP GIUNTA,

Petitioners,

-against-

THE INCORPORATED VILLAGE OF
ASHAROKEN, THE INCORPORATED VILLAGE
OF ASHAROKEN BOARD OF TRUSTEES and
THE INCORPORATED VILLAGE OF
ASHAROKEN ENVIRONMENTAL REVIEW
BOARD,

Respondents,

-and-

ROBERT HOLMES and ASHAROKEN BAYSIDE
ASSOCIATION,

Intervenor-Respondents.

ORIG. RETURN DATE: February 16, 2018

FINAL RETURN DATE: June 26, 2018

MOT. SEQ #: 001 MD

ORIG. RETURN DATE: June 1, 2018

FINAL RETURN DATE: June 26, 2018

MOT. SEQ #: 002 MD; CASEDISP

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Upon the reading and filing of the following papers in this matter: (1) Notice of Verified Petition by petitioners dated January 3, 2018, and supporting papers; (2) Notice of Supplemental Second Amended Petition by petitioners dated April 4, 2018, and supporting papers; (3) Verified Answer and Return to Second Amended Petition by respondents dated April 24, 2018, and supporting papers; (4) Verified Reply to Answer pursuant to CPLR 7804 [d] by intervenor-respondents dated May 17, 2018, and supporting papers; (5) Submission Pursuant to CPLR 7804 [d] by intervenor-respondents dated May 10, 2018, and supporting papers; (6) Additional Submission Pursuant to CPLR 7804 [d] by intervenor-respondents dated May 11, 2018, and supporting papers; (7) Verified Reply to Answer Pursuant to CPLR 7804[d] by intervenor-respondents dated May 17, 2018, and supporting papers; (8) Verified Reply to Answer Pursuant to CPLR

7804 [d] by petitioners dated May 16, 2018, and supporting papers; and (9) Verified Reply to Answer pursuant to CPLR 7804 [d] by intervenor-respondents dated May 17, 2018, and supporting papers, it is

ORDERED that the petition (seq.#001) and the second amended petition (seq.#002) are consolidated for purposes of this determination; and it is

ORDERED that the petition (seq.# 001) is DENIED as moot; and it is

ORDERED that the petitioner's application pursuant to Article 78 of the CPLR (seq.#002) is DENIED; and it is

ORDERED that this matter shall be marked "disposed."

This action arises out of the denial of petitioners' respective applications for permits to construct seasonal and removable docks at their homes in the Ida Smith area of the Village of Asharoken.¹ Their applications were filed with the respondent The Incorporated Village of Asharoken ("the Village") and were then referred to respondent The Incorporated Village of Asharoken Environmental Review Board ("ERB) for review. ERB conducted a series of public hearings and received documentary evidence as well as hearing testimony. ERB issued written decisions, which were submitted to respondent The Incorporated Village of Asharoken Board of Trustees ("the Board"), recommending that the applications be denied and setting forth the reasons for those recommendations. The Board found that the petitioners had not satisfied certain provisions of Article IVA of Chapter 125 of the Code of the Village of Asharoken ("the Dock Code") and issued resolutions denying the applications. Petitioners have commenced this proceeding pursuant to Article 78 of the CPLR seeking an order annulling, setting aside, and reversing the Board's resolutions and granting the petitioners' applications without the imposition of any further conditions or any further review under the New York State Environmental Quality Review Act ("SEQRA") on the asserted grounds that the Board's findings were arbitrary and capricious, an abuse of discretion and affected by an error of law in that the Board allegedly disregarded petitioners' riparian rights. Respondents and intervenor-respondents are opposing the application on the grounds that there was ample evidence in the record to support the Board's findings and that the Dock Code represents a reasonable and lawful restriction of petitioners' riparian rights. Respondents and intervenor-respondents contend that in the event the court annuls and sets aside the Board's resolutions, the applications must be returned to the Board to make a SEQRA determination of significance

¹The original petition (seq. #001) was amended and effectively superceded by the second amended petition (seq. #002). Accordingly, the original petition is denied as moot, and the current decision and order relates to the amended petition (seq. #002).

regarding the proposed docks.

Background

Petitioners own properties that lie along Northport Bay, and each is seeking to construct a removable dock extending over the beach and foreshore and into the waters of the bay. The proposed docks would be roughly parallel to each other and approximately three hundred feet apart. Prior to filing their applications for permits to build the subject docks, they each applied to the New York State Department of Environmental Conservation ("the DEC") for permits from the DEC as required by the ECL given that Northport Bay's shoreline is a tidal wetland under Article 25 of the Environmental Conservation Law. The DEC determined that each proposed dock was a "Type II" action under SEQRA and issued permits to both petitioners to construct the docks. The New York State Department of State ("the DOS") has designated Northport Bay as a Significant Coastal Fish and Wildlife Habitat, thus making it a requirement that petitioners submit their dock proposals to the DOS to determine whether their proposals were consistent with New York State's Coastal Management Program. The DOS determined that each proposal met the DOS's general consistency concurrence criteria. Pursuant to 42 USC § 403, a dock cannot be built in navigable waters outside of a harbor without the approval of the federal government. Petitioners therefore applied to the United States Army Corps of Engineers ("ACE") for permits for their docks, which were issued.

After obtaining the appropriate approvals and permits from DEC, DOS, and ACE, petitioners filed their applications for permits to build the docks to the Village. Both were filed on September 25, 2015. The applications to the DEC, DOS and ACE, as well as the applications filed with the Village, were prepared by petitioners' environmental experts, Land Use Ecological Services, Inc. ("Land Use"). Petitioners' dock permit applications were referred to ERB, which is tasked with reviewing such applications, holding public hearings, and making recommendations to the Board. ERB held seven public hearings regarding the applications - on November 23, 2015, May 23, 2016, June 27, 2016, July 25, 2016, October 24, 2016, September 25, 2017 and October 30, 2017. ERB heard testimony from Dan Hall, an ecologist employed by Land Use, intervenor-respondent Robert Holmes, Holmes' attorneys Kenneth P. Savin and Frederick Eisenbud, the attorney for the Village, petitioners' attorney Michael McCarthy, Dr. Ron Abrams, an environmental expert employed by Dru Associates, Inc. ("Dru"), a firm of environmental consultants engaged by Holmes, and residents of the Asharoken community. After the fifth hearing, which was held on October 24, 2016, ERB recommended that the Board hire an independent environmental consultant in the hope of shedding light on the conflict in expert opinions that had been rendered during the course of the proceedings. Accordingly, the Village hired GEI Consultants ("GEI"), which issued a draft report, followed by a superseding revised report and, ultimately, a final report dated July 31, 2017. All GEI reports were submitted to ERB for review. ERB considered documentary evidence in the form of letters from Asharoken community members both in support of and against the proposed docks, reports from Land Use, Dru and GEI, photographs, drawings and visual renderings, emails from petitioners,

Holmes, and the Village attorney and letters from Michael McCarthy and Frederick Eisenbud.

The initial design for each of the proposed docks called for a T-shaped structure. In response to objections raised at the initial ERB hearing held in November 2015, Land Use filed supplements to the applications that included revised plans that reduced the width of the T cross-bar in the each of the docks. At the sixth ERB hearing held on September 25, 2017, ERB voted 3-2 in favor of recommending that the Board disapprove petitioners' applications for dock permits. On October 30, 2017, ERB issued identical written decisions as to each of the petitioners' respective applications, setting forth their findings. The ERB's findings in pertinent part were as follows:

"4. In adopting Article IVA of Chapter 125 of the Code of the Village of Asharoken, entitled "Docks," the Board of Trustees of the Village of Asharoken determined that, for ecological, public enjoyment, public navigation, aesthetic, public health, safety and welfare reasons, docks in the "Ida Smith property" need to be regulated.

5. Section 125.22.5(B) of Article IVA of Chapter 125 of the Asharoken Village Code provides that the Environmental Review Board shall recommend the issuance of a dock permit only when it is determined that the dock will not provide any of the adverse effects enumerated in Section 125.22.2 and the dock meets the conditions set forth in Section 125.22.5(B). The adverse effects enumerated in Section 125.22.2 relate to: A. Environmental, B. Pollution, C. Swimming, D. Navigation, E. Aesthetics and F. General.

6. Since all docks affect, to some degree, the environment, pollution, swimming, navigation and aesthetics, the Board interprets Section 125.22.5(B) of the Asharoken Village Code to provide that the Environmental Review Board shall recommend the issuance of a dock permit only when it is determined that the dock will not significantly provide any of the adverse effects enumerated in Section 125.22.2.

7. With respect to A. Environmental - the Board finds that Applicant did not demonstrate that the dock will not significantly impede the tidal and littoral flow of waters, which impediment can cause significant collection of flotsam and decaying marine and plant life on and above the shoreline. The Board further finds that the Applicant did not demonstrate the dock will not result in significant accretion of sand and seaweed in and around the dock, which interferes with the environmental quality of the waterfront.

8. With respect to B. Pollution - the Board finds that Applicant did not demonstrate that the dock will not significantly increase pollution near the shoreline resulting from running, idling or testing of boats alongside of the dock.

9. With respect to C. Swimming - the Board finds that the one hundred thirty (130) feet

length of the dock will be an obstacle to lateral swimming along the shoreline.

10. With respect to D. Navigation - the Board finds that the one hundred thirty (130) feet length of the dock will interfere with the movement of sailboats tacking to and from the beach and the movement of rowboats, canoes and small boats along the shore.

11. With respect to E. Aesthetics - the "Ida Smith property" has a crescent beach. One dock is located in the northwest end of the "Ida Smith property," at 271 Asharoken Avenue, which predates the adoption of Article IVA. Two docks are located at the southeast end of the "Ida Smith property" at 123 Asharoken Avenue and 131 Asharoken Avenue, which also predate the adoption of Article IVA. The properties between these existing docks have an unobstructed vista of Northport Bay. The dock would be located near the center of the crescent beach, thereby significantly adversely impacting the unobstructed vista of Northport Bay.

13. With respect to the conditions set forth in Section 125.22.5(B), the Board finds that:
- (a) The dock is not designed and constructed in such a manner as to minimize any adverse environmental effect on the waters of the area and to allow for adequate flow-through of waters while the dock is resting in the water. The Board also agrees with the recommendation of GEI Consultants, Inc., P.C. that modular polyurethane flotation pontoons/drums should be used instead of twenty (20) feet long floats to reduce impacts from interference with the tidal and littoral flow of water.
 - (b) The length of the dock will impede the navigation of vessels, as discussed in Finding No. 10; and
 - (c) The "T" configuration at the end of the dock results in the width of the dock to exceed four (4) feet."

On November 30, 2017, Land Use submitted revised drawings of the proposed docks to the Board which eliminated the T configuration and adopted an alternative design for the docks' floats as was suggested by GEI in its final report. On December 5, 2017, the Board voted to adopt the findings of the ERB and disapprove the applications.²

²Petitioners and intervenor-respondents contend that the Village respondents left out materials in the return that were properly submitted to the Board before a vote was taken on the petitioners' applications. The Village respondents consented to petitioners and intervenor-respondents submitting materials to the court to consider them as part of the administrative record. Accordingly, the court is deeming those materials part of the administrative record. The materials in questions are as follows: (1) Emails dated November 20, 2017 from petitioner Akeson; (2) Revised dock plans from petitioners'

Since the Board's determination was made after informational public hearings, as opposed to a quasi-judicial evidentiary hearing, the question before the court is whether the determination was affected by an error of law, or was arbitrary and capricious or an abuse of discretion, or was irrational (*Zupa v Board of Trustees of Town of Southold*, 54 AD3d 957, 957, 864 NYS2d 142 [2d Dept 2008]; see CPLR 7803[3]; *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757-758, 570 NYS2d 474 [1991]). "It is well settled that in reviewing administrative action a court may not substitute its judgment 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 is arbitrary and capricious" (*Warder v Bd. of Regents of Univ. of State of N. Y.*, 53 NY2d 186, 194 [1981]). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact'" (*Pell v Bd. of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974], quoting, 1 N. Y. Jur., Administrative Law, § 184, p. 609). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Pell v Bd. of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, *supra*). The court must determine "whether there is a reasonable fulcrum of support in the record to sustain the [administrative] body's findings" (*Furey v Suffolk County*, 105 AD2d 41, 44 [2d Dept 1984] [internal quotations omitted]).

Here, Dr. Ron Abrams of Dru submitted reports and letters to ERB as well as the Board and testified at one of the ERB public hearings. According to Dr. Abrams, the Ida Smith area is such an ecologically sensitive area that any dock could cause significant long-lasting adverse impacts on the marine environment that could potentially degrade the irreplaceable fish and wildlife habitats in the area. In Dr. Abrams' opinion, the proposed docks would cause negative changes in long shore water flows, which will result in accumulation of debris and algae in the sensitive Ida Beach area, as well as significant accretion of sand and seaweed in and around the proposed docks. Dr. Abrams opined that the docks would have a negative impact on important marine species in the area. He also opined that the proposed docks will change the hydrodynamics of the inshore zone and that the docks would have a negative impact on lateral swimming along the beach as well as use of kayaks and paddle craft.

For the most part, Dr. Abrams' opinions contradicted those expressed by other experts who

environmental consultant and accompanying letter; (3) Letter from petitioners' attorney dated December 1, 2017; (4) Transcript of Board meeting of December 5, 2017; (5) Letter by Dru to the Board in support of ERB's recommendations; (6) Letter signed by twenty-five Ida Beach residents (members of intervenor-respondent Asharoken Bayside Association) supporting ERB's recommendations; (7) Letter by Eisenbud dated December 5, 2017 to the Mayor of the Village of Asharoken and individual members of the Board. Intervenor-respondents offered "other letters from the community" but no copies were provided to the court for review.

presented testimony or reports, or both, to the ERB, although Land Use did admit that the proposed docks would have some limited impacts on lateral swimming and, as the Village respondents point out, Land Use's stated opinion that the docks would not be a significant obstacle for qualified sailors implies that a concession by Land Use that the length of the proposed docks would present a significant obstacle for novice sailors. It was lawfully within ERB's discretion to choose to credit Dr. Abrams' opinion over the other conflicting expert opinions that were presented, as it did here (see *Matter of Power Auth. of State of N.Y. v Williams*, 101 AD2d 659, 475 NYS2d 901 [3d Dept 1984]; *Winston v Freshwater Wetlands Appeals Bd.*, 254 AD2d 363, 678 NYS2d 654 [2d Dept 1998]; *Forrest v Grossman's Lumber*, 175 AD2d 498, 572 NYS2d 774 [3d Dept 1991]); ERB's and, ultimately, the Board's decision to rely on the conclusions of Dr. Abrams did not render their respective determinations arbitrary, capricious or lacking in a rational basis (*Ball v New York State Dept. of Environmental Conservation*, 35 AD3d 732, 732, 826 NYS2d 698 [2d Dept 2006], citing *Gladstone v Zoning Bd. of Appeals of Inc. Village of Southampton*, 13 AD3d 445, 785 NYS2d 697 [2d Dept 2004]; *Seven Acre Wood Street Associates, Inc. v Town of Bedford*, 302 AD2d 532, 533, 755 NYS2d 275 [2d Dept 2003]; *Winston v Freshwater Wetlands Appeals Bd.*, *supra*).

Dr. Abrams noted that the precedent that would be created by approving the docks would encourage other nearby property owners to apply for permits to construct docks, which would result in a proliferation docks in the Ida Smith area, amplifying the negative environmental impact upon the area that would be created by the two proposed docks, a concern that was shared by others who expressed opposition to the construction of the docks in the Ida Smith area. As Dr. Abrams stated in his report to ERB dated July 25, 2016, "[the] addition of first two and eventually many docks will of course increase boating activity [in the Ida Smith area] and along with it increases in the amounts of oil, waste and disturbance to the sea bottom." It was not inappropriate for the Board to consider Dr. Abrams' opinion concerning the adverse precedential consequences that granting the petitioners' applications would have on the Ida Smith area as weighing against permit approval (see, e.g., *In the Matter of Michael Matthews, Applicant*, 2004 WL 1158832 [NY Dept Env Conserv 2004]; *Kleinknecht v Brogan*, 165 AD3d 934, 86 NYS2d 852 [2d Dept 2018]).

As to the potential impact that the proposed docks would have on the aesthetics of the Ida Smith area, a number of residents of the area, including the intervenor-respondents, submitted photographs, visual renderings, letters and testimony to ERB and later to the Board depicting and/or describing the existing aesthetics of the Ida Smith area, and the impact that the proposed docks and then the feared proliferation of docks that would follow would have upon those aesthetics. The evidence presented showed that the Ida Smith area is a crescent-shaped beach, with one dock on the northwest end of the crescent, and two docks on the southeast end. These three docks pre-dated the enactment of the Village Dock Code in 1994. The properties between these existing docks enjoy an unobstructed vista of Northport Bay. The proposed docks would be located at the center of this vista, and their construction would necessarily adversely impact the aesthetics of the Ida Smith area. In his report of July 25, 2016, Dr. Abrams noted that "the purpose of installing a dock is to host

boats, so the results [of the construction of the proposed docks] will be that both water craft and linear visual obstructions will be present and will plainly alter the existing aesthetics of the Ida Smith area.” In his report to ERB dated October 10, 2016, Dr. Abrams stated “[a]s a precedent-setting action, [the proposed] docks will have an enormous potential to create a lasting visual change to an area designated for its pristine beauty.”

Petitioners argue that the Board’s determinations denied the petitioners their riparian rights and were therefore affected by an error of law. A riparian owner has the right of reasonable, safe and convenient access to navigable water (see *Tiffany v Town of Oyster Bay*, 234 NY 15, 21 [1922]). This right includes the right to make this access a practical reality by building a pier or “wharfing out” (see *Town of Oyster Bay v Commander Oil Corp.*, 96 NY2d 566, 571, 734 NYS2d 108 [2001]). What is considered a reasonable, safe and convenient use of the upland owner’s riparian rights is defined on a case-by-case basis (see *Town of Hempstead v Oceanside Yacht Harbor*, 38 AD2d 263, 266, 328 NYS2d 894 [2d Dept 1972]).

Riparian rights are not unfettered and must yield to the legitimate governmental exercise of police power. “Specifically, the right of access for navigation and the ‘right to make a landing, wharf or pier for one’s own use or for the use of the public, are subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatever those may be’” (*Stutchin v Town of Huntington*, 71 FSupp2d 76, 101 [EDNY 1999], quoting *Thousand Island Steamboat Co. v Visger*, 179 NY 206, 210, 71 NE 764 [1904]; see *Matter of Haheer’s Sodus Point Bait Shop v Wigle*, 139 AD2d 950, 951, 528 NYS2d 244 [4th Dept 1988]; *Town of Islip v Powell*, 78 Misc2d 1007, 358 NYS2d 985 [Sup Ct, Suffolk County 1974, Lazer, J.]; *Rottenberg v Edwards*, 103 AD2d 138, 141, 478 NYS2d 675 [2d Dept 1984]).

The court finds that the respondents appropriately applied the rules and regulations imposed by the Village Code to protect the rights and interests of the public (see *Stutchin v Town of Huntington*, 71 FSupp2d at 101). The Code of the Village of Asharoken notes that “. . . various means already exist for owners to access their boats, including private rowboats, membership in various nearby yacht clubs, public mooring facilities in Northport, Centerport and Huntington Harbors, commercial marine supply companies providing launch service and moorings and the Village of Northport dock.” (Village Code § 125.22.3). Accordingly, the petitioners’ riparian rights of access to navigable portions of the Northport Bay were not denied by the respondents’ denial of their respective applications to construct the proposed docks, but merely limited petitioners’ mode of access to the other various means already in existence in the area (see *Stutchin v Town of Huntington*, 71 FSupp2d 76, 102 [EDNY 1999]; *Montero v Babbitt*, 921 FSupp 134, 139 [EDNY 1996]). Thus, petitioners’ argument that the Board’s determination unlawfully denied them of their riparian rights is unavailing.

For all of the above reasons, the court finds that the Board’s determinations regarding the

petitioners' respective applications were not affected by an error of law, nor were they arbitrary and capricious, an abuse of discretion, or irrational. Therefore, petitioners' application pursuant to Article 78 of the CPLR is denied. The court has considered the remaining contentions of the parties and finds that they do not alter the foregoing determination.

The foregoing constitutes the decision and order of the court.

Dated: 9/18/2019

Riverhead, New York



HON. SANFORD NEIL BERLAND, A.J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION