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789 N.E.2d 1093

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58 Mass.App.Ct. 1106, 789 N.E.2d 1093, 2003 WL 21384187 (Mass.App.Ct.)
 (Cite as: 58 Mass.App.Ct. 1106, 789 N.E.2d 1093)

Briefs and Other Related Documents
 Jacquet v. Planning Board of
 EdgartownMass.App.Ct.,2003.NOTICE: THIS IS
 AN UNPUBLISHED OPINION.

Appeals Court of Massachusetts.
 Ernest K. JACQUET & another,^{FN1}

FN1. Madeline B. Jacquet.
 v.
 PLANNING BOARD OF EDGARTOWN.
 No. 02-P-208.

June 16, 2003.

*MEMORANDUM AND ORDER PURSUANT TO
 RULE 1:28*

*1 At the tip of John Oliver Point, which reaches into the Cape Poge Bay of Chappaquiddick Island, lie approximately five acres of property owned by the Jacquets. The only present access to their property is a narrow beach road. [A. 5] On the premise that this road sometimes floods, turning their property into an island, the Jacquets filed an application with the planning board of Edgartown (board) for a special permit to build a stairway and a segmented pier to provide access to their land via the water.^{FN2} [A. 34] The application was denied on a variety of grounds, including environmental impact, economic impact, and the Jacquets' failure to prove the necessity for the pier. [A. 10] A Superior Court judge affirmed the board's decision, and the Jacquets appeal. We affirm.

FN2. Jacquet's application proposed to build a stairway down to the beach, a fixed pier 230 feet long, two wooden floats, and a fifteen-foot wooden ramp linking the fixed pier to the floats. [A. 5-6, J's br. 1]

The Edgartown zoning by-laws require the board to consider the reports of several other agencies before it may grant a request for a special permit. See by-law § 17.5(c). Those agencies each recommended a denial. [A. 6-8] When the Edgartown conservation commission (commission) denied the Jacquets' request, they appealed to the Department of Environmental Protection (DEP). Although the DEP affirmed the commission's denial, it eventually approved a modified plan, calling for the construction of a shorter pier in a different location. No application was presented to the board for the construction of this modified pier. [A. 6-7, 10] The board held public hearings on the Jacquets' original application (the only application ever made to the board), discussed the evidence for and against it at a regular meeting in December of 1993, and on January 25, 1994, voted to deny the application. [A. 9] Shortly after the Superior Court judge affirmed the board's decision, the Edgartown zoning by-laws were amended to prohibit all non-municipal piers. [A. 362; J's br. 11; B's br. 25]

The Jacquets press two contentions on appeal: (1) that the Superior Court judge erred in affirming the board's blanket denial of the application without considering the beach stairway (see note 2, *supra*) separately; and (2) that the judge erred in failing to remand the case to the board for consideration of the modified proposal.

The first issue is not properly before us, as it does not appear from the record below that it was raised in the Superior Court. See, e.g., *Burwick v. Zoning Bd. of Appeals of Worcester*, 1 Mass.App.Ct. 739, 745-746 (1974); *Shalbey v. Board of Appeal of Norwood*, 6 Mass.App.Ct. 521, 527 (1978). The Jacquets claim that they specifically argued for the stairway as a separate item, but their record citations do not support this claim. Although the DEP had approved of the stairway portion of the proposal separately from the remainder (as well as eventually approving of the 155 foot pier), and the Jacquets argued that the DEP decision had res

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judicata effect [A. 99], they were explicit that their sole request of the Superior Court judge was for a remand to the board for consideration of the new pier proposal. [A. 129] Because the issue of the stairway alone was not raised below, we will not address it for the first time on appeal.

*2 As for the second contention, the trial judge did not err in failing to remand the case for consideration of the new pier proposal. A reviewing court may not disturb the decision of the board unless it is "based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Davis v. Zoning Bd. of Chatham*, 52 Mass.App.Ct. 349, 355 (2001), quoting from *Roberts v. Southwestern Bell Mobile Sys., Inc.*, 429 Mass. 478, 486 (1999). The decision of the board was to deny the original pier proposal for the reasons outlined above. The Jacquets did not contest that denial at trial but focused instead on the merits of their new pier proposal. As the Jacquets do not attempt to find fault with the board's decision, neither do we. The Superior Court judge properly declined to remand the case to the board for consideration of a plan never presented to it. Remands are ordered to give a board the opportunity "to make further findings of fact or to state more fully the reasons for its decision, or [to] instruct [] the board to reconsider an application in the light of stated legal principles different from those on which the board has thus far proceeded." *Roberts-Haverhill Assocs. v. City Council of Haverhill*, 2 Mass.App.Ct. 715, 717 (1974). None of these circumstances applies here. What the Jacquets seek is not accurately described as a remand but a circumvention of the zoning by-laws that now prohibit the construction of non-municipal piers. Especially in light of the delicate nature of the Martha's Vineyard environment, we decline to intervene.

Judgment affirmed.

Mass.App.Ct.,2003.
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Briefs and Other Related Documents (Back to top)

- 2002 WL 32758442 (Appellate Brief) Reply Brief of Plaintiffs - Appellants (May. 13, 2002) Original Image of this Document (PDF)
- 2002 WL 32758457 (Appellate Brief) Brief of Defendant - Appellee (Apr. 25, 2002) Original Image of this Document (PDF)
- 2002 WL 32758451 (Appellate Brief) Brief of Plaintiffs - Appellants (Mar. 25, 2002) Original Image of this Document with Appendix (PDF)

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COMMONWEALTH OF MASSACHUSETTS

DUKES, ss

SUPERIOR COURT
C.A. # 94-009

ERNEST K. JACQUET and MADELINE B. JACQUET

v.

SUSAN CONVERY, MICHAEL DONAROMA, BENJAMIN HALL, JR.,
RICHARD O'NEIL, NORMAN RANKOW and PAUL SHEEHAN, as they are
the members of the EDGARTOWN PLANNING BOARD

MEMORANDUM OF DECISION AND ORDER

[Including Findings of Fact and Rulings of Law Pursuant to Mass. R. Civ. P. 52(a)]

The plaintiffs, Ernest K. Jacquet and Madeline B. Jacquet (Jacquets), filed a complaint against the Edgartown Planning Board (Board), claiming the denial of a special permit to construct and maintain a pedestrian access stairway and fixed pier and float facilities was arbitrary, capricious and an abuse of authority and exceeded its authority. The action is brought pursuant to G.L. c. 40A §17.

Trial was held without a jury. The parties presented opening statements, introduced evidence through the testimony of witnesses and twenty-nine exhibits and made closing statements.

FACTS

I find the following facts based on the testimony of the witnesses I deemed credible, the exhibits and the reasonable inferences drawn from all the evidence.

On January 25, 1994 the Board voted to deny the Jacquets request for a special permit to construct a wooden pedestrian stairway 3' x 21', a fixed wooden pier and float facilities 230' long by 4' wide with a 15' long and 4' wide wooden ramp and two wooden

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floats 8' x 38' and 8' x 40'; 308 feet of the pier are below mean low water. The proposed pier is from John Oliver Point on Chappaquiddick Island, into the waters of Cape Pogue Bay, Edgartown, Massachusetts. The Jacquets¹ own about five acres of land at the tip of John Oliver Point which they purchased in 1991. Access to their property is by a beach road over the abutters property located on the northerly side of the island. During certain storm conditions the road maybe flooded.

The Jacquets presented to the Board the project plans for the construction² and maintenance of the pier, a copy of the Notice of Intent (NOI) filed with the Conservation Commission and comments regarding compliance with the "Marine Advisory Committttee" Pier Permitting Guidelines of November 20, 1990.

While pursing the special permit from the Board, the Conservation Commission denied the request both under the Wetlands Protection Act and the Town By-laws. The Jacquets appealed to the Department of Environmental Protection (DEP) which affirmed the Conservation Commission. Subsequently, they filed a modified plan³ with DEP for the construction of 155 foot pier together with other changes. An appeal was taken pursuant to G.L. 249 §4 from the Conservation Commission denial of the request

¹The Jacquets own a house and boat dock on North Water Street, Edgartown,

²The proposal calls for the installation of 510 pilings to support the pier below mean low water.

³DEP issued an order of conditions for the construction of a 155 foot pier. The relief sought by the Jacquets in this appeal is a remand to the Board of this decision of DEP. No application was presented to the Board for the construction of the 155 foot pier.

for the 308 foot pier project . The commission decision⁴ was affirmed by the Court, Gershengorn, J.

At the public hearing before the Board, the Jacquets' spokesperson stated the pier was necessary to protect access to the property for safety because the access road is inaccessible at low tide since the storms of 1990 and 1991. She stated the pier will not affect shellfishing except for limiting the use of drags near it. The drags are used by commercial and recreational fishermen to harvest scallops. Cape Pogue Bay was the town's primary source of scalloping in 1993 and was listed as one of the top five scalloping areas in the Commonwealth. About one million dollars worth of scallops are harvest from Cape Pogue Bay. In 1993 there were 150 commercial shellfish licenses and over 800 recreational licenses issued by the Town.

Anton Bettencourt, a member of the Marine Advisory Committee, recommendation as did the committee to deny the special permit. The committee determined the proposed pier would have an adverse impact on the shellfish areas and eelgrass; would impede shell fishing around the perimeter of the bay; and would interfere with commercial and recreational navigation. Mr. Bettencourt voted to ban piers in the bay. In the recent past no new piers have been constructed in the Bay.

Paul Bagnall, the Shellfish Constable and Marine Biologist opposes any new piers in the Bay because it is Edgartown's premier scalloping resource. He opined there is no literature to support the applicant's position that a pier will enhance the shellfish habitat. The conservation commission objected to the pier for the reasons it denied the

⁴The case is Dukes County C.A. #94-0003. A copy was provided by the plaintiffs as an attachment to their motion on issue preclusion.

application, the Wetlands Protection Act and the Zoning By-laws.

The Marine Advisory Committee promulgated guidelines for pier permitting generally, and then, specifically with respect to certain critical areas. Based on its criteria the Marine Advisory Committee recommends no new pier construction in Cape Pogue Bay. The guidelines for considering an application require giving primary consideration to protecting existing and potential shellfish and shellfish beds, maintenance of safe and open navigation, preservation of historic vistas and prevention of water pollution of any type. Applying the guidelines to the Jacquets' application the Marine Advisory Committee concluded the proposed pier would have an adverse effect on the shellfish industry in the Bay; especially the scalloping because of the destruction or scouring of the eelgrass beds which are critical for the growing of scallops. Immature scallops attach to the eelgrass which provides cover from predators. When the scallop matures it drops to the sea bed and is secreted in the sand.

The Marine Advisory Committee noted extensive scouring of the eelgrass in the location of the Jacquets mooring. The mooring which is located off shore is identifiable in the aerial photograph as is the scouring around it.

Several applications for pier permits were either denied or withdrawn. No new piers have been constructed in Cape Pogue Bay, nor has there been any reconstruction or extensions of any existing or dilapidated piers in the bay in the recent past. Mr. Bagnall explained of the six existing pier structures in the Bay, one consists of only two remaining broken pilings. Dr. Self, Sr.'s pier was constructed about 22 years ago and measures 135 feet. Dr. Self, Jr.'s pier is about 95 feet and was built about 20 years ago. Another pier built about 1985 is 40 feet. The Pacella pier is 120 feet. The final

pier which is located on the north side at Cape Pogue Gut is 35 feet and was rebuilt after the No Name Storm but had existed for about 20 years.

The Jaquets never inquired of the owners of the beach road the likelihood or feasibility of repairing and upgrading to the condition before the storms. Their sole approach to resolving a potential evacuation from the island is the construction of the pier.

The Town has an evacuation plan in the event of a storm which would result in flooding because many areas of Chappaquidick Island flood. The fire chief stated he can take a 4 wheel vehicle out over the beach road except in catastrophic conditions. For example in a ten year storm the stillwater elevations at Cape Pogue would be 4.4 feet high due to tidal and wind setup effects including wave action. Edgartown Harbor would have the same 4.4 feet elevation during such a storm. A fire truck could not reach the property under such conditions. However, the evacuation plan would be implemented to rescue people stranded on Chappaquidick Island.

At a regular meeting in December, 1993 the Board discussed the evidence submitted for the proposed 308 foot pier, both pro and con. It was recommended that the request for a special permit be denied because of the importance of Cape Pogue Bay as the shellfish resource in Edgartown, the conservation commission's concerns, the recommendations of the Marine Advisory Committee and the Shellfish Warden and, finally, the failure of the applicant to demonstrate there were no other possible avenues of access besides the pier.

On January 25, 1994 the Board reviewed the application before voting. By an unanimous vote the request for the special permit was denied. The Board listed seven

reasons for its decision: (1) the recommendation and reasons of the Marine Advisory Committee as detailed in its letter to the Board dated November 3, 1993; (2) the opposition and supporting reasons from the Shellfish Committee; (3) the denial of the NOI and reasons in support filed by the Conservation Commission; (4) the Jacquets failed to prove that the pier was the only access to the property; (5) the Jacquets have not demonstrated a hardship which would outweigh the public right to the shellfish and recreational resources of the Bay; (6) the site is not appropriate because it will diminish the public resources; and, (7) the proposed pier will adversely affect the shellfishing, navigation, and recreational use of the area.

Dr. Anderson represented the Jacquets at both the DEP hearing and during this trial. He inspected the area for a proposed 155 foot pier which is in an area different from the plans submitted to the Board for the 308 foot pier. After consulting with various experts, review of the scientific literature, and performing a resource assessment based on a rectangular grid he opined about the quantity and location of the eelgrass near or under the proposed pier. Dr. Anderson concluded there was a sector about 30 feet wide containing about 30% eelgrass and about 150 foot section with 10% eelgrass. As he went deeper out into the Bay there was a final section about 30 feet wide with 5% eelgrass. The 308 foot pier would cover about 210 feet stretch of eelgrass from the shore to the terminal point of the pier. Mr. Skomal from the Massachusetts Division of Marine Fisheries estimated based on his survey pier would cover the eelgrass for a distance of 260 feet.

Dr. Anderson's site inspection also included a scallop and shellfish survey⁵. The entire site inspection last only one day. He acknowledged the concerns regarding the use of pressure treated pilings and the leachates from the pilings.

In 1994 Dr. Anderson was retained to represent the owners of a parcel of land who desired to construct a pier in Lagoon Pond. It required crossing a dense eelgrass area about 30 feet wide. His recommendation to the owners was to relocate the pier so it would not cross the eelgrass. As with the Jacquets property the section with the eelgrass is ecologically significant to the scallop habitat. However, he recommends constructing pilings at the Jacquet property within the eelgrass sector.

Ms. Fields is employed as a coastal geologist with the Woods Hole Group in Falmouth. She was retained by the Jacquets to evaluate the stairway and the 155 foot pier up to the mean low water to determine the impact on the flora and fauna. She concluded the foot of the stairway would impact on a salt marsh area which would necessitate it being relocated about five feet to the south. Dr. Anderson's testimony is premised on the location set forth on the 155 foot plan and not the changed location based on the salt marsh area identified by Ms. Fields.

Several scallopers, both commercial and recreational, explained the methods used in scalloping, the viability of Cape Pogue Bay for scalloping and the impact of a 308 foot pier on their ability to scallop in and around the pier. The fishermen who use drags attach about six or eight to the rear of the boat. Near the shore the drags are pulled along a line perpendicular with the shore line. A pier would interfere with their

⁵Dr. Anderson recognized the mobile nature of scallop habitat based on storms and other environmental interaction. The beds may change from year to year.

ability to drag along the shore. In order to maneuver the boat and not disturb the drags the fishermen could not get any closer than fifty feet to the pier. Clearly, they could not scallop under the pier.

The Jacquets proposed pier is in the area referred to as Happy Hollow. Years ago the scallopers drove out on the beach road to Happy Hollow where they moored their boats. After scalloping they would remove the catch to their vehicles and drive to town. This had a deleterious effect on the environment so it was banned.

In addition to scallops, Cape Pogue Bay is a significant and important shellfish habitat. Clams and quahogs grow there. The Jacquets' pier would affect the shellfish in the area of the pilings. In 1995 Dr. Anderson did not locate many shellfish in the area of the pier. However, his most recent survey did not address the shellfish population.

In 1975 the Martha's Vineyard Commission (MVC) was created by Chapter 637 of the Acts of 1974, as amended by Chapter 759 of the Acts of 1974. It created an overlay district over the existing zoning for the communities on Martha's Vineyard. The MVC designated the coastal district of the island as a district of critical planning concern. The MVC declared:

"In considering the problems of inappropriate or uncontrolled development within the Coastal District, the Commission finds that so fragile are these lands and waters and the values they create and support that to maintain and enhance the health, safety, and general welfare of Island residents and visitors, and for present and future generations, special development controls within the District must be adopted".

Within the Coastal District there is allowed by means of a special permit "certain minor non-residential structures and uses" including docks. The legislation requires the towns to adopt regulations which at a minimum comport with the MVC guidelines.

The Board, after a public hearing, denied the Jacquets' request for a special permit. It referenced Articles XIII, XIV, and XX of the Edgartown Zoning By-Laws as the basis for denying the application for the pier. Article XIII is the beach and wetlands regulations. Under §13.4(b)(4) docks are a conditionally permitted use. The Board may grant a special permit subject to special conditions deemed necessary "to assure continued dune stabilization, to maintain the ecological integrity of beach areas, and to reduce the likelihood of hazards for health or safety". Article XIV pertains to the Coastal District. §14.4 is entitled Cape Pogue District. Prior to taking any action on an application for a special permit, the Board shall forward a copy of the application to the MVC, the Harbor Master, the Conservation Commission, the Marine Advisory Committee, the Shellfish Committee, the Board of Health, the Selectmen and the Cape Pogue DCPC Advisory Committee for their written comments. §14.4.4(f) requires the Board to grant the special permit after a public hearing only if it finds, inter alia, the proposed development: " (a) will not materially impair the physical integrity of coastal dunes...coastal banks...land containing shellfish...;". Article XX is to encourage appropriate water dependent uses of the Town's harbors and other water resources by protecting and enhancing the environmental quality of the waters, minimizing potential adverse effect on the marine flora and fauna and promoting safety in navigation. Piers are permitted by Special Permit from the Board and subject to the Rules and Regulations issued by the Harbor Master. The Board must review written recommendations from a variety of committees and determine, inter alia, the proposed use is consistent with the Edgartown Master Plan and the Edgartown Open Space Plan.

DISCUSSION

The standard of review on an application for a special permit is a de novo review of local zoning authority decisions. G.L. c. 40A, § 17 states: "[t]he court shall hear all evidence pertinent to the authority of such board or special permit granting authority and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board or special permit granting authority or make such other decree as justice and equity may require." On appeal to the Superior Court a judge determines the legal validity of a zoning board decision on the facts found by him/her and gives no evidentiary weight to the board's findings. Roberts v. Southwestern Bell Mobile Systems, Inc., 429 Mass. 478, 486 (1999); see Josephs v. Board of Appeals of Brookline, 362 Mass. 290, 295 (1972), and cases cited. Judicial review is limited: the decision of the board "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Id.*; quoting MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 639 (1970); citing Gulf Oil Corp. v. Board of Appeals of Framingham, 355 Mass. 275, 277 (1969). The court may not substitute its judgment for that of the board. Burnham v. Board of Appeals of Gloucester, 333 Mass. 114, 120 (1955); Garvey v. Board of Appeals of Amherst, 9 Mass.App.Ct. 856, 856 (1980).

The Jacquets' seek to remand this matter to the Board with an amendment to their application reflecting a pier of 155 feet long in lieu of the 308 feet pier originally proposed before the Board. The relief sought in the complaint is to annul the Board's decision because it exceeded its authority, was arbitrary, capricious and an abuse of authority.

The first issue is whether the Board's decision was arbitrary, capricious, an abuse of discretion or and based on legally untenable grounds. The second issue will address the request for a remand of a pier with a design length of 155 feet.

The Board's decision is based on a proposed pier extending 308 feet below the mean low water with 510 pilings supporting it. The pier will be built over the eelgrass which extends between 210 feet and 260 feet into the bay. The eelgrass is critical to the habitat for developing scallops.

A pier 308 feet below mean low water will interfere with the commercial scallopers use of drags within 50 feet of the pier. The pilings and the pier will also affect the shellfish area where they harvest clams and quahogs. It will be impossible to shellfish under the 8 foot wide pier. These are sensitive areas for the inhabitants of the Town who scallop and shellfish not only for recreation but more importantly for a living. The bay is recognized as one of the five top areas for scalloping in the Commonwealth with a revenue of about one million dollars for the 150 commercial license holders. A 308 foot pier will obstruct navigation and the recreational use of the area not only for the inhabitants of Edgartown but the many visitors and summer residents.

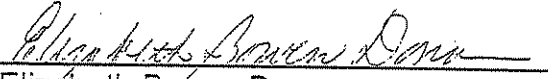
G.L. c. 40A §9 provides in part: "...Special permits may be issued only for uses which are in harmony with general purpose and intent of the...by-law...". Articles XIII, XIV and XX of the By-laws have as an essential purpose the protection of the ecology of the coastal district including the integrity of land containing shellfish. In light of the purpose of the by-laws and the designation by the MVC of the coastal district requiring critical planning, it can not be ruled that the Board's decision was arbitrary, capricious, an abuse of discretion or and based on legally untenable grounds.

The second issue is whether the case may be remanded to the Board for consideration of a plan never presented to it. In Chambers v. Building Inspector of Peabody, 40 Mass. App. Ct. 762, 769 (1996), the Court decided the remedy for a significant modification to a site plan wherein a special permit was granted for a lesser development requires the applicant to file for a new special permit. The Court reasoned that the size and location of a proposed structure was an issue of substance for the special permitting authority, in its decision whether to issue a discretionary special permit and for abutters to receive notice of a public hearing. *Id.* at 766. "We think it reasonable to assume, therefore, that, when a board is asked to exercise its discretion to grant a special permit, the site plan submitted by the owner or developer should accurately reflect the proposed facility..." *Id.* at 767.

Here, the Board voted to deny a 308 foot pier. The Jacquets never submitted a application for a new special permit for a 155 foot pier to the Board. That is their only avenue to proceed because as previously stated there is nothing the Board did in denying the application which warrants a remand. An application for a new special permit is a separate and distinct proceeding which must follow the procedures for requesting a special permit.

ORDER

It is hereby ORDERED and ADJUDGED the decision of the Edgartown Planning Board in denying the application for a special permit by the plaintiffs, Ernest K. Jacquet and Madeline B. Jacquet is AFFIRMED.


Elizabeth Bowen Donovan
Justice of the Superior Court

Date: October 27, 2000