

**SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY**

PRESENT:

HON. JOSEPH C. PASTORESSA
JUSTICE OF THE SUPREME COURT

Mot Seq: #002-MD
#007-MG

_____^x
IN THE MATTER OF THE APPLICATION OF
ROUND DUNE, INC.,

ATTY FOR PETITIONER(S):
ESSEKS, HEFTER & ANGEL, PLLC
108 E. MAIN ST.
P.O. BOX 279
RIVERHEAD, NY 11779

Petitioner(s),

FOR A JUDGMENT UNDER ARTICLE 78 OF
THE CIVIL PRACTICE LAW AND RULES,

ATTY FOR RESPONDENT(S):
ZONING BOARD OF APPEALS OF THE
TOWN OF SOUTHAMPTON
ATTN: TOWN CLERK
116 HAMPTON RD.
SOUTHAMPTON, NY 11968

-against-

ZONING BOARD OF APPEALS OF THE TOWN
OF SOUTHAMPTON AND 94 DUNE ROAD
HOLDING CORP., A/K/A DOCKERS
WATERSIDE RESTAURANT AND MARINA,

BENNET & READ, ESQ.
212 WINDMILL LANE
SOUTHAMPTON, NY 11968

Respondent(s).

TOWN OF SOUTHAMPTON
TOWN ATTORNEY'S OFFICE
116 HAMPTON RD
SOUTHAMPTON, NY 11968

_____^x

Pages Numbered

Notice of Motion/Order to Show Cause/ _____
Petition/Cross Motion and Affidavits (Affirmations) Annexed 1, 8
Opposing Affidavits (Affirmations) 2, 3, 4, 5, 6, 9, 10
Reply Affidavits (Affirmations) 7
Affidavit (Affirmation) _____
Other Papers _____

Upon the foregoing papers, the petitioner seeks a judgment pursuant to CPLR Article 78 annulling a determination of the respondent Zoning Board of Appeals of the Town of Southampton (hereinafter "ZBA") dated October 7, 2004, which denied petitioner's application to void a determination of the Town of Southampton building inspector dated March 17, 2004 regarding a proposed renovation and expansion of the pre-existing nonconforming use of the respondent's property and moves for an order striking from the record unauthorized affirmations, affidavits, and other exhibits. The petitioner avers that the determination is arbitrary and capricious, without rational basis and is not supported by substantial evidence.¹

¹ Justice Robert Oliver, Supreme Court, Suffolk County, issued a decision dated May 11, 2005 denying the respondent 94 Dune Road Holding Corp.'s motion to dismiss the proceeding pursuant to CPLR 404(a) and denying the respondent Zoning Board of Appeals motion

The subject property consists of 9.4 acres located at 94 Dune Road on the north side of the barrier island in the hamlet of East Quogue, Town of Southampton, New York (hereinafter "subject property"). The respondent 94 Dune Road Holding Corp. a/k/a Dockers Waterside Restaurant and Marina (hereinafter "Dockers") is the owner of the subject property. The subject property consists of a restaurant/bar and marina and is bound on the north by a canal which is adjacent to Shinnecock Bay. The subject property is located in a R-80 residential zone and has operated as a restaurant/bar and marina since 1968 as a pre-existing nonconforming use. Petitioner's property is located at 101 Dune Road, East Quogue, New York. The petitioner's property consists of 76 cooperative apartments on 5.3 acres with waterfront on the Atlantic Ocean and is located in the Residential 80 Residence District. The respondent ZBA in a previous determination dated April 19, 1993 regarding the subject property determined, inter alia: (1) that the marina and restaurant could continue as a pre-existing nonconforming use; (2) that the permission to expand the restaurant and enclose certain decks was granted, conditioned upon the following: obtaining building permits and certificates of occupancy within eighteen months; all commercial parking for fee prohibited; tennis courts are to be used only for tennis only, no parking, commercial or otherwise is allowed; and site plan review by the Planning Department regarding the parking space to occupancy ratio based on square footage of restaurant.

The Town of Southampton building inspector in a letter dated March 17, 2004 upon a request by the subject property's attorney for an opinion on "whether or not the expansion of the boat slips" at the subject property (which possess a pre-existing certificate of occupancy, inter alia, for a marina use) requires approval from the Zoning Board of Appeals pursuant section 330-167(B)(1)(a) of the Southampton Town Code and whether the ZBA's determination of April 13, 1993, "prohibits your client from removing the tennis courts to provide additional parking." The building inspector answered no to both questions. Furthermore, the building inspector's letter dated March 17, 2004 stated in pertinent part the following:

"The applicant has applied to the Board of Trustees for permission to install approximately 60 dock slips in a manmade dug canal. You advise that your client is not proposing to expand the dug canal. 330-167(B)(1)(a) states: 'In the case of a nonconforming use, such enlargement or extension shall not exceed, in all, 50% of the floor area of such building or structure actually devoted to such nonconforming use on the effective date of this having first become nonconforming'. The application does not propose to expand the floor area of any of the upland existing buildings or structures. Expansion of the dock slips is not expansion of any floor area. If you were expanding any of the upland structures; for example the restaurant, then this section of the code would apply.

Condition #3 of the ZBA decision states:

Tennis courts are to be used only for tennis-no parking, commercial or otherwise on the tennis courts surface.

I have reviewed this decision, and it does not preclude the applicant from removing the

dismissing the petition pursuant to CPLR 3211(a)(3) and granted the petitioner's motion seeking to restrict the court's determination to the petition and its supporting papers. The instant action was subsequently re-noticed before Justice Oliver and subsequently re-assigned to Justice Blydenburgh whereupon it lay fallow for a number of years before being re-noticed and reassigned to the instant Justice.

tennis court to provide additional parking. This condition was put into the decision because the facility, at one time, was allowing people to park on the tennis court. Furthermore, the ZBA has in the past made the interpretation that parking is permitted in all zones as an accessory use, although accessory to a non-conforming use, is not in itself a non-conforming use, and that no variances are necessary for the expansion of a permitted use (parking area)(decision of Everett Reisig, SCTM # 0900-44-2-30.1, dated February 20, 1997.”

The petitioner appealed the building inspectors opinion that the proposed project did not represent a substantial expansion of the subject property’s nonconforming use. The petitioner’s challenge to the building inspectors opinion was addressed at a public hearing held on August 5, 2004. At the time of the ZBA’s hearing of petitioner’s appeal, applications by Dockers to renovate and expand the existing marina were before the Board of Trustees of the Freeholders and Commonalty of the Town of Southampton, the Southampton Planning Board, and the New York State Department of Environmental Conservation/Army Corps of Engineering for the necessary permits and approvals. Dockers proposed dredging the canal, removal/filling of the existing boat ramp, removal and replacement of bulkheading and installation of floating hinged finger piers to accommodate approximately 60 boats, a boat house and marina office with shower and toilet facilities, fueling facilities, a new septic system, and new parking for 76 additional vehicles by removal of tennis courts. The ZBA in a determination dated October 7, 2004 found that jurisdiction to decide this matter rests with the Town of Trustees of the Town of Southampton and that the building inspectors opinion that (i) the reconfiguration of the marina to allow for additional boat slips was not an expansion of a pre-existing nonconforming use and therefore did not require a variance and (ii) additional parking, as an accessory use in any zone, did not require relief from the ZBA, was correct.

Petitioner avers that the ZBA has the jurisdiction to decide its appeal and that the ZBA was in error when it determined that the Docker’s proposal was not an expansion or enlargement of the pre-existing nonconforming marina use of the property and that the renovation and expansion cannot proceed without first obtaining the approval of the ZBA for a use variance and for modification of the earlier conditions imposed in the 1993 ZBA determination that prohibited the use of the existing tennis courts for parking. Petitioner further contends that the addition of parking spaces and the construction of new docking facilities and boat slips, new fueling facilities, a new boat house and marina office, new lavatory and shower facilities, new picnic facilities and a new septic system will unlawfully transform and fundamentally change and expand the use of Docker’s property.

It is well established that Courts may not substitute their discretion for that of the zoning board, and its determination should be upheld if it has a rational basis (Matter of Ifrah v Utschig, 98 NY2d 304). “In a proceeding pursuant to Article 78 to review a determination of a zoning board of appeals, a zoning board’s interpretation of its zoning ordinance is entitled to great deference and will not be overturned by the courts unless unreasonable or irrational” (Matter of Green 2009, Inc. v Weiss, 114 AD3d 788, 788; see, Matter of Kabro Assoc., LLC v Town of Islip Zoning Bd. Of Appeals, 95 AD3d 1118; Matter of Ferraris v Zoning Bd. of Appeals, 298 AD2d 458). Moreover, “[l]ocal zoning boards have broad discretion in considering applications for variances, and the judicial function in reviewing such decisions is a limited one. Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure” (Matter of Pecoraro v Board of Appeals of Town of Hempstead, 2 NY3d 608, 613; see, Inlet Homes Corp. v Zoning Bd. of Appeals of Town of Hempstead, 2 NY3d 769).

Under these particular circumstances, the Court finds that the ZBA’s determination was

supported by substantial evidence in the record, was not arbitrary, capricious, nor an abuse of discretion and had a rational basis (see, Matter of Green 2009, Inc. v Weiss, supra; Matter of Kennedy v Zoning Bd. Of Appeals of Vil. of Patchogue, 57 AD3d 546; Matter of Muth v Scheyer, 51 AD3d 799; Matter of Wolf Hill Props., Inc. v Modelewski, 19 AD3d 429; Matter of Inlet Homes Corp. v Zoning Board of Appeals of Town of Hempstead, supra; Matter of Merlotto v Town of Patterson Zoning Board of Appeals, 43 AD3d 926). Contrary to the petitioner's contention regarding jurisdiction, the court finds that ZBA's determination that the jurisdiction of the Docker's application rests with the Board of Trustees of the Freeholders and Commonalty of the Town of Southampton (hereinafter Board of Trustees) was not in error and had a rational basis (see, State of New York v Board of Trustees, 99 AD2d 804; Town of Southampton Town Code 111-30). Section 111-30 of the Town Code states in relevant part: "no dock or structure designed to provide access to and from the shoreline of any Town waters or Trustee waters shall be constructed without first obtaining a permit from the Town Trustees." The ZBA's determination had a rational basis in light of the Dongan Patent; the fact that the Board of Trustees is vested with jurisdiction to determine issues regarding docks, bulkheads, wharfs, piers and marinas in tidal waters; that Dockers maintains a preexisting nonconforming use regarding the use of a marina; and that historically the ZBA in the Town of Southampton defers jurisdiction to the Board of Trustees regarding docks.

Moreover, contrary to the petitioner's contention, the ZBA's determination that Docker's proposal does not constitute an impermissible extension or enlargement of his nonconforming use (see, Incorporated Vil. of Laurel Hollow v Owen, 247 AD2d 585; Matter of Tartan Oil Corp. v Board of Zoning Appeals of Town of Brookhaven, 213 AD2d 486) or if it did, such expansion was permitted since it formed an integral part of the intent for the entire parcel and is constitutionally protected (see, Syracuse Aggregate Corp. v Weise, 72 AD2d 254 (4th Dept), affd 51 NY2d 278 [1980]) had a rational basis in the record, and was not arbitrary and capricious. The ZBA's determination that the Dockers proposal was not seeking to change the essential use of the property was rational. The petitioner failed to show that the use of the marina will be changed to activities that deviate from what is defined as a marina pursuant to the Town of Southampton Town Code. Section 330-5 of the Town Code states: Marina-- a facility for the berthing and fueling of all types of recreational watercraft. The term "marina" shall not be deemed to include the term "boatyard" or to include out-of-water storage, restaurant or repair facilities, fishing stations or similar activities." Here, Dockers Certificate of Occupancy (2004) allows a one story frame building with a second floor office, a restaurant/bar, marina with tennis courts, decks and parking. The ZBA's determination regarding the alleged change of use of the marina states: ". . . to our knowledge, the Building Inspector has never listed on a certificate of occupancy the number of slips allowed at a marina. Indeed, no marina within this Town will boast a certificate of occupancy with the exact number of allowable slips in its waters because, simply stated, a marina is a marina. Accordingly, the Building Inspector properly determined that the proposed reconfiguration and additions were not enlargements, extensions nor changes that required this Board's intervention" or if so, that such expansion is permitted since the marina is unique and was intended to be utilized for the ascribed purpose (see, Syracuse Aggregate Corp. v Weise, supra; Jones v Town of Carroll, 15 NY3d 139).

Furthermore, petitioner failed to show that Dockers' proposal required it to seek a use variance given that its proposal was not prohibited by the provisions of the Town Code dealing with nonconforming uses (see, Tartan Oil Corp. v Board of Zoning Appeals of Town of Brookhaven, supra). Indeed, the Town and the ZBA use an area variance test to any expansion of a nonconforming use. Town Code 330-167B(1)(a) states "such enlargement or extension shall not exceed, in all, 50% of the floor area of such building or structure actually devoted to such nonconforming use on the effective date of this having first become nonconforming". Additionally, the ZBA's determination that the proposed boathouse, fueling pumps, and additional parking spaces are accessory uses to the

primary use of the marina and Dockers is entitled to deference and has a rational basis and is supported by substantial evidence (see, Kam Hamton I Realty Corp. v Board of Zoning Appeals, 273 AD2d 385). The boathouse and fueling pumps are specifically proposed to facilitate the marina use and are an accessory and ancillary use to a marina and the ZBA condition regarding parking on the tennis courts does not prohibit Dockers from removing the tennis court to provide for additional parking. The ZBA determination found the following regarding the parking: “[t]his Board has previously held that parking is a permitted use in all zones and, although accessory to a pre-existing, non-conforming use, parking is not in and of itself a non-conforming use. In fact, it is a permitted accessory use to whatever the main use on the property may be. Thus, it is not necessary for this Board to comment on that which is already allowed.”

Accordingly, the petition is dismissed.

The petitioner’s motion seeking an order striking from the record certain unauthorized affirmations, affidavits, and other exhibits is granted to the extent that the Court’ strikes exhibits A-D of the attorney affirmation of the respondent Town of Southampton ZBA and exhibits B, and C of the attorney affirmation of the respondent Dockers as well as the portion of respective attorney affirmations’ reference to the exhibits therein.

This shall constitute the decision and order of the court.

DATED: March 30, 2014



HON. JOSEPH C. PASTORESSA, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION