



**Town of Southampton**  
**Board of Appeals**

*This is Not a Building Permit.*

DECISION NO. D011517

DECISION DATE: October 7, 2004

**NO JURISDICTION**

**OWNER:** 94 Dune Road Holding Corp  
94 Dune Rd  
East Quogue, NY 11942

**LOCATION:** North side, #94 Dune Rd, East Quogue.

**DETERMINATION:**

Thus, for all these reasons stated herein, this Board finds that it does not have jurisdiction to hear this application and, furthermore, the applicant does not have standing to bring this appeal. In any event, we also find that the Building Inspector acted properly when he considered all the evidence before him and determined (i) that the reconfiguration of the marina to allow for additional boat slips is not an expansion of a pre-existing nonconformin use, and thus, does not require a variance from this Board; and (ii) additional parking, as an accessory use in any zone, doe not require relief from this Board.

Pursuant to application, and survey and conditions as approved by the Board of Appeals.

NOTE: The holder of this variance is requested to familiarize himself with the ordinance under which said variance is granted. Any violation of the provisions of said ordinance shall render the offender liable for the penalties provided therein, and in addition thereto, may result in the immediate revocation of the building permit.

*This notice must be kept on the premises until full completion of the work authorized.*

PER

Herbert E. Phillips  
Chairman

ZONING BOARD OF APPEALS  
TOWN OF SOUTHAMPTON

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In the Matter of the Application of

ROUND DUNE, INC.  
101 Dune Road  
East Quogue, New York  
Applicant.

DECISION

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FINDINGS AND DETERMINATION

Based upon the application, documents contained in the Board's file, site inspections and testimony from the public hearing held on August 5, 2004, the Zoning Board of Appeals finds and determines as follows:

ISSUE

Applicant appeals the determination of the Building Inspector and his issuance of certificate of occupancy number C040123 dated March 17, 2004, with respect to the property known as "Dockers", a restaurant/bar and marina, located at 94 Dune Road in the hamlet of East Quogue, Town of Southampton. The owners of Dockers applied to the Trustees of the Freeholders of the Commonalty of the Town of Southampton (the "Trustees") for a permit to remove the existing docks and boat ramp at the site and, in their place, install floating docks with approximately 60 boat slips. They also sought to add a boathouse and marina office with a shower and toilet facilities, fueling facilities, a new septic system to service the existing restaurant, and office and additional parking. The Building Inspector determined, by letter dated March 17, 2004, (i) that the reconfiguration of the marina to allow for additional boat slips is not an expansion of a pre-existing, non-conforming use, which would require a variance from the ZBA, and (ii) that the removal of the existing tennis courts to allow additional parking is a permitted use. We are faced with the issue then, of whether these proposals represent an enlargement, extension or change of a non-conforming use, which thus must be determined by the ZBA. We find however, that this Board does not have to reach that issue because (i) the Board does not have jurisdiction to entertain this application; and (ii), the applicant does not have standing to bring this application. Having said that, however, the Board recognizes that the Building Inspector's determination was not arbitrary and capricious.

BACKGROUND

The property in dispute is identified on the SCTM as #0900-385-1-36.3, is approximately 41 acres in area, and is located on the north side of Dune Road in East Quogue, bounded on the north by a canal adjacent to Shinnecock Bay. The parcel is located in the R-80 Zoning District and, while conforming to size standards, benefits

from a pre-existing, nonconforming certificate of occupancy with respect to use. The newly updated certificate of occupancy, which is being challenged herein, allows for a one story frame building with a second floor and office, a restaurant/bar, marina with tennis courts, decks and parking per 1993 ZBA decision #9380. The property likewise benefits from certificates of compliance to repair a deck, repair a deck and awning, complete a deck addition, and replace an awning.

A review of the history of the parcel reveals that, from 1957, the year zoning was first established within the Town of Southampton, until May 2, 1972, this property was located in the "L Beach Business" Zoning District. Permitted uses in the "L Beach Business" district included single family dwellings, hotels and motels, yacht clubs, country clubs, restaurants and marinas. In 1968, the then owner obtained a certificate of occupancy, No. 6231, dated October 22, 1968, for a marina. Approximately one month later, the owner received a certificate of occupancy for a "marina storage building-sail loft (only) [sic] for building #2"<sup>1</sup>. Thereafter, in 1972, the "L Beach Business" Zoning District became an R-80 Zoning District.

In 1993, another predecessor in title, Shorelands Inc., received a decision from this Board in response to its request for an interpretation (and confirmation) of the validity of certificate of occupancy No. 6231. That decision indicated, in pertinent part, that the pre-existing use as a bar/restaurant, marina with tennis courts, parking, and decks was allowed and, likewise, that the use of the marina was not abandoned, thereby rendering such use permitted as pre-existing, non-conforming. Five years later, in 1998, the current owner of Dockers successfully applied to the ZBA for a variance to add decking for restaurant seating. Finally, in September of 2003, such owner applied to the Trustees for renovation of the marina and dredging of the canal.<sup>2</sup> Concurrent with that application, Dockers requested an opinion from the Building Inspector as to whether the reconfiguration of the slips would require a variance from the ZBA. As previously stated, the Building Inspector, by letter dated March 17, 2004, indicated that no such variance was necessary. Thereafter, applicant, Round Dune, Inc. brought this appeal.

#### SEQRA

An appeal from a determination of the Building Inspector is a Type II action pursuant to the State Environmental Quality Review Act ("SEQRA") and the relevant provisions of the Southampton Town Code.

#### HEARING

The following testimony was submitted at the hearing before the ZBA:

Counsel for applicant, Round Dune, Inc., argued that the Building Inspector was wrong when he granted the requested relief instead of advising Dockers to apply to the ZBA for variances. Counsel argued that §§330-116 and 330-117 of the Town Code

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<sup>1</sup> That certificate however, was superseded by the 2004 certificate.

<sup>2</sup> As of the date of this decision, that application for a permit is still pending before the Trustees.

prohibits the enlargement, extension or change of non-conforming uses. Likewise, counsel asserted that the Building Inspector's analysis of §330-167(B)(1)(a) was flawed since that section addresses only the expansion of floor area and not the use itself. Instead, counsel maintained that Dockers should be applying to this Board for a use variance to determine the number of slips allowed within the marina. Finally, counsel asked this Board to focus on the totality of uses on the property when evaluating this matter.

In response, Dockers' counsel maintained that this Board lacked the jurisdiction to hear this appeal – particularly, that the Town has no jurisdiction over tidal wetlands and only the Town Trustees may hear such applications. Further, counsel urged that applicants likewise lacked any standing to challenge the Building Inspector's determination in that they failed to provide any evidence of any injury or harm in fact. In addition, counsel argued that the Building Inspector properly determined that the proposed activities were not expansions of, but fell within, acceptable uses attributed to a marina, negating any need for review from this Board. Finally, counsel similarly asserted that the addition of parking is not an expansion of a non-conforming use since parking has always been deemed an allowable accessory use in a residential zone.

Kevin McAllister of Peconic BayKeeper, as well as William Bates, Esq., spoke in opposition to the Building Inspector's determination. Also present was a Mr. Larry Oxman, who expressed a general interest in the application without making specific objections. The Board allowed any and all parties to submit written comments on the application. Counsel for applicant, Theodore D. Sklar, Esq., as well as counsel for Dockers, John J. Bennett, Esq., submitted memorandums of law, which the Board has reviewed and considered, and which are maintained as part of this record. In addition, approximately ten letters were received from members of the community, all in support of the appeal. These too, are part of this record.

The Southampton Town Planning Board indicated by memorandum dated July 15, 2004, that it is the policy of the Board not to comment on Building Department determinations. The Southampton Town Conservation Board indicated by letter dated July 28, 2004, that it was concerned about the impacts this project would have on the ecologically sensitive area and recommended that Dockers consider various changes to their property. These letters too, are part of this record.

## DISCUSSION

### A. Jurisdiction

This Board agrees with Dockers' counsel that jurisdiction to decide this matter rests with the Trustees. Indeed, §111-30 of the Southampton Town Code requires, in relevant part, that 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. Here, there can be no dispute that Dockers' proposed conduct falls within this purview and thus, the decision to allow such actions

rests with the Trustees.<sup>3</sup> In fact, this is not the first time this Board has been asked, and refused, to decide an issue with respect to docks. For example, in the matter of Fred and Lois Kelsey, Decision No. 10190, dated June 18, 1998, this Board did not decide whether the applicant could expand a marina by adding piers and dock space in an adjacent creek, reasoning that the Trustees have jurisdiction over construction within the creek itself. We do not now choose to stray from that decision.

#### B. Standing

This Board recognizes, and it is well-settled, that an appeal may be taken only by someone who is “aggrieved” or by an “officer, department, board or bureau” of the Town.<sup>4</sup> It is also well-settled that the burden of establishing standing to raise a claim is on the party seeking review.<sup>5</sup> Thus, applicant bears the burden of establishing its standing to bring this appeal. Specifically, applicant must demonstrate that it will suffer (i) a direct injury-in-fact that is (ii) in some way different from that of the public at large and (iii) within the zone of interest that the statute is intended to protect.<sup>6</sup> The record in this case is clear that applicant has failed to demonstrate either an in-fact injury or an injury different in kind and degree from the community at large. In fact, the adverse impacts of Dockers proposed conduct, as stated by applicant, are community-wide in nature, such as traffic, noise, air, and water pollution. Indeed, generalized allegations that a project will have a harmful impact are not enough to articulate an injury different from the public at large.<sup>7</sup>

Stated somewhat differently, although an inference of standing may be presumed if a party is in close proximity to a project, distance, in and of itself, is not enough to confer standing and, consequently, “the status of neighbor does not . . . automatically

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<sup>3</sup> The Board considered applicants reliance on S.D. Office Equipment Company, Inc. v. Channing Philbrick, 247 A.D.2d 838, 668 N.Y.S.2d 426 (4<sup>th</sup> Dept. 1998) as well as Town of Islip v. Powell, 78 Misc.2d 1007, 358 N.Y.S.2d 985 (Sup. Ct., Suffolk Cty. 1974), and is aware that “municipal zoning power extends to restriction[s] [on] the use of the shoreline, such as the construction of docks in connection with marinas,” S.D. Office Equipment Company, Inc., *supra* at 840. However, the Trustees in the Town of Southampton preempt this field, and thus, should first pass on this project. With respect to the discussion of riparian rights being subject to zoning limitations in the Powell case, we note that the Town of Islip does not have a governing body such as the Trustees to decide these issues. Instead, we understand that the Planning Board there issues wetlands permits for the construction of docks. But that Planning Board, an agency that derives its power from the Town of Islip, a creature of the State, is clearly distinguishable from the Trustees – a creature that pre-dates state law and, in fact, derives its power from the King of England through the Dongan Patent of 1686. Indeed, the Trustees’ powers, having been conferred upon them prior to the ratification of the U.S. Constitution in 1787, may not be impaired by the acts of the State or any municipal body acting under powers delegated by the State Legislature. Trustees of Dartmouth College v. Woodward, 4 Wheat 518 (1819).

<sup>4</sup> Town Law §267-a(4). See also Terry Rice, *Practice Commentaries*, MCKINNEY’S CONSOLIDATED LAWS OF NEW YORK, TOWN LAW, Book 61, §267-a, p.259 (2004).

<sup>5</sup> See The Society of the Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761, 570 N.Y.S.2d 778, 782 (1991).

<sup>6</sup> *Id.*

<sup>7</sup> See Long Island Pine Barrens Society v. Planning Board of the Town of Brookhaven, 213 A.D.2d 484, 623 N.Y.S.2d 613 (2d Dept. 1995).

provide . . . [an] admission ticket” to review.<sup>8</sup> In the absence of any facts before this Board of a special injury to applicant if this project is implemented, the close distance between Dockers and applicant is irrelevant.<sup>9</sup>

In addition, applicant offers no proof of an economic harm or injury in fact. To the contrary, Aram Terchunian presented some evidence on behalf of Dockers indicating that the proposed reconfiguration to its marina may in fact enhance the value of applicant’s property. For example, Seascape Condominiums, also located within the Town of Southampton, are similar to applicant with respect to proximity to both the water and a marina, and were appraised at a higher value than applicant’s property. While the Board appreciates that the evidence is not from a licensed real estate appraiser, applicant fails to refute such evidence and thus, leaves this Board to consider facts relevant to economic hardship – or lack thereof – that may inure applicant.

Based upon all the testimony and evidence, we find that applicant was not aggrieved by the Building Inspector’s decision.

### C. Dockers does not propose an expansion or change of use on this property

The standard of review we apply here is whether the Building Inspector, acting on the facts before him, decided arbitrarily and capriciously, or without any rational basis, that Dockers did not need to seek a variance from the ZBA for the proposed project. We think he did not.

As indicated earlier, Dockers has a certificate of occupancy which allows for a one-story frame building with a second floor office, a restaurant/bar, marina with tennis courts, decks and parking. Though this certificate was issued in 2004, there is no dispute that this property has been used, in part, as a marina since 1968, the year it first received a certificate of occupancy for such use.<sup>10</sup> Thus, for 36 years this parcel has been used for the exact same purpose – a marina. Furthermore, there is no evidence before this Board that the use of this parcel will now be changed to undertake activities that stray from what is contemplated at a marina, as defined in §330-5 of the Southampton Town Code:

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<sup>8</sup> See Matter of Sun-Brite v. Board of Zoning and Appeals of the Town of N. Hempstead, 69 N.Y.2d 406, 515 N.Y.S.2d 418, 422 (1987).

<sup>9</sup> See Olish v. Heaney, No. 25505-02, 2003 WL 21276342 (Suffolk Cty. Sup. Ct. Apr. 16, 2003)(Broad, indirect effects, such as noise, traffic patterns, air and water quality, while perhaps felt by many individuals, do not create a controversy before the courts to confer standing); see also Oates v. Village of Watkins Glen, 290 A.D.2d 758, 736 N.Y.S.2d 478, 481 (3d Dept. 2002)(nearby property owner lacked standing to sue where petitioner owned property approximately 530 feet from proposed Walmart supercenter site but asserted unsubstantiated allegations concerning increased traffic and expected change in the character of the community, effects not different from the community at large); see also Buerger v. Grafton, 235 A.D.2d 984, 652 N.Y.S.2d 880 (3d Dept. 1997)(owner of property within 600 feet of proposed subdivision’s access road failed to allege specific concerns required for standing).

<sup>10</sup> Notably, we are cognizant of the holding in Bekermus v. Nardy, 123 Misc.2d 378, 383, 472 N.Y.S.2d 570 (Sup. Ct. Suffolk County, 1984), where the Court instructed *this Board*, once a certificate of occupancy is issued, the Town and its agencies are bound by it.

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.<sup>11</sup>

Parenthetically, we note that, 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.

In Syracuse Aggregate Corp. v. Weise, 51 N.Y.2d 278, 434 N.Y.S.2d 150 (1980) the Court of Appeals found that where a property owner engages in substantial activities (there it was quarrying activities), on a distinct parcel of land over a long period of time, and the activities clearly manifest an intent to appropriate the entire parcel to the particular business, the extent of protection afforded by the nonconforming use will extend to the boundaries of the parcel, even though extensive activities may have been limited to only a portion of the property. We think that holding fully supports the Building Inspector’s determinations.

Here, both the owner of Dockers as well as its predecessors in title, have, since 1968 (a period of 36 years) used the entire canal, not merely sections nor areas, as a marina. In fact, we do not think there is any doubt or controversy that the owners of this subject parcel, both past and present, ever intended to use this canal as anything other than a marina – and Dockers’ 36-year certificate of occupancy for a marina is the best evidence of this continuous use. Again, a fact worth repeating, there has never been a certificate of occupancy limiting the number of slips nor the number of vessels allowed within this canal. Thus, this Board declines to deprive Dockers of this “vested right,” as recognized by the Building Inspector, and will not require that they now “seek permission to do that which they have a legal right to do.”<sup>12</sup>

#### D. Parking is a permitted accessory use

This 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.<sup>13</sup> In fact, it is a permitted accessory use to whatever the main use

<sup>11</sup> As an aside, we note that there are no changes proposed to the existing “restaurant.”

<sup>12</sup> See Town of Somers v. Camarco, 308 N.Y. 537, 541 (1955)(Court found that amended zoning ordinance which removed the protection afforded to certain nonconforming uses was unconstitutional in that it unreasonably deprived defendants of a vested right. Generally, nonconforming uses and structures are constitutionally protected and permitted to continue, notwithstanding the attempted contrary provisions of a new or amended zoning ordinance); see also Telimar Homes, Inc. v. Miller, 14 A.D.2d 586, 218 N.Y.S.2d 586 (2d Dept. 1961)(court held that plaintiff acquired a vested right to a nonconforming use as to the entire tract of land, despite a change in zone).

<sup>13</sup> See In the Matter of the Application of Everett Reisig, Decision No. 9939 of 1997.

on the property may be. Thus, it is not necessary for this Board to comment on that which is already allowed.

E. All proposed structures are contemplated within the operation of a marina

Given the express reference to “fueling” in the definition of a marina, and our earlier discussion, applicant’s arguments with respect to the proposed gas pumps at the Dockers site are without merit. Likewise, this Board finds the addition of a boat house and marina office are appropriate accessory uses to the marina. Section 330-5 of the Southampton Town Code defines an accessory use, building or structure, in pertinent part, as, “[a] subordinate use, building or structure customarily incidental to and located on the same lot occupied by the main use, building or structure.” Here, there can be no doubt that a boathouse is an accessory, non-excluded, use to a marina, and a structure likely present at many other marinas throughout the Town.<sup>14</sup> Dockers is merely conditioning the marina for current, modern use, and adapting to accommodate the present day. The Board recognizes that it is difficult to conduct a marina without equipment and facilities of this nature, and its status as a nonconforming use should not preclude modernizing<sup>15</sup>, especially where, as discussed below, the Town has a goal of preserving marinas.

Finally, this Board defers to the Department of Health for jurisdiction over a new septic system but recognizes the efforts of a property owner bringing a septic system into compliance with State and local codes, often at a great expense.

F. The Town seeks to preserve marinas

We further note that the 1998 Southampton Town Comprehensive Plan Update speaks to marinas within the Town and, we think, indicates that maintaining – and promoting – marinas within the Town is a recognized goal. The 1998 Southampton Town Comprehensive Plan Update Implementation Strategies states, quite clearly, that one goal for economic development within the Town is to “strengthen the ability of the marine industry, including marinas, to survive and locate in the Town.” The choice of the word “survive” signals that many marinas are in fact, pre-existing nonconforming uses. In fact, the Plan Update goes on to even more plainly address challenges facing marinas within the Town, including the lack of land availability and zones that allow a marina use. In concluding the marina report the Update warns that, if the suggestions are not followed, there is the “risk” of “a slow, if erratic, attrition of marinas and marina slips.” That is not an erosion to which this Board seeks to contribute.

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<sup>14</sup> See exclusions in the definition of “marina,” *supra* at page 6 of this decision.

<sup>15</sup> See Matter of Crossroads Recreation, Inc. v. Broz, 4 N.Y.2d 39, 172 N.Y.S.2d 129 (1958)(Van Voorhis, J., dissenting)(rejecting the divided Court’s opinion that the reconstruction and replacement of existing gasoline station was an extension of a nonconforming use).

CONCLUSION

Thus, for all these reasons stated herein, this Board finds that it does not have jurisdiction to hear this application and, furthermore, the applicant does not have standing to bring this appeal. In any event, we also find that the Building Inspector acted properly when he considered all the evidence before him and determined (i) that the reconfiguration of the marina to allow for additional boat slips is not an expansion of a pre-existing, non conforming use, and thus, does not require a variance from this Board; and (ii) additional parking, as an accessory use in any zone, does not require relief from this Board.

Dated: October 7, 2004



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HERB PHILLIPS