

**Matter of Andes v Zoning Bd. of Appeals of the
Town of Riverhead**

2012 NY Slip Op 32052(U)

June 28, 2012

Supreme Court, Suffolk County

Docket Number: 10-27305

Judge: W. Gerard Asher

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COPY MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 32

In the matter of the Application of

WILLIAM F. ANDES, JR., EVA ANDES,
MARTIN SILVER and DALE SILVER,

Petitioners,

By: Asher, J.S.C.

Index No. 10-27305
Mot. Seq. # 001 - MGCASEDISP

- against -

Return Date: 8-27-10

ZONING BOARD OF APPEALS OF THE
TOWN OF RIVERHEAD, JOHN REEVE and
SANDRA REEVE,

Adjourned: 2-1-11

Respondents.

For Relief Pursuant to Article 78 of the New York
Civil Practice Law and Rules.

ESSEKS, HEFTER & ANGEL ESQS.
Attorney for Petitioners
108 East Main Street, P.O. Box 279
Riverhead, New York 11901

SCOTT DE SIMONE, PLLC
Attorney for Respondent Town of
Riverhead Zoning Board of Appeals
41780 Route 25, P.O. Box 233
Peconic, New York 11958

CIARELLI & DEMPSEY P.C.
Attorney for Respondents Reeve
200 Howell Avenue
Riverhead, New York 11901

In this Article 78 proceeding petitioners seek a judgment annulling, vacating and reversing a determination by the respondent Zoning Board of Appeals of the Town of Riverhead which sustained a November 24, 2009 letter of pre-existing use. The petition is granted to the extent that the mater is remitted to the respondent Board for further findings in accordance with this determination.

Petitioners, William F. Andes, Jr. and Eva Andes ("the Andes") are the owners of real property located at 12 White's Lane, Aquebogue, New York. The property was acquired by Mr. Andes in or about July 1994. Martin Silver and Dale Silver ("the Silvers") are the owners of property located at 131 Leafy Way, Aquebogue, New York, having acquired same in or about 1986. Respondents John Reeve and Sandra Reeve ("the Reeves") are the owners of property located at 28 White's Lane, Aquebogue,

New York. They acquired the property from Benjamin H. White by deed dated April 28, 1994. The properties owned by the Andes and the Reeves are located adjacent to each other on the west side of the body of water known as Reeves Creek. The property owned by the Silvers is located on the east side of Reeves Creek across from the Andes and the Reeves properties. John Reeve is the Town of Riverhead Sanitation Superintendent and has been employed by the Town of Riverhead for approximately thirty (30) years.

Effective June of 1959, the first zoning ordinance for these properties was enacted in the Town of Riverhead. Commercial oyster operations were not permitted uses under the original zoning rules (nor are they under the present codes). In 1994 when the Reeves purchased their property, one-family dwellings were permitted uses, as were "marina-resorts" (boat basins with facilities for berthing and securing all types of recreational craft but which may not provide adequate supplies, provisions and service and fueling facilities...) pursuant to the town code then in effect. At present, and since the zoning ordinance was amended on June 24, 2004, all of the properties are situated in an area which is zoned RB-40, a medium density residential development. Only one-family dwellings, attached single family dwelling units and non-commercial parks and playgrounds are permitted uses. By special permit of the Town Board, two-family dwellings, day care facilities, nursery schools, and overhead electrical power transmission and distribution lines in excess of 133 kilovolts may be permitted. No marinas are permitted in the RB-40 residence district.

A survey dated April 25, 1994, certified to the Reeves, clearly shows that six one-story framed cottages, one two-story frame house and attached barn, the remains of a wood dock, and three old wood docks were present on the Reeves property at the time of their purchase. A May 5, 1994 letter from the Town of Riverhead Building Department regarding the Reeves property indicates that "(6) Six Framed Cottages, One 2 Story Frame House & Barn. was built prior to 1965, therefore no Certificate of Occupancy is required." On July 24, 2003 the Reeves applied to the Town of Riverhead for a building and zoning permit for "bulkhead".¹ On July 24, 2003 a Building-Zoning Permit # ZB 26890 was issued to the Reeves for bulkheading "as per DEC & CAC". The permit was to expire on January 24, 2005. (As is indicated above, in June 2004, the Riverhead zoning laws were amended so that marinas would not be permitted uses on the Reeves property.) On October 11, 2006 the Reeves applied for a renewal of the "Bulkhead/Dock" permit and on October 12, 2006 permit # ZB 31285 was issued which renewed

¹ Prior thereto they had applied to and, on May 28, 2003, received approval from the New York Department of Conservation ("the DEC") to "construct 132' of new bulkhead seaward of non-functional bulkhead remains... Install floating docks within boat basin and install ramps and floating docks on three existing catwalks..." In response to the Reeves' June 5, 2003 application, for a permit to construct the dock and bulkhead pursuant to the DEC approval, the Riverhead Conservation Advisory Council ("the CAC") issued a letter which stated in pertinent part "[y]our application for a new bulkhead...installation of floating docks within the basin and installation of ramps and floating docks on three existing catwalks have been reviewed and approved ...subject to any conditions imposed by the New York State Department of Environmental Conservation and the following: The three new ramps and floating docks in front of the cottages shall be reduced by a minimum of ten [10] feet so as to not impeded [*sic*] safe navigation of the boating channel."

permit # ZB 26890, and expired on April 12, 2008. On November 14, 2008 the Reeves submitted a "blank" request for Duplicate Certificate of Occupancy and/or a Letter of Pre-Existing Use to the Town of Riverhead. On November 25, 2008 building permit # ZB 33993 was issued by the Town of Riverhead which granted a renewal of permit ZB 31285 to the Reeves, although the Reeves application for same, dated November 25, 2008, was not sworn to by Sandra Reeves until November 26, 2008—after the renewal permit was granted.

On December 2, 2008 the Town of Riverhead Building Department issued a letter addressed to the Reeves which stated, in pertinent part, "This letter shall confirm that the Building Department has inspected the above referenced structure and reviewed the records maintained by the Town of Riverhead. Following said review and inspection, the undersigned has determined that the above referenced structure and use existed prior to June of 1965, and has continued to this date, December 1, 2008, as a Two-Story Frame Single Family Dwelling with Barn, Screen Porch & Six One-Story Wood Frame Cottages w/ Porches, as provided by the Town Code of the Town of Riverhead." A Certificate of Occupancy numbered 22538 and dated December 5, 2008 was issued to the Reeves for their White's Lane property for permit ZB 33993 issued November 25, 2008, indicating that "three [3] northside floating docks w/ catwalks, L-Shaped floating dock w/catwalks and replacement bulkhead" were permissible. A "second" Certificate of Occupancy numbered 22538 and dated December 5, 2008 was issued to the Reeves for permit ZB 33993 which permitted the identical uses as the "first" Certificate except that it added "floating dock" to the end of the items permitted.

The Reeves submitted an Application for Special Permit for "Reconfiguration of Docks", verified by them on January 30, 2008; however, it was marked "received" on February 3, 2009 at 4:30 p.m. The Town of Riverhead Conservation Advisory Council ("the CAC") reviewed an application regarding the Reeves' project "to eliminate three (3) existing docks and construct a new floating dock measuring 6 ft x 238 ft with seven (7) finger piers measuring 4 ft x 20 ft, resulting in 14 boat slips, Raise an existing two story frame house and barn and construct new foundation and construct a 100 square foot gazebo at the property". Prior to a determination regarding the project, the CAC sent a letter to the Riverhead Zoning Board of Appeals which indicated that it required clarification with regard to: proof of pre-existing non-conforming use of the structures, the statement by the Reeves that the linear footage of the dockage would not be expanded while the plans showed existing dockage to be 160 feet with proposed expansion to 387 feet, whether a special permit would be required if such an expansion of dockage took place, whether the planned 37 parking spaces were permissible on the property as zoned RB 40, and whether the oyster business leasing dock space from the property was a legal operation on the premises. The CAC's letter to the Zoning Board of Appeals indicated that it had several other concerns, including the fact that an accurate assessment of the navigable waters was not possible without the inclusion on the survey of the existing structures located on the opposite side of the creek, and whether there would be adequate drainage areas provided for the runoff from the proposed parking areas. Joseph Hall from the Town of Riverhead Planning Department prepared a memorandum dated February 11, 2009, wherein he expressed concerns regarding the expansion of the dockage to serve 25 boats (such use was not permitted in the RB-40 district). He also noted that the applicants claimed the non-conforming use was pre-existing and that the dock was being reconfigured, not expanded.

The Andes submitted a letter, dated April 7, 2009, to the Town Board of the Town of Riverhead opposing the Reeves application for a special permit to expand the non-conforming marina use. They argued that there was insufficient proof that the commercial marina and related structures were legal, pre-existing, non-conforming uses. The Andes opposed the application at the public hearing held on April 7, 2009, regarding same. In a letter dated "December 2, 2008 Revised April 23, 2009" the Town of Riverhead Building Department sent a letter to the Reeves which stated, in pertinent part, "Following said review and inspection, the undersigned has determined that the above referenced structure(s) and use(s) existed prior to June of 1965, and has continued to this date, April 23, 2009, as a Two Story Frame Single Family Dwelling (AKA the Scallop shack), Barn w/ Screen Porch, Six One Story Wood Frame Cottages w/ Porches, docks and bulk heading as provided by the Town Code of the Town of Riverhead."² On June 19, 2009 the Andes filed an Application to the Zoning Board of Appeals as aggrieved persons and adjoining property owners, requesting that the Reeves' special permit application be denied.

Several affidavits were submitted by the Zoning Board of Appeals as part of the Return. Robert E. White averred that he resided in the Village of Greenport since 1926 and that his father bought and operated a clam and oyster business on what is now the Reeves property in the mid-1930s. His father operated the business until his death, when his brother Benjamin took it over. Robert White indicated that the bungalows and four docks were built in the 1930s and 1940s. Although he states that David and Thomas Lessard purchased the underground water property in the "90's", and that they continued "the operation", Mr. White is not specific about the use of the property from the 1990s to the present. Bertha Trinwoski's affidavit indicates that she worked for the Whites in or about 1960 sorting oysters. Although she states that the property had three catwalk docks and a floating dock, and that baymen used the facilities to unload, sort and ship their catches to market, she is conclusory in her statements that the Reeves continued to operate the docking facility and that Mr. Benjamin White sold the underwater deeded property to the Lessards, while giving no dates or facts as to what occurred on the property after it was sold by Benjamin White. In Dave Lessard's affidavit, he avers that he and his brother purchased underwater deeded property from Benjamin White in 1992, that they rented a dock slip, repaired and dried oyster racks and operated from this property during the time Benjamin White owned it and while the Reeves owned it, up until the present date.

The testimony of "Judge Stark" at the July 23, 2009 Zoning Board of Appeals hearing, indicated that a shellfish business was in operation on the Reeves' property during the 1950s and 1960s, but that he never saw services that consisted of a marina operation on the property. Justice Allen Smith testified that for several seasons the clam beds were not staked or identified which would usually indicate that clamming operations were inactive. Petitioner William Andes testified that he moved into his home in 1994 and that there was no shellfish operation or marina in use at the Reeves property. He stated that the cottages were used minimally but that there weren't any boats stored at the property or tied up at the docks. He stated that three to four years after he purchased his property he noticed a slow increase in boats at the Reeves' docks. He stated that the oyster beds were not in use for at least three or four years

²At a Zoning Board of Appeals hearing held on August 27, 2009 Riverhead Town Building Inspector, Richard E. Gadzinski, who signed the revised letter, stated that he revised the letter at the request of Leroy E. Barnes, Jr., the Building Department Administrator.

after he purchased his property. Petitioner Martin Silver testified that when he purchased his property in 1986, there was no commercial fishing done in the creek and that there were no stakes in the water. Mr. Silver stated that at the time he bought his home, there were "ramshackle" finger type docks on the Reeves property and no permanent docks located there. Bruce Schroeder testified that he has owned waterfront property on the north side of the creek since 1984 and has lived in the area for 61 years. He stated that he had never seen more than three boats at the dock, that there was a building they called "the oyster shack" located on the Reeves property, but that there was no operation going on at the Reeves' property for ten years from 1984 to 1994.

In Findings and Conclusions of the Zoning Board of Appeals dated October 8, 2009, it was determined that the Building Department issued a letter "to whom it may concern" dated May 5, 2004, wherein it indicated that six framed cottages and one two-story house and barn were built on the property prior to 1965; that on December 5, 2008 a certificate of occupancy was issued pursuant to building permit #ZB33993 for "three (3) northside floating docks w/catwalks, L-shaped floating dock w/catwalks and replacement bulkhead & floating dock"; that credible testimony was provided which indicated that, prior to 1965, there existed on the subject property six framed cottages and one two-story house with barn as well as three northerly finger docks, and a southerly dock, all of which had separable floating docks that would be removed and brought ashore in the winter; and that "[t]he letters of pre-existing use dated both December 2, 2008 and April 23, 2009 simply do not set forth what the current uses on the property are ... the letters of pre-existing use dated December 2, 2008 and revised April 23, 2009 are deemed to be annulled". The Board found that the six cottages and single family residence with barn existed prior to 1965. As to the dock and bulkheading structures, the Board found that, although said structures may have existed prior to 1965, they had been completely replaced so that the currently "existing docks and bulkheading structures cannot be considered to have existed prior to 1965". The Board recommended that the Building Department issue another letter of pre-existing use, if requested by the Reeves, with greater specificity and clarity as to all structures on the property.

On October 21, 2009, the Reeves requested another letter of pre-existing use from the Department Administrator of the Town of Riverhead Building Department. Leroy E. Barnes, Jr., the Administrator of the Building Department, responded with a letter dated November 24, 2009, wherein he concluded that the docks and bulkhead structures are now pre-existing, non-conforming structures because "[d]ocks and bulk headed structures reconstructed in 2003 did not constitute an expansion of a pre-existing, non-conforming use in 2003"; that the single family residence conformed to the permitted uses in the RB-40 zoning use district, but the building was non-conforming and was entitled to a letter of pre-existing building; that the commercial oyster operation was a pre-existing, non-conforming use and the commercial oyster shack was a pre-existing, non-conforming structure, thus the use and buildings were entitled to receive letters of pre-existing building and of pre-existing use; and, that the summer home cottages were pre-existing uses and buildings that were entitled to receive letters of pre-existing building and of pre-existing use.³ Mr. Barnes states in the November 24, 2009 letter that he reviewed and relied upon various records and documents in reaching his conclusions, however, it is difficult, if not

³No previous application had been made by the Reeves with regard to a "commercial oyster operation" or "commercial oyster shack", nor had they been mentioned in any requests for letters of pre-existing use.

impossible, to determine the specific documents or records upon which he relied since he does not properly or specifically identify them and many are not “attached” as was indicated by him in the letter.

The Andes and the Silvers filed an application, dated January 20, 2010, with the Zoning Board of Appeals as adjoining property owners and aggrieved persons, requesting that the decision of Mr. Barnes “be reversed, vacated and annulled.” Hearings on this application were scheduled for and held on February 25, 2010, March 25, 2010, April 22, 2010, May 13, 2010, May 27, 2010, June 10, 2010 and June 24, 2010. Mr. Barnes was to appear at the April hearing and to provide a copy of his letter with the attachments to which it referred; however, he did not appear until the May 27, 2010 hearing. (Coincidentally, a fire occurred in Mr. Barnes’ office over the weekend of April 17-18, 2010 in which the Building Department’s file regarding the Reeves’ property was destroyed. Fortunately, the documents had been scanned and preserved.) Mr. Barnes testified that in writing his November letter, he reviewed zoning ordinances, assessors’ records, and aerial photography. He stated that the Reeves had received a building permit for bulkheading and installation of floating dock on July 24, 2003, that the Reeves built the dock over time, and that a certificate of occupancy was issued in 2008 for the docks. (He stated that the town re-zoned in 2004, adopted RB-40, and removed marina resort or marinas from the permissible uses, so that the buildings and their uses became non-conforming pre-existing.) Petitioner Martin Silver testified at the February 25, 2010 hearing that he lives across the creek from the Reeves and bought his property in or about 1987. He stated that there were four cottages with four finger slips and no marina on the Reeves property. He stated that the channel is small, that his family swims in it, and that the creek cannot accommodate a lot of boats.

On June 24, 2010 the Zoning Board of Appeals issued its determination with regard to the Petitioners’ application. It stated “THE LETTER OF PRE-EXISTING USE DATED NOVEMBER 24, 2009 IS SUSTAINED IN ITS ENTIRETY. THE DOCUMENTS RELIED UPON BY THE BUILDING INSPECTOR IN MAKING HIS DETERMINATION REASONABLY AND RATIONALLY SUPPORT HIS FINDINGS AND CONCLUSIONS.” It contained no independent factual findings supporting this determination. The Petitioners commenced the instant Article 78 proceeding challenging the Board’s determination as illegal, arbitrary and capricious and not supported by substantial evidence on the record.

Generally, “[i]n a proceeding pursuant to CPLR article 78 to review a determination of a zoning board of appeals, judicial review is limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion [*citations omitted*]” (*Ferraris v Zoning Bd. of Appeals for the Vill. of Southampton*, 7 AD3d 710, 711, 776 NYS2d 820, 821 [2d Dept 2004]). The scope of judicial review of the Board’s determination is limited to an examination of whether it has a rational basis and is supported by substantial evidence (*New Venture Realty v Fennell*, 210 AD2d 412, 620 NYS2d 99 [2d Dept 1994]). The consideration of “substantial evidence” is limited to determining “whether the record contains sufficient evidence to support the rationality of the [Respondent Board’s] determination” (*Sasso v Osgood*, 86 NY2d 374, 384, 633 NYS2d 259, 264 [1995]). This Court may not substitute its discretion for that of the Board unless its determination is arbitrary or contrary to law (*Smith v Board of Appeals of the Town of Islip*, 202 AD2d 674, 609 NYS2d 912 [2d Dept 1994]). Nor may the court weigh the evidence or reject the choice made by the zoning board where the evidence is conflicting and

room for choice exists (*Calvi v Zoning Bd. of Appeals of the City of Yonkers*, 238 AD2d 417, 656 NYS2d 313 [2d Dept 1997]).

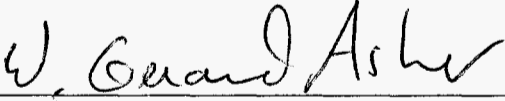
Here, the Board failed to make any factual findings in support of its determination. Such a deficiency requires that the matter be remanded to the Board as proper judicial review is not possible under these circumstances (*see Syracuse Aggregate Corp. v Weise*, 51 NY2d 278, 434 NYS2d 150 [1980]). However, the record is clear that the determination of the Board in upholding the letter of pre-existing use dated November 24, 2009 is arbitrary and contrary to law, in part. Based upon all of the submissions before the Board, there is no question that the six single-story cottages and the one family residence with attached barn pre-existed any of the applicable zoning laws and should be granted letters of non-conforming pre-existing use and buildings, as was done previously by the Building Department.

The docks and bulkheading, as approved by the NYSDEC and the CAC, and for which a permit was granted as a result of the June 5, 2003 application (and renewed several times thereafter) cannot be considered non-conforming pre-existing uses, based upon the Zoning Board's prior determination that they did not exist prior to 1965. Any decision of the Board which does not adhere to its own precedent or prior decision without indicating a reason for reaching a different result on the "same" facts is arbitrary and capricious (*see Frisenda v Zoning Bd. of Appeals of the Town of Islip*, 215 AD2d 479, 626 NYS2d 263 [2d Dept 1995]). Based upon the permits issued by the Town, the docks and bulkheading might be permissible through a variance under the permit issued. However, as the expansion of the docks by the Reeves' in the application for "reconfiguration of docks", amounts to an expansion of a non-conforming use or an "improvement", no letter of pre-existing use or building should be issued nor should a permit or variance be granted for them. "The right to maintain a pre-existing, non-conforming use does not include a right to extend or enlarge it" (*Garcia v Holze*, 94 AD2d 759, 760, 462 NYS2d 700, 703 [2d Dept 1983]). Consequently, no marina should be permitted upon the property, except to the extent that boats for the Reeves or the cottage renters may be permitted to use the docks.

Finally, it appears that no determination was made as to whether or not the commercial oyster operation was in continuous uninterrupted use after the White's sold the underwater property rights. As the record is not clear, the Board must make a factual determination with regard to the use of the docks for an oyster operation, and it must determine if the non-conforming use was continued without a year's interruption and without impermissible expansion (*see Smith v Board of Appeals of the Town of Islip, supra*).

Accordingly, the determination is annulled and the matter is remitted to the respondent Zoning Board for a new determination of the Petitioners' application in accordance with this determination.

June 28, 2012



J.S.C.