

**Matter of Koleda Mar., LLC v Town of Islip Zoning  
Bd. of Appeals**

2013 NY Slip Op 33457(U)

December 10, 2013

Supreme Court, Suffolk County

Docket Number: 34791/2010

Judge: William B. Rebolini

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MEMORANDUM

## SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTYSUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

In the Matter of Koleda Marina, LLC,

Petitioner,

-against-

Town of Islip Zoning Board of Appeals, William  
D. Wexler, Chairman, Michael A. Gadjos, Vice  
Chairman and Kurt Pahlitzsch, Barbara O'Connor  
and James H. Bowers, Members,

Respondents.

Motion Sequence No.: 001; MOT.D  
CD;SUBJMotion Date: 11/30/10  
Submitted: 9/4/13Index No.: 34791/2010Attorney for Petitioner:Schlimbaum and Schlimbaum  
320 Carleton Avenue, Suite 2500  
Central Islip, NY 11772Attorney for Respondents:Robert L. Cicale, Town Attorney  
Town Hall  
655 Main St  
Islip, New York 11751

In this article 78 proceeding, the petitioner challenges an August 31, 2010 decision of the Town of Islip Zoning Board of Appeals ("Zoning Board") which (i) denied its application to establish that the use of its property at 29 Degnon Boulevard, Bay Shore, New York for a commercial shipyard and boat storage with outdoor storage of boats in the water is a legal nonconforming use, and (ii) denied, without prejudice, its application for a front yard setback variance to leave an accessory building on the property where it has been for the past 50 years. The property is located in the Town's Industrial 1 zoning district, in which "commercial shipyard and boat storage with outdoor storage of boats in the water" is not a permitted use; it appears that such use was permitted as of right until September 11, 1956, after which date it was permitted only by special permit of the Town Board and only in the Town's Business 3 zoning district (*see* Islip Town Code § 68-302).

The property is an approximately one-acre parcel, contiguous to navigable waterways and improved with a 1½ story building and two accessory structures. In 1940, the Town issued a

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certificate of occupancy for the “commercial building” on the property for use as a fish packing plant. In 1984, the Town issued a certificate of compliance for the repair of fire damage to the commercial building.

In or about 2008, the petitioner received a series of summonses relating to its use of the property, including one for operating a fish packing plant as a marina, one for constructing a dwelling in the front of the property, and one for the outdoor storage of boats. As a result, according to the petitioner’s attorney, the petitioner proceeded to apply for certificates of compliance with respect to “everything on the property”; after an inspection in December 2009, the petitioner was “advised to go to the Board of Appeals to get the variances or prove the nonconforming uses of the property.”

Thus, in December 2009, the petitioner applied to the Zoning Board “to establish a nonconforming use of commercial shipyard, boat repair yard and boat storage with outdoor storage of boats both on land and on water,” as well as for variances from front, side, and rear yard setback requirements with respect to the two accessory buildings. The petitioner subsequently amended its application to delete the references to boat repair and outdoor storage of boats on land, leaving the request for nonconforming use status as one to establish the use of the property as a commercial shipyard and boat storage with outdoor storage of boats in the water only.

Following hearings on March 16, 2010 and May 4, 2010 at which the Zoning Board considered letters and testimony from nearby property owners, aerial photographs, affidavits, memoranda, maps, deeds, and surveys, and upon review of post-hearing submissions, the Zoning Board issued the following decision, dated August 31, 2010:

A review of the record and documents in the file, including the post hearing submissions of Judith Koenig and Lark Shlimbaum, Esq., the applicant has come before this Board to establish nonconforming use of a commercial shipyard, boat repair yard and boat storage with outdoor storage of boats in water, and to leave 2 detached structures; Structure 1- having side and rear yards of 3.3 feet instead of required 10 feet each; Structure 2- having front yard of 15.3 instead of required 50 feet on this property. As part of a post hearing submission by the applicant, the request for boat repair was eliminated from the request.

The first issue is what year was required for this to precede to be a nonconforming use. There was some question as to whether it was 1956 or 1964. The memoranda from the Planning Department and from the Town Attorney’s Office, from Mr. Cannava, all indicated that the year was 1956. After much discussion, Counsel for the Petitioner (Koleda Marina) acknowledged on Page 23 of the Official Transcript of May 4<sup>th</sup>, that the operative year to establish nonconforming use was 1956.

The second issue to be dealt with is that the Town Code as of 1992 prohibited

establishing nonconformity on property that has been subdivided without Town approval. The memorandum from Mr. Cannava and the Title Search have indicated that this property was subdivided from the adjoining tax lot on the south in 1966 and on the north in 1966. So it was subdivided prior to their appearance before this Board and prior to 1992 when the Code was amended to clarify that the subdivision of a nonconforming use would terminate that nonconforming use. Whether that affects this property or not, was another issue that was raised as to when that Code provision was effective, when the applicant seeks to establish the nonconforming use or historically when the alleged nonconforming use took place?

The applicant produced five witnesses at the March 16<sup>th</sup> hearing and again approximately eight witnesses at the May 4<sup>th</sup> hearing, many of whom were in attendance at both hearings. The Board has documents in evidence that the primary building on the premises was C/O'd as a fish packing plant in 1940. In 1984 a Certificate of Compliance was issued for the repair of fire damage. At some time between 1940 and 1984, the building's use had changed from a fish packing plant to what all the witnesses agree was a marine radio and electronics repair business known as 'South Shore Marine Radio.' Aerial photographs submitted indicate the marine repair use was in operation as early as 1970.

The testimony, as far as this Board could ascertain, was that the only boats that were stored in or around were those that were being worked on to install marine radios, transducers, depth finders, etcetera. Only one or two boats at a time. Apparently their marine radio antenna was struck by lightning in or about 1972 and the building suffered severe damage.

There was testimony that there were many clam boats around, but the clam boats were quite small and often stored on land during the winter. Aerial photographs were submitted from the following years: 1961, 1969, 1999, 2001, 2004 and 2007. The 1961 aerial photograph shows three or four boats at this site. The aerial photo from 1969 shows two or three boats at the site, the main building still being intact. The aerial photo from 1999 shows three boats. The aerial photograph from 2001 shows two, possibly three boats. During all this period of time, there was no storage on land (the request to establish that has been deleted by the applicant). These aerial photographs show boats docked in great numbers at the marinas directly to the south and others along parts of the creek but not at this site. The 2004 aerial photograph shows five or six boats present. The 2007 aerial photograph shows four boats in the water with numerous boats on the other sites (not related to the subject parcel) and approximately six or seven boats on land. At no time did any of the aerial photographs indicate the concentration of boats at the subject parcel that existed on the adjoining marinas and the other marinas in the area. There were very few boats at the subject parcel historically, which

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supports the testimony that boats were there only when they were having their marine radio equipment installed or repaired by South Shore Marine Radio Corporation (formerly a fish packing plant).

Many of the witnesses were unsure and unconvincing as to whether or not there were boats stored in the water. Martin Krall testified that he worked as a marine mechanic, and that from where he worked (beginning in about 1969) he could see the subject property. He indicated that he could not swear to the fact that it was or was not ever discontinued and that when Mr. Koleda, the owner, died there was a merger, but he had no firsthand knowledge. Joyce Newins indicated that there were boats in the water on one side of the property when South Shore was engaged in radio repair and electronics. Mrs. Newins could not state that she had ever seen people working there continuously, but indicated that there were boats in the water, but did not know how many. Henry Gemmer's testimony that clearly this was South Shore Marine and all work that was done was electronic, and there were no boat repairs being performed at the site. That the only type of repair work performed was the electronic installation and repair for boat equipment, which was there at least since 1972. Mrs. Koenig testified that there was never outdoor storage or boat repairs performed on this property.

Letters were presented from Charles Kornahrens, whose brother is a commercial fisherman, was familiar with the property and never saw outdoor storage or boat repairs performed on this property in the last 42 years. Diane Kornahrens testified similarly. Mr. Kornahrens further indicated that Mr. Koleda did not allow any boat repairs, the work performed was strictly electronics. Ms. Koenig testified that during the 36 years she has been living there, she has seen very little activity and that it was very quiet. People came in and assessed their boats in the summer and left. No one had boats in the water in the winter, or on the land. That it was a very low intensity use. That very little happened from the 1970's to the present time. Apparently the owner, Mr. Koleda, was in the 90's, in the 1980's and his business was just about nonexistent or phased out. After he died the property appeared to be abandoned for a period of time and was up for sale for several years. Before that, it had been well kept, but had become overgrown for several years, starting in approximately the year 2000 to 2002, essentially indicating that upon Mr. Koleda's death, all the uses on the property had been abandoned.

The file also includes a submission by Ms. Koenig of a copy of the Official Transcript from a Public Hearing of the Islip Town Board on May 15, 1986 when the then owner, John Koleda, made an application to use the mooring, for a tour sightseeing boat on the site. There was testimony, much of which indicated that the use at the time was not a marina or commercial shipyard but a marine radio facility. The application was denied by the Town Board. Several of the witnesses indicated that they did not live near a marina, they lived near a creek. The basis of the 1986 denial by the Town Board (denying docking of a touring cruise ship on

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this site), was that it was deemed to be a quiet onshore business with relatively little traffic, not a marina. The testimony at that hearing which opposed docking of any boat on the site, including cruise ships, clearly indicated that there was a very low level of activity on the site and is similar to the testimony that was given as part of the current application.

Two hearings were held on this issue. The Board finds that the aerial photographs, as indicated before, demonstrate that from 1961 through 2001 there were no more than three or four boats docked at this site. The testimony of all the witnesses, although somewhat contradictory, (none of which went back before 1956) was that the property was in use as a marine radio and electronic repairs shop, and that any boats that were on the site were there for the purpose of having either installation or repair of electronic equipment, radios, transducers, depth finders, etc. There was no evidence that this area was actually used as a marina or commercial shipyard as we currently understand it, for the rental of boats, boat space, docking, repairs. Certainly there was no advertisement of mechanical repair since the building itself indicated 'South Shore Marine Radio' as its function. Almost everybody agreed that Mr. Koleda, who died in the 1980's (and was over 90 years old), was in the business of marine radio installation and not boat repair.

As we indicated earlier, the most significant evidence as to what existed on this site are the aerial photographs. The 1969 aerial showed only three boats at this site when there were many other boats in the area. By 1999 at a time when almost all the other boatyards or marinas in the area were completely crowded with boats both on the land and in the water, this site had three boats in the water and none on the land. By the year 2001, the aerial photograph reveals that there were two boats at this site, none on the land. It was during that period of time that Ms. Koenig testified after Mr. Koleda had died and that the property was not being used at all but was actually abandoned. By 2004, the aerial photograph indicates there are boats in all the other boat yards in vast numbers. At the subject parcel, there were five or six boats docked in the water, one on land. In the 2007 aerial photograph, there were only four boats in the water at this site in contrast to the large numbers of other boats in other marinas in the area stored on land and in the water, but not at this site.

Photographic evidence would indicate to this Board that this was never primarily used as a commercial shipyard. It was originally a fish packing plant. Sometime between 1940 and 1972 its use changed from a fish packing plant to a marine radio installation repair facility. It was not used as a shipyard or a marina as we understand them. It was not a boat repair facility or a boat storage facility, neither on the land nor in the water.

The issue of abandonment for a period of two years, from approximately 2000 to

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2001, is not really a point we have to reach, but there appears to be evidence to support the position that when Mr. Koleda died, and the property was up for sale, it was not being used for any purpose.

On the issue of the one story frame and vinyl building, Structure 2, 15.3 feet from Degnon Boulevard, the Board is quite convinced from the testimony that this is an old building and probably preexisted the Code which would have prohibited its use. Whether or not it was continuously used is not clearly established, but the Board believes that the preponderance of the evidence (where so many witnesses were unclear, but witnesses saw people living there, and the applicant had been cited by the Town for maintaining an illegal residence), all leads the Board to believe that was a building being used prior to the Code which would have prohibited its use. The applicant is asking not to establishing nonconforming use, but for permission to maintain the front yard of 15.3 feet instead of the required 50 feet in an Industrial District. The Board feels that although the building may not have met the setback requirements in 1956, it was there and has been there certainly for 40 or 50 years. That tearing it down because of the 15.3 foot front yard setback would not be in keeping with the spirit and intent of the Ordinance. This building has no Certificate of Occupancy, and is apparently not new. It shows up as early as the 1961 aerial photograph. It was used, based on the testimony, as a residential structure, which is prohibited in Industrial 1 Zoning. The Board feels that there is no basis for this to be used as a residence on this site, it would not meet the requirements of §267 of the Town Code. It is not in keeping with the nature and character of the area. It is a very substantial relaxation and, of course, it would have been self-imposed by somebody it building without a permit. The Board would not think it would be practical to demolish it, but it would have to be used as a storage building or ancillary to a permitted use. Therefore, the variance that is being requested on this building is DENIED WITHOUT PREJUDICE.

Therefore, the Board finds based on all of the documents and the credible evidence before us that this site had been converted from a fish packing factory to a marine radio repair shop and was never used primarily or even secondarily for in water boat storage or as a commercial shipyard. That the only boats that were there, which were very few, were most probably related to installation or repair of electronic equipment. The Board finds that this is not and never was a commercial ship yard, as that term is used and referred to and understood by most people in this neighborhood. As far as the structures go, Structure #1 was unquestionably a shed or storage building, and certainly would be entitled to remain on this site with side and rear yards of 3.3 feet instead of the required 10 feet each.

The structure, one story frame and vinyl building, Structure #2, without a Certificate of Occupancy was obviously used for a residence, based on all the

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testimony, and residences are prohibited in Industrial Zones. That structure will be DENIED WITHOUT PREJUDICE permitting the applicant to present the intended use of the structure.

Therefore, the Board finds based on §68-14 and §68-15(a) and (b) of the Islip Town Code, the testimony of the witnesses, the letters submitted, the memorandum from the Town Attorney's Office, and the aerial photographs of the site, that the applicant failed to establish by clear and convincing evidence that this was a commercial shipyard or marina prior to 1956, therefore failing to establish it as a nonconforming use.

Therefore, the application is DENIED with regard to the commercial shipyard and boat storage in water, and DENIED WITHOUT PREJUDICE as to the vinyl frame building, Structure #2. The back shed, Structure #1, with 3.3 feet from the waterway and 3.3 feet from Orowoc Creek (literally an old shed), which photographs indicate, it is not near any residence and has been there for more than 50 years. The Board finds that under §267 of the Town Law, it does not question the nature and character of the area, there is nothing to compare it with. Even though the relaxations are significant, the hardships would not be self-imposed since the shed may have been built before there were any setback requirements. Therefore, the Board finds that the back shed, Structure #1, requesting area variances under §267 of the Town Law for side and rear yards of 3.3 feet instead of the required 10 feet each be GRANTED, all of the preceding on motion of Ms. O'Connor, seconded by Mr. Pahlitzsch and unanimously carried.

Application DENIED with regard to the commercial shipyard and boat storage, DENIED WITHOUT PREJUDICE as to Structure #2, the vinyl frame building; and GRANTED as to Structure #1, the back shed with setback of 3.3 feet from waterways and creek, by a vote of 5-0.

This proceeding followed.

The petitioner claims that those portions of the Zoning Board's decision denying its application for nonconforming use status and for a front yard setback variance are arbitrary and capricious, an abuse of discretion, affected by an error of law, and without support in the record. In support of its claim, the petitioner cites the affidavits and hearing testimony of numerous witnesses who personally observed the petitioner's property being used as a marina for outdoor storage of boats in the water and boat repairs at various times from the 1950s to date. As to the requested variances, the petitioner contends that there is no proof that "Structure #2" was ever used as a residence and, therefore, no reason to condition the granting of a front yard setback variance on a showing as to the petitioner's intended use of the structure. The petitioner does not challenge those portions of the decision granting its application for side and rear yard setback variances, as it is not aggrieved thereby.



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In a proceeding pursuant to CPLR article 78 to review a determination of a zoning board of appeals, the board's interpretation of its zoning ordinance is entitled to great deference (*Matter of Brancato v Zoning Bd. of Appeals of City of Yonkers, N.Y.*, 30 AD3d 515, 817 NYS2d 361 [2006]), and judicial review is limited to ascertaining whether the action taken by the board is illegal, arbitrary and capricious, or an abuse of discretion (*Matter of Ifrah v Utschig*, 98 NY2d 304, 746 NYS2d 667 [2002]). In applying the "arbitrary and capricious" standard, a court looks only to whether the determination lacks a rational basis, *i.e.*, whether it was without sound basis in reason and without regard to the facts (*Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 809 NYS2d 98 [2005], *appeals dismissed* 6 NY3d 890, 817 NYS2d 624, *lv denied* 7 NY3d 708, 822 NYS2d 482 [2006]). A determination will be deemed rational so long as it has some objective factual basis, and does not rest entirely on subjective considerations such as general community opposition (*id.*). The burden is on the petitioner to show that there is no rational basis for the board's determination (*Matter of Grossman v Rankin*, 43 NY2d 493, 402 NYS2d 373 [1977]). A court may not substitute its judgment for that of the board (*Matter of Ball v New York State Dept. of Env'tl. Conservation*, 35 AD3d 732, 826 NYS2d 698 [2006]).

Where, as here, a zoning board's interpretation involves a determination regarding a nonconforming use,<sup>1</sup> a petitioner challenging the board's interpretation faces a burden of persuasion that is high because of the law's traditional aversion to nonconforming uses (*Matter of Pelham Esplanade v Board of Trustees of Vil. of Pelham Manor*, 77 NY2d 66, 563 NYS2d 759 [1990]). The law views nonconforming uses as detrimental to a zoning scheme, and the overriding public policy of zoning in New York State and elsewhere is aimed at their reasonable restriction and eventual elimination (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 654 NYS2d 100 [1996]).

Contrary to the petitioner's contention, the court finds the determination of the Zoning Board that the petitioner failed to meet its burden of establishing a legal preexisting nonconforming use of the property has a rational basis and was not illegal, arbitrary and capricious, or an abuse of discretion. Whatever the use of the property from the 1950s through the date of the petitioner's application, there is evidence, including the affidavit and hearing testimony of Judith Koenig, a longtime local resident, that the property was abandoned in 2000 and that use of the property for all purposes was discontinued for a period of at least one year. As section 68-15 (B) of the Islip Town Code expressly provides that "substantial discontinuance of any nonconforming use for a period of one year or more" terminates such use, it is evident that

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<sup>1</sup> Section 68-3 of the Islip Town Code defines "nonconforming use" as "[a]ny use of a building, structure, land or water area lawfully existing at the time of the passage of this chapter, or any amendments thereto affecting such use, which does not conform to the provisions of the use district in which it is situated." Section 68-14 defines "legal nonconforming use" as one "which, at the time such use was commenced, was maintainable as a matter of right under the statutes, ordinances and general rules of law then in effect in the Town of Islip" and which "shall not be considered a permitted use." Section 68-15 provides, in part, that "[t]he substantial discontinuance of any nonconforming use for a period of one year or more terminates such nonconforming use of a structure or premises."

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the record contains sufficient evidence to support the rationality of the Zoning Board's determination. Where, as here, a board sets forth multiple reasons for its determination, any one of which is supported by a rational basis, the determination will be sustained (*Matter of Logiudice v Southold Town Bd. of Trustees*, 50 AD3d 800, 855 NYS2d 620 [2008]). Nor should a reviewing court be swayed by the quantum of evidence supporting an alternative rational conclusion; so long as room for choice exists, a court may not weigh the evidence and reject the board's conclusion (e.g. *Matter of Collins v Codd*, 38 NY2d 269, 379 NYS2d 733 [1976]).

However, as to the Zoning Board's determination relative to the front yard setback variance requested for Structure #2, the court is constrained to find that it lacks a rational basis. In determining an application for an area variance, a zoning board is limited to consideration of the criteria set forth in Town Law § 267-b (3) (see *Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 259 [1995]; *Matter of Caspian Realty v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 886 NYS2d 442 [2009], *lv denied* 13 NY3d 716, 895 NYS2d 316 [2010]; see also Islip Town Code § 68-412).

Pursuant to Town Law § 267-b (3), when determining whether to grant an area variance, a zoning board of appeals must weigh the benefit of the grant to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted \* \* \*. The zoning board is also required to consider whether (1) granting the area variance will produce an undesirable change in the character of the neighborhood or a detriment to nearby properties; (2) the benefit sought by the applicant can be achieved by some method, feasible to the applicant, other than a variance; (3) the requested area variance is substantial; (4) granting the proposed variance would have an adverse effect or impact on physical or environmental conditions in the neighborhood or district; and (5) the alleged difficulty is self-created.

(*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 612-613, 781 NYS2d 234, 236-237 [2004] [citations omitted]). Thus, as the Zoning Board seeks to require the petitioner to demonstrate compliance with zoning laws pertaining to the intended use of the structure as a condition for the granting of an area variance, its determination cannot be sustained (see *Marro v Libert*, 12 Misc 3d 1152[A], 819 NYS2d 210 [2006], *affd* 40 AD3d 1100, 836 NYS2d 691 [2007]). While the court acknowledges the Zoning Board's concerns regarding a residential use in an industrial district, it may not enforce a use restriction by denying an area variance to which the petitioner might otherwise be entitled.

As to the petitioner's objections to the respondents' answer, the court finds them to be without merit. And while the court is authorized to order a respondent to supply an omission in the record (CPLR 7804 [e]), here the petitioner has supplied the missing affidavit of William M. Rehor, rendering the record complete.

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Accordingly, the petition is granted only to the extent that the denial, without prejudice, by the Zoning Board of Appeals of petitioner's application for a front yard setback variance with respect to Structure #2 is annulled. The matter shall be remitted to the Zoning Board for a determination on the evidence already presented whether the petitioner is entitled to the requested front yard setback variance based on the factors set forth in Town Law § 267-b (3). In all other respects, the petition is denied.

Submit judgment.

Dated: 12/10/2013

  
HON. WILLIAM B. REBOLINI, J.S.C.