Short Form Order

Index No. 06164/2013

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

P R E S E N T:
Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER

CASEDISP

x
In the Matter of the Application of

KPE II, LLC,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and Declaratory Judgment

-against-

TOWN OF SMITHTOWN BOARD OF ZONING APPEALS, TOWN OF SMITHTOWN TOWN BOARD and TOWN OF SMITHTOWN,

Respondents.
x

Mot. Seq. No.: 001 - Mot-D
Orig. Return Date: 04/01/2013
Mot. Submit Date: 07/03/2018

PETITIONER'S ATTORNEY
Edward McCabe, Esq.
445 Broad Hollow Rd. Ste. 25
Melville, NY 11747

RESPONDENTS' ATTORNEY
Smithtown Town Attorney's Office
99 West Main Street
Smithtown, NY 11787

Upon the summons, notice of petition, verified petition/complaint and supporting exhibits, affidavits and affirmation, the answer and returns, affirmations in opposition and the reply affirmation and exhibits, it is

ORDERED, that, in accordance with CPLR 103(c), the declaratory judgment cause of action in the hybrid action/proceeding for a declaration that KPE II's uses as of 2013 were pre-existing non-conforming uses is converted to a claim for relief pursuant to CPLR article 78; and it is further

ORDERED, that the petition portion of this hybrid action/proceeding is granted insofar as the respondent/defendant Town of Smithtown Board of Zoning Appeals' ("BZA") determination ("BZA Decision") to deny the petitioner/plaintiff's ("KPE") application for certificates of existing use ("CEU") for a: (1) pre-cast concrete cesspool manufacturing facility; (2) concrete manufacturing plant; (3) concrete aggregate processing center; (4) ancillary office uses; (5) ancillary outdoor storage; (6) ancillary material stockpile yard; (7) ancillary truck and heavy equipment facility; (8) associated parking; (9) pre-cast related facilities; and (10) associated screening ("Non-Solid Waste Management Facility ['SWMF'] Uses") is annulled in accordance with and as limited by this order; and it is further

ORDERED, that to the extent the Non-SWMF Uses are consistent with BZA's determination in Case 509 of 1961 and the Building Inspector's determination of October 27, 2004 in the *Matter of Cervoni-Key Way Complex, 27 Montclair Avenue, Saint James, Town of Smithtown* ("Building Inspector's 2004 Interpretation") or are ancillary thereto, they are legal "non-nuisance" uses which do not require a CEU and the failure of the BZA to acknowledge this was arbitrary, capricious and affected by an error of law; and it is further

ORDERED, that to the extent the Non-SWMF Uses are inconsistent with Case No. 509 of 1961 and/or the Building Inspector's 2004 Interpretation, they are pre-existing, non-conforming uses and the failure to grant a CEU was arbitrary, capricious, and affected by an error of law; and it is further

ORDERED, that the operation of the Non-SWMF Uses may continue insofar as they are consistent with and limited by the BZA's determination in Case 509 of 1961 and the Building Inspector's 2004 Interpretation and are prior uses; and it is further

ORDERED, that the petition is denied insofar as KPE sought to nullify the BZA Decision to deny KPE's application both for a CEU to operate a facility for recycling broken concrete and rock crushing and for a CEU to operate a SWMF to process or recycle solid waste such as concrete, asphalt pavement, brick, soil, rock (including rock crushing) and trees, together with, for each of the aforementioned facilities, ancillary or associated: (1) screening; (2) outdoor storage; (3) material stockpile yard; (4) truck and heavy equipment facility; (5) offices; and (6) parking; and it is further

ORDERED, that KPE's application for reasonable attorney's fees, costs and disbursements is denied; and it is further

ORDERED, that this matter is remanded to the BZA for issuance of CEUs in accordance with the terms of this order; and it is further

ORDERED that KPE's motion for a preliminary injunction is denied as moot in accordance with this Court's order in ***Town of Smithtown v KPE II, LLC***, Suffolk County Index No. 06144/2013 ***("Town of Smithtown v KPE")*** signed simultaneously herewith.

This is a hybrid article 78 proceeding/action for a declaratory judgment by KPE challenging the BZA Decision to deny CEU's for twelve uses[1] at the property owned by KPE. The subject property is located on the northwest corner of Old Northport Road and Lawrence Avenue in the hamlet of Kings Park in the Town of Smithtown and consists of three tax lots totaling 14.2 acres ("Subject Property"). The Subject Property is currently zoned light industrial or "LI." KPE or its principals had been the mortgagees of the Subject Property and apparently obtained the Subject Property from the prior owners, the Carlson Family, in 2011. The Carlson Family had owned the Subject Property since the 1940's.

In March, 2012, the Town issued two summonses to KPE. One summons was for a violation of Section 322-8 (A) of the Town Code (Zoning Table of Use Regulations) and the second was for violation of Section 322-93 of the Town Code (failure to obtain site plan approval). KPE pled guilty to the two violations and received a conditional discharge. One of the conditions of the discharge was that KPE would file an application with the BZA for a CEU while the Town consented to allow KPE to operate a concrete aggregate processing and truck storage facility at the site. In accordance with the conditional discharge, KPE filed a BZA application seeking a CEU for the following uses: (1) pre-cast concrete cesspool manufacturing facility; (2) concrete manufacturing plant; (3) concrete aggregate processing center; (4) ancillary office uses; (5) outdoor storage; (6) material stockpile yard; (7) truck and heavy equipment facility; (8) associated parking; (9) sand screening; (10) recycling broken concrete; (11) rock crushing; and (12) pre-cast related facilities.

The BZA held a hearing on the CEU application on November 27, 2012. The BZA issued findings and denied KPE's application on all twelve (12) uses (even those which it indicated in the findings did not need CEU's) on February 12, 2013. Thereafter, on March 1, 2013, KPE commenced this matter, *inter alia*, to annul the BZA Decision and for a declaratory judgment that KPE's then current uses were pre-existing non-

[1]Although the BZA Decision referred to thirteen uses, twelve were listed.

conforming uses. KPE did not seek a temporary restraining order ("TRO").

In the meantime, on January 3, 2013, the Town issued a summons to KPE for a further violation of Section 322-8 (A) for operating a SWMF, which is a prohibited use in the LI zone. Thereafter, on March 4, 2013 the Town commenced an action in Suffolk Supreme Court, by order to show cause, to permanently enjoin KPE from operating the facility in violation of the Town Code and from operating a SWMF. A TRO was granted on March 4, 2013 temporarily enjoining KPE from using the Subject Property as a SWMF, a concrete aggregate processing center, a storage yard for commercial trucks and trailers and use of heavy industrial equipment including rock crushers. ***Town of Smithtown v KPE***, Suffolk Co. Index No. 6164/2013 (Gazzillo, J.). The TRO was extended by an order issued from the bench on April 4, 2013 (Pitts, J.).

Over the ensuing years the parties made numerous joint requests for multiple adjournments during which they represented to the court that alternative uses for the Subject Property were being proposed and reviewed. The parties then reached an apparent impasse and asked that the motion for a preliminary injunction in ***Town of Smithtown v KPE*** and the present matter be submitted.

The record before the BZA established the following:

• Under the current Town Code cement batching and concrete products manufacturing are not permitted in the LI zone, but non-nuisance industries are permitted.

• In 1955 the Subject Property was zoned LI. At that time the LI zone permitted concrete manufacturing, sand and gravel screening together with accessory uses such as truck storage and screening.

• In 1961 the BZA issued an interpretation in Case No. 509 that concrete batching was a non-nuisance industry. The testimony at the hearing which resulted in that interpretation described concrete batching activities as "bringing in stone and sand, it goes into ...hoppers and...transit mix trucks drive up and the materials are mixed and put into transit mix trucks ...while they are on the road [they do] the mixing. There is no actual mixing done. It's the adding of ingredients, actually...We drop the ingredients into the trucks and the trucks by there [*sic*] own motion turn it...They do the mixing en route. For the ready material there probably will be storage...you will have a stockpile to that extent."

• In 1964 the Town Code was amended to prohibit cement (but not concrete) batching and rock crushing in the LI zone ("1964 Amendment").

• The Building Inspector's 2004 Interpretation was issued on October 27, 2004. There, the Building Inspector cited the above-referenced Case 509 of 1961, and determined that a "concrete readi-mix business also known as a concrete batching business is a non-nuisance industry use within...[LI] zoning," which was permitted. The Building Inspector went on to determine that "redi-mix concrete plant with batching, dispatching of trucks and servicing of fleet vehicles kept on site...[w]arehousing, storing and outside stockpiling of construction and equipment would also be permitted."

• No Town Code amendment since 2004 reversing this Building Inspector interpretation was recited in the BZA record. Accordingly, to the extent KPE sought to continue the activities recited in Case 509 of 1961 and in the 2004 Building Inspector Interpretation, they are legal uses in the LI zone. No CEU is required.

• On August 27, 1968 the Town Code was amended to prohibit "concrete products manufacture" in the LI zone ("1968 Code Amendment"). However, the record also contains the affidavit of Frank DeRubeis, the Town Planning Director which indicates that on November 29, 1968, three months after the 1968 Code Amendment, there was an approval for a "concrete manufacturing plant" at the Subject Property and that such a plant was "permitted at the time of this approval in 1968."

• There was no dispute that the testimony, photographs, land use application and Town approvals from 1968 through 2006 established that a precast concrete cesspool manufacturing facility, a concrete manufacturing plant and a concrete aggregate processing center were being operated at the Subject Property.

• The testimony of the neighboring property owner, John Gesuale, was that the activities described in the above paragraph were continuous through to the time of the BZA hearing. He stated that he observed pouring of concrete into molds to manufacture pre-cast concrete cesspool rings at the subject property from the 1970's through to the time of the BZA hearing. The BZA Decision ignored this testimony.

• Witness Kevin Cahill, who observed the property while making deliveries during the 1980's and "currently" at the time of the BZA hearing, testified that the operation remained the same except that at the time of the BZA hearing it was "not as robust" but still included crushing, "pre-cast work," and the pouring of concrete into molds. The BZA Decision did not cite the portions of this testimony which recited Mr. Cahill's "current" observations, but considered these observations "not good" for some reason that is not apparent to the court.

• The affidavit of Albert Herget indicated that he was a representative of KPE, which held a mortgage on the Subject Property during the period between 2007 and 2011 while the Carlson family was in title. As a representative of the mortgagee, Mr. Herget testified that he visited the Subject Property on multiple occasions between 2007 and 2011. During those numerous visits he observed continued operations of a manufacturing facility and a processing center including, e.g., that cesspool rings were being stored, deliveries were being accepted, equipment was being operated, loading and unloading of materials and machine activity, as well as sorting and screening were being conducted. The BZA Decision discounted this testimony because KPE "did not acquire the site until 2011" and because Mr. Herget concluded that the activities cited above resulted in his "opinion" that these activities were "historically associated with site operations at the site."

• The testimony of Mr. Valente was that he delivered small amounts of redi-mix concrete to the Subject Property from 2009 to 2012 to be "poured for...pre-cast rings." Although Mr. Valente's unchallenged testimony that the concrete was to be used for these purposes the BZA Decision disregarded his testimony because the receipts he produced did not "indicate what the concrete was used for."

• In the face of this testimony, largely based on regular visits to the property, the BZA nevertheless relied on the testimony of neighbors that the manufacturing and processing operation had been abandoned, even though none of them testified that they went onto the property on a repeated or regular basis.

• In view of the foregoing, and in accordance with the case law cited below, to the extent the pre-cast concrete manufacturing facility, concrete manufacturing plant and the concrete aggregate processing center are not legal non-nuisance uses in accordance with Case No. 509 of 1961 or the 2004 Building Inspector Interpretation, they are pre-existing non-conforming uses which were continuous from 1968 to the time of the BZA hearing. Contrary to the BZA Decision, they were not abandoned for a twelve-month period. The BZA Decision's failure to recognize the legal conforming uses and to deny a CEU for these uses was affected by error of law, arbitrary and capricious and an abuse of discretion.

• In 2012 KPE was granted a SWMF permit by the NYS Department of Environmental Conservation ("DEC") to process or recycle concrete, asphalt pavement, brick, soil, rock and trees of up to 250 cubic yards per day and to store up to 15,000 cubic yards of processed and unprocessed materials ("DEC Permit"). The DEC permit indicates that it is subject to local zoning law.

• The DeRubeis affidavit, the summonses, testimony at the BZA hearing and the BZA members' deliberations indicated that at the time of the BZA application and the Town's commencement of ***Town of Smithtown v KPE,*** the Subject Property was being used as a SWMF or recycling facility. That SWMF use is prohibited under the Town Code. There was no testimony that there was a pre-existing recycling or SWMF use. Moreover, the increased noise and vibrations emanating from the Subject Property, to which witnesses had testified, coincided with the issuance of the DEC Permit for a SWMF.

• The record indicates that rock crushing has been prohibited since 1953

• The testimony presented by KPE's witness, Mr. Gesuali, indicated that over the years a rock crusher would operate periodically at the Subject Property, and that rock crushing took place from time to time when a portable rock crusher was brought to the Subject Property. He also testified that the rock crushing which took place on the Subject Property was incidental to the manufacturing of the rings and involved cesspool rings which had been broken. The testimony at the BZA hearing did not establish that crushing of rocks or concrete was a regular continuous use at the Subject Property, and was not for the purposes of recycling or solid waste management.

• There is nothing in the record, including Case No. 509 of 1961, the 2004 Building Inspector Interpretation or the DeRubeis affidavit indicating approval of a rock crusher as a legal use at the Subject Property.

A local zoning board has broad discretion when reviewing applications, but its determination may be set aside if the record reveals that "the board acted illegally or arbitrarily, or abused its discretion." ***Matter of Pecoraro v. Bd. of Appeals of Town of Hempstead***, 2 N.Y.3d 608, 613, 781 N.Y.S.2d 234 (2004); ***Vomero v. City of New York***, 13 N.Y.3d 840,892 NYS2d 284 (2009); ***Marina's Edge Owner's Corp. v. City of New Rochelle Zoning Bd. of Appeals***, 129 A.D.3d 841, 11 N.Y.S.3d 232 (2d Dept. 2015). The determination of a local zoning board is entitled to great deference, and will be set aside only if it is illegal, arbitrary and capricious, or irrational. ***Waterways Dev. Corp. v. Town of Brookhaven Zoning Bd. of Appeals***, 126 A.D.3d 708, 5 N.Y.S.3d 450 (2d Dept 2015); ***L & M Graziose, LLP v. City of Glen Cove Zoning Bd. of Appeals,*** 127 A.D.3d 863, 7 N.Y.S.3d 344 (2d Dept. 2015). Here, as set forth above, the failure of the BZA Decision to recognize the nine legal uses and to grant a CEU was affected by an error of law and was arbitrary and capricious.

The Smithtown Town Code provides at Section 322-77 that the BZA may not issue a CEU where "a lawful nonconforming use...is **abandoned** for more than 12 months..."

(emphasis supplied). Thus, the Smithtown Town Code requirements for a CEU are distinct from code provisions in other jurisdictions which rely upon a mere discontinuance or cessation of activity for a period of time as opposed to abandonment in order to extinguish a pre-existing non-conforming use. ***Marzella v. Munroe***, 123 A.D.2d 866, 507 N.Y.S.2d 646, 647 (1986), *aff'd as modified*, 69 N.Y.2d 967, 516 NYS2d 647 (1987). Abandonment, or intention to abandon, cannot be presumed but must be based on an affirmative action of the one who is abandoning. ***City of Binghamton v. Gartell***, 275 A.D. 457, 90 N.Y.S.2d 556 (3d Dept. 1949). "Generally, abandonment of a nonconforming use requires both an intent to relinquish and some overt act or failure to act, indicating that the owner neither claims nor retains any interest in the subject matter of the abandonment." ***Toys R Us v. Silva***, 89 N.Y.2d 411, 421, 654 NYS2d 100, 105 (1996). Abandonment "depends upon the concurrence of two factors, namely an intention to abandon and some overt act, or some failure to act, carrying the implication that the owner neither claims nor retains any interest in the subject matter of the abandonment." ***Putnam Armonk, Inc. v. Town of Southeast***, 52 A.D.2d 10, 15, 382 N.Y.S.2d 538, 542 (2d Dept 1976).

Not only did the testimony at the BZA hearing not establish that there had been an intent to abandon, it failed to show a complete cessation of the pre-existing activity. Rather, the testimony merely demonstrated reduced activity. "Abandonment of a legal nonconforming use requires 'a complete cessation' of the nonconforming use." ***Eccleston v. Town of Islip Zoning Bd. of Appeals***, 40 A.D.3d 854, 855, 836 N.Y.S.2d 637, 639 (2d Dept 2007). In view of the foregoing, insofar as the BZA Decision denied a CEU for the ten uses which did not constitute a SWMF, recycling, rock crushing and related offices, storage, stockpiling, truck facilities and parking, such decision was affected by an error of law and was arbitrary and capricious.

The court has considered the parties' additional contentions and finds them unnecessary to this determination. The request for attorney's fees is denied. Petitioner cited to no statutory authority to support such a request in this matter.

Submit judgment.

ENTER

Dated: July 15 2019
Riverhead, New York

Martha L. Luft
MARTHA L. LUFT, A.J.S.C.

__X_FINAL DISPOSITION

_____NON-FINAL DISPOSITION