

COPY
Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

In the Matter of the Application of

**THE LITTLE FRESH POND
ASSOCIATION, INC., FOSTER MAER,
SARAH PAGE BAREAU, LARISSA
POTAPCHUCK and DANIEL PATRY,**

Petitioners,

**For a Judgment under Article 78 of the
Civil Practice Law and Rules**

- against-

**ZONING BOARD OF APPEALS OF
THE TOWN OF SOUTHAMPTON and
SOUTHAMPTON DAY CAMP
REALTY, LLC**

Respondents.

ORIG. RETURN DATE: 5/20/19

ADJOURNED DATE: 6/20/19

MOTION SEQ. NO.: 001 - MD

PLTF'S/PET'S ATTY:

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Upon the following papers read on this Article 78 petition: Notice of Petition and supporting papers with memorandum of law by petitioner dated April 8, 2019; Notice of Cross-Motion and supporting papers___ Answer in opposition and supporting papers by respondent Zoning Board; Memorandum of Law in reply and supporting papers by petitioner dated June 19, 2019; Other___; ~~(and after hearing counsel in support of and opposed to the motion)~~ it is,

ORDERED that Petitioner's petition seeking reversal of a decision of the Zoning Board of Appeals of the Town of Southampton which granted a change in non-conforming use variance based upon Southampton Town Code rather than New York Town Law is denied.

The within petition seeks a judgment annulling and reversing the decision of the Zoning Board of Appeals of the Town of Southampton ("Zoning Board") dated March 7, 2019, which was filed in the Office of the Town Clerk on March 12, 2019. Such decision granted a variance to Southampton Day Camp Realty, LLC ("SDCR") for property located at 665 Majors Path, Southampton, New York (Tax Map 900-97-317.1). Relying on analysis under Southampton Town Code §330-167(B)(3), the Zoning Board granted the variance upon a determination that the proposal to change the use of the property from "the pre-existing nonconforming use as a "tennis club and/or tennis camp" to another nonconforming use, a tennis club and/or day camp, will be beneficial to the general neighborhood." The variance was subject to site plan approval by the Southampton Town Planning Board and was

contingent upon incorporation of certain measures proposed by the Zoning Board as well as measures contained within the Findings Statement of the Planning Board.

Owners of property near Little Fresh Pond and a not-for-profit corporation with the stated purpose of protecting and preserving Little Fresh Pond bring the within petition. Petitioners aver that the decision of the Zoning Board of Appeals of the Town of Southampton resulted in the addition of a second nonconforming commercial use, along with the pre-existing one, on a residentially zoned property. Petitioners argue that the Zoning Board exceeded its authority under Southampton Town Zoning Code §330-167(B)(3) by allowing a second non-conforming use of the property because such provision only authorizes swapping of one nonconforming use for another under certain circumstances. They claim that creation of a new nonconforming use generally requires a use variance, which may be granted only upon a showing that the required elements set forth in NY Town Law §267-b(2) are met, and that the Zoning Board improperly circumvented these requirements in proceeding under Zoning Code §330-167(B)(3). Petitioners further state that a prior Zoning Board decision in 2012 determined that the prior nonconforming use of the property was that of a tennis club with an accessory tennis camp for members' children and that a "day camp" was a separate, incompatible and noninterchangeable use from the tennis club and accessory tennis camp. Petitioners opine that this second nonconforming use as a public day camp is much larger in scale than the members-only tennis camp which would bring large-scale bus traffic and approximately 60 full-time counselors residing on site. Petitioners frame the central issue here as being whether or not the Zoning Board has the authority to grant a variance to add an additional nonconforming use on a residential property by deeming such addition to be a change in non-conforming use subject to the provisions of Southampton Town Zoning Code §330-167(B)(3) or whether such a change in use requires that granting of a variance be in compliance with requirements under Town Law §267(b)(2).

Southampton Town Zoning Code §330-167 provides in part:
Specific types of variances.

In the instances of the following types of variances, the Board of Appeals is hereby specifically empowered to grant the variance pursuant to the guiding principles and the general standards stated in § 330-166B and C and to the provisions which follow.

**** (section A and B(1) and (2) omitted)*

B(3) To grant a certificate of occupancy for a change in a nonconforming use, provided that:

- (a) The Board of Appeals shall have made a determination that such change will be beneficial to the general neighborhood.
- (b) Such change is made subject to such reasonable conditions and safeguards as the Board of Appeals may stipulate.

NY Town Law §267-b provides in part:
Permitted action by board of appeals

(section 1 omitted)

2. Use variances.

- (a) The board of appeals, on appeal from the decision or determination of the administrative official charged with the enforcement of such ordinance or local law, shall have the power to

grant use variances, as defined herein.

(b) No such use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located, (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence; (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created.

(c) The board of appeals, in the granting of use variances, shall grant the minimum variance that it shall deem necessary and adequate to address the unnecessary hardship proven by the applicant, and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

On March 15, 2012, the Zoning board rendered a decision determining whether SDCR's proposal to renovate and expand operations on the subject property to include use as a "day camp" was simply a continuation of the pre-existing non-conforming "tennis club and/or tennis camp" or such change required a Zoning Board variance. Little Fresh Pond Assoc. (Petitioner herein) and two neighborhood groups (one of which was represented by its Vice President Foster Maer, who is also a Petitioner herein) had brought the issue before the Zoning Board in a challenge to the determination by the Chief Building Inspector that the day camp use would be a continuation not requiring a variance. The reversal was predicated upon analysis of the Standard Industrial Classification Code. In instances where the Town Code does not define particular types of uses, the Chief Building Inspector and the Zoning Board look to the Standard Industrial Classification ("SIC") Code for guidance. In this instance, the 2012 Zoning Board found that SIC Code 7997 applied because such code deals with membership clubs. Although the history of the property is that it did have some non-members permitted to use the tennis courts and did have other accessory activities, the Zoning Board, overruling the Chief Building Inspector, found that the primary non-conforming use was that of a tennis club, therefore use as a day camp, which would be covered by SIC Code 7999 (entitled "Amusement and Recreation Services Not Elsewhere Classified") was deemed to be a separate non-conforming use requiring a variance. The Zoning Board's conclusion in the 2012 decision was, "Therefore, this Board finds that the proposed renovation and expansion of the subject premises from a "tennis club and/or tennis camp" to a "day camp" is a change from one nonconforming use to another nonconforming use since these uses are not compatible, or interchangeable, pursuant to the SIC Code; SDCR must seek a variance from this Board pursuant to Southampton Town Code §330-167(B)(3) for its proposed "day camp" use." The decision further stated that any other assumptions relied upon in the Chief Building Inspector's determination would be addressed if and when a variance is sought by SDCR. This determination was unchallenged.

The subsequent application, which was ultimately determined by the March 7, 2019 decision that is the subject of this petition, sought a variance in accordance with the Zoning Board's 2012 decision. After consideration and review of a comprehensive geological and environmental impact study, septic plans, runoff and drainage management, traffic flow, vegetative buffers, degree of disturbance around the wetland areas of Little Fresh Pond and testimony of community members, the Board approved the change from the pre-existing non-conforming use of tennis club and/or tennis camp to the non-conforming use of tennis club and/or day camp pursuant to

Southampton Town Code §330-167(b)(3), finding that such change will be beneficial to the general neighborhood, conditioned upon approval of the Town Planning Board and incorporation of the proposed conditions and safeguards. It is the position of Respondents that the approved change of non-conforming use was governed by Town Code §330-167(B)(3), rather than Town Law §267-b, and that the Zoning Board properly determined that that the change would be generally beneficial to the community. In accordance with Town Code §330-167(B)(3)(b), the Zoning Board imposed the following conditions and safeguards upon the change in use variance: activities are to be concentrated in disturbed areas of the property and existing natural area and vegetation are to be maximized, particularly areas within 650 feet of Little Fresh Pond; the grandfathered allowable sewage flow standards are to be reduced from 9,450 gallons per day to no more than 6,800 gallons per day; there is to be a limitation on the number of campers, staff and overnight stays; upgraded sanitary septic systems; extension of public water to the site for water supply and fire protection; implementation of a drainage plan for storm water runoff; facilities to be upgraded to ADA compliance; no expansion of existing floor area or court area; the tennis club, day camp and cottages will be seasonal rather than full time unrestricted use; significant vegetative buffers are to be provided along property boundaries and along Little Fresh Pond; and seven tennis courts are to be maintained rather than conversion of some courts to a softball field.

In Petitioners' Reply Memorandum of Law, Petitioners clearly articulate that they do not challenge the rational nature of the determination by the Zoning Board. The issue for Petitioner is that they believe a second non-conforming use is being added and that doing so requires a use variance and accompanying analysis in accordance with Town Law requirements. Petitioner asserts that the Zoning Board exceeded its authority by granting the change in non-conforming use under Town Code §330-167(B)(3). Petitioner suggests that SDCR deceived the Zoning Board by the use of "and/or" in the description of the existing non-conforming use as "tennis club and/or tennis camp" because the 2012 Zoning Board decision determined that the primary use of the property was as a membership tennis club with accessory camp (although the conclusion of such decision did contain reference to the application as seeking a change from "tennis club and/or tennis camp"). Petitioner claims that SDCR may not describe the current use of the property as such because it implies two existing non-conforming uses without clarifying the accessory nature of the "camp" use. Therefore, Petitioner asserts that the current application to convert the non-conforming use of the property to "tennis club and/or day camp" is impermissible because it appears that SDCR seeks to change one of two separate existing non-conforming uses whereas the Zoning Board previously found one of the prior uses to be ancillary. Petitioner argues that this apparent addition of a use would require analysis under the four mandatory criteria to be considered under NY Town Law § 267-b(2) rather than the arguably less stringent standard of review set forth in Southampton Town Code §330-167(B)(3).

The 2012 decision by the Zoning Board specifically considered the use of the property as a day camp and determined that such use would require a variance under Town Code §330-167(B)(3). The Zoning Board noted in its 2012 decision that such a change in non-conforming use is sometimes favored so that the subject property is not left to deteriorate and become a blight on the neighborhood. Although Petitioner would argue that the proposal here seeks to impermissibly retain tennis club membership use while adding the camp use, the extent, nature and location of activities to be conducted on the subject property were fully considered by the Zoning Board in the current proceedings. Additionally, the recommendations and determinations in the 2012 decision were brought to the attention of the Zoning Board and the issue of the proper standard of review was raised in the proceedings before the Board. The Zoning Board determined the proper variance analysis to be that of the Southampton Town Code's change in non-conforming use rather than the more extensive New York Town Law use variance analysis. If the Zoning Board had determined the proposed activities to expand the non-conforming use beyond the scope of consideration under Town Code §330-167(B)(3), they could have required an application for a use variance but

declined to do so. Petitioner asserts that the Zoning Board's decision is not entitled to the customary judicial deference in zoning cases because the issue is not whether or not the determination is arbitrary and capricious, the question is whether or not the correct regulation was followed. Petitioner has not challenged the authority of the Zoning Board to grant a certificate of occupancy for a change in non-conforming use. Petitioner simply wishes to have the Court find that the approved use is actually two separate uses and that Town Law §267-b review is required to approve the day camp use. The Court declines to do so. Insufficient basis is presented for the Court to find that the Town exceeded its legal authority in making its determination.

The usual standard of review in an Article 78 proceeding brought challenging a determination such as the one here at issue, is "...whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion..." (CPLR§ 7803; *Perry v. Brennan*, 153 AD3d 522, 524–25, 60 NYS3d 214, 217 [2d Dept. 2017]; *Suffolk Cty. Ass'n of Mun. Employees, Inc. v. Levy*, 133 AD3d 674, 675, 19 NYS3d 563, 565 [2d Dept 2015]; *Zupa v. Bd. of Trustees of Town of Southold*, 54 AD3d 957, 957, 864 NYS2d 142, 143 [2d Dept 2008]). A decision is arbitrary and capricious when it is taken without regard to the facts or without reasonable basis (*Ward v. City of Long Beach*, 20 NY3d 1042, 1043, 985 NE.2d 898, 898–99 [2013]). If the determination has a rational basis, it will be sustained, even if an alternate result would be reasonable (*Ward, supra*; *Peckham v. Calogero*, 12 NY3d 424, 430–31, 911 NE2d 813 [2009]). A local zoning board has broad discretion in determining variance applications. A decision of a Zoning Board may be reviewed by the Court to determine whether or not it was illegal, arbitrary and capricious or an abuse of discretion and further, whether or not it was rationally made based upon the substantial evidence before it. (*Petikas v. Baranello*, 78 AD3d 713, 714–15, 910 NYS2d 515, 516–17 [2d Dept. 2010]; *King v. Town of Islip Zoning Bd. of Appeals*, 68 AD3d 1113, 1115–16, 892 NYS2d 174, 176–77 [2d Dept. 2009]; *Harris v. Zoning Bd. of Appeals of Town of Carmel*, 137 AD3d 1130, 1131–32, 27 NYS3d 660, 661–62 [2d Dept. 2016]; *Daneri v. Zoning Bd. of Appeals of Town of Southold*, 98 AD3d 508, 509–10, 949 NYS 2d 180, 181–82 [2d Dept. 2012]; *Rieco Properties, Inc. v. Town of Hempstead*, 20 AD3d 541, 797 NYS2d 912 [2d Dept. 2005]; *Purdy St., LLC v. Harrison Zoning Bd. of Appeals*, 22 AD3d 498, 801 NYS.2d 539 [2d Dept. 2005]; *Sasso v. Osgood*, 86 NY2d 374, 385, 657 NE2d 254, 259 [1995]; *Ifrah v. Utschig*, 98 NY2d 304, 306–09, 774 NE2d 732, 733–35 [2002]; *Monte Carlo 1, LLC v. Weiss*, 142 AD3d 1173, 1175–77, 38 NYS3d 228 [2d Dept. 2016] The decision of a Zoning Board should be upheld upon judicial review if it has a rational basis and is supported by substantial evidence (*Ifrah v. Utschig*, 98 NY2d 304, 306–09, 774 NE2d 732, 733–35 [2002]). Here, instead of challenging the decision as arbitrary and capricious, the Petitioner seeks to distinguish between the finding itself and the standard of analysis used to reach that finding. However, the Zoning Board neither exceeded its authority nor did it act arbitrarily and capriciously in making its determination.

The Court finds that the Zoning Board did not err as a matter of law in applying the Southampton Town Code §330-167(B)(3) to the change in non-conforming use variance application rather than Town Law §267-b. Furthermore, the Zoning Board's decision was neither arbitrary nor capricious. As such, Petitioner's petition is denied.

Dated: Riverhead, New York
October 10, 2019



VINCENT J. MARTORANA, J.S.C.

CHECK ONE: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION