

Matter of Sweig v Finnerty

2006 NY Slip Op 30194(U)

July 9, 2006

Supreme Court, Suffolk County

Docket Number: 0024713/2006

Judge: Jeffrey Arlen Spinner

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DUPLICATE

**SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK**

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

In the Matter of the Application of
**MARC SWEIG, HILLARY B SWEIG, PETER COLMAN,
 ROSE COLMAN, DENNIS DeCRESCENZO, DAVID
 REINBACH, SUSAN WEXLER-REINBACH, PAUL
 ANASTASAKIS, BERNADETTE BASSAN** as Trustee of
 the Bassan Living Trust, **STEVEN RAFTOPOULOS** and
DIMITRI BOYLAN,
Petitioners,
 - against -
**DENNIS FINNERTY, Chairman, JOHN BLANEY,
 LAWRENCE TOLER, JACQUIE LOFARO, E BLAIR
 McCASLIN, ALMA HYMAN and GEORGE SKIDMORE,**
 constituting the **PLANNING BOARD OF THE TOWN OF
 SOUTHAMPTON** and **WILLIAM A. BABINSKI, JR,**
Respondents.

INDEX NO.: 2006-24713
MOTION SEQ. NO.: 002 - MD
ORIG. MOTION DATE: 09/28/06
FINAL SUBMIT DATE: 05/02/07

UPON the following papers numbered 1 to 120 read on this Petition:

- Petitioners' Petition & Supporting Papers (Pages 1-23 & Exhibits A-F & A);
- Respondent SOUTHAMPTON's Answer(Pages 24-37 & Exhibits 1-50);
- Respondent BABINSKI's Answer(Pages 38-54);
- Petitioners' Support (Pages 55-67);
- Respondent SOUTHAMPTON's Opposition (Pages 68-88);
- Respondent BABINSKI's Opposition (Pages 89-108);
- Petitioners' Reply (Pages 109-120);

it is,

ORDERED, that the application of Petitioners is hereby denied in all respects.

Petitioner moves this Court for a Judgment, pursuant to CPLR Article 78, §§ 7801, 7803 and 7804, rescinding and setting aside the resolution of approval and determination of Respondent SOUTHAMPTON, filed in the Office of the Town Clerk on August 9, 2006, granting approval of site plan and construction permit to Respondent BABINSKI, to build a 3,240 square foot metal barn on a 3.23-acre Agricultural Reserve created as part of the William A Babinski Subdivision, on the Suffolk County Tax Map as parcel No. 900-52-1-1.6.

Petitioners are the owner of parcels of property adjacent to and nearby to the above referenced parcel that was the subject of the application before Respondent SOUTHAMPTON; in 1990, William A Babinski, father of the present owner of the subject parcel, obtained subdivision approval of his 6.5-acre parcel into 4 lots, conditioned on his conveying an Agricultural Reserve to the Town of Southampton over 3.23 acres thereof, in accordance with Southampton Town Code Chapter 247, Town Law § 281 and General Municipal Law § 247, which he retained in his own name and later transferred to his son, Respondent BABINSKI herein; on May 8, 2006, Respondent BABINSKI applied to Respondent SOUTHAMPTON for site plan approval and a construction permit to erect a 3,420 square foot metal barn on the subject parcel (which would cover 2.5% of said parcel), for storage of farm machinery for all his farm operations, including some 50 acres in Wainscott, New York, and some 30 acres in Bridgehampton, New York, which application was given conditional approval, same being filed with the Office of the Southampton Town Clerk on August 9, 2006, after which Petitioners brought this action.

The easement, or Agricultural Reserve, conveyed by Respondent BABINSKI's father to the Town of Southampton was dated February 16, 1990, and recorded in Liber 11071 Page 120 with the Office of the Suffolk County Clerk, and stated in relevant part:

“...nothing herein shall be construed as precluding the GRANTOR from erecting or constructing structures or buildings which are deemed reasonably necessary for the utilization of the burdened premises for bona fide agricultural production, provided that a site plan showing the size and location of such structures or buildings is submitted to and found acceptable by the Planning Board of the Town of Southampton...”.

While Petitioners argue that said Agricultural Reserve allows only the construction of such a building as Respondent BABINSKI seeks approval of in order to accommodate operations restricted to said parcel (and therefore the actions of Respondent SOUTHAMPTON was arbitrary, capricious, a patent abuse of discretion, beyond its legal authority and not supported by substantial evidence), Respondent BABINSKI has at all times represented that the facility proposed (which the Court believes has now been constructed) would function with his entire agricultural operation of over 80 acres, and both Respondents argue that such operation is permissible under the relevant statutes and the specific language of the Agricultural Reserve conveyed herein. Both Respondents also argue that Petitioners lack standing to bring the underlying proceeding.

Respondents also point out that, by their own admission, Petitioners herein did not participate in the hearing before Respondent SOUTHAMPTON, although they had the opportunity to do so, but other neighbors did participate both at the hearing and during the additional 10 day written comment period (several Petitioners having also submitted written statements during said period), and as a result thereof, Respondent SOUTHAMPTON considered the following matters in their deliberations:

- I. Appearance of the building;
- ii. Parcel too small for farming;
- iii. Farming and building will impact ten surrounding homes;
- iv. Access is in close proximity to homes;
- v. Set precedence with neighboring Agricultural Reserve;
- vi. Requests prohibition on pesticides;
- vii. Size of building be limited for subject property and not be used with adjacent lots;

basically demonstrating that Respondent SOUTHAMPTON considered all of the objections and concerns raised herein by Petitioners, and determined to grant site plan and construction permit approval.

Respondents further points out that the Town of Southampton Agricultural Advisory Committee found (according to the Land Management Department's Staff Report on Respondent BABINSKI's application before Respondent SOUTHAMPTON, that "Ag. Machinery storage is to be sited on the east side of owned acreage off Lumber Lane 3,420 sq. ft. This is a bonafide farming operation with substantial equipment list - interior space should be identified - the building a requirement for this use - legitimate use."

From the start, it should be noted that it is well settled law in the State of New York that a Court may not substitute its own judgment for that of the reviewing board (*see: Janiak v. Planning Board of the Town of Greenville*, 159 AD2d 574, 552 NYS2d 436 [2nd Dept], *appeal denied*, 76 NY2d 707, 560 NYS2d 989, 561 NE2d 889 [1990]; *Mascony Transport and Ferry Service v. Richmond*, 71 AD2d 896, 419 NYS2d 628 [2nd Dept 1979], *aff'd*, 49 NY2d 969, 428 NYS2d 948, 406 NE2d 803 [1980]). Therefore, if the decision rendered by the reviewing board is within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is arbitrary, capricious or unlawful (*see, Castle Properties Co. v. Ackerson*, 163 AD2d 785, 558 NYS2d 334 [3rd Dept 1990]). It is, therefore, indisputable that the standard of review for determinations of Respondent PLANNING BOARD is whether the decision rendered is arbitrary, capricious and/or unlawful.

Petitioners argue that the language contained in the Agricultural Reserve stating that Respondent BABINSKI may erect or construct "...structures or buildings which are deemed reasonably necessary for the utilization of the burdened premises for bona fide agricultural production..." is clear and unambiguous in meaning that the structure must be necessary for the use of the subject parcel, while said Respondent openly admits that the proposed facility will serve the totality of his farming operation.

Respondent BABINSKI counters that the Town of Southampton, in the spirit of preserving the Town's farming history, has created a patchwork of agricultural reserves. He eloquently writes that, "The sight of farm tractors on the side roads on the East End is not only historical but also a necessity due to the ever decreasing and fragmented farm land remaining. If Petitioners' logic would control, each and every farm field would have to have its own tractors and equipment and its own storage building to house them. This strained reading of the Agricultural Easement would effectively be a death knell to the traditional farming in the Town of Southampton." Counsel for said Respondent adeptly points out that any ambiguity in a covenant restricting the use of land must be strictly construed against those seeking to enforce it, and the Court must interpret the covenant to limit, rather than extend, its restriction (*See: 9394 LLC v Farris*, 10AD3d 708 [2 Dept 2004] (where the language used in a restrictive covenant is equally susceptible to two interpretations, the less restrictive interpretation must be adopted); *Ludwig v Chautauqua Shores Improvement Assn*, 5 AD3d 1119 [4 Dept 2004]); and that a party seeking to enforce a restriction on land use must prove, by clear and convincing evidence, the scope as well as the existence of the restriction (*See: Greek Peak, Inc v Grodner*, 75 NY2d 982 555 NE2d 906 [1990]).

The Court notes that in the instant matter, the Agricultural Reserve doesn't even lend itself to being susceptible to two interpretations, there being nothing therein, nor in the Town Code, to restrict the erection or construction a buildings on the subject parcel to solely the agricultural production on that parcel, and that Respondent BABINSKI's intention to use the storage facility for the totality of his farming operation is

totally consistent with said Agricultural Reserve, and therefore the Court hereby determines that the approval granted by Respondent SOUTHAMPTON is not arbitrary, capricious, a patent abuse of discretion, beyond its legal authority nor unsupported by substantial evidence.

Petitioners further argue that Respondent BABINSKI "...uses the pretense of farming to defend the construction of a huge metal storage facility smack in the middle of surrounding residences...", further writing that "...none of the adjacent homeowners ever contemplated that the driveway easement would be used by [sic] for the purpose of transporting farm machinery to and from the Agricultural Easement."

Respondent BABINSKI counters that Respondent SOUTHAMPTON ensured that the Agricultural Reserve had its own access to public roadways, by the very creation of the driveway thereto, in the adopted design of the original Babinski Subdivision that created said reserve.

The Court is somewhat mystified by Petitioners' position herein. It seems totally inconsistent to own property adjacent to or nearby an Agricultural Reserve, and consider construction of a modern barn, or the appearance of farm machinery along the driveway of such Agricultural Reserve, as not-contemplated. The Court notes that this is one of at least 5 Agricultural Reserves in the immediate area of these Petitioners' properties, and whether they purchased before creation of such reserves (and therefore were on notice when they were created) or after said creation (where any proper search would have revealed the existence of same), it was no secret that they were surrounded by such reserves, and that there was more than reasonable certainty that same would be used for agricultural purposes and the uses appurtenant thereto. The Court hereby determines the position of Petitioners to be without merit.

Petitioners argue that Respondent SOUTHAMPTON violated the Agriculture and Markets Law by granting Respondent BABINSKI's application, in that the subject parcel is less than seven acres, and they allege could not have produced an average of \$50,000 in gross sales in the proceeding two years, as required by § 301(4), again relying on the parcel standing alone as a 3.23 acre site.

Respondent SOUTHAMPTON counters that, in fact, Agriculture and Markets Law § 301(11) defines "farm operation" as "...the land and on-farm buildings, equipment, manure processing and handling facilities, and practices which contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise, including a "commercial horse boarding operation" as defined in subdivision thirteen of this section. Such farm operation may consist of one or more parcels of owned or rented land, which parcels may be contiguous or non contiguous to each other."

The Court notes that the very purpose of the Article of Agriculture and Markets Law from which the parties derive their citations is clearly defined at the second paragraph of § 300, "The socio-economic vitality of agriculture in this state is essential to the economic stability and growth of many local communities and the state as a whole. It is, therefore, the declared policy of the state to conserve, protect and encourage the development and improvement of food and other agricultural products. It is also the declared policy of the state to conserve and protect agricultural lands as valued natural and ecological resources which provide needed open space for clean air sheds, as well as for aesthetic purposes."

In light of the above, it would therefore, be inconceivable to the Court that these statutes could be so narrowly construed so as to defeat their very purpose, and unreasonably restrict and promotion the

termination of use of land for farm operations, most especially when designated as an Agricultural Reserve. Respondent SOUTHAMPTON states the rebuttal well when its Counsel writes, "This parcel is not being used in a vacuum, nor has it ever been so constrained either by law or easement. It is one of three parcels which encompass the farming operations." The Court hereby determines that there is no evidence of any violation of New York State Agriculture and Markets Law in the actions of Respondent SOUTHAMPTON.

Petitioners curiously argue that the issue of whether or not anyone other than the Town of Southampton may enforce the covenant is not properly raised in an Article 78 proceeding, so they also instituted a separate declaratory judgment action against Respondent BABINSKI. In flies directly in the face of the meat of their arguments against approval of the instant application by Respondent SOUTHAMPTON, all of which has everything to do with the content of said covenant, and Petitioners' interpretation and attempt to enforce said interpretation thereof. In fact, Petitioners attack the determination of Respondent SOUTHAMPTON on the very basis it failed to consider the terms of said covenant.

Respondent SOUTHAMPTON argues that Petitioners lack standing to bring this action, and while Petitioners' Counsel counters with good arguments about zone of interest and close proximity, the Court cannot look beyond the fact that Petitioners are in fact trying to enforce a covenant, which Petitioners themselves set forth was created and accepted pursuant to General Municipal Law § 247. As adeptly pointed out by Counsel for Respondent SOUTHAMPTON, subsection 4 thereof clearly states that "...any interest acquired pursuant to this section is hereby enforceable by and against the original parties and the successors in interest, heirs and assigns of the original parties..."; an abutting property owner lacks standing to enforce a scenic easement (*See: Bleier v Board of Trustees of Incorporated Village of East Hampton*, 191 AD2d 552 [2 Dept 1003]); The extent of the use of an easement might be an issue between the parties to the easement but may not be contested by a person not a party to the easement (*See: New York Jurisprudence, § 206*). The Court hereby determines that, in the final analysis, Petitioners herein lack standing to maintain the instant proceeding.

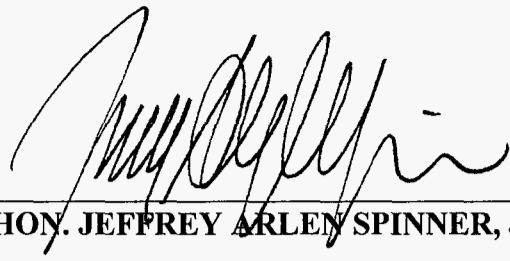
Respondent argue that Respondent SOUTHAMPTON considered all of the objections and concerns raised herein by Petitioners, and properly determined to grant site plan and construction permit approval, and this Court concurs.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the application of Petitioner for a Judgment rescinding and setting aside the resolution of determination of Respondent SOUTHAMPTON granting approval of site plan and construction permit to Respondent BABINSKI, to build a 3,240 square foot metal barn on a 3.23-acre Agricultural Reserve on the Suffolk County Tax Map as parcel No. 900-52-1-1.6, is hereby denied in all respects, the Petition is hereby dismissed and the action disposed of; and it is further

ORDERED, that Counsel for either Respondent is hereby directed to serve a copy of this order, with Notice of Entry, upon all other parties, upon the Calendar Clerk of this Court and upon the Suffolk County Clerk within twenty (20) days of the date this order is entered by the Suffolk County Clerk..

**Dated: Riverhead, New York
July 9, 2006**



HON. JEFFREY ARLEN SPINNER, J.S.C.

✓ FINAL DISPOSITION	NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

TO:

Twomey Latham Shea Kelley Dubin & Quartararo, LLP
Attorneys for Petitioners
33 West Second Street, PO Box 9398
Riverhead, New York 11901

Garrett W Swenson, Jr, Southampton Town Attorney
Attorney for Respondent SOUTHAMPTON
116 Hampton Road
Southampton, New York 11968

MacLacklan & Egan, LLP
Attorney for Respondent BABINSKI
241 Pantigo Road
East Hampton, New York 11937