

**Matter of Bishop v Town of Southampton Zoning
Bd. of Appeals**

2009 NY Slip Op 32292(U)

September 29, 2009

Supreme Court, Suffolk County

Docket Number: 1311/2009

Judge: Paul J. Baisley

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MEMORANDUM

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SUPREME COURT - SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

I.A.S. PART 36

By: Baisley, J.S.C.

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In the Matter of the Application of
MARILYN BISHOP, PETER FARMER, DONALD L.
FLEXNER, LYNNE D. FLEXNER, SHELLY DUNN
FREMONT, VINCENT FREMONT, JIM KILPATRIC,
WILLIAM LOWE, HARRY NEYENS, CHESTER
WALKER and LEONA WALKER,

Dated: September 29, 2009

Petitioners,

INDEX NO.: 1311/2009
MOT. NO. 001 MG - CASEDISP

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

-against-

TOWN OF SOUTHAMPTON ZONING BOARD OF
APPEALS, EAST END GUNITE POOLS SUPPLY,
LLC and R.K.B. REALTY, LLC,

Respondents.

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EAST END GUNITE POOLS SUPPLY, LCC and
R.K.B. REALTY, LLC,

Petitioners,

INDEX NO.: 1363/2009
MOT NO.: 001 MD - CASEDISP

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

-against-

ZONING BOARD OF APPEALS OF THE TOWN OF
SOUTHAMPTON, HERBERT PHILLIPS, as
Chairman, BETH WICKEY, as Vice-Chairperson,
ANN NOWAK, MARGARET CARAHER, KEITH
TUTHILL, DENISE O'BRIEN and ADAM
GROSSMAN, as Members of the Zoning Board of
Appeals of the Town of Southampton,

Respondents.

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As a preliminary matter, on the Court's own motion and in accordance with the January 28, 2009 stipulation of the parties, the above-titled Article 78 proceedings are hereby consolidated for purposes of this determination. The first-captioned proceeding was commenced under Index No. 1311/09 by various homeowners whose property is either adjacent or proximate to an industrial parcel owned by R.K.B. Realty, LLC ("R.K.B.") and leased to East End Gunite Pools Supply, LLC ("East End"), and is referred to hereinafter as the "Neighbors' Proceeding"). The second-captioned proceeding was commenced under Index No. 1363/09 by R.K.B. and East End and is referred to hereinafter as the "Applicants' Proceeding." The petitioners in both proceedings seek review of a decision of the Town of Southampton Zoning Board of Appeals (the "Board") dated December 4, 2008 rendered in response to the request of East End for a determination that the special exception standards regarding paving and construction material manufacturing found in Southampton Town Code (the "Code") §330-145 do not apply to East End's application to operate a cement plant which is pending before the Town Planning Board.

The record reflects that the property that is the subject of the Board's determination is a 5.45-acre parcel located in the LI-40 (light industrial) zoning district of the Town of Southampton. East End leases a two-acre portion of the property from R.K.B., on which it operates a materials storage and manufacturing facility where it prepares ready-mixed gunite concrete used for the construction of swimming pools. The remainder of the property is devoted to other industrial uses, including a garden supply store owned and operated by R.K.B. Realty and its principals. After criminal charges were brought against East End for failure to obtain building permits and site plan approval for its concrete manufacturing operations, East End applied to the Town of Southampton Planning Board to change a pre-existing non-conforming use of the property for fertilizer storage and indoor and outdoor manufacturing facility to permit it to operate a concrete and gunite manufacturing and materials storage facility. In connection with that application, East End sought a determination from the Board of Appeals that the special exception standards of Code §330-145 do not apply to its concrete and gunite operations; that the existing use of the premises is a pre-existing, non-conforming use; and, in the alternative, for a variance from the special exception standards determined by the Board of Appeals to be applicable to the site.

Code §330-145, entitled "Paving and construction material manufacturing," provides as follows:

- A. The lot area shall be not less than five acres.
- B. When adjacent to any residence district, there shall be a transitional yard 150 feet in depth along all property lines, with natural screening or screen plantings and an eight-foot chain link fence on the inside boundary of such yard to assure compatibility with adjacent properties.
- C. Water used in the washing process shall be recycled, and the overall facility shall be designed, located and operated so as to protect the groundwater reservoir from pollution."

On December 4, 2008, the Board of Appeals issued its determination, which concluded that "in addition to the general standards applicable to all site plan applications, the special exception standards regarding paving and construction material manufacturing found in Town Code §330-145 also apply to the application for a cement plant pending before the Planning Board. Further, given applicant's concession that one side of the property does not comply with the requisite setback requirement of Section 330-145(B), a variance would be required."

In its discussion, the Board of Appeals noted that under the general regulations applicable to the LI-40 Industrial District (Code §330-35(A)), up to one use is permitted for every 10,000 square feet of lot area. The Board found that inasmuch as the subject property comprises more than 220,000 square feet, up to a total of 22 uses would be permitted on the property. The Board noted that the property is presently being utilized for 3-4 uses, including the concrete manufacturing activities being conducted by East End on the two-acre portion it leases from R.K.B. In light of the foregoing, the Board concluded that the property complies with the general limitation of §330-35(A). That statute further provides that “such use shall also comply with all other applicable provisions of this chapter.” Although East End argued that the special exception provision of chapter 300, §330-145, entitled “Paving and construction material manufacturing,” is inapplicable, the Board disagreed, finding that the ready-mix concrete manufactured by East End “is a construction material because it is used to construct items.”

Having determined that East End’s application fell within the special exception provision of Code §330-145, the Board further found that the subject property met the requirements of Code §330-145(A) “because the lot area does indeed exceed five acres.” The Board expressly rejected the argument of the petitioners in the Neighbors’ Proceeding, who opposed the application, that subdivision (A) should be read to mean “not less than five acres *per use*,” concluding, without further discussion or elaboration, that “such reading is contrary to the plain language of §330-145(A).” The Board further found that, as conceded by East End, the property did not meet the 150-yard setback requirement of §330-145(B), and accordingly a variance would be required. The Board rejected East End’s contention that it was entitled to the “automatic relief” provisions of Code §330-115 granting relief for side and rear yard dimensions and lot coverage to nonconforming lots, expressly finding that the property is not “nonconforming” because it not only conforms to but far exceeds the minimum dimensional requirements for the LI-40 Industrial District.

The Board’s determination was thereafter challenged in the two separate Article 78 proceedings consolidated herein. The Neighbors’ Proceeding challenges only so much of the determination as concluded that the five-acre minimum lot area requirement of Code §330-145(A) was met because the total lot area of the R.K.B./East End property exceeds five acres. The Applicants’ Proceeding challenges only so much of the determination as concluded that the lot is not a nonconforming lot and thus not eligible for automatic relief under Code §330-115(A) from the setback requirements of Code §330-145(B).

Upon a careful review of the record, the applicable Code provisions, relevant caselaw, and the parties’ submissions, the Court finds that the Board’s determination that East End’s use of the property to manufacture concrete comports with the five-acre minimum lot area requirement of Code §330-145(A) is arbitrary and capricious and affected by an error of law; and further finds that the Board correctly determined that the subject lot is not a nonconforming lot as contemplated by the Code and that a variance from the setback requirements of Code §330-145(B) would be required.

As found by the Board of Appeals, and as now conceded by East End (Applicant’s Proceeding, Pet. ¶6), a special exception permit is required to operate a concrete plant in the LI-40 zoning district (Code §330-145). Pursuant to Code §330-122, every special exception use must meet certain enumerated “general standards” and, pursuant to Code §330-123(A), the “special conditions and safeguards required” with respect to the particular use. Among the “special conditions and safeguards” that must be satisfied in order to obtain a special exception use permit to operate a concrete plant in the LI-40 zoning district is the requirement that the lot area be a minimum of five acres (Code §330-145(A)). The Board’s conclusion that that “special condition and safeguard” may

be satisfied without regard to the type or number of other uses being conducted on the property, or the amount of land dedicated to each of such other uses, as long as the total parcel measures at least five acres, is illogical and inconsistent with the expressed purpose of the special exception provisions of the Code.

It is well established that a statute must be given “a sensible and practical over-all construction, which is consistent with and furthers its scheme and purpose and which harmonizes all its interlocking provisions. It is axiomatic that such an approach is preferred...especially when an opposite interpretation would lead to an absurd result that would frustrate the statutory purpose [citations omitted]” (*Long v Adirondack Park Agency*, 76 NY2d 416 [1990]). Under the Board’s interpretation, and in light of its prior invocation of Code §330-35(A), up to 22 concrete plants could be constructed on the five-acre parcel, as long as each plant occupied no more than 10,000 square feet. That is an absurd result, which effectively nullifies Code §330-145(A) and renders the five-acre limitation meaningless.

It is a basic principle of statutory construction that “[a]ll parts of an enactment shall be harmonized with each other as well as with the general intent of the whole enactment, and meaning and effect given to all provisions of the statute” (McKinneys Statutes §98). The only construction of Code §330-145(A) that makes sense, and that harmonizes with Code §330-35(A), is that the five-acre minimum lot size for a concrete plant is an additional requirement superimposed on the general standards of Code §330-35(A) which applies to the proposed *use* of the property and not to the property itself. The Board’s determination to the contrary is arbitrary and capricious and erroneous as a matter of law. Accordingly, the petition in the Neighbors’ Proceeding is granted, and so much of the Board of Appeals’ determination as concluded that Code §330-145(A) was satisfied upon East End’s application is vacated and annulled, and the matter is remitted to the Board for the issuance of a new determination consistent herewith.

As to the Applicants’ Proceeding, a “nonconforming lot” is defined in Code §330-5 as “[a]ny lot lawfully existing in single and separate ownership at the effective date of this chapter or any amendment thereto affecting such lot, *which does not conform to the dimensional regulations of this chapter for the district in which it is situated*. If such lot shall thereafter be held in the same ownership as an adjoining parcel, it shall lose its status as a nonconforming lot, except to the extent that the lot created by the merger of the two parcels shall remain nonconforming in the same respect” [emphasis added]. It is undisputed that the subject 5.45 acre parcel more than meets the dimensional regulations of the LI-40 zoning district in which it is situated. Accordingly, the Board of Appeals correctly determined that the subject parcel is not a “nonconforming lot” that is subject to the “automatic relief” provisions of Code §330-115, and that a variance from the setback requirements of Code §330-145(B) would be required. In light of the foregoing, the petition in the Applicants’ Proceeding is denied and the proceeding is dismissed.

Settle judgments.

Dated: September 29, 2009

PAUL J. BAISLEY, JR.

J.S.C.

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