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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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RICHARD BURDEN and LORRAINE BURDEN,

Plaintiffs/Petitioners,

- against -

SOUTHOLD TOWN ZONING BOARD OF APPEALS,

Defendant/Respondent.

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DECISION AND ORDER
SCHEDULING HEARING

Hon. Andrew G. Tarantino, Jr., A.J.S.C.
I.A.S. Part 50

Index No. 14-8491

Mot. Seq. #001 - RRH
Mot. Seq. #002 - MD
Mot. Seq. #003 - XMD

Return Date: May 23, 2014 (#001)
Return Date: August 18, 2014 (#002 & #003)
Adjourned: August 26, 2014

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In this hybrid proceeding and action for CPLR article 78 and declaratory relief, Richard Burden and Lorraine Burden ("the Burdens") seek the entry of judgment (i) annulling a March 24, 2014 determination of the Zoning Board of Appeals of the Town of Southold ("ZBA"), denying their application for variances from certain bulkhead, rear yard, and side yard setback requirements with respect to an existing in-ground swimming pool and deck, and (ii) declaring that section 280-116 (B) of the Code of the Town of Southold ("Town Code") is unconstitutional under the New York and United States Constitutions and *ultra vires* under Town Law § 261.

The Burdens are the owners of residential waterfront property located at 2800 Ole Jule Lane, Mattituck, New York. The property is situated in the Town's R-40 Residential Low-Density District, in which a minimum rear yard setback of 50 feet and a minimum side yard setback of 15 feet are required. Section 280-116 (B) of the Town Code further requires that

> B. All buildings or structures located on lots upon which a bulkhead, concrete wall, riprap or similar structure exists and which are adjacent to tidal water bodies other than sounds shall be set back not less than 75 feet from the bulkhead. The following exceptions will apply:

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(1) Buildings which are proposed landward of existing buildings.

(2) Lands which are not bulkheaded and are subject to a determination by the Board of Town Trustees under Chapter 275, Wetlands and Shoreline, of the Code of the Town of Southold.

(3) Docks, wharves, pilings, boardwalks, stairs, promenades, walkways and piers, which are accessory and separate from existing buildings or accessory structures.

Section 280-4 defines "structure" as "[a]n assembly of materials, forming a construction framed of component structural parts for occupancy or use, including buildings, antenna support structures, and small wind-energy systems," and defines "swimming pool," in part, as a "structure."

According to the petition/complaint, the property consists of approximately 0.3 acres and fronts 100 feet on Ole Jule Lane. The property is abutted to the west by a parcel owned by Richard Burden only ("the adjoining property"). The adjoining property also consists of approximately 0.3 acres but has slightly less than 100 feet of frontage on Ole Jule Lane. In 1958, the former owner of the adjoining property obtained variance relief from the ZBA with respect to the frontage deficiency. Both the property and the adjoining property were created by deed in 1959, at which time they complied with all applicable zoning requirements, and both have reputedly been held in single and separate ownership since prior to July 1, 1983 (*see also* Town Code §§ 280-9, 280-10). The neighborhood, as described by the Burdens, consists of approximately 80 lots, many of which are waterfront properties and several of which contain swimming pools.

In 1994, Richard Burden applied for and obtained from the Board of Southold Town Trustees a wetlands permit to construct an in-ground pool and deck at the property (*see* Town Code ch 275, art II). He also obtained a determination of non-jurisdiction from the New York State Department of Environmental Conservation. At or about the same time, he claims that he inquired of Victor Lessard, who was then the Town's building inspector, about obtaining a building permit for the pool and deck; that he was requested by Lessard to sign documentation in connection with the proposed pool and deck; and that, having complied with the request, was advised by Lessard that he could proceed with the construction, which he did.

In September 2011, the Burdens formally applied for a building permit with respect to the existing pool and deck. A series of denials followed, culminating with a notice of disapproval dated December 4, 2013, in which the building inspector concluded, *inter alia*, that the construction was violative of setback requirements for bulkheads (3.8 feet where a minimum of 75 feet is required), rear yards (23 feet where a minimum of 50 feet is required), and side yards (8.8 feet where a minimum of 15 feet is required). On December 9, 2013, the Burdens applied to the ZBA for variances from the setback requirements. After a public hearing, the ZBA issued a March 24, 2014 determination, denying the requested relief in accordance with the following findings:

SEQRA DETERMINATION: The Zoning Board of Appeals has visited the property under consideration in this application and determines that this review falls under the Type II category of the State's List of Actions, without further steps under SEQRA.

SUFFOLK COUNTY ADMINISTRATIVE CODE: This application was referred as required under the Suffolk County Administrative Code Sections A 14-14 to 23, and the Suffolk County Department of Planning issued its reply dated December 30, 2013, stating that this application is considered a matter for local determination as there appears to be no significant county-wide or inter-community impact.

LWRP DETERMINATION: This application was referred for review under Chapter 268, Waterfront Consistency review of the Town of Southold Town Code and the Local Waterfront Revitalization Program (LWRP) Policy Standards. The LWRP Coordinator issued a recommendation dated Dec. 23, 2013. Based upon the information provided on the LWRP Consistency Assessment Form submitted to this department, as well as the records available to us, it is our recommendation that the proposed action is INCONSISTENT with LWRP policy standards and therefore is INCONSISTENT with the LWRP, the conditions attached to this decision will mitigate the inconsistency and therefore making it consistent.

PROPERTY FACTS/DESCRIPTION: The Applicants' property is a 31,321 sq. ft. waterfront parcel in the R-40 Zone, consisting of lots 122-4-15&16. The northerly lot line abuts a saltwater dredged canal. The easterly lot line borders an adjacent residential parcel. The southerly lot line adjoins Ole Jule Lane, and the westerly lot line lies along Channel Lane. The parcel has two front yards. The property is improved with a single family dwelling, a detached garage, and the "as built" swimming pool and decking that are the subjects of this variance appeal, with all structures as shown on the survey drawn by John T. Metzger, Licensed Land Surveyor, dated Oct. 24, 2013.

BASIS OF APPLICATION: Request for Variances from Article XXII Section 280-116B, Article XXIII Section 280-124 and the Building Inspector's last updated December 4, 2013 Notice of Disapproval based on an application for building permit for "as built" deck addition and in-ground swimming pool, at 1) less than the code required bulkhead setback of 75 feet, 2) less than the code required rear yard setback of 50 feet, 3) less than the minimum code required side yard setback of 15 feet.

RELIEF REQUESTED: The Applicants request variances for 1) An "as built" in-ground swimming pool and wood decking with a bulkhead setback of 3.8 feet where 75 feet is required by Code, 2) a rear yard setback of 23 feet where 50 feet setback is required, 3) a side yard setback of 8.8 feet where 15 feet is required.

ADDITIONAL INFORMATION: This property was the subject of two prior ZBA appeals. In decision #91, dated Sept. 11, 1958, a previous applicant was granted a

variance for what was at that time a separate lot 122-4-16 for insufficient frontage of 97.39 feet on Ole Jule Lane. In decision #1196, dated Aug. 15, 1968, an applicant was granted a variance for insufficient front yard setback of 10.2 feet from Channel Lane in order to construct a detached garage on the property, in consideration that it has two front yards, and the fact that Channel Lane was an unpaved, road/town row. The current Applicants received Southold Town Trustees permit #4324, dated May 26, 1994, authorizing construction of the swimming pool that is the subject of this variance application. The Town building department has determined that the pool was "as built" without a building permit. The Applicants do not have a valid Certificate of Occupancy for this pool.

Additionally, the Notice of Disapproval appears to indicate that these lots have merged, in that it cites two adjacent tax lots as the "premises" and refers to the total square footage of each tax lot. Upon inspection of the property and review of the survey, these lots have been treated as a single lot with portions of a concrete patio and timber retaining wall connected to the single family residence on lot 122-4-15 encroaching onto lot 122-4-16 and lot 122-4-16 containing an accessory structure that would not be permitted on a single & separate lot without a principal structure. However, this Board did not consider that portion of the Notice of Disapproval that addressed the potential merger issue and this determination makes no findings with respect to whether lots 15 & 16 have merged.

FINDINGS OF FACT/ REASONS FOR BOARD ACTION:

The Zoning Board of Appeals held a public hearing on this application on January 9, 2014, at which time written and oral evidence were presented. Based upon all testimony, documentation, personal inspection of the property and surrounding neighborhood, and other evidence, the Zoning Board finds the following facts to be true and relevant and makes the following findings:

1. Town Law §267-b(3)(b)(1). Grant of the variances will produce an undesirable change in the character of the neighborhood or a detriment to nearby properties. The application submitted by the applicants notes that pools are common accessory structures and that the pool was constructed with a wetlands permit from the Town of Southold Board of Trustees. The Board finds that this reasoning alone is insufficient to illustrate that the application does not have an undesirable change in the character of the neighborhood or detriment to nearby property owners. The Board requested that the applicant submit records of other variances granted for pools in this area of a similar magnitude of the relief requested to indicate the character of the neighbor [sic]. Generally, this neighborhood is located on a peninsula with approximately 40 waterfront properties located on Ole Jule Lane, of which approximately 5 have pools. The applicant submitted a list of properties (on January 22, 2014) that have pools in this area. However, with the exception of one parcel, SCTM # 1000-122-4-10 that received a variance from this Board (Appeal No. 4732), no other property received variance relief from this Board.

Furthermore, the variance granted in appeal no. 4732 is clearly distinguishable from the circumstances here. First, the application sought only a single variance (distance from bulkhead), as opposed to the three at issue here. Additionally, the pool was permitted at 40 feet from the bulkhead, as opposed to the 3.8 feet requested in this application. Based upon the information provided by the applicant there has been virtually no showing that the application will not produce an undesirable change in the character of the neighbor [sic].

2. Town Law §267-b(3)(b)(2). While the applicant argues that the pool was constructed 20 years ago, the pool was constructed without the benefit of a building permit or variance relief from this Board. From the precedent established by this Board, had the applicant complied with the law and applied for variances prior to constructing the pool, this Board would have required that the applicant locate the pool in a more conforming location.

3. Town Law §267-b(3)(b)(3). The variances granted herein are mathematically substantial, representing 95% relief from the code required 75 feet bulkhead setback, 54% relief from the required 50 feet rear yard setback, and 41% relief from the required 15 feet side yard setback. In light of the substantiality of the variances requested and the undesirable change to the character of the community by granting variances of this magnitude, this factor weighs against the applicant.

4. Town Law §267-b(3)(b)(4). The applicant submitted in its application that granting variances on this property will not have an adverse impact on the physical or environmental conditions in the neighborhood since the pool has a drywell that handles all runoff from the pool.

5. Town Law §267-b(3)(b)(5). The difficulty has been self-created. The Applicants constructed the swimming pool without a building permit, and they did not receive a CO after the construction. Furthermore, the Applicants purchased the parcel after the Zoning Code was in effect and it is presumed that the Applicants had actual or constructive knowledge of the limitations on the use of the parcel under the Zoning Code in effect prior to or at the time of purchase.

6. Town Law §267-b. Denial of the requested relief is the minimum action necessary and adequate to preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

RESOLUTION OF THE BOARD: In considering all of the above factors and applying the balancing test under New York Town Law 267-B, motion was offered by Member Horning, seconded by Member Weisman (Chairperson), and duly carried, to

DENY, the variances as applied for, and shown on the survey drawn by John T. Metzger, Licensed Land Surveyor, dated Oct. 24, 2013, updated January 31, 2014.

This hybrid proceeding and action followed. Issue was joined on or about May 29, 2014.

In support of their request for CPLR article 78 relief, the Burdens contend that the ZBA's determination was arbitrary and capricious because (i) there was no more conforming location for the pool and deck on the property, (ii) there was no evidence that the neighborhood would be adversely affected if variance relief were granted, (iii) the ZBA improperly considered only those pools whose owners received variances, (iv) the ZBA erroneously described the neighborhood, (v) the ZBA irrationally shifted onto the Burdens the onus of demonstrating that the neighborhood would not be adversely affected, (vi) the ZBA failed to properly consider the Burdens' permits and prior efforts with the building department, and (vii) the ZBA misconstrued the applicability of Appeal No. 4732.

Pursuant to Town Law § 267-b (3), when a local zoning board considers whether to grant an application for an area variance, it must weigh the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the variance is granted. To make this determination, the board must consider (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance, (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance, (3) whether the requested area variance is substantial, (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district, and (5) whether the alleged difficulty was self-created (Town Law § 267-b [3]; *e.g.* ***Matter of Colin Realty Co. v Town of N. Hempstead***, 24 NY3d 96, ___ NYS2d ___ [2014]). However, the board is not required to justify its determination with supporting evidence with respect to each of the five factors, so long as its ultimate determination balancing the relevant considerations is rational (***Matter of Merlotto v Town of Patterson Zoning Bd. of Appeals***, 43 AD3d 926, 841 NYS2d 650 [2007]).

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 Envtl. Conservation***, 35 AD3d 732, 826 NYS2d 698 [2006]).

Upon review, the court has unanswered questions as to whether the ZBA engaged in the requisite balancing test and considered the relevant statutory factors, and thus, whether its determination was arbitrary or irrational. Initially, the court questions the ZBA's finding that the Burdens' alleged hardship was self-created and therefore, not entitled to relief. Although the record does not reveal the substance of Richard Burden's conversations with former building inspector Victor Lessard in or about 1994, Burden insists that he was advised to proceed with construction of the pool and deck by Lessard once he received Southold Town Trustees permit #4324 dated May 26, 1994, authorizing construction of the subject swimming pool. Further, the record does not support the ZBA's finding that the granting of the requested variances would result in a detrimental change in the character of the neighborhood–the pool and deck having been in existence for nearly 20 years prior to the application. Further, although the ZBA considered the review by the Local Waterfront Revitalization Program (LWRP), which concluded that the proposed action was inconsistent with LWRP policy standards, the LWRP review also suggested that there were "conditions" attached to its decision that would "mitigate the inconsistency" "making it consistent", begging the question as to whether the ZBA's finding was arbitrary or irrational.

Accordingly, the "petition" for CPLR article 78 relief is held in abeyance pending a hearing before this Court to address the Court's questions to be conducted in Part 50 at **2:00 PM on MARCH 24, 2015.**

The ZBA further moves to dismiss what is now the remaining cause of action (for declaratory relief) on the ground that the Burdens failed to join the Town Board of the Town of Southold ("Town Board") as a necessary party, and the Burdens cross-move for leave to add the Town of Southold as a party.

"In a matter seeking a declaratory judgment challenging a legislative act, the legislative body that enacted the challenged law or ordinance is a necessary party" (***Matter of Stoffer v Department of Pub. Safety of Town of Huntington***, 77 AD3d 305, 318, 907 NYS2d 38, 47 [2010]; *accord* ***Matter of Overhill Bldg. Co. v Delany***, 28 NY2d 449, 322 NYS2d 696 [1971]; ***Matter of Garden City Ctr. Assoc. v Incorporated Vil. of Garden City***, 193 AD2d 740, 598 NYS2d 62, *lv denied* 82 NY2d 658, 604 NYS2d 557 [1993]). While the Town Board is clearly a necessary party by that account, dismissal is not the proper recourse. Where, as here, a necessary party who has not been joined "is subject to the jurisdiction of the court, the court shall order him summoned" (CPLR 1001 [b]). That the applicable statute of limitations may have expired, as the ZBA claims, does not deprive the court of jurisdiction or render such joinder futile (*see* ***Windy Ridge Farm v Assessor of Town of Shandaken***, 11 NY3d 725, 864 NYS2d 794 [2008]; ***Matter of Romeo v New York State Dept. of Educ.***, 41 AD3d 1102, 839 NYS2d 297 [2007]). The Town Board, therefore, must be joined as a party, without prejudice to its right to assert any defenses it might have (*see* ***Matter of 37 W. Realty Co. v New York City Loft Bd.***, 72 AD3d 406, 896 NYS2d 870 [2010]; ***Matter of Lazzari v Town of Eastchester***, 62 AD3d 1002, 878 NYS2d 904, *lv dismissed* 13 NY3d 771, 886 NYS2d 870 [2009]).

Now, in light of the foregoing, and upon the reading and filing of the following papers in this matter: (1) Summons, Notice of Petition, and Verified Petition/Complaint, dated April 23, 2014, and supporting papers (including Memorandum of Law); (2) Answer dated May 29, 2014, (3) Return of the

Zoning Board of Appeals of the Town of Southold; (4) Notice of Cross Motion by the defendant, dated July 23, 2014, and supporting papers (including Memorandum of Law); (5) Notice of Cross Motion by the plaintiffs, dated July 30, 2014, and supporting papers; (6) Affirmation in Opposition by the defendant, dated August 12, 2014, and supporting papers; and (7) Reply Affirmation by the plaintiffs, dated August 18, 2014, and supporting papers; it is

ORDERED that the motion (incorrectly denominated as a cross motion) by the defendant for an order pursuant to CPLR 3211 (a) (10) and (e), dismissing the plaintiffs' cause of action for a judgment declaring that section 280-116 (B) of the Code of the Town of Southold is unconstitutional under the New York and United States Constitutions and *ultra vires* under Town Law § 261, is denied, and the court, *sua sponte*, directs the joinder of the Town Board of the Town of Southold as a party defendant; and it is further

ORDERED that the cross motion by the plaintiffs for an order pursuant to CPLR 401, 1001, and 1003, granting leave to join the Town of Southold as a party defendant, is denied as superfluous; and it is further

ORDERED that the plaintiffs shall, within 30 days after service of a copy of this order with notice of its entry, serve and file a supplemental summons and amended complaint naming the Town Board as a party defendant; and it is further

ORDERED that entry of judgment on the cause of action for CPLR article 78 relief shall be held in abeyance pending a hearing scheduled for **2:00 PM on MARCH 24, 2015**, and a determination on the cause of action for declaratory relief.

Dated: FEB 19 2015

A.J.S.C.