

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 32

In the Matter of the Application of
WILLIAM F. ANDES, JR., EVA ANDES,
MARTIN SILVER and DALE SILVER,

Petitioners,

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

- against -

ZONING BOARD OF APPEALS OF THE
TOWN OF RIVERHEAD, JOHN REEVE,
SANDRA REEVE and J & S REEVE SUMMER
COTTAGES, LLC,

Respondents.

By: W. Gerard Asher, J.S.C.
Dated: December 15, 2017

Index No. 16-8742
Mot. Seq. #001 - MD; CDISPSUBJ

Return Date: 10/28/16
Adjourned: 8/15/17

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In this article 78 proceeding, the petitioners challenge an August 11, 2016 decision by the Zoning Board of Appeals of the Town of Riverhead, denying their appeal from a letter of preexisting use issued by the Town's building department administrator to John Reeve and Sandra Reeve on November 24, 2009.

William F. Andes, Jr. and Eva Andes are the owners of real property located at 12 White's Lane, Aquebogue, New York. Martin Silver and Dale Silver are the owners of property located at 131 Leafy Way, Aquebogue, New York. John Reeve and Sandra Reeve are the owners of property located at 28 White's Lane, Aquebogue, New York, having acquired it from Benjamin H. White on April 28, 1994.

The Andes and Reeve properties are located adjacent to each other on the west side of a body of water known as Reeves Creek. The Silver property is located on the east side of Reeves Creek across from the Andes and Reeve properties.

In 1959, when a zoning code was first adopted in the Town of Riverhead, the Reeve property was located in the Residence 2 district, and was improved with a single-family dwelling, an attached “oyster shack,” a marina with finger docks and bulkheading, and six summer rental cottages. At that time, single-family dwellings were permitted uses in the Residence 2 district, as were “[m]arinas, provided no services are rendered,” and “summer homes” were a permitted accessory use; a commercial oyster operation, however, was not a permitted use. Consequently, upon the adoption of the zoning code, the commercial oyster operation on the property became a preexisting, nonconforming use, and the oyster shack became a preexisting, nonconforming structure. On September 24, 1970, the zoning code was amended to include “Marina (Resort)”– defined as “[a] boat basin with facilities for berthing and securing all types of recreational craft but which may not provide adequate supplies, provisions and service and fueling facilities, except emergency services may be provided and the owner of a boat may repair and service his own boat”–as a permitted use in the district in which the Reeve property was located. That amendment, however, also eliminated “summer homes” as accessory uses in the district, as a result of which the cottages, which had been conforming until September 24, 1970, became preexisting, nonconforming uses and structures. On June 22, 2004, the Town adopted new zoning relative to the property, namely, the RB-40 district, eliminating marinas as permitted uses and thereby rendering nonconforming any previously permitted and conforming marina use and dock or bulkheading structure on the property.

Section 301-3 (B) of the Riverhead Town Code defines “nonconforming use” as “[a]ny building, structure or land lawfully occupied by a use that does not conform to the regulations of the use district in which it is situated,” and “nonconforming building” as “[a] building or structure lawfully existing on a lot at the effective date of this chapter or any amendment thereto affecting such building or structure, which does not conform to the dimensional regulations of this chapter for the district in which it is situated, regardless of the use to which such a building or structure is put.” Section 301-222 (A) provides that “[a]ny building, structure or use existing on the effective date of this chapter, or any amendment thereto, may be continued on the same lot held in single and separate ownership, although such building, structure or use does not thereafter conform to the regulations of the district in which it is located, and may thereafter be expanded or extended on the same lot by special permit of the Town Board.” Section 301-222 (C) provides that no nonconforming use may be reestablished “where such nonconforming use has been discontinued for a period of one year.” Section 301-222 (G) provides that the zoning code “shall not apply to any preexisting nonconforming use that has received a special permit to expand said use from the Town Board prior to the effective date hereof.”

It appears that the November 24, 2009 letter was issued in response to the Reeves’ request for clarification regarding the legal status of the preexisting uses, buildings, and structures on their property. Briefly summarized, the letter provides (i) that the docks and bulkhead structures reconstructed in 2003 are preexisting, nonconforming structures because, prior to the adoption of the RB-40 district on June 24, 2004, “Marina (Resort)” was a permitted use of the property, (ii) that the commercial oyster

operation is a preexisting, nonconforming use and the commercial oyster shack is a preexisting, nonconforming structure, and (iii) that the summer rental cottages are preexisting uses and buildings.

The petitioners timely appealed the decision of the Town's building department administrator. A series of hearings ensued and evidence was taken. On June 24, 2010, the Zoning Board issued a determination sustaining the November 24, 2009 letter but containing no independent findings of fact. The petitioners then commenced an article 78 proceeding (Suffolk County Clerk's Index No. 10-27305). By order dated April 8, 2013, the court, noting that the Zoning Board had "failed to make any factual findings in support of its determination," granted the petition to the extent of annulling the Zoning Board's decision and remitting the matter to the Zoning Board "for further findings."

After a substantial delay, the matter was noticed for a public hearing on June 23, 2016. At the conclusion of the hearing, the Zoning Board directed that the record be kept open for 10 days to allow for the submission of "financial records." Thereafter, in a decision dated August 11, 2016, the Zoning Board again sustained the November 24, 2009 letter as to the docks and bulkhead, the commercial oyster operation and the commercial oyster shack, and the summer home cottages. As to the shellfishing use and "oyster shack," the Zoning Board made the following findings:

The Zoning Board finds that the shellfishing use and Oyster Shack at the Subject Property are and continue to be, a legal, pre-existing nonconforming use and legal, pre-existing nonconforming building. Based on the facts set forth below and the entire record before the Board, the Board affirms the Building Department Administrator's determination with respect to this use.

The following testimony and documents establish to the Board's satisfaction that the shellfishing use and Oyster Shack existed prior to 1959, the date that the Town first adopted its zoning code. Under the 1959 code [Ordinance 26, Section 202 (A) (2)], the shellfishing use at the Subject Property became nonconforming. The testimony and documents below further establish that the nonconforming shellfishing use continued through the date of the Building Department Administrator's November 24, 2009 determination:

Robert E. White established that the shellfishing use pre-existed the 1959 adoption of zoning. Mr. White, who is the son of Washington White, testified at the July 23, 2009 hearing that his family purchased the property in the 1930s and that it was used for "shellfish processing." Mr. White also submitted an April 2009 affidavit averring that, his brother Benjamin White took over the shellfish business from his father and continued it, and that the "underwater property" was then purchased by David and Thomas Lessard in the 1990s, who "continued the operation."

That the shellfishing use began on the property prior to 1959 was further confirmed by the testimony of Hon. Thomas M. Stark, Hon. Allen Smith and George Reeve, Jr.

David Lessard testified as to the continued use of the Subject Property for shellfishing. At the July 23, 2009 hearing he stated that he and his brother purchased the underwater oyster grant from Benjamin White in February 1992 and have continually used the Subject Property for a commercial shellfish operation from that time to the present. He

also testified that Benjamin White told him that he had always “worked it.” Mr. Lessard also submitted an affidavit to that effect.

Mr. Lessard’s testimony was corroborated by his brother, Thomas Lessard. Thomas Lessard submitted an affidavit stating that he and his brother purchased the property in 1992 and “rented a dock slip, repaired and dried oyster racks and operated from this property when Benjamin White owned it and then John and Sandra Reeve until this present date” of April 23, 2009.

In addition to the Lessards’ sworn testimony, books and records from Lessards’ Oyster Company for the years 1996 to 2016 were submitted showing that the business was operating for all of those years.

Richard Gadzinski, a Riverhead Town building inspector who inspected the property and prepared a prior pre-existing letter, testified at the August 27, 2009 hearing that based on his personal knowledge and years in the Town, he believed that prior to Benjamin White’s sale to the Lessards, Mr. White used the Oyster Shack on an annual basis in order to meet the DEC criteria for maintaining control of the shellfish beds.

Marilyn Corwin also testified as to the continued shellfishing use. Ms. Corwin, the niece of Benjamin White and granddaughter of Washington White, testified at the August 27, 2009 hearing that to the best of her knowledge, the taking of shellfish was continuous since her grandfather shellfished, and when her “Uncle Ben stopped, the Lessard boys continued.”

The continued existence of the Oyster Shack itself was documented in the May 5, 1994 certificate of occupancy for “(6) Six Framed Cottages, One 2 Story Frame House & Barn” that was issued by Raymond Wiwczar, who was then the Sr. Building Inspector for the Town of Riverhead.

Russell Krateville also confirmed the continued shellfishing use. He testified at the July 23, 2009 hearing that he has visited the Reeves’ property since 1992 or 1993 and that the “main use of the property has never been a residential property, it’s always been cottages, shell fishing, so that’s what was there.”

Finding: The evidence in the record demonstrates that when zoning was first enacted in 1959, the commercial shellfish use on the property had already been well-established and became a pre-existing, nonconforming use at that time. The Oyster Shack also became a pre-existing nonconforming building when the zoning was adopted. The record further demonstrates that the shellfishing use of the property has continued to the present day. Thus, the Board sustains the Building Administrator’s determination that shellfishing and the Oyster Shack are a legal, preexisting nonconforming use and building on the Subject Property.

As to the summer rental cottages, the Zoning Board made the following findings:

The Zoning Board finds that the six cottage buildings are and continue to be, a legal, pre-existing nonconforming use and buildings on the Subject Property. Based on the facts set forth below

1, 2009, the date of his affidavit.

The record also contains a certificate of occupancy for “(6) Six Framed Cottages, One 2 Story Frame House & Barn” dated May 5, 1994 that was issued by Raymond Wiwczar, Sr. Building Inspector for the Town of Riverhead. The certificate further states that all of the structures were built prior to 1965 and therefore no certificate of occupancy had been required. The survey submitted with the 1994 request for certificates of occupancy prepared by Joseph A. Ingegno depicts the six cottages with screened porches and steps.

Findings: The evidence in the record establishes that the six cottages were constructed prior to 1970 and were rented out during the summer months, that they became a pre-existing nonconforming use in September 1970, and that their use as summer rental cottages has continued to the present day as pre-existing nonconforming buildings and use. Thus, the Board sustains the Building Administrator’s determination that the six cottages are legal, pre-existing nonconforming buildings and use on the Subject Property.

As to the docks, bulkheading, and marina use, the Zoning Board made the following findings:

The Zoning Board finds that the “Marina, Resort” use and the docks and bulkhead on the subject property are and continue to be, a legal, pre-existing nonconforming use and legal, pre-existing nonconforming structures. Based on the facts set forth below and the entire record before the Board, the Board affirms the Building Administrator’s determination with respect to this use.

The testimony and documents in the record establish to the Board’s satisfaction that the “Marina, Resort” use and the docks and bulkheads existed prior to 2004 when they became nonconforming and continued from that date through to the date of the Building Department Administrator’s November 24, 2009 determination.

In 1959 when the Town first adopted the zoning ordinance, “Marina” was a permitted use in zoning district “Residence 2” where the Subject Property is located provided that no services were rendered [Ordinance 26, Section 202 (A) (2)]. Docks and bulkheads were not regulated. On September 24, 1970, the Town Code applicable to the Reeve property was amended to include “Marina (Resort),” which was defined as “[a] boat basin with facilities for berthing and securing all type of recreational craft, but which may not provide adequate supplies, provisions and serve [sic] and fueling facilities except emergency services may be provided and the owner of a boat may repair and service his own boat” [Ordinance 26, Section 203A (1) (i) and “Definitions”]. On June 22, 2004, the code as applicable to the Subject Property was amended to eliminate marina facilities as a permitted use in that zone. As a result, any pre-existing marina use at the Reeve property became nonconforming on June 24, 2004.

On September 3, 2003, the Town amended Chapter 47 of the Town code to limit dimensions of docks and other structures for the first time. Under the amendment, any dock which received a New York State Department of Environmental Conservation (“DEC”) permit prior to the filing of the Local Law amendment was grandfathered and therefore not subject to the new limits on the dimensions of docks.

The following testimony and evidence establishes that marina use has been continuous since June 22, 2004:

Robert White established that the Reeves continued renting slips after they purchased the property from Benjamin White. Mr. White submitted an April 22, 2009 affidavit stating that when the property was sold to the Reeves in 1994, they continued to rent out boat slips and “make use of the property as my family did.” Bertha Trinowski, a former employee of Washington White’s shellfishing business, also submitted an April 22, 2009 affidavit stating that she has continued to “track the events” of Mr. White’s business and that the Reeves continued to rent the small houses and boat slips that were on the White’s [sic] property and continued to “operate the docking facility.”

The continuous marina use was also established by the testimony of David Lessard. In his April 23, 2009 affidavit, David Lessard stated that he rented a dock slip from when Benjamin White owned the property until “this present date.” At the June 23, 2016 hearing, David Lessard testified that he and his brother kept 4 or 5 commercial boats at the docks from 1987/88 through 2014.

John Reeve’s testimony similarly established the continued marina use. Mr. Reeve testified at the August 27, 2009 hearing that he purchased his property in 1994 from Benjamin White and that at that time, there were three finger docks. He explained that people renting the cottages could bring a boat and use one of the slips, and that he would also rent slips. He testified that “in the very beginning” after he purchased the property, he rented slips for two boats. In approximately 2003, he applied to Riverhead Town, New York State, and the US Army Corps of Engineers for permits to replace the docks. After he secured the permits, he put in a few more boats.

At the June 23, 2016 hearing, Mr. Reeve testified that for the last 23 years, he has rented out dock space, and that he currently has 14 boat slips. He testified that he did not stop using the subject property as a marina at any time from June 24, 2004 to November 24, 2009.

In addition to the sworn testimony presented as to the marina use of the property, the Reeves also submitted records of boat slip usage including payments received every year from 2001 to 2016. The redacted copies of Schedule E of the Reeves’ tax returns for the years 1997 and 1998, and for the years 2004 to 2008 show reporting income from “dockage.”

At the June 23, 2016 hearing, Sandra Reeve testified that there were three finger docks in 1994 when she and her husband purchased the property and that the docks were reconfigured in 2003 and 2004 and made permanent. She further testified that the linear footage of the docks was not increased.

At the June 23, 2016 hearing, David Young, a neighbor, testified that the Reeve’s [sic] dockage is “basically the same as Ben White had” and that there are 14 boats on the property and that there have always been boats at the property.

The following testimony and evidence establishes that the Reeves’ docks and bulkhead were grandfathered and therefore not subject to the September 2003 amendment to Chapter 47:

The record contains a copy of a permit granted to Mr. Reeve on May 28, 2003, by the DEC to construct 132 feet of new bulkhead, dredge the boat basin, install floating docks in the boat basin and install ramps and floating docks on the three existing catwalks pursuant to the DEC approved Corwin survey.

On or about July 21, 2003, Mr. Reeve was also approved by the Town of Riverhead Conservation Advisory Council for the work requested, with the condition that the ramps and floating docks in front of the cottages be reduced by ten feet.

On July 24, 2003, the Building Department issued a permit for bulkheading "as per DEC & CAC."

Russell Krateville testified at the July 23, 2009 hearing that the permits were properly posted on the property in 2003.

The work was completed in 2008 and a Certificate of Occupancy was issued on December 5, 2008 for "three (3) northside floating docks w/ Catwalks, L-shaped floating dock w/ catwalks and replacement bulkhead & floating dock."

Finding: The evidence in the record demonstrates that the "resort marina" use of the property was established prior to the zoning change in 2004, when it became nonconforming. Furthermore, the record reflects that permits were issued for the docks and bulkhead in 2003, and the work was completed in 2008. The record further reflects that the Subject Property has continued to be used as a marina with the pre-existing docks and bulkheads to the present day. Thus, the Board sustains the Building Administrator's determination that the marina use and docks and bulkhead are legal, pre-existing nonconforming use and structures on the Subject Property.

Based on the foregoing findings, the Zoning Board denied the petitioners' appeal. This proceeding followed.

In support of the petition, the petitioners claim, in essence, that the Zoning Board's decision was contrary to the weight of evidence—e.g., records in the building department's files, including aerial photographs, permits, site plans, surveys, and other records, as well as testimony of local residents—showing that the Reeves' property had not been used as a marina and that no commercial oyster operation had been in continuous operation during the relevant time periods. Relative to that claim, the petitioners contend that the Reeves failed to submit business records to corroborate the continuing existence of the marina or commercial oyster operation; that there are no building or use permits for the construction or expansion of a marina; that there is no site plan approval for a marina, and no off-street parking for a marina; that according to agency records, the marina structures were not constructed or completed until December 2008; that the Reeves expanded the docks and changed their use by making them available to people who did not rent the cottages; that the Lessards did not have shellfish diggers permits from 1994 through 1997, so they could not have lawfully been using the Reeves' property for that purpose during that time; and that because the basin area where the shellfish operation presumably took place had nonfunctional bulkheading and needed to be dredged, according to agency documentation from 2003, there were no facilities that could support the operation at that time.

The petitioners also assert that the Reeves and their primary witnesses are Town “insiders,” John Reeve having been the Town’s sanitation superintendent for 30 years, the Lessards, who run the shellfishing business on the property, being Town police officers, and Russell Krateville, who uses the property to dock his boat, also being a Town employee. Finally, the petitioners contend that the Zoning Board violated their due process rights, *inter alia*, by permitting the Reeves to submit additional post-hearing documents for review without copying the petitioners and without giving them an opportunity to respond.

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 Env’tl. Conservation*, 35 AD3d 732, 826 NYS2d 698 [2006]), but must restrict itself to ascertaining whether there has been illegality, arbitrariness, or abuse of discretion (*Matter of Pelham Esplanade v Board of Trustees of Vil. of Pelham Manor*, 77 NY2d 66, 563 NYS2d 759 [1990]).

“It is the law of this state that nonconforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance” (*People v Miller*, 304 NY 105, 107 [1952]; *accord Matter of Keller v Haller*, 226 AD2d 639, 641 NYS2d 380 [1996]). The law, however, views nonconforming uses as detrimental to a zoning scheme, and the overriding public policy of zoning is aimed at their reasonable restriction and eventual elimination (*Matter of Toys “R” Us v Silva*, 89 NY2d 411, 654 NYS2d 100 [1996]; *Matter of Syracuse Aggregate Corp. v Weise*, 51 NY2d 278, 434 NYS2d 150 [1980]). Thus, even when such uses are permitted to continue, they may not be expanded as a matter of right (*Matter of Rudolf Steiner Fellowship Found. v De Luccia*, 90 NY2d 453, 662 NYS2d 411 [1997]), and an owner seeking to demonstrate that a nonconforming use was legally established before the restrictive zoning ordinance took effect will face a burden of persuasion that is “high” (*Matter of Pelham Esplanade v Board of Trustees of Vil. of Pelham Manor*, *supra* at 70, 563 NYS2d at 761).

Now, upon review of the evidence in the record, the court finds that the Zoning Board’s August 11, 2016 decision was rational and not arbitrary and capricious.

The petitioners’ myriad arguments to the contrary—all of which have been considered by the court if not expressly addressed in this decision—are without merit. Whatever weaknesses may exist in the

Reeves' evidentiary showing, and whatever inconsistencies may arise when that showing is considered in juxtaposition to the petitioners' proof, it must be remembered that the sole, limited function of the reviewing court in an article 78 proceeding is to determine whether a rational basis exists for the agency's determination. "The determination of a zoning board regarding the continuation of a preexisting nonconforming use must be sustained if it is rational and is not illegal or an abuse of discretion, even if the reviewing court would have reached a different result" (*Matter of Jacobsen v Town of Bedford Zoning Bd. of Appeals*, 59 AD3d 622, 623, 873 NYS2d 221, 222-223 [2009]).

Here, it cannot be said that the Zoning Board's decision lacks evidentiary support in the record; that the nature of the evidence relied on by the Zoning Board is almost entirely testimonial is of no consequence for purposes of this analysis (see *Town of Ithaca v Hull*, 174 AD2d 911, 571 NYS2d 609 [1991]). Likewise, while the court is sensitive to the implication of the petitioners' claim that the Zoning Board discredited their proof in favor of the affidavits and hearing testimony of "insiders," i.e., the Reeves and "their friends," it remains constrained by the limited scope of review afforded in article 78 proceedings, particularly absent proof of actual bias or favoritism. The court also rejects the petitioners' implicit claim that judicial review of a zoning board's determination requires some kind of comparative analysis of the quality and quantity of the evidence adduced in support of and in opposition to an application. A court may not weigh the evidence or reject the choice made by the board where the evidence is conflicting and room for choice exists (*Matter of Toys "R" Us v Silva, supra*). Even to the extent it has been held that a board's determination must be supported by "substantial evidence," a court need only decide whether the record contains sufficient evidence to support the rationality of the board's determination (*Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 259 [1995]; *Matter of Slonim v Town of E. Hampton Zoning Bd. of Appeals*, 119 AD3d 699, 988 NYS2d 890 [2014], *lv denied* 26 NY3d 915, 23 NYS3d 641 [2015]).


As to the petitioners' claim that the Reeves failed to sustain their "high" burden of persuasion, the court notes that this standard applies only to a matter before a municipal officer or board and not to a judicial proceeding; it bears repeating that the scope of judicial review of a zoning board's determination is limited to an examination of whether the determination has a rational basis, even when that determination involves an application to establish or certify a prior nonconforming use (e.g. *Matter of Keller v Haller, supra*; *Matter of Watral v Scheyer*, 223 AD2d 711, 637 NYS2d 431 [1996]). Whether, as the petitioners further contend, the Reeves lacked the necessary permits, certificates, and approvals to operate a marina on the property until the new docks and bulkheading were constructed and completed in 2008, or whether the Lessards did not have shellfish diggers permits from 1994 through 1997 so they could not have lawfully been using the Reeves' property for that purpose during that time, is largely irrelevant. Although a nonconforming use may not be established through an existing use of land that was commenced or maintained in violation of a zoning ordinance (*Matter of Rudolf Steiner Fellowship Found. v De Luccia, supra*), "[a] use which is otherwise lawfully maintained may be continued as a nonconforming use although the user failed to procure or renew a license, certificate, or other permit required by law" (*Matter of Kennedy v Zoning Bd. of Appeals of Town of N. Salem*, 205 AD2d 629, 631, 613 NYS2d 264, 265 [1994]), as such failure "does not render the use unlawful in the sense intended by zoning ordinances which preserve existing lawful uses" (*id.*; accord *Costa v Callahan*, 41 AD3d 1111, 840 NYS2d 163 [2007]). And while it is undisputed that the Reeves have substantially

increased the number of boat slips and upgraded the docking facilities, it does not appear that a mere increase in volume or intensity of use, as here, may be found to constitute an impermissible expansion (*Matter of Piesco v Hollihan*, 47 AD3d 938, 849 NYS2d 671 [2008]; *Town of Clarkstown v M.R.O. Pump & Tank*, 32 AD3d 925, 822 NYS2d 576 [2006]), nor that extending docking privileges to individuals other than family members amounts to a change of use.

The petitioners' procedural due process claim, which is properly subject to article 78 review (see *Matter of Aubin v State of New York*, 282 AD2d 919, 724 NYS2d 84, *lv denied* 97 NY2d 606, 738 NYS2d 289 [2001]), is rejected as well. The petitioners' claim is twofold: first, that on July 6, 2016, following the June 23 hearing, the Reeves filed certain documents as permitted, but failed to provide the petitioners with copies of those documents, and second, that on July 14, 2016, the Reeves submitted additional documents, primarily concerning the oyster business, to which the petitioners objected in an August 8, 2016 letter but which the Zoning Board accepted without reopening the hearing to give the petitioners an opportunity to respond. It appears, however, that the petitioners did, in fact, receive copies of the Reeves' July 6 document submission sometime on or before July 14 and that they addressed the substance of that submission in a letter dated July 14, 2016. With respect to the July 14 document submission, it is likewise evident from the record that they received the documents sometime on or before August 8, having objected to their submission in a letter dated August 8, 2016; while they now complain that they were not given an opportunity to analyze or refute those documents, it does not appear, significantly, that they ever requested additional time to do so (*cf. Matter of McDonald v Zoning Bd. of Appeals of Town of Islip*, 31 AD3d 642, 819 NYS2d 533 [2006]). Under the circumstances, the court finds no impropriety implicating the petitioners' due process rights. As to the petitioners' further claim that the Zoning Board improperly reopened the public hearing in June 2016 instead of simply issuing a new determination based on evidence already in the record, the court notes that this does not state a due process violation; in any event, given that the court's open-ended direction to the Zoning Board to make "further findings" was never intended to limit that body's discretion to reconvene a hearing and consider additional evidence if it saw fit, it cannot be said that the Zoning Board exceeded the scope of the remittitur.

Accordingly, the petition is denied and the proceeding is dismissed.

Submit judgment.


J.S.C.