263 Higbie LLC v Wexler
2015 NY Slip Op 30004(U)
January 6, 2015
Supreme Court, Suffolk County
Docket Number: 12-21050
Judge: W. Gerard Asher

[* 1]

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 32

---

263 HIGBIE LLC,

Petitioner,

For a Judgment pursuant to Article 78 of the Civil Procedure Rules and Procedures,

- against -

WILLIAM D. WEXLER, Chairman, MICHAEL A. GAJDOS, Vice Chairman, JAMES H. BOWERS, JOSEPH L. FRITZ and ANNMARIE LAROSA, constituting the Zoning Board of Appeals of the Town of Islip,

Respondents.

By: W. Gerard Asher, J.S.C.
Dated: January 6, 2015

Index No. 12-21050
Mot. Seq. #001 - MD; CDISPSUBJ

Return Date: 8/22/12
Adjourned: 9/9/14

DONALD A. RETTALIATA, PLLC
Attorney for Petitioner
4250 Veterans Memorial Highway, Suite 275E
Holbrook, New York 11741

ROBERT L. CICALE, ESQ.
Islip Town Attorney
By: Christopher R. Nicolia, Esq.
655 Main Street
Islip, New York 11751

In this article 78 proceeding, the petitioner challenges a June 12, 2012 decision of the Town of Islip Zoning Board of Appeals ("Zoning Board") to the extent that it denied the petitioner's application to establish the legal nonconforming use of outside seating at the commercial property located at the northeast corner of Higbie Lane and Oakwood Avenue in West Islip, New York. The petitioner is the owner of the property, which is located in the Town's Business 1 zoning district and is improved with a one-story building currently in operation as a bar known as Farrell's of Brooklyn. It appears that the Town issued a certificate of occupancy for the building's use as a restaurant in 1950; at that time, according to the petition, a restaurant with outside seating was a permitted use in the Business 1 district and the Town's zoning code did not distinguish between restaurants and bars. On or about October 1, 1956, the zoning code was amended by eliminating outside seating as a permitted use in the Business 1 district. Under the current zoning code (Islip Town Code ch 68), restaurants and bars are permitted in the Business 1 district only by special permit of the Planning Board, as is outside seating as an accessory use to a restaurant (Islip Town Code § 68-272.1).

On October 25, 2011, the petitioner filed an application with the Zoning Board for permission to establish a legal nonconforming use of its building "as a bar, tavern, nightclub with outside seating in a

1-7-15

Business 1 district," claiming, in part, that the easterly portion of its property has been used continuously for outside seating in conjunction with the bar/restaurant operation since at least 1956. Section 68-3 of the Islip Town Code defines "nonconforming use" as "[a]ny use of a building, structure, land or water area lawfully existing at the time of the passage of this chapter, or any amendments thereto affecting such use, which does not conform to the provisions of the use district in which it is situated." Section 68-14 defines "legal nonconforming use" as one "which, at the time such use was commenced, was maintainable as a matter of right under the statutes, ordinances and general rules of law then in effect in the Town of Islip" and which "shall not be considered a permitted use." Section 68-15 provides, in part, that "[t]he substantial discontinuance of any nonconforming use for a period of one year or more terminates such nonconforming use of a structure or premises."

Following a public hearing on January 31, 2012, at which the Zoning Board considered affidavits and oral testimony from individuals presumably familiar with the history of the property's use, photographs (aerial and otherwise), letters, memoranda, maps, deeds, surveys, and other documents, and upon review of post-hearing submissions, the Zoning Board issued the following decision, dated June 12, 2012:

> A review of the record and documents in the file reveals that the subject property is located at the northeast corner of Higbie Lane and Oakwood Avenue, West Islip, in the Business 1 zoning district. The property is improved with a one story commercial building currently in use as a bar. A Certificate of Occupancy was issued by the Town in April of 1950 for a "Commercial Building (Restaurant)". An addition of 230 square feet was also added to the building which received a Certificate of Occupancy in September of 1985.
>
> The applicant is now before this Board seeking permission to establish the legal nonconforming use of the commercial building located on the subject property as a bar, tavern or nightclub with outdoor seating. Thus, as was done at the public hearing, the application can be divided into two separate requests–the first to establish nonconformity of the building as a bar, tavern or nightclub and the second to establish nonconformity of the outdoor seating. Islip Town Code Section § 68-14 defines a nonconforming use as one which, at the time such use was commenced, was maintainable as a matter of right under Town of Islip Zoning Code, but at some point thereafter, became prohibited by the applicable Code.
>
> As recognized at the public hearing, the date the purported uses became nonconforming must be established prior to analyzing the facts of the instant matter. Once the operative dates are determined, the burden falls on the applicant to demonstrate that the purported use has existed continuously since it became nonconforming. First, with respect to the use of the commercial building as a bar, tavern or nightclub, it was established at the public hearing that the operative year was 1995. Second, regarding the use of outdoor seating, it was established at the public hearing that the operative year was 1956. It must be noted that these dates were submitted by the applicant at the hearing and confirmed by the Town of Islip Planning Department.
>
> Thus, the applicant is charged with the initial burden of demonstrating that the building has been operating as a bar, tavern or nightclub since at least 1995, and further, that the outdoor seating associated with said operation has existed since at least 1956. However, Islip Town Code § 68-15 sets forth certain conditions which additionally must be met by the applicant before a purported use can be considered legal nonconforming. Therefore, not only must the applicant prove the continuity of the purported use prior to the operative date, but the applicant must also establish that the purported use has not been changed in size or nature, discontinued for a period

of one year or more, subdivided, or merged since the operative dates discussed above. It is against this backdrop the Board analyzes the within application.

At the public hearing, there was tremendous support as well as opposition for the instant application in the form of live testimony, affidavits, and photographs, all of which was included as part of the record and carefully considered by the Board. In support, the Board was presented with two aerial photographs, provided by Aeroimage, from 1953 and 1966. With respect to said photographs, the affidavit of John Wickenhauser, an employee of Aeroimage, states that "the photographs show some man made objects casting shadows located in the rear or easterly part of the property." The Board has carefully examined said photographs but same, especially that from 1953, are unclear and do not establish the presence of outdoor seating. Further, even giving full credit to the testimony of Wickenhauser that the photographs depict "man made objects", which the Board can not decipher from the photographs, outdoor seating is still not established as these alleged "man made objects" could be anything including storage containers.

The first to testify at the hearing was Charles Lanigan who stated that, as a ten year old, he witnessed outside eating as part of the operation of the bar located on the subject property. His affidavit, which was also submitted, states that he dined at the premises in 1956, and that from 1956 to date "the easterly portion of the property has been continuously used for outside seating in conjunction with the main use." An affidavit of James Lanigan was also submitted to the Board confirming the testimony of Charles Lanigan. Next to testify was Wayne Foley who stated that picnic tables were located on the easterly portion of the property in or around 1963, and further, his affidavit states that since 1956 "the easterly portion of the property has been continuously used for outside seating in conjunction with the main use."

Additionally, the Board was presented with the affidavits of Frederick Powers and John A. Stanton, Jr., both of which identically state "the easterly portion of the property has been continuously used for outside seating in conjunction with the main use," but provide no more specific details. Also included in the record is the affidavit of Steven Lenowicz which stated that in the past 23 years the operators of the subject property have maintained outside seating. Furthermore, the affidavits of Ralph Carreras and Raymond Rendina were submitted to the Board after the hearing date. Both affidavits, similar to those submitted to the Board at the hearing, contain the boilerplate sentence "the easterly portion of the property has been continuously used for outside seating in conjunction with the main use," but provide no more specific details regarding the outdoor seating in 1956. Each of these affidavits has been carefully considered by the Board.

There was an enormous amount of support for the application in the form of both live testimony and correspondence. The Board is in receipt of dozens of letters in support of the application, each of which has been read and considered. From both the testimony at the hearing, as well as the letters in support, it is clear that the applicant has hosted an abundance of charitable events benefitting the community and even improved the appearance of the current structure. However, for the purposes of the current application, these letters and testimony in support are mostly irrelevant as they do not address the pertinent issue before this Board– whether outdoor seating has been continuously maintained, in the same size and nature, since 1956. Neither the letters in support nor the testimony not specifically mentioned herein, demonstrate the continual use of outdoor seating since 1956. In fact, some of the affidavits make clear that the back patio has been recently renovated. This much is confirmed by the aerial photographs in the file which indicate that the back portion of the property has undergone, within the last few years, quite an overhaul.

On the other hand, just as there was much support for the application, there was also opposition to the application. The first to testify at the hearing in opposition was Donald Smith who

submitted aerial photographs from 2001 and 2004 along with numerous affidavits. Mr. Smith testified that he purchased his home, which is located within 200 feet of the subject property, in 1983, and at that time there was no outdoor seating used in conjunction with the bar occupying the subject property. Instead, according to Mr. Smith, the easterly portion of the property was overgrown and used for storage until approximately 2004 when Mustang Sally's occupied the premises. Mr. Smith testified that, as a long term resident of West Islip, 20 plus years of which have been spent in close proximity to the subject property, there was no outdoor seating at the subject property from 1964 through 2004. Last, Mr. Smith's affidavit indicates that he has attended retirement and birthday parties, as well as other small occasions, at the bar which occupied the premises but never witnessed any outdoor seating.

Carrie Smith, the wife of Donald Smith, also testified at the hearing and stated that she too had been a life-long resident of not only West Islip, but also of Oakwood Avenue. She testified that her father used to make pizza at the bar which operated at the subject location but that there was never any outdoor seating nor, as indicated by her affidavit, any outdoor seating area when the bar was occupied by Mustang Sally's. Instead she testified that the subject portion was a grass lot which transformed over the years into a storage facility. In fact, she testified that the area was not paved until the smoking laws came into effect in the early 2000's. This much is verified by the 2001 aerial photograph submitted by the Town of Islip Planning Department. Further, Mrs. Smith testified that when Mustang Sally's occupied the subject premises the easterly portion of the property was used solely for smoking and occupants of the bar were prohibited from drinking outside.

Deborah Taylor, another nearby resident living within 200 feet, testified that she purchased her home in 1982 and would do her weekly shopping at the King Kullen located directly to the north of the subject property. Specifically, Mrs. Taylor testified that she would park her car right next to the portion of the lot in question and that it was a wooded lot with no outdoor seating. Instead, she testified, it was used for storage. Mrs. Taylor stated that while she had seen people "linger" in the subject area she never observed tables or seats. Confirming the testimony of Mr. Smith, Mrs. Taylor testified that the first time she noticed outdoor seating was when Mustang Sally's occupied the facility. Last, Mrs. Taylor testified that the back portion of the subject premises was cleared a few years ago and a brick seating area was installed.

Mrs. Taylor's husband, Don Taylor, also testified at the hearing and confirmed the testimony of his wife that the subject area had been used for storage not outdoor seating. In fact, Mr. Taylor's affidavit explains that there had never been an outdoor seating area until the recently constructed outdoor entertainment area. Betsy Frankel, a 40 year resident of Oakwood Avenue, also testified at the hearing that for approximately 40 years, 3 to 4 times a week, she would pass by the back of the bar and never observed any type of outdoor seating. Fran Campbell, another resident of Oakwood Avenue since 1976, testified that there was absolutely no outdoor seating at the subject location until about five years ago when the occupants put up "umbrella tables".

As stated above, this Board has been presented with evidence from those in support and those opposed to the instant application. As the determination of whether a particular use is nonconforming is a factual determination for this Board to make, this Board has carefully reviewed, considered, and weighed all of the evidence before it. Given that much of the evidence in the record is conflicting, it is the task of this Board to pass on the credibility of the witnesses as well as the documents presented. In rendering this decision, the Board is mindful that nonconforming uses, although, constitutionally protected, are generally viewed as detrimental to the zoning scheme, and the overriding public policy of zoning in New York State is aimed at their reasonable restriction and eventual elimination.

As discussed above, in order to establish the nonconformity of the commercial building's use as

a bar, tavern or nightclub, the applicants must clearly establish that the premises has continually operated as such prior to 1995. This burden has been overwhelmingly met by the applicant. It is important to note that not even the opposition dispute the fact that the commercial building located on the property has been used as a bar for quite some time and quite possibly back as far as the 1950's. This Board determines that the applicant has met its burden of establishing that the commercial building's use as a bar, tavern or nightclub, has continually operated as such from at least 1995, and thus, that portion of the application is GRANTED.

Also discussed above, the applicant must clearly establish the continual use of outdoor seating since 1956 and further that it has not been changed or discontinued pursuant to Islip Town Code § 68-15 in order to establish its nonconformance. With respect to this part of the application, however, the Board determines that the applicant has not met its burden.

After carefully reviewing the aerial photographs submitted by the applicant from 1953, even when coupled with the affidavit of John Wickenhauser, the Board can not decipher whether outdoor seating was present at the premises. Much more clear were the aerial photographs submitted by Jessica Joyce of the Town of Islip Planning Department from 2010, 2007, 2004, 2001, and 1980. Although not as clear as the others, the aerial from 1980 does not show the existence of any tables or chairs in the area in question. The aerial from 2001, which is extremely clear, depicts a grassed area with no visible tables or chairs in that portion of the lot which the applicant argues was used for outdoor seating. It is not until the 2004 aerial photograph that the easterly portion of the property appears to be used for outdoor seating as same depicts what this Board considers tables and chairs. Further, when comparing the 2001 aerial to the 2004 aerial, the latter demonstrates that the once grassed area had been paved at some point in between. Last, the picture of the current premises provided by Mr. Smith shows a back patio with brickwork and tables that certainly were not present in 2001. While the applicant presented some question as to the time of year the aerial photographs were taken, the Board is of the opinion that by the color of the grass, the photographs are from a time of year when there certainly could be outdoor seating. In any event, the aerials clearly depict that the area in question has undoubtably been altered and that it did not exist as it does today until some time after 2004.

Moreover, based upon the consistency, specificity and detail of the testimony given by those who opposed the application, the Board determines that the outdoor seating now associated with the operation of the bar has not been continuously maintained since 1956. The affidavits submitted by the applicant merely contain the identical, boilerplate statement that outside seating has been present at the site from 1956. However, the testimony of those who have lived in close proximity to the site over the past 20 to 30 years, demonstrate that the easterly portion of the subject property has not always been used for outside seating. The Board is of the opinion that the outdoor area in question was vegetated and had been used for storage, if anything at all, for a significant amount of time between the present and 1956. Further, the evidence before the Board, supports the conclusion that it was not until the smoking ban in public establishments came into effect that the outdoor area in question began to serve as an outdoor "extension" of the bar with an outside seating area. Last, but certainly not least, the aerial photographs in the record support the determination made by the Board.

The burden to prove nonconformity of a particular use falls squarely on the applicant. Based upon the foregoing, the Board determines that the applicant has failed to meet this burden with respect to establishing that the use of outdoor seating has been continuously maintained as such since 1956. As such, that portion of the application seeking to establish the nonconforming use of outside seating is DENIED, while the that part of the application seeking to establish the subject premises as a bar, tavern or nightclub is GRANTED, on motion of Mr. Wexler, seconded by Mr. Gajdos, and carried by a vote of 3-0. Mr. Fritz and Ms. LaRosa abstaining.

This proceeding followed.

The petitioner claims that the portion of the Zoning Board's decision denying its application for legal nonconforming use status is arbitrary and capricious and not supported by substantial evidence. In support of its claim, the petitioner contends, in part, that the evidence demonstrating the use of outside seating at the property for the requisite period was "overwhelming" and that the evidence in opposition "was not nearly of such quality and quantity as was that in support." The petitioner further contends that the Zoning Board failed to set forth the facts on which it based its determination, and that it used a board member's knowledge of the property (*i.e.*, knowledge that outdoor seating did not exist "until the last few years") to reach its decision without disclosing such knowledge in the record. The petitioner does not challenge the portion of the Zoning Board's decision granting its application to establish the legal nonconforming use of the building as a bar, tavern or nightclub, as it is not aggrieved thereby.

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]).

Where, as here, a zoning board's interpretation involves a determination regarding a nonconforming use, a petitioner challenging the board's interpretation faces a burden of persuasion that is high because of the law's traditional aversion to nonconforming uses (***Matter of Pelham Esplanade v Board of Trustees of Vil. of Pelham Manor***, 77 NY2d 66, 563 NYS2d 759 [1990]). The law views nonconforming uses as detrimental to a zoning scheme, and the overriding public policy of zoning in New York State and elsewhere is aimed at their reasonable restriction and eventual elimination (***Matter of Toys "R" Us v Silva***, 89 NY2d 411, 654 NYS2d 100 [1996]).

Contrary to the petitioner's contention, the court finds the determination of the Zoning Board that the petitioner failed to meet its burden of establishing a legal preexisting nonconforming use of the property has a rational basis and was not illegal, arbitrary and capricious, or an abuse of discretion. Notwithstanding the "overwhelming" proof relied on by the petitioner, there is evidence, including the affidavits and hearing testimony of Donald M. Smith, Carrie E. Smith, Donald Taylor, and Deborah Taylor–all longtime local residents, occasional patrons of the various establishments occupying the property over the years, or both–that they never observed any outside seating at the property from the

mid-1980s through at least the mid-1990s; rather, it was their testimony, based on firsthand knowledge, that the (subject) easterly portion of the property was wooded, overgrown, and used primarily for storage throughout that time. As section 68-15 (B) of the Islip Town Code expressly provides that "substantial discontinuance of any nonconforming use for a period of one year or more" terminates such use, it is evident that the record contains sufficient evidence to support the rationality of the Zoning Board's determination. The court rejects the petitioner's 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. 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]). That certain of the residents opposed to the application may also have complained about the noise associated with the petitioner's establishment does not imply undue bias or otherwise require a finding that the Zoning Board erred or abused its discretion in crediting their testimony. And whether the photographic evidence relied on by the Zoning Board may have been equivocal, as the petitioner suggests, it is axiomatic that where, as here, a board sets forth multiple reasons for its determination, any one of which is supported by a rational basis, the determination will be sustained (***Matter of Logiudice v Southold Town Bd. of Trustees***, 50 AD3d 800, 855 NYS2d 620 [2008]). The court further rejects the petitioner's claim that the Zoning Board failed to make necessary findings of fact as to when and for how long the use of outside seating at the property was abandoned or discontinued, as it clearly found that the easterly portion of the property "has not always been used for outside seating" since the mid-1980s and that it was not until after 2001, or after the smoking ban in public establishments came into effect, that it "began to serve as an outdoor 'extension' of the bar with an outside seating area." Finally, as to the petitioner's claim regarding a board member's knowledge of the property, it suffices to note the lack of evidence in the record that any such knowledge was shared with fellow board members, influenced their deliberations or impacted their decision, thus rendering the court's consideration of the claim little more than an exercise in speculation; nor is it inherently improper or unfair, as a general matter, for a zoning board to rely, *inter alia*, on the personal knowledge of its members in making a determination (*see e.g.* ***Matter of Smyles v Board of Trustees of Inc. Vil. of Mineola***, 120 AD3d 822, 992 NYS2d 83 [2014]).

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

Submit judgment.

W. Gerard Asher

J.S.C.