Matter of Bonefish Grill, LLC v Zoning Bd. of Appeals of the Vil. of Rockville Ctr.
2014 NY Slip Op 33925(U)
December 23, 2014
Supreme Court, Nassau County
Docket Number: 6101-14
Judge: Steven M. Jaeger
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

In the Matter of the Application of	TRIAL/IAS, PART 39 NASSAU COUNTY INDEX NO.: 6101-14
BONEFISH GRILL, LLC, Petitioner, For Judgment Pursuant to Article 78 of the C.P.L.R. -against- THE ZONING BOARD OF APPEALS OF THE VILLAGE OF ROCKVILLE CENTRE, Respondent.	MOTION SUBMISSION DATE: 12-3-14 MOTION SEQUENCE NO. 01

The following papers read on this motion:

Notice of Verified Petition and Verified Petition	X
Memorandum of Law	X
Answer and Affidavit and Exhibits in Support of Answer	X
Respondent's Memorandum of Law in Opposition to Petition	X
Petitioner's Reply Memorandum of Law	X
Record of Proceedings	X

Motion by the attorney for the petitioner for an order pursuant to Article 78 of the CPLR reversing the conditions in the decision of the respondent Zoning Board of Appeals (ZBA) under its cases numbered 16-2014 and 17-1014, and the unnumbered case for a Substantial Occupancy Permit, which imposed upon

petitioner, Bonefish Grill, LLC, conditions to receive a Substantial Occupancy Permit and parking variance to open a restaurant at the southwest corner of Sunrise Highway and Morris Avenue, a/k/a 340 Sunrise Highway, in the Village of Rockville Centre, Nassau County, is determined as hereinafter set forth.

This case concerns an appeal for a parking zoning variance sought by the petitioner. In 2012, petitioner, Bonefish Grill, LLC, (Bonefish) identified the premises known as 340 Sunrise Highway, Rockville Centre, New York, as a potential location to open up a restaurant. Bonefish sought to demolish an existing 700 seat theatre with no parking and replace it with a 5,400 square foot restaurant. After applying for a building permit, on February 21, 2013 the Village Building Department issued a denial letter in which the building permit was denied due to a setback requirement.

> "§ 340-88. Corner Plots.
>
> A. On Corner plots a setback of at least 10 feet from the property line on both street frontages shall be required.
> B. No side or rear yard setbacks are required, except where abutting any residential district, in which case a ten-foot setback is required."

Bonefish executed a lease on March 5, 2013. An integral part of the lease was a License Agreement which provided for parking. On March 6, 2013, the matter came before the Village Zoning Board of Appeals (BZA). The Board

passed the application, and on March 22, 2013, provided minutes and its decision granting the variance in writing. The variance had the following two conditions.

> "1. All the proposed work shall be done in full and complete compliance with the plans submitted to the Board with the plans approved, in advance, in writing, by the Village Department, and within six (6) months after the date on which this decision is filed with the Village Clerk, applicant shall obtain all permits and licenses of whatever kind are required for the proposed work and, within one year from such last date, applicant shall obtain all certificates of occupancy or completion or compliance required for all such work;
>
> 2. The exterior designs, colors and materials for any roofing, siding, pain, trim, windows for the proposed work shall match as closely as practicable the exterior designs, colors and materials approved for such items by the Village Architectural Review Board, and all exterior lighting at the Premises shall be shielded and directed so as not to shine or beam on any residential real property other than the Premises."

The movie theatre was demolished and a building permit was obtained. The building permit is dated October 11, 2013, expiring October 11, 2014. By March of 2014, the restaurant was substantially ready to open. In early 2014, the Village Building Department became aware that the planned merger of petitioner's property with 330 Sunrise Highway had not taken place. Therefore, respondent asserts petitioner's property would not abut a municipal parking field and the parking requirements of the code would apply. Petitioner was advised to apply for

a parking variance. On March 3, 2014 the Village enacted an ordinance requiring a Substantial Occupancy Permit (SOP). The Village would not allow petitioner to open without (1) extending the front yard variance which the Village alleged to have expired; (2) obtaining a parking variance, and (3) obtaining a SOP as required by the Ordinance enacted March 3, 2014.

The Village Code provides certain parking requirements for all uses of property. Pursuant to the Code, freestanding restaurants are required to provide one (1) parking space for each 100 square feet of gross floor area. However, ". . . [I]nterior restaurants that abut municipal parking fields are not required to provide off-street parking." The building is 5,400 square feet, which would require providing 54 parking spaces unless the "municipal parking field" exception applied. Petitioner did not propose to provide any parking spaces.

While Petitioner's property does not abut a municipal parking field, when the project was first proposed in 2013, petitioner advised the Village Building Department that a merger of lots was to take place with the adjoining lot which would have resulted in petitioner's property abutting the municipal parking field. If the merger took place, no parking variance would be necessary. Petitioner also submitted a License Agreement which provided that petitioner would have a license to 40 spaces of the on-premises parking from the building next door at 330

Sunrise Highway between 4:00 p.m. and 12:30 a.m. Monday through Friday and from 10:00 a.m. to 12:30 a.m. on Saturday and Sunday. Petiitoner asserts the plan was to merge petitioner's parcel with the neighboring property, which was why no parking variance was deemed necessary at that time.

Petitioner filed an application for a parking variance on or about April 8, 2014 . In the application (¶ 15) petitioner stated: "Parking variance was not initially deemed necessary as the Landlord was to merge lots so that restaurant would be contiguous to public parking field alleviating the need for a variance. As that has not been completed and the restaurant is ready to open, a variance is necessary." The variance application proposed providing zero (0) parking spaces where 54 spaces were required.

The Board conducted hearings on the variance appeal on April 23 and May 7, 2014. Petitioner's counsel noted at the April 23rd hearing: "the parking variance initially was not required. As the landlord was going to merge lots so the restaurant would be contiguous to the municipal parking lot, alleviating the need for a variance pursuant to the zoning code." Counsel for the adjoining landowner also appeared at the hearing with respect to the parking license agreement and the potential merger of the lots. He stated that a deed would be filed merging the lots.

Respondent asserts the merger never took place, and petitioner does not suggest that it ever will. Petitioner's counsel proposed that a certificate of occupancy be granted to the restaurant pending the lot merger, and, until such time as the merger took place, that the restaurant would be open only for dinner during the week and for lunch and brunch on the weekends.

Petitioner's counsel confirmed this proposal in a letter to the secretary of respondent dated April 29, 2014. In the letter, petitioner (via its counsel) stated "To reiterate, my client would agree not to be open for lunch during the week at this time. . . The petitioner, upon compliance with the Code provisions negating the need for a parking variance, would be able to apply for a Certificate of Occupancy (CO) and to be open for lunch during the week upon providing the Village with a parking plan for lunch during the week."

Respondent also considered the information submitted by petitioner in connection with a Substantial Occupancy Permit, which was required by Section 340-118.2 of the Village Code. That section became effective on or about March 3, 2014. Respondent issued a decision with respect to the parking variance application on May 30, 2014. Respondent granted the variance with conditions i.e., a limitation in the hours of operation, valet parking, and certain other related condition. On the same day, respondent issued a decision granting petitioner's

Substantial Occupancy Permit with the same conditions contained in the decision granting the variance. The BZA granted the variances and the Substantial Occupancy Permit with the following conditions:

1. The hours of operation of Bonefish Grill must not exceed the following parameters: Monday through Friday, 4:00 p.m. to 12:30 a.m.; Saturday and Sunday, 10:00 a.m. to 12:30 a.m.;

2. Applicant must have permitted and continuous use of the parking lot behind 330 Sunrise Highway, Rockville Centre, New York during the hours set forth in paragraph 1 above, as per the terms of a Covenant and Restriction Agreement (C&R) as set forth in more detail in the Minutes and Decision for BZA Case No. 17-2014, which C&R incorporates by reference the License Agreement between 330 Sunrise Highway, LLC, 340 Sunrise Highway, LLC and Bonefish Grill, LLC dated March 5, 2013, which C&R shall run with the land and shall not now nor shall it ever revised, amended or terminated without the Board's prior approval. To this end, within a six month period after the date of this decision, applicant at its sole cost and expense shall have an attorney draft and submit to the Counsel for this Board for approval, and upon such approval, applicant shall promptly record in the Office of the Clerk of Nassau County a declaration of covenants and restriction duly executed and acknowledged and properly notarized by the owners of the Premises, the owners of 330 Sunrise Highway, LLC and the owners of 340 Sunrise Highway, LLC which declaration shall have attached, as Exhibit A thereto, a copy of this decision as filed with the Village Clerk/Administrator and, as Exhibit B thereto, a description of the Premises by (i) complete street address, (ii) metes and bounds and (iii) Nassau County Section, Block and Lot tax designation, and such declaration shall expressly state that the applicant's use of the parking lot behind 330 Sunrise Highway, Rockville Centre, New York is conditioned and restricted as per the terms of the Minutes and Decision for BZA Case No. 17-2014, and that said C&R shall

run with the land and shall not now or shall it ever revised, amended or terminated without the Board's prior approval. Upon filing, a copy of such filed declaration of covenants and restrictions, certified by the Nassau County Clerk's office shall be delivered to this Board and shall be filed with the Village Building Department, and a complete legible copy thereof shall be delivered to this Board's counsel;

3. To insure parking compliance by Bonefish Grill patrons and valet parking employees, there shall be installed permanently and well maintained at all times in clean and legible condition , a 24 inch by 24 inch metal sign bolted to a sign post at the entrance to the rear parking lot behind 330 Sunrise Highway (the parking lot location further described by License Agreement between 330 Sunrise Highway, LLC, 340 Sunrise Highway, LLC and Bonefish Grill, LLC dated February 2013), at a place observable at all times by all Bonefish Grill patrons and valet parking employees, which sign shall state in two inch high with a half inch stroke, printed black lettering on a white background: 'RESTRICTED PARKING: BONEFISH GRILL PATRONS TO USE VALET PARKING ONLY";

4. Valet parking for restaurant patrons is required during all hours of operation of Bonefish Grill;

5. Valet parking of vehicles in any Rockville Centre Municipal Parking Field is strictly prohibited;

6. All employees must purchase Rockville Centre employee parking permits, which must be utilized by all employees when parking their vehicle for work in a properly designated village employee parking lot. Applicant shall supply the Village of Rockville Centre Building department with a roster naming all current employees on a bi-annual basis."

In making a determination whether to grant an area variance, the ZBA must take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by the grant: "(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, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance" (*see* Village Law § 7-712-b[3]; *see also Colin Realty Co. v Town of North Hempstead et al.*, 2014 NY LEXIS 2819, 2014 NY Slip Op 07008).

The Village Zone Code requires 54 spaces (*see* Village Law § 7-712-b[3][b][3]). To offset the lack of parking, petitioner proposed a licensing agreement with the abutting property owner at 330 Sunrise Highway. Petitioner's landlord at 340 Sunrise Highway also owns 330 Sunrise Highway. Petitioner's

argument that respondent waived the parking requirement when it granted the two (2) variances in 2013 without imposing conditions for a parking variance is misplaced. Even if the petitioner affirmatively raised the issue of a parking variance in 2013, which it clearly did not based on the record before the Court (or on error made), estoppel may not be raised to prevent the Village from enforcing its zoning code (*Parkview Associates v City of New York*, 71 NY2d 274, 282). ("[E]stoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results"); *25-50 FLB, LLC v Srinivasan*, 116 AD3d 1056; *Ramundo v Pleasant Valley Zoning Board of Appeals*, 41 AD3d 855, 858). ("Assurances by certain officials that the petitioner could build on the lots, despite the fact that they were nonconforming, did not estop the Zoning Board from denying the variances.").

Pursuant to Condition 3 of Exhibit 24 (corresponding to Condition 2 of Exhibit 25), petitioner was required to record covenants and restrictions incorporating the conditions set forth by respondent. Those covenants were recorded on or about October 17, 2014. The License Agreement dated March 5, 2013 as recorded on or about October 2014 states that:

1. License. Subject to the terms hereof, Licensor grants to Licensee, Bonefish, its agents, employees and invitees, a license (the "License") for the use of the Parking Lot shown on Exhibit A, as authorized under the Lease Agreement; provided that such use is in compliance with all applicable laws, codes, ordinances, rules and regulations. The use permitted hereunder for the Parking lot shall be:

a. For in-common parking use between the house of 4:00 p.m. and 5:30 p.m., Monday through Friday, for purpose of customer drop off and pick up with the valet service, but parking the vehicles shall be prohibited at this time and arrangements shall be made offsite during this period of time.

b. For in-common parking between the hours of 5:30 p.m. and 12:30 a.m., Monday through Friday. Use of the Parking Lot during this period shall be for customer drop off, pick up and use of parking spaces.

c. For in-common parking between regular business hours and 12:30 a.m. on weekends. Use of the Parking Lot during this period shall be for a customer drop off, pick up and use of parking spaces.

d. For the placement and use (at the sole cost and expense of Bonefish) of an adequately screened trans dumpster or compactor to be located in the area as depicted on Exhibit A: provided that such placement and use is in compliance with all applicable laws, codes, ordinances, rules or regulations and the terms of the Lease. Unless otherwise permitted hereunder, no other portion of 330 Sunrise Highway shall be affected by this Agreement. The parties acknowledge that Licensor, as fee simple owner, retains absolute control over 330 Sunrise Highway.

The attorney for the petitioner argues that based on the recorded covenants and restrictions incorporating the expressly stated terms of the License Agreement

for use by the petitioner of the 40 parking spaces at 340 Sunrise Highway, "...[t]here is no question now that the property which petitioner licenses and leases abuts the municipal parking lot for the duration of its Lease Agreement. As such, there should not have been a requirement for a parking variance . . ." (Reply Aff. p. 8).

In Re Van Rensselaer v Roseville Sts. in City of Buffalo, 116 AD 549, the court determined that an abutting property and a licensed property should be treated as one. The argument was made that since the License could be revoked, the property might not abut. The court found there was no evidence of any intention to revoke so the property did abut.

> "We are constrained to hold that under the act in question, where one parcel of real property abutting upon a street is owned by an individual or corporation, and another piece of property not abutting on said street is used in connection therewith and as a whole in the prosecution of a business, that the owner of property abutting upon such street may recover not only for damages done to such real estate owned by him abutting upon such street, and to the buildings and the machinery erected thereon, but also for the damage done to the parcel not so abutting where, as before said, the whole is used as one plant and is necessary in the conduct of a single business."

In *Russo v Morgan*, 174 Misc 1013, the court found property rights given to abutting property owners extended to tenants of the abutting property owners even when the tenants were on the upper floors of an office building. *Russo* involved

the Fulton Fish Market. Abutting property owners were given the right to have a fish stand in the street in front of their property. Mr. Russo was a tenant on an upper floor in the office building abutting the street. He wished to have a fish stand even though he had no spot on the street. The court agreed that it did not matter whether his interest was a lease or in the fee. The court found "so long as the City elects to permit the use of the street as a market it cannot discriminate against some of the abutting owners, whether in fee or by leasehold." 174 Misc at 1015.

In the within action, with the recorded License Agreement and the Restrictive Covenants, there is no possibility of the License Agreement being revoked without the Lease also being revoked (*see also, In re City of New York*, 267 NY 212). Thus, the petitioner's interest is in the nature of an abutting property owner based on said License Agreement.

The record contains a Parking Study (Exhibit 15) and testimony from Paul Going, P.E., that there is sufficient parking for the restaurant at lunch (Exhibit 14). Further testimony at the hearing (Exhibit 14, pp. 19-20, Exhibit 18) was that on petitioner's block there are seven existing restaurants, six of which are open for lunch, the seventh being a pub which opens from 4:00 p.m. to 4:00 a.m. In *Kabro Associates LLC v Town of Islip Zoning Board of Appeals*, 95 AD3d 1118, the

applicant sought to open a restaurant, which was an allowed use, but had insufficient parking. The Zoning Board denied the application and the Appellate Division reversed:

> A determination will not be deemed rational if it rests entirely on subjective consideration, such as general community opposition and lacks an objective factual basis. . .
>
> The neighboring property owners claimed that the granting of the special exception permit would, among other things, exacerbate existing traffic congestion and decrease the value of their properties. However, these claims were uncorroborated by empirical data and were contradicted by the expert testimony offered by petitioner . . . Accordingly, the ZBA's determination lacked a rational basis.

Petitioner argues this supports its application that a restaurant would not produce an undesirable change in the neighborhood, adversely impact on physical and environmental conditions, or otherwise result in a detriment to the health, safety and welfare of the neighborhood or community and that the conditions imposed which prevent the restaurant from opening before 4:00 p.m. during the week are improper, arbitrary and capricious.

In light of this Court's determination herein that, in the context of the within application, the License Agreement creates in the petitioner an interest in the nature of an abutting property owner and the fact that the License Agreement

provides for forty (40) additional parking spots, the requirement that petitioner also must have valet during the hours when parking is permitted (5:30 p.m. to 12:30 a.m. on Monday - Friday and regular business hours on weekends until 12:30 a.m.) is arbitrary and capricious. Moreover, since the License Agreement as recorded combines both lots so that the petitioner's property abuts the parking lot, the requirement that the restaurant cannot be open during lunch is similarly arbitrary and unreasonable.

Accordingly, the matter is remanded to the BZA to modify the conditions previously set forth above as items nos. 1, 3 and 4 to vacate the requirement that there must be valet service provided and to allow the restaurant to be open during lunch on weekdays. The application to vacate and set aside conditions previously set forth as nos. 2, 5 and 6 is denied.

The foregoing constitutes the decision and order of the Court.

Settle judgment on notice.

Dated: December 23, 2014

Hon. STEVEN M. JAEGER, A.J.S.C.