

Matter of Kogel v Zoning Bd. of Appeals of the Town of Huntington
2015 NY Slip Op 31717(U)
August 7, 2015
Supreme Court, Suffolk County
Docket Number: 13-24850
Judge: Peter H. Mayer
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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 17

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In the Matter of the Application of

JAMES KOGEL, RYAN VOLLMER, STEVEN GOLDSTEIN, JEFFREY HUNTLEY, RENEE HUNTLEY, ISABELLE PULLIS, GEORGE PULLIS, ANNE WESP, WILLIAM WESP, DONNA INGRASSIA, JOHN SHIPMAN, ALLAN PEARLMAN, GEORGE GAUGHAN and GREGORY T. TEMPERINO,

Petitioners,

- against -

ZONING BOARD OF APPEALS OF THE TOWN OF HUNTINGTON, JOSEPH F. CLINE, as director of the Town of Huntington Department of Engineering Services, THATCHED COTTAGE REALTY LLC f/k/a CBPI Realty LLC, THATCHED COTTAGE CATERERS INC., f/k/a Waterside Seafood Corp. d/b/a Jellyfish, and THATCHED COTTAGE, L.P.,

Respondents,

For Relief Pursuant to Article 78 of the Civil Practice law and Rules of the State of New York.

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By: Mayer, J.S.C.
 Dated: August 7, 2015

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 Mot. Seq. # 002 - MD; CDISPSUBJ

Return Date: 10-29-13
 Adjourned: 12-16-14

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Petitioners commenced this Article 78 proceeding, to annul as arbitrary, capricious, and contrary to law, the July 18, 2013 determination of respondent Zoning Board of Appeals of the Town of Huntington (the “ZBA”) which denied their appeal challenging the issuance of Building Permit No. P121586 (the “Building Permit”) for the Jellyfish restaurant located at 441 E. Main Street, Centerport in Suffolk County (the “Premises” or “Jellyfish”). The Building Permit was issued to respondent Thatched Cottage Realty LLC when it was known as CBP1 Realty LLC (“Thatched Cottage Realty”). Petitioners also seek an order annulling and vacating the Building Permit pursuant to the Town of Huntington Code § 87-24 subsections (B) and (D),¹ and § 87-30 subsections (B) and (E).² Respondents, Thatched Cottage Realty, Thatched Cottage Caterers Inc. f/k/a Waterside Seafood Corp. d/b/a Jellyfish (“Thatched Cottage Caterers”), and Thatched Cottage, L.P. (“Thatched Cottage”), collectively, have interposed an answer verified by non-party Ralph Colamussi (“Colamussi”), president of Thatched Cottage Caterers., and a memorandum of law in opposition to the petition. The ZBA and respondent Joseph F. Cline (“Cline”) as Director of the Department of Engineering Services, have not answered or opposed the petition.

Petitioners allege, *inter alia*, and the answering respondents do not deny that Thatched Cottage Realty, with its principal offices located at 445 E. Main Street, Centerport, New York, is the owner of the Premises, and that Thatched Cottage Caterers was the “Applicant” on the special use permits and parking variances submitted to the ZBA. The court notes, however, that the ZBA refers to the “Applicant” as the “applicant/owner.” Thus, hereinafter, Thatched Cottage Realty and Thatched Cottage Caterers, collectively, will be referred to as the “Owners.” It is alleged and not denied that Thatched Cottage, with its principal executive offices located at 445 E. Main Street, Centerport, New York, is the owner of the property east and adjacent to the Jellyfish restaurant. This adjacent property hereinafter will be referred to as the “Thatched Cottage Property.”

The Premises, on which a restaurant has existed for approximately 75 years, was the subject of a previous ZBA hearing wherein Thatched Cottage Realty applied for special use permits to utilize two existing decks and variances for parking and a parking buffer. The petitioners, all of whom live within the vicinity of the Premises, participated in the previous ZBA hearing process on the application, raising concerns regarding the adequacy of available parking, increased noise from outdoor dining and congestion and traffic flow in the neighborhood.

¹Section 87-24 provides that the Director of Engineering Services may revoke a building permit (B) where he finds that the “permit was issued in error and should not have been issued in accordance with applicable law” or (D) “[w]here he finds that the work performed under the permit has not been performed in accordance with any condition, restriction, grant or determination of the Huntington Town Board, Zoning Board of Appeals, Planning Board or Director of Planning.”

²Section 87-30 (B) contains the same language as section 87-24 (B) but applies to a certificate of occupancy or certificate of permitted use. Section 87-30(E) provides for the revocation of such a certificate where the Director of Engineering Services “finds that the owner has not complied with a condition, restriction, grant or determination of the Town Board, Zoning Board of Appeals, Planning Board or Director of Planning which should have been met under the circumstances before the issuance of a permit or certificate.”

By its October 6, 2011 determination, the ZBA granted the application for the special use permits for the decks to be used as outdoor seasonal dining, thereby allowing an increase of Jellyfish's seating capacity to accommodate 90 additional patrons (the "2011 Determination"). Also granted were parking variances which increased the number of parking spaces from 36 to 64 on-site and 78 off-site. Use of the outdoor decks for dining, however, was conditioned upon, among other things, the Owners being able to lawfully valet park 78 cars off-site. The Owners were directed to apply to the Planning Board for all required approvals and to the Department of Engineering Services for the necessary building permits. Neighbors commenced an Article 78 proceeding against the ZBA challenging the 2011 Determination. The petition was denied and dismissed, allowing the building official to proceed as directed in the 2011 Determination.

On August 2, 2012, the Building permit was issued for the Jellyfish restaurant. As proof that 78 cars could be lawfully parked off-site in satisfaction of the condition imposed by the ZBA, the building official accepted a signed letter from Colamussi indicating that Jellyfish would be permitted to use the Thatched Cottage Property parking lot. In an affidavit, the building official explained that he has the authority and discretion to grant or deny building permits depending on whether it is demonstrated to his satisfaction that any condition to which the property is subject has been met. The neighbors who challenged the 2011 Determination, appealed to the ZBA arguing that the Building Permit should be rescinded as it was improperly or incorrectly issued by the building official.

By its determination dated July 18, 2013 (the "2013 Determination"), the ZBA denied the appeal finding that the building official acted within his authority and in conformity with the 2011 Determination. The ZBA found no proscription under the zoning code which would disallow the valet parking arrangement set forth in the Colamussi letter. Additionally, although it addressed the merits of the petitioners' arguments, the ZBA found that the appeal was untimely since it was taken more than sixty days after the Building Permit had issued. The instant petition to annul the ZBA's 2013 Determination and to direct Cline to rescind the Building Permit ensued.

Petitioners argue that the Owners failed to satisfy the conditions imposed by the ZBA, and thus it was unlawful for the Building Permit to have been issued. Petitioners maintain that merely having permission in the form of a letter from Colamussi to valet park cars at the Thatched Cottage Property is insufficient to demonstrate that such parking is lawful under the Huntington Town Code. Furthermore, petitioners argue that the building official found the valet parking condition was satisfied solely upon a letter from Colamussi, although, pursuant to Huntington Town Code § 198-120³, the Thatched Cottage Property is not a permitted use to valet park cars for Jellyfish patrons unless a certificate of permitted use has been issued. Petitioners also contend, without citing any authority, that for such a certificate to be issued, variances would have to be obtained from the ZBA, and possibly site plan approval would have to be obtained from the Town Planning Board. In the absence of the certificate, petitioners posit, the use of the Thatched Cottage Property for valet parking by the Owners for Jellyfish patrons is unlawful and thus not in compliance with the ZBA's 2011 Determination. Further, the petitioners maintain, there is

³Section 198-20 (A) provides that "[i]t shall be unlawful to maintain, occupy or use a building, structure or land, or any part thereof, for which a certificate of occupancy and/or a certificate of permitted use has not been issued, or if such certificate has been revoked or suspended."

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not sufficient space to accommodate 78 cars on the Thatched Cottage Property. Indeed, petitioners point out, the Thatched Cottage restaurant uses an off-site parcel for overflow parking of its patrons' vehicles. Thus, petitioners argue, "both the [2013] Determination and the underlying Building Permit are arbitrary, capricious, unlawful, an abuse of discretion, and unsupported by substantial evidence."

As to the timeliness of the appeal to the ZBA, petitioners argue that from the time the Building Permit was issued on August 2, 2012 and their discovery of its issuance on December 26, 2012, there was no work performed on the Premises or outdoor dining on the decks of Jellyfish which could have or should have put them on notice. Petitioners state it was in December 2012 that they became aware of the Building Permit's issuance upon receiving papers in opposition to a separate hybrid Article 78 proceeding against the Huntington Town Board. Thus, it is argued, contrary to the ZBA's finding in the 2013 Determination, the appeal was timely.

Generally, courts will not interfere with a determination of a zoning board since special use disputes are "best resolved by the common-sense judgments of representative citizens doing their best to make accommodations between conflicting community pressures" (*Matter of Lemir Realty Corp. v Larkin*, 11 NY2d 20, 25, 226 NYS2d 374 [1962]). The settled rule in reviewing the actions of a zoning board of appeals as to variances or exceptions, is for the court to ascertain "whether there has been illegality, arbitrariness or abuse of discretion" and not to make new or substitute judgments (*id.* at 24; *Halperin v City of New Rochelle*, 24 AD3d 768, 771, 809 NYS2d 98 [2d Dept 2005]). This standard has been interpreted to mean a "willful and unreasoning action without consideration of or in disregard of the facts" (*Nager v Incorporated Village of Saddle Rock*, 140 Misc 2d 644, 647, 530 NYS2d 966 [Sup Ct, Nassau County 1988], *aff'd* 160 AD2d 785, 555 NYS2d 614 (2d Dept 1990)), or a determination without a factual basis (*Highland Brooks Apts. Inc. v White*, 40 AD2d 178, 338 NYS2d 709 [4th Dept 1972]). Furthermore, in making its determination, a zoning board of appeals is not required to follow formal rules of evidence (*Matter of Von Kohorn v Morrell*, 9 NY2d 27, 32, 210 NYS2d 525 [1961]; *Merlotto v Town of Patterson Zoning Bd. of Appeals*, 43 AD3d 926, 841 NYS2d 650 [2d Dept 2007]). It may act on its own knowledge, so long as its determination sets forth the facts known to its members and discloses all of the evidence upon which it relied in reaching a decision (*Stein v Board of Appeals of Town of Islip*, 100 AD2d 590, 473 NYS2d 535 [2d Dept 1984]).

Here, in reaching its decision, the ZBA stated that "it is commonly known that the Thatched Cottage valets many of its cars at that off-site location pursuant to a covenant and restriction imposed by the Town Board incident to the 1967 re-zoning of that lot." Thus, the ZBA continued, "[t]hat would permit The Thatched Cottage to accept all of the 78 Jellyfish cars." The ZBA then concluded that there was no proscription in the Zoning Code which would warrant a reversal of the building official's issuance of the Building Permit, nor any finding that the building official acted outside his authority or otherwise in derogation of the 2011 Determination. As the ZBA set forth the facts and the evidence upon which it relied, and the 2013 Determination has a reasonable and factual basis, it did not abuse its discretion or act in an arbitrary or capricious manner.

The court declines to consider petitioners' argument that the Building Permit should be vacated and annulled based on the 2014 bankruptcy filing by the Thatched Cottage, L.P., as this argument is raised for the first time in reply (*see Stock v Morizzo*, 92 AD3d 672, 938 NYS2d 206 [2d Dept 2012]).

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In any event, as recognized by petitioners, the subsequent bankruptcy filing has no bearing on the issuance of the Building Permit in 2012. As the ZBA addressed the petitioners' arguments, the timeliness issue is moot.

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

Submit order and judgment.



J.S.C.