SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MAXVER LLC d/b/a CALLE DAO CHELSEA,

Petitioner,

-against-

THE COUNCIL OF THE CITY OF NEW YORK,

Respondent.

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DECISION AND ORDER
Index No.: 160647/2018
Motion Sequence 001

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this Article 78 proceeding, Maxver LLC, d/b/a Calle Dao Chelsea (Petitioner) moves for a judgment reversing the resolution of the City Council of New York (Respondent) disapproving its application for an unenclosed sidewalk cafe. In reply, Respondent opposes the motion and cross-moves for an order upholding the resolution. For the reasons set forth below, the Court grants the petition in its entirety.

BACKGROUND FACTS

In May 2018, Petitioner, who operates a restaurant on West 23rd Street in Manhattan named Calle Dallo ("the restaurant"), applied to the New York City Department of Consumer Affairs ("DCA") for a revocable consent to open an unenclosed sidewalk café outside the restaurant. The proposed sidewalk café would hold four tables with two chairs at each table, for a total seating of 8 patrons (NYSCEF doc No. 28 at 7). Thereafter, DCA forwarded the petition to the City of New York Community Board No. 4 ("CB4") for review. CB4 held a public hearing

on the application in June 2018, and in a later board meeting, voted unanimously to deny the application. In a letter to the DCA Commissioner explaining its decision, CB4 noted its reasoning was largely based on the resistance of the residents of London Terrace, a co-operative building complex that stretches across the full block and shares space with the restaurant. The letter noted that "residents of the building complex … reported to CB4 the problems that would be caused to reasonable residential quality of life by a sidewalk café at this location – problems that were made evident by a prior sidewalk café…that was briefly in place under a prior operator at this location" (NYSCEF Doc No. 20 at 1-2). The letter also noted that Petitioner had operated in bad faith by violating several prior agreements with CB4 and the London Terrace residents. For example, when Petitioner first applied for its liquor license, a condition of the agreement was that it would not apply for a sidewalk café without prior approval from CB4 and the residents.

Notwithstanding CB4's letter, on July 11, 2018, the DCA forwarded Petitioner's revocable consent agreement to Respondent, and recommended approval of the agreement (NYSCEF doc No. 17). Respondent's Committee on Zoning and Franchises held a public hearing on August 2, 2018, where testimony was heard from counsel for Petitioner in support of the application, as well as several shareholder-residents from London Terrace opposing the application. Specifically, the residents maintained that Petitioner had broken several promises to the residents, including the aforementioned promise that he would not seek a sidewalk permit without approval. According to the residents, Petitioner had also agreed he would not serve a "bottomless brunch" of unlimited quantities of alcohol, yet has proceeded to do so, which has allegedly led to loud noise, smoking, garbage, and vomiting outside of the restaurant (NYSCEF doc No. 28 at 10). Residents also testified that the presence of a laundry room vent outside the

building meant outdoor tables would have to be extended further on the sidewalk, impeding pedestrian flow on an already crowded street. While the residents made it very clear that the sidewalk café would exacerbate the already adverse impact the restaurant has had on the community, no witness referenced any zoning regulations or claimed that the petition was improper under applicable local law.

Immediately following the hearing, Respondent's Committee on Land Use voted to disapprove the petition, noting they heard testimony that the restaurant was "a nuisance to the community" (NYSCEF doc No. 26 at 4). Following the committee's vote, Respondent passed Resolution No. 498, which disapproved Petitioner's application. The resolution noted that Respondent "has considered the land use implications and other policy issues relating to the Petition" (NYSCEF doc No. 4).

Petitioner commenced this Article 78 proceeding on November 14, 2018, seeking to annul the resolution. Petitioner argues that Respondent's decision was arbitrary and capricious as it was based not on issues with land use or zoning regulation compliance, but on concerns that the sidewalk café would adversely affect the neighborhood. In opposition, Respondent argues its decision is supported by a rational basis and meets the standard of review under Article 78, as Respondent considered the administrative record before it in rendering its decision. Respondent contends that Petitioner's past bad faith acts toward the residents, along with the testimony about the restaurant being a harm to the community, were circumstances that Respondent had the broad authority to consider when issuing its disapproval.

DISCUSSION

On an Article 78 motion, the Court evaluates whether the determination of an agency was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion. An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts" (*Matter of Pell v. Board of Education,* 34 NY2d 222, 231 [1974]; *see also Jackson v. New York State Urban Dev Corp.,* 67 NY2d 400, 417 [on review of agency action under CPLR Article 78, the courts may not "second guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence"]). The test is thus limited to "whether the administrative action is without foundation in fact" (*Matter of Pell*, 34 NY2d at 230-31). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion (*id.*). Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*see Mid-State Management Corp. v. New York City Conciliation and Appeals Board,* 112 AD2d 72 [1st Dept.], aff'd 66 NY2d 1032 [1985]). Moreover, where the agency's determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference (*see Flacke v. Onondaga Landfill Systems, Inc.,* 69 NY2d 355, 363 [1987]).

Petitioner argues that Respondent's decision was arbitrary and capricious as it is contrary to applicable law. The restaurant is located in a commercial overlay within a residential district. City regulations hold that sidewalk cafes are generally allowed in such areas, except where specifically prohibited (NY City Zoning Resolution § 14-4011). For instance, sidewalk cafes are

prohibited on 23rd Street between the East River and 8th Avenue, but no regulation prohibits them west of 8th Avenue (NY City Zoning Resolution § 14-41). Additionally, just a few years ago, Respondent approved the application for a sidewalk café for the restaurant that occupied the space before Petitioner. Respondent contends that the prior restaurant's application is distinguishable because the prior restaurant had the approval of CB4 and made numerous concessions, including agreeing to limit the number of tables and closing the sidewalk café early each night (NYSCEF doc No. 28 at 17). Regardless, Petitioner is still correct that the exact same location was recently approved for a sidewalk café by Respondent. Petitioner also bases much of its argument for reversal on the court's holding in *Weprin v Council of the City of New York* (15 Misc. 3d 684 [Sup Ct, NY County, 2007]), which involved extremely similar circumstances. In *Weprin*, the court reversed Respondent's denial for a sidewalk café after finding that the petitioner in that case was located in a district clearly zoned for commercial use and had only been rejected due to community opposition. The court noted that while at the time there was no precedent for overturning a City Council decision regarding a café license, "it is well settled that 'classification of a particular use as permitted in a zoning district is 'tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood'" (*id.* at 687, quoting *Matter of Twin County Recycling Corp v Yevoli,* 90 NY2d 1000, 1002 [1997], and quoting *Matter of North Shore Steak House v Board of Appeals Inc. Vil. Of Thomaston*, 30 NY2d 238, 243 [1972]).

Respondent contends that *Weprin* merely stands for the proposition that "the record contain support for Council's disapproval of the sidewalk café application based on the Council's

charge to hold a public hearing upon notice and take final action on the petition within the required time" (NYSCEF doc No. 28 at 18). However, that is inaccurate.

While *Weprin* does not go so far as to state that a use being permitted in a district means the Council has no discretion whatsoever to disprove an application, the court explicitly notes that "where a zoning resolution permits unenclosed cafés in a particular neighborhood, denial of a petition to operate such a café must be based on more than community resistance to be rational" (15 Misc 3d at 687). However, the court held that a review of the record demonstrated that the Council considered nothing other than community opposition, which appears to also be the case here. In *Weprin*, the Community Board recommended denial of the petition, after finding that the community had a "longstanding tradition" of discouraging sidewalk cafés (*id.* at 685). Following a hearing, DCA nevertheless recommended approval to the Council, who then disapproved the petition after a hearing before the Council's Committee on Zoning and Franchises. Just as in the present case, the Council offered no detail beyond its rejection other than that it "considered the land use implications and other policy issues related to the Petition" (*id* 686).

Respondent also cites *Lisksa N.Y. Inc. v City Council of the City of New York* (134 AD3d 461 [1st Dept 2015]) for the proposition that the Council's broad review powers for application may include consideration of matters related to the public welfare. This is true, but *Liska* involved the application for a special permit that was contrary to the applicable zoning law. That makes *Liska* inapplicable, as Petitioner's application was for a permit that is expressly permitted by the applicable zoning resolution, not for a special exception.

As in *Weprin*, the record provides no evidence that Respondent considered anything other than the problems the residents had with Petitioner. Testimony at the hearing resolved solely around those issues; not one resident mentioned zoning or other land use matters in their remarks. Respondent offered no basis for its denial other than the fact that it heard testimony that Petitioner was a "nuisance to the community" (NYSCEF doc No. 26 at 4).

Respondent also cites to the "general purposes" section of the zoning resolution for sidewalk cafés, which holds that a purpose of the regulations is to "discourage them in locations where they are inappropriate, and promote and protect public health, safety, general welfare and amenity" (NY City Zoning Resolution § 14-00). However, the purpose of this regulation is only to articulate the goals of sidewalk café licensing; it does not grant the Council discretionary authority to reject a petition because of its interpretation these goals. This is especially true when, as here, Petitioner seeks to open a sidewalk café next to an already functioning restaurant in a district zoned for commercial use.

As Respondent's rejection is unsupported by evidence regarding land use and zoning regulations and only based on community opposition, it fails the rational basis test and is thus arbitrary and capricious.

The Court notes that its decision should not be viewed as a condonation of Petitioner's alleged bad faith acts toward its neighboring residents, if such acts indeed occurred as described. The Court merely holds that Respondent's resolution is not supported by a rational basis, and therefore must be reversed.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED and that the petition of Maxver LLC, d/b/a Calle Dao Chelsea, is granted in its entirety; and it is further

ORDERED that Respondent's cross-motion is denied; and it is further

ORDERED that Respondent is directed to grant Petitioner a revocable consent to establish, maintain and operate an unenclosed sidewalk café located at 461 West 23rd Street, Community District 4, Borough of Manhattan; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that Petitioner shall serve a copy of this order, along with notice of entry, on all parties within 15 days of entry.

Dated: February 21, 2019

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.