Hedges Inn, LLC v Zoning Bd of Appeals of the Vil. of E. Hampton
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January 6, 2021
Supreme Court, Suffolk County
Docket Number: 201/2019
Judge: Martha L. Luft
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

COPY

THE HEDGES INN, LLC and THE HEDGES INN MANAGEMENT COMPANY, LLC,

Petitioners/Plaintiffs,

- against -

ZONING BOARD OF APPEALS OF THE VILLAGE OF EAST HAMPTON, THE VILLAGE OF EAST HAMPTON, THE BOARD OF TRUSTEES OF THE VILLAGE OF EAST HAMPTON, and KENNETH COLLUM, East Hampton Village Building Inspector,

Respondents/Defendants,

- and -

PETER HANDAL and PATRICIA HANDAL,

Intervenors-Respondents/Defendants.

DECISION AND ORDER

By: Martha L. Luft, A.J.S.C.
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Return Date: September 16, 2019 (#002)
Return Date: September 18, 2019 (#003)
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Adjourned: June 16, 2020

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In this hybrid article 78 proceeding and action for declaratory relief and monetary damages ("the proceeding"), the petitioners/plaintiffs ("the petitioners") seek the entry of judgment (i) annulling a December 14, 2018 determination of the Zoning Board of Appeals of the Village of East Hampton ("the ZBA"), which upheld the village code enforcement officer's denial of tent permits requested by them for March 31, 2018, April 21, 2018, June 2, 2018, and June 6, 2018, (ii) declaring that section 139-15 (D) of the Code of the Village of East Hampton ("the Code") is violative of state and local law and is

unconstitutional under the due process, equal protection, and takings clauses of the New York State Constitution, and (iii) awarding compensatory damages pursuant to 42 USC § 1983.

The petitioners are, respectively, the owner of real property located at 74 James Lane, East Hampton, New York, and the operator of an historic inn and restaurant on the property known as the Hedges Inn. The property is located in the village's R160 Residence District, and the petitioners' operation of the property constitutes a pre-existing nonconforming commercial use in a residential district. Section 278-1 (A) of the Code defines "nonconforming use," in part, as "[a]ny use of a building, structure, lot, land or part thereof lawfully existing on the effective date of this chapter." The property's most recent certificate of occupancy, dated February 28, 2008, lists the following uses:

> A three story wood frame Inn (14 rooms) with restaurant; unfinished basement; two story wood frame barn (not to be used for sleeping); wood frame gazebo; bins; slate patio with awning (no sides allowed); slate patios; brick slate walkways and irrigation pit * * * Maximum Occupancy 113 people.

The petitioners claim that the customary accessory uses[1] of the property have historically included outdoor special events, sometimes in tents, including weddings, bar and bat mitzvahs, and graduation and anniversary parties. They also claim that from at least 2001 through 2017, Hedges Inn submitted no fewer than 14 applications for, and subsequently obtained, permits from the village for outdoor and tented events at the property.

It appears that on or about February 19, 2018, Hedges Inn submitted permit applications to the appropriate village officials in anticipation of four weddings to be held outdoors in tents at the property between March and September 2018. As of that date, chapter 71 of the Code required any person or other entity proposing to hold an "assemblage of persons," defined in relevant part below, to obtain a permit from the village.

> § 71-1. Definitions.
>
> As used in this chapter, the following terms shall have the meanings indicated:
>
> ASSEMBLAGES OF PERSONS —
>
> A. Any group of 50 or more person engaged in a meeting, social activity, sports event, fund-raising event or similar gathering on property other than public property where one or more of the following conditions exists:
>
> (1) The parking of vehicles of those in attendance is on a public road or a public place.

[1] Section 278-1 (A) of the Code defines "accessory use" as "[a] subordinate use, building or structure customarily incidental to and located on the same lot occupied by the main use, building or structure."

> (2) Accumulation of refuse or litter beyond that normally provided for on the premises where the large assemblage is taking place.
>
> B. Any group of persons engaged in a meeting, social activity, sports event, fund-raising event or similar gathering on public property.
>
> C. Notwithstanding the above, people gathered at a religious institution, theater, museum or school shall not constitute an "assemblage of persons."

Section 278-2 (B) (7) (c) of the Code provides that

> Tents used exclusively for recreational camping purposes and tents erected for not more than 21 days in any one calendar year are permitted in residential districts, provided that all other permits that may be required, including but not limited to a special events permit or a tent permit required pursuant to the codes of New York State, are obtained.

By letter dated March 15, 2018, the village administrator notified the petitioners that the application for mass assemblage permits had been denied because "the proposed events violate the Zoning Code in that outdoor dining is not a permitted use of the premises in your zoning district and under your Certificate of Occupancy." Attached was a letter from the village's code enforcement officer, Kenneth Collum, advising the petitioners that the requested tent permits "cannot be issued as they are in violation of the zoning code 278-7 (C) (2) (d) (3) as well as the court decision of May 16, 2006." Section 278-7 (C) (2) (d) (3) of the Code provides that

> No variance shall be granted to permit the introduction of any outdoor use, including outdoor dining, to a preexisting nonconforming commercial use in a residential district, or to permit the expansion or extension of any such outdoor use, and any variance granted to permit the reconstruction or alteration of any such lawfully existing outdoor use shall not exceed 100% of the lawfully preexisting area of such outdoor use.

The "court decision of May 16, 2006" referred to is *Matter of Palm Mgt. Corp. v Goldstein* (29 AD3d 801, 815 NYS2d 670 [2006], *affd* 8 NY3d 337, 833 NYS2d 423 [2007]), involving the same property, in which the Appellate Division upheld so much of a ZBA determination annulling a prior owner's certificate of occupancy with respect to the use of a patio for outdoor dining on the property.

Although Hedges Inn timely appealed the code enforcement officer's determination, its appeal was denied by the ZBA on December 14, 2018. In its decision, the ZBA, citing the earlier administrative and judicial determinations in *Matter of Palm Mgt. Corp. v Goldstein*, concluded that the proposed repeated use of the property for private outdoor catered events was prohibited under section 278-1 (B) (2) (c) of the Code—which provides that a nonconforming use "shall not be extended or enlarged"—in that it would constitute an expansion of the pre-existing nonconforming use. It stated:

> Although the area in which the present applicant seeks to conduct its tented events is not the same enclosed patio that was the subject of the Palm Management matter, the

> rationale for this Board's determination in that case, as confirmed by the three courts that reviewed it, is nevertheless persuasive. The Zoning Board of Appeals found that dining on the patio was an expansion of the pre-existing nonconforming inn and restaurant use, and specifically observed that allowing outdoor dining would "essentially transform the basic nature of the small Inn that existed in 1925 and enable the owner to operate a different kind of use altogether, a restaurant facility capable of hosting and catering large special events . . ."

This proceeding followed.

According to the petitioners, the decision by village officials to deny the requested permits was made in anticipation of a newly proposed amendment to the Code aimed at prohibiting historic inns in the village from holding outdoor events—an amendment championed, they claim, by Peter and Patricia Handal, owners of the adjoining residential property ("the intervenor respondents"). That amendment, which was under consideration in March 2018 and is now codified at section 139-15 (D), prohibits any "special event"—defined as "[a]n assembly at a residence having 50 or more people in attendance, or if at a commercial premises, an event which is not one of the approved uses of the premises"—from being held "in whole or in part outdoors or in a tent on property containing a legally pre-existing nonconforming business use in a residential district." By Local Law No. 7 of 2018, chapter 71 was repealed and replaced by chapter 139, effective October 1, 2018.

The petitioners contend that the amendment impermissibly targets legally pre-existing nonconforming business uses by barring the owners of such properties from applying for and obtaining a permit for a special event to be held outdoors or in a tent, and constitutes unlawful spot zoning; that the amendment was never intended to advance or promote the general public health, safety, welfare or morals of the community, but to strip the petitioners of a customary and incidental use of their property in order to benefit a single property owner; that the Board of Trustees, in adopting the new law, failed to comply with limitations and restrictions attendant to the enactment of a zoning amendment; and that the amendment violates their substantive due process and equal protection rights and constitutes an unlawful taking in that it eliminates a valid accessory use of the property.

Since the commencement of this proceeding, the parties have stipulated to allow the filing of a first and a second amended petition/complaint, the latter of which is now the operative pleading in the case; it will be referred to as "the petition." Issue was joined by the ZBA, the village, the Board of Trustees, and Kenneth Collum ("the village respondents") on or about March 13, 2019. The court has no record of an answer to the petition having been served or filed by the intervenor respondents.

In their petition, the petitioners plead twelve "claims for relief." The first two are for article 78 relief, annulling the ZBA's determination—the first, on the ground that it was arbitrary and capricious or an abuse of discretion, and the second, on the ground that the determination was based on information dehors the record, namely, a written memorandum that the ZBA received from its attorney but failed to include in the record. The third through eleventh are for declaratory relief, invalidating chapter 139 of the Code. In their third claim for relief, the petitioners allege generally that the Board of Trustees, in enacting what is effectively a zoning amendment, exceeded the powers delegated to it under New York

State law. The fourth is to nullify chapter 139 as violative of Village Law § 7-708 in that the petitioners were deprived of their right to attempt to force a supermajority vote in order for the legislation to pass. As their fifth claim for relief, the petitioners plead that the Board of Trustees failed to refer the proposed amendment to the Suffolk County Planning Commission as required under General Municipal Law § 239-m and section A14-14 of the Suffolk County Administrative Code. The sixth is to nullify chapter 139 on the ground that it was enacted in violation of Village Law § 7-702, which requires that all zoning regulations be uniform for each class or kind of buildings within a district. The petitioners' seventh claim for relief is to declare chapter 139 a nullity as inconsistent with and contradictory to section 278-2 (B) (7) of the Code. As their eighth, ninth, tenth, and eleventh claims for relief, the petitioners allege, respectively, violation of due process, violation of equal protection, bad faith taking, and *de facto* taking, all under the New York State Constitution. The petitioners' twelfth and final claim for relief is for monetary damages under 42 USC § 1983.

Now before the court are the petitioners' request for article 78 relief, as set forth in their first and second claims for relief; a motion by the petitioners for an order granting leave to conduct discovery as to the requested article 78 relief, based on their claim that the ZBA improperly relied on documents outside the record, and compelling disclosure as to the requested declaratory relief; a motion by the village respondents for summary judgment dismissing the petitioners' third through twelfth claims for relief; a motion by the intervenor respondents for summary judgment dismissing the petitioners' third through twelfth claims for relief; and a cross motion by the petitioners for summary judgment in their favor on their third through seventh claims for relief.

Before considering the parties' respective requests for relief, it must be noted that the petitioners' self-styled "claims for relief" are not strictly coextensive with what the court deems to be their causes of action. The court views the first and second claims for relief as stating but a single independent cause of action for article 78 relief, and the third through eleventh claims for relief as stating a single independent cause of action for declaratory relief. It is also noted that despite frequent references in the petition to chapter 139 as a whole, the court considers the petitioners' request for declaratory relief as one directed specifically to the validity and enforceability of section 139-15 (D).

The court will first address the relief requested with respect to the petitioners' cause of action for article 78 relief, by which the petitioners seek to annul the ZBA's December 14, 2018 determination, which upheld the denial of their request for tent permits in connection with weddings scheduled for March 31, 2018, April 21, 2018, June 2, 2018, and June 6, 2018.

Upon review, the court finds that the proceeding is moot to the extent that the petitioners seek article 78 relief. A proceeding is considered moot where the rights of the parties are not "directly affected" by the determination of the proceeding and the interest of the parties is not an "immediate consequence" of the judgment (***Matter of Hearst Corp. v Clyne***, 50 NY2d 707, 714, 431 NYS2d 400, 402 [1980]; *accord* ***Matter of Bath Petroleum Stor. v New York State Dept. of Envtl. Conservation***, 272 AD2d 746, 709 NYS2d 636, *lv denied* 95 NY2d 768, 721 NYS2d 605 [2000]). Here, not only have the dates for the scheduled events all passed, but the petitioners also acknowledge that on or about March 16, 2018, they reached a "short term accommodation" with the village respondents to allow the weddings to take place on adjacent residential properties owned by the petitioners' principals.

While the court is cognizant that it may adjudicate an otherwise moot matter if it falls within an exception to the doctrine of mootness, no such adjudication is merited here. "[E]xamination of the cases in which [the Court of Appeals] has found an exception to the doctrine discloses three common factors: (1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i. e., substantial and novel issues" (***Matter of Hearst Corp. v Clyne***, *supra* at 714-715, 431 NYS2d at 402). If this standard is met, "a court may reach the moot issue even though its decision has no practical effect on the parties" (***Saratoga County Chamber of Commerce v Pataki***, 100 NY2d 801, 811, 766 NYS2d 654, 658, *cert denied* 540 US 1017, 124 S Ct 570 [2003]). Given the time-sensitive nature of an application for a permit attendant to a wedding or other like event, it cannot seriously be disputed that the issue presented is one which, because of its relatively brief existence, will typically escape judicial review. Nor is the court willing, at least at this juncture, to characterize as insubstantial the petitioners' interest in perpetuating what they claim is a customary accessory use of their property. Nevertheless, as pandemic-related restrictions on social gatherings continue with no end in sight, and given what appears to be the village's ongoing desire to severely curtail if not prohibit the holding of special events outdoors or in tents in residential districts, it seems a virtual certainty that the next application for a tent permit will not be reviewed under the same set of criteria as those used by the village's code enforcement officer and the ZBA here. Since the issue is likely incapable of repetition, no useful purpose will be served by deciding it. And even were the court to employ those criteria, there is no evidentiary basis in the record to determine, as a factual and historical matter, whether holding special events outdoors or in tents is a valid customary accessory use of the property.

The analysis proceeds to the parties' respective motions for summary judgment, beginning with the claim by the intervenor respondents that the petitioners lack standing to challenge the validity and enforceability of section 139-15 (D).

Before addressing that claim, the court notes that the intervenor respondents' request for summary judgment is premature inasmuch as they have not answered the petition (*see* CPLR 3212 [a]). Nevertheless, except as to the alleged lack of standing, the court has considered each of their arguments in conjunction with those raised by the village respondents and deems them to have joined in the motion by the village respondents; as to the standing defense, the court has considered their request as a pre-answer motion under CPLR 3211 (a) (3).

"Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria" (***Society of Plastics Indus. v County of Suffolk***, 77 NY2d 761, 769, 570 NYS2d 778, 782 [1991]). Only an "aggrieved" person has standing to bring a lawsuit (***Saratoga County Chamber of Commerce v Pataki***, *supra*). To determine whether a person is aggrieved and, hence, the proper party to request adjudication, a court will look, in part, to whether he or she has established an injury in fact, *i.e.*, "a sufficiently cognizable stake in the outcome" (***Community Bd. 7 of Borough of Manhattan v Schaffer***, 84 NY2d 148, 155, 615 NYS2d 644, 646 [1994]).

To dismiss a pleading on CPLR 3211 (a) grounds, it must appear either that the pleading is defective on its face or, though adequate on its face, lacks merit or requires dismissal on some other

basis (Siegel, NY Prac § 257 [5th ed]). On a motion pursuant to CPLR 3211 (a) to dismiss a complaint for lack of standing, "the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied [and] the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" (***Deutsche Bank Trust Co. Ams. v Vitellas***, 131 AD3d 52, 59-60, 13 NYS3d 163, 170 [2015]).

The court finds the intervenor respondents' showing insufficient to demonstrate the petitioners' lack of standing. Where, as here, "a party owns property that falls within an area affected by the regulation in question, it is presumed to have been adversely affected by the change in the zoning law and have standing to contest it" (***Matter of Rossi v Town Bd. of Town of Ballston***, 49 AD3d 1138, 1142, 854 NYS2d 573, 577 [2008]). In the face of that presumption, the intervenor respondents contend that Hedges Inn is without standing to maintain its causes of action for declaratory and monetary relief because it was already barred under chapter 278 of the Code from holding outdoor special events on the property and, therefore, is not aggrieved by the enactment of chapter 139. The court disagrees. Section 278-7 (C) (2) (d) (3) operates to bar only the introduction of an outdoor use or the expansion or extension of any such outdoor use. It does not purport to bar an existing outdoor dining use except to the extent that it is expanded or extended. Chapter 139, by contrast, purports to bar all outdoor special events. Thus, as the petitioners will presumably be aggrieved by the enactment of chapter 139 to the extent they seek to hold outdoor special events on their property which do not fall within the prohibition of section 278-7 (C) (2) (d) (3)—as they claim to have done in the past—the court finds the intervenor respondents' contention regarding the issue of standing to be unpersuasive.

With the threshold procedural issue having been resolved, the analysis turns to the substantive merit of the petitioners' cause of action for declaratory relief. As it is axiomatic that a court should avoid dealing with a constitutional question if it can make a dispositive determination on another appropriate ground (*see* ***Matter of Beach v Shanley***, 62 NY2d 241, 476 NYS2d 765 [1984]), the court will first address the non-constitutional claims raised in the petitioners' third through seventh claims for relief.

To obtain summary judgment it is necessary that a party establish its cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in its favor (CPLR 3212 [b]), and that it do so "by tender of evidentiary proof in admissible form" (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790, 792 [1979]; *accord* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). A party moving for summary judgment must satisfy its burden by demonstrating affirmatively, with evidence, the merit of its claim or defense rather than by merely pointing to gaps in its opponent's case (*e.g.* ***Nick's Garage v Geico Indem. Co.***, 165 AD3d 1621, 85 NYS3d 660 [2018]).

In their third through seventh claims for relief, the petitioners allege generally that chapter 139 is a de facto zoning amendment enacted in contravention of applicable procedural and substantive requirements. Both sets of respondents, while disputing the characterization of chapter 139 as a zoning regulation, contend that chapter 139 as a whole, and section 139-15 (D) in particular, were in fact adopted in conformity with the requirements for local laws amending a zoning code.

As a preliminary matter, the court agrees with the petitioners that section 139-15 (D) is, in essence, a zoning amendment inasmuch as it relates directly to the physical use of land and the potential impact of such use on neighboring properties (*see* ***Louhal Props. v Strada***, 191 Misc 2d 746, 743 NYS2d 810 [2002], *affd* 307 AD2d 1029, 763 NYS2d 773 [2003]) and, therefore, accepts the general premise on which their third through seventh claims for relief are based.

Having done so, and having duly considered the statements in the pleadings and the parties' various arguments on summary judgment relative to the third through seventh claims for relief, the court finds, as a matter of law, that section 139-15 (D) is invalid because it was enacted in violation of Village Law § 7-702, which authorizes the adoption of zoning regulations and the division of a village into districts but provides that "such regulations shall be uniform for each class or kind of buildings, throughout such district but the regulations in one district may differ from those in other districts."

In matters of zoning, a uniformity requirement such as the one set forth in Village Law § 7-702 (and in Town Law § 262 and General City Law § 20 [24]) "is intended to assure property holders that all owners in the same district will be treated alike and that there will be no improper discrimination" (***Matter of Augenblick v Town of Cortlandt***, 104 AD2d 806, 814, 480 NYS2d 232, 239 [1984] [Lazer, J.P., dissenting], *revd on dissenting mem* 66 NY2d 775, 497 NYS2d 363 [1985]). "In other words, although zoning regulations obviously may vary from district to district, regulations must apply uniformly throughout any particular district" (Terry Rice, Practice Commentaries, McKinney's Cons Laws of NY, Village Law § 7-702). "Where specialized circumstances exist for certain property within a district the uniformity rule may be bent," but "[a]n ordinance will be held to uniformity if the record does not disclose any reasonable basis for different treatment among similar parcels within a district" (***Matter of Augenblick v Town of Cortlandt***, *supra* at 814, 480 NYS2d at 239). Although the failure to observe a uniformity requirement will result in invalidation of a zoning provision, it is not a bar to fashioning appropriate zoning regulations to satisfy a community's needs; it generally does not interfere with the ability of a board of trustees to impose conditions on the rezoning of a parcel of property if such conditions are related to and incidental to the use of the property and intended to minimize any adverse impact on the surrounding area, and is not a bar to authorization of a use upon issuance of a special permit (Terry Rice, Practice Commentaries, McKinney's Cons Laws of NY, Village Law § 7-702).

The petitioners contend that Village Law § 7-702 prohibits a village, as here, from singling out certain properties in the same zoning district for disparate treatment, and that there is no rational basis for barring special events outdoors or in tents at inns and restaurants in the village's residential districts while allowing such events to be held at residential properties in those districts. The petitioners also note, and it is not contested, that the village continues to permit special events outdoors and in tents at other properties in the same district, including a church, a farm, a library, and a historical society, even though none of those properties is residential.

The village respondents, joined by the intervenor respondents, claim that the prohibition of section 139-15 (D) is not in conflict with Village Law § 7-702, because inns and restaurants are not within the same "class or kind of buildings" as the many residences located in the village's residential districts and, therefore, need not all be regulated uniformly. Rather, they contend that since section 139-

15 (D) treats all nonconforming business uses in residential districts the same, it meets the uniformity requirement of Village Law § 7-702.

The court finds the respondents' position untenable. It is incontrovertible that section 139-15 (D) does not treat all the owners of property in the residential district the same; it is not enough, for purposes of the uniformity requirement, that section 139-15 (D) treats all owners of nonconforming business uses in the residential district the same. Even if a rational basis might exist for treating residential property differently from nonresidential property, the respondents have articulated no basis—rational or otherwise—for distinguishing certain nonresidential property from other nonresidential property. As to their argument that a legally nonconforming use in a residential district is subject to disparate treatment because it is nonconforming, the record reveals no circumstances particular to the property itself that might justify such treatment. "What is required for differential treatment is that the land be uniquely situated" (***Matter of Augenblick v Town of Cortlandt***, *supra* at 815, 480 NYS2d at 239). Nor does their argument seem to take into account that pre-existing nonconforming uses are, in fact, approved uses[2] whose legal protections extend to their customary accessory uses (*see* ***Incorporated Vil. of Old Westbury v Alljay Farms***, 64 NY2d 798, 486 NYS2d 916 [1985]). Similarly, as to their claim that a for-profit business in a residential district may properly be subject to treatment different from that accorded to other uses permitted in that district, the court finds that this does not state a reasonable basis to flout the uniformity requirement. The court acknowledges that a for-profit business like a restaurant or inn has a financial motivation attached to the use of its property, and that due to the nature and volume of that use, residences located in proximity to such a business may be more impacted than residences located in proximity to properties on which not-for-profit businesses are operated. Nevertheless, the village can (and already has) implemented legislation to prevent the expansion of nonconforming uses, and it can also require that permits be issued relative to the holding of an outdoor event subject to conditions regulating noise, parking, and other community concerns. What it has done here, by contrast, violates the uniformity requirement.

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[2] Section 278-1 of the Code defines "Nonconforming use" as follows:

> Any use of a building, structure, lot, land or part thereof lawfully existing on the effective date of this chapter, or any amendment thereto affecting such use, which does not conform to one or more current use regulations hereof for the district in which it is situated, including those for which a special permit was granted during the period of time when this chapter permitted the expansion or alteration of a nonconforming use pursuant to a special permit. Permission to temporarily conduct or continue a prohibited use granted by the Zoning Board of Appeals prior to the effective date of this chapter or any amendment thereto shall not be construed to establish a "nonconforming use" as herein defined, and, therefore, any such permission and the use which is authorized shall terminate upon the expiration thereof.

Section 278-1 (B) (2) (a), moreover, provides that

> Every lawful nonconforming use may be continued in the building or structure or upon the lot or land which it occupies after the effective date of this chapter or after the effective date of any pertinent amendment thereto.

Before concluding its analysis relative to uniformity, the court deems it appropriate to address the argument raised by both sets of respondents that section 139-15 (D) was enacted in accordance with the Municipal Home Rule Law. Although the argument was not specifically directed at the petitioners' claim relative to Village Law § 7-702, its implication is that a zoning amendment so enacted need not comply with the requirements of the Village Law, including, perhaps, the uniformity requirement of Village Law § 7-702.

Under the Municipal Home Rule Law, an incorporated village has the power to amend or supersede "any provision of the village law relating to the property, affairs or government of the village * * * notwithstanding that such provision is a general law, unless the legislature expressly shall have prohibited the adoption of such a local law" (Municipal Home Rule Law § 10 [1] [ii] [e] [3]; *accord* ***Matter of Schilling v Dunne***, 119 AD2d 179, 506 NYS2d 179 [1986]). Generally, then, a village may supersede provisions of the Village Law as they relate to zoning matters (***Matter of Cohen v Board of Appeals of Vil. of Saddle Rock***, 100 NY2d 395, 764 NYS2d 64 [2003]), so long as there is compliance with the relevant procedures for adopting zoning regulations by local law under the Municipal Home Rule Law. To do so effectively, however, the board of trustees must announce its intent to supersede the Village Law by specifying "the chapter or local law or ordinance, number and year of enactment, section, subsection or subdivision, which it is intended to change or supersede" (Municipal Home Rule Law § 22 [1]). And although the statute also provides that "the failure so to specify shall not affect the validity of such local law" (*id.*), "substantial adherence" to the statute is nevertheless required, *i.e.*, a clear statement by the local legislature invoking its supersession authority, made with definiteness and explicitness, in order to avoid the confusion that might result if one could not discern whether it intended to supersede a statute or which part or parts it intended to supersede (***Kamhi v Town of Yorktown***, 74 NY2d 423, 548 NYS2d 144 [1989]; ***Turnpike Woods v Town of Stony Point***, 70 NY2d 735, 519 NYS2d 960 [1987]; ***Matter of Viscio v Town of Wright***, 42 AD3d 728, 839 NYS2d 840 [2007]).

Here, a review of the documents attached to the affidavit of Rebecca Hansen, the village administrator and clerk, identified by her as the village's records pertinent to the adoption of chapter 139 as a local law, does not indicate in any way whether the Board of Trustees intended to invoke its supersession authority. Irrespective, then, of whether the local law may have been enacted in compliance with the notice and hearing requirements of Municipal Home Rule Law § 20 and the filing and publication requirements of Municipal Home Rule Law § 27, there is no evidence before the court to support a finding that the local law was intended to supersede Village Law § 7-702 or any other portion of the Village Law (*see e.g.* ***Port Chester Police Assn. v Village of Port Chester***, 291 AD2d 389, 736 NYS2d 907 [2002]).

Accordingly, summary judgment is granted in favor of the petitioners on their cause of action for declaratory relief, the petitioners are entitled to the entry of judgment declaring that section 139-15 (D) is invalid and unenforceable, and the court need not reach the constitutional issues raised.

The petitioners' cause of action for monetary relief (which is a subject only of the respondents' motions and not their own) is premised on the statements in their twelfth claim for relief, alleging that the village respondents acted under the color of state and local law to deprive the petitioners of their substantive due process and equal protection rights under the Fourteenth Amendment to the United

States Constitution, as well as their rights under the First Amendment to the United States Constitution. As the basis for their claim, the petitioners contend that the village code enforcement officer's denial of their applications for tent permits, which was affirmed by the ZBA, as well as the subsequent enactment and anticipated enforcement of section 139-15 (D), have rendered and will continue to render them unable to book special events outdoors or in tents at their property.

Pursuant to 42 USC § 1983, an aggrieved individual is afforded a civil remedy against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges or immunities secured by the Constitution * * *." Municipalities and other local governmental units are included among those "persons" to whom the law applies (***Monell v New York City Dept. of Social Servs.***, 436 US 658, 98 S Ct 2018 [1978]). "In the land-use context, 42 USC § 1983 protects against municipal actions that violate a property owner's rights to due process, equal protection of the laws and just compensation for the taking of property under the Fifth and Fourteenth Amendments to the United States Constitution" (***Bower Assoc. v Town of Pleasant Val.***, 2 NY3d 617, 626, 781 NYS2d 240, 245 [2004]).

In support of their motion, the village respondents, again joined by the intervenor respondents, rest on the assumption that the petitioners, in seeking damages under 42 USC § 1983, rely on the same facts supporting their claims for violation of due process, violation of equal protection, bad faith taking, and *de facto* taking under the New York State Constitution, which facts, the respondents assert, are insufficient to state a valid claim under the United States Constitution. Even if that is so, it is no longer relevant; as those claims pertain to prospective injury resulting from the enactment of section 139-15 (D), and that section has now been deemed invalid and unenforceable, they no longer serve to support the petitioners' cause of action for monetary relief in any event.[3] What the respondents fail to offer, significantly, is any meaningful argument or proof relative to what the petitioners cite as the remaining basis of their cause of action, namely, the unlawful denial of their tent permit applications. Absent any such argument or proof, the court finds no basis on which to fashion an award of summary judgment.

Now, in light of the foregoing, and upon the reading and filing of the following papers in this matter: (1) Summons and Notice of Petition, both dated January 11, 2019; (2) Second Amended Verified Petition/Complaint, dated February 25, 2019, and supporting papers; (3) Answer dated March 12, 2019, and supporting papers; (4) Return of Proceedings before Zoning Board of Appeals; (5) Notice of Motion by the petitioners, dated August 22, 2019, and supporting papers; (6) Notice of Motion by the village respondents, dated August 26, 2019, and supporting papers (including Memorandum of Law); (7) Notice of Cross Motion by the intervenor respondents, dated September 27, 2019, and supporting papers (including Memorandum of Law); (8) Affirmation in Further Support by the petitioners, dated November 6, 2019; (9) Notice of Cross Motion by the petitioners, dated November 13, 2019, and

[3] The intervenor respondents' further attempt to establish that the revocation of a special permit by a municipality does not implicate the property owner's First Amendment rights to freedom of speech and freedom of assembly is similarly misguided. What the petitioners allege with respect to the First Amendment—and which the court again recognizes is no longer relevant—is not interference with the right to speak or assemble but the right to petition the government for a redress of grievances.

supporting papers (including Memorandum of Law); (10) Reply Memorandum of Law by the village respondents, dated December 9, 2019; (11) Memorandum of Law in Further Support by the intervenor respondents, dated December 11, 2019; and (12) Reply Memorandum of Law by the petitioners, dated January 7, 2020; it is

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the petitioners for an order pursuant to CPLR 408 and 3124, *inter alia*, granting leave to conduct discovery with respect to their cause of action for article 78 relief and compelling the respondents to comply with all outstanding requests for disclosure, is granted to the extent of directing that a preliminary conference take place on **February 16, 2021** as recently re-scheduled, and is otherwise denied as moot; and it is further

ORDERED that the motion by the village respondents for an order pursuant to CPLR 3212, granting summary judgment dismissing the petitioners' third through twelfth claims for relief, is denied; and it is further

ORDERED that the motion (incorrectly denominated as a cross motion) by the intervenor respondents for an order pursuant to CPLR 3212, granting summary judgment dismissing the petitioners' third through twelfth claims for relief, is denied; and it is further

ORDERED that the cross motion by the petitioners for an order pursuant to CPLR 3212, granting partial summary judgment in their favor on their third through seventh claims for relief, is granted to the extent of granting summary judgment declaring that section 139-15 (D) of the Code of the Village of East Hampton is invalid and unenforceable, and is otherwise denied; and it is further

ORDERED that entry of judgment on the petitioners' causes of action for article 78 relief and declaratory relief shall be held in abeyance pending a determination on the cause of action for monetary relief or other disposition of the action.

Dated: January 6, 2021

A.J.S.C.
HON. MARTHA L. LUFT

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**