

**Matter of Kogel v Zoning Board of Appeals of Town
of Huntington**

2006 NY Slip Op 30347(U)

February 13, 2006

Supreme Court, Suffolk County

Docket Number: 0031203/2006

Judge: Thomas F. Whelan

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ORDERED that this petition (#001) for a judgment: (1) vacating and annulling the September 20, 2006 determination of the Zoning Board of Appeals of the Town of Huntington filed in the Huntington Town Clerks' Office on October 3, 2006, upon the grounds that it is barred by res judicata and is arbitrary, capricious, unlawful, an abuse of discretion and unsupported by substantial evidence; (2) declaring that the September 20, 2006 determination of the Huntington Zoning Board of Appeals, filed in the Town of Huntington's Clerk's Office on October 3, 2006, is null and void because it was issued in violation of the State Environmental Quality Review Act and its implementing regulations; (3) setting aside any and all building permits and actions arising out of the September 20, 2006 determination of the Huntington Zoning Board of Appeals; and (4) enjoining all construction activities and actions arising out of the September 20, 2006 determination of the Huntington Zoning Board of Appeals, is denied; and it is further

ORDERED that the motion (#002) by the respondents for a judgment pursuant to CPLR 3211 and CPLR 7804 dismissing this proceeding and sustaining the September 20, 2006 determination of the Zoning Board of Appeals in all respects and awarding costs and disbursements, is granted; and it is further

ORDERED AND ADJUDGED that respondents shall recover from petitioner costs and disbursements in the sum of \$ _____ as taxed by the Clerk and respondents shall have execution therefor; and it is further

ORDERED that the counsel for the petitioner and the respondents shall each serve a copy of this Order with Notice of Entry upon respective counsel within thirty (30) days of the date herein pursuant to CPLR 2130(b)(1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court.

The petitioners in this hybrid proceeding are seeking a declaratory judgment pursuant to CPLR 3001 and Article 78 of the CPLR, challenging a determination of the Zoning Board of Appeals of the Town of Huntington (hereinafter "Board") regarding its granting of the application of respondent, Tino's Enterprises, Inc. (hereinafter "Tino's"). The petitioners allege that the Board's determination rendered in 2006, countermanded a prior determination of the Board rendered in 2003; that the Board's determination is barred by the doctrine of res judicata and was arbitrary, capricious, unlawful, an abuse of discretion and unsupported by substantial evidence; that the Board violated procedural and substantive requirements of the State Environmental Quality Review Act (hereinafter "SEQRA"); that by implementing regulations, ignored relevant areas of environmental concern thereby failing to issue a reasoned elaboration in support of its SEQRA determination.

In 1982, Tino's applied to the Board for a use variance in order to expand a non-conforming 31 unit motel building. The application sought to construct a swimming pool, an office and 20 additional motel units to be built as a partial second story addition to the existing ground floor motel. The application was denied by a 4-2 vote with one member absent indicating that Tino's did not meet the criteria enumerated in *Otto v Steinhilber*, 282 NY 71 (1939); namely, that: (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood; and (3) that the use to be authorized by the variance will

not alter the essential character of the neighborhood. The Board found that if the variance was granted, it would alter the essential character of the neighborhood and decrease the value of adjacent properties because of the unsightliness of its construction to adjacent homeowners. The record, as presented, is devoid of any indication if the denial was appealed.

Less than five month's later, in 1983, Tino's submitted another application for a use variance to erect an addition to the motel consisting of 15 additional units, a swimming pool and an office. The record on this application indicated that there was a pre-existed restaurant business on the property. The same Board in a 4-3 vote approved the variance under the hardship criteria enumerated in *Otto v Steinhilber*, 282 NY 71, *supra* finding that by granting the use variance, same would not alter the essential character of the neighborhood. The Board also granted the variance based on the uniqueness of the property, the fact that there were numerous commercial businesses, government occupied buildings entities and vacant commercially zoned land in the immediate area of the motel, although it was located in a C-6 zone in which a motel was not a permitted use. In its 1983 decision, it was noted that the Board in 1982, had no other means by which to grant a variance to this non-conforming structure, except if the variance did not require an alteration and modification greater than 25% of the floor area. In 1982, the Board found that the application did require an alteration in excess of the 25%. In the 1983 decision, the faction of the Board, which denied the application in 1982, felt that Tino's failed to prove its case under the criteria enumerated in *Otto v Steinhilber*, 282 NY 71, *supra*. Further they felt the two applications were the same except that the 1983 application contained proposed additional changes to a different side of the property from the site proposed in 1982. There was no limiting language as to the granted variance in the Board's decision.

Twenty years later in 2003, Tino's applied for a use variance to (i) expand the motel to 71 rooms with 36 being provided in the existing motel building and 35 on the second and third floors above the restaurant portion of the property; (ii) install a swimming pool; and (iii) request a parking variance to provide parking for 167 vehicles where the Town Code requires parking for at least 189 vehicles. Since Tino's indicated it would comply with code requirements regarding parking, that portion of its application for a parking variance was withdrawn. The Board considered that portion of the application seeking renovations and felt same to be substantial, noting that the application was based upon Tino's right by virtue of the C-6 code zoning and the use variance previously granted by the Board.

The Board, by a unanimous vote of the five members present on December 1, 2003, granted Tino's application in part and denied it in part with certain conditions. Tino's would be permitted to demolish the existing single story restaurant building and erect a two story restaurant building for a restaurant, banquet and meeting room use and construct a swimming pool. That portion of the application to build rooms on the third floor was denied and the motel was to remain limited to 46 motel units as per the 1983 use variance. Tino's was also directed to apply to the Planning Board for site plan approval.

In its decision, the Board stated that if the 1983 Board intended the variance to be an open-ended use expansion of the premises for motel use, it had the knowledge to do so and it would have clearly stated so in its decision. When interpreting the 1983 decision, the 2003 Board concluded that Tino's was not granted

an open-ended use variance and that the language in the decision of the 1983 Board was clear; that is, Tino's was only granted a limited use variance for the addition of 15 motel units with an office and a swimming pool. The Board contended that Tino's clearly understood the use variance granted in 1983 and that it was limited to that which was granted by the Board.

The Board further stated that there existed a separate and distinct reason why the application could not be granted without a further use variance. The application as it stood for the right to build additional rooms in the restaurant building, would now constitute a hotel under the building code, which was not allowed in a C-6 zone. Therefore, there would be a change in its designation from a motel to a hotel. Since Tino's did not make a use variance application from a motel to a hotel, the Board declined to make any determination on this and simply stated "the Board will not pass upon it." As the restaurant was closed and the building was in disrepair, the Board voted to grant the application for its reconstruction as a two story building with banquet and meeting rooms only. Since Tino's did not apply for site plan approval as directed by the Board's granting for reconstruction of the restaurant building, it lapsed by operation of law and became a nullity.

In 2006, Tino's submitted an application seeking relief from various sections of the zoning code, or in the alternative, relief from prior conditions or restrictions imposed for the purpose of demolishing the existing single story building on the subject lot and erecting in its place a larger, two story, main building to be constituted as a restaurant with banquet and meeting rooms and to modify the motel use to include twenty additional motel rooms and additional parking. The application further stated that there would only be an outside stairway, not an interior stairway, to facilitate access to the proposed additional rooms. In order to have the Board grant the application, Tino's also needed a parking variance.

Tino's claimed that since the Board's decision in 1983, the county road adjacent to Tino's property was widened by the appropriate governmental agencies to provide additional southbound lanes, thereby increasing the width of the road and facilitating a free flow of traffic. Tino's also presented to the Board proof that it had undertaken significant improvements to decrease its sewage flow, which was a concern to the Board in 2003.

On September 20, 2006, by unanimous vote of the five members present, the Board, while noting the respective decisions of the 1983 and 2003 Boards, rejected the reasoning that Tino's use variance was limited to the dimensional economic requirements set forth by the initial grant in 1983. In adopting its position, the Board stated that it was its decision that once a use variance was granted, it runs with the land and is not limited to the particular dimensional and economical requirements of an applicant. Subsequent expansions and extensions may be permitted without a showing of further hardship (*see Borer v Vinberg*, 213 AD2d 828, 623 NYS2d 378 [3d Dept 1995]; *Angel Plants, Inc. v Schoenfeld*, 154 AD2d 459, 546 NYS2d 112 [2d Dept 1989]). The Board also cited *Matter of JMD Realty, LLC* (ZBA No. 15901, *supra*), an unpublished decision it issued on May 27, 1999, which held that once granted, a use variance runs with the land. The Board also reviewed the Town Code definitions of a hotel and motel and found it to be ambiguous and capable of two constructions. It also found that any obvious ambiguity in the zoning code must be construed in favor of the

applicant; that on these facts before them, Tino's was entitled to the construction more favorable to it; and that the proposed restaurant building with rooms for overnight accommodation may be permitted.

The doctrine of claim preclusion (*res judicata*) is intended to provide finality to litigation thus giving the parties stability. Upon final judgment, further litigation between the parties arising from the same transaction is barred (*see Federated Dept. Stores, Inc. v Moities*, 452 US 394, 101 S. Ct. 2424, 69 L.Ed.2d 103 [1981]). New York has adopted this pragmatic, transactional analysis approach, holding that a claim or a cause of action is coterminous with the transaction irrespective of the number of substantive theories or variant forms of relief available to the plaintiff (*see O'Brien v City of Syracuse*, 54 NY2d 353, 445 NYS2d 687 [1981]). Thus, once a claim is brought to its conclusion, all other claims arising out of the same common nucleus of operative facts are barred, even if they are based on different theories, seek different remedies, or allege different facts (*see Coliseum Towers Assocs. v County of Nassau*, 217 AD2d 387, 637 NYS2d [2d Dept 1996]).

Res judicata bars a party from asserting claims that are either (1) duplicative of the claims between parties that were previously decided on the merits or (2) claims that arise out of the same facts as claims between the same parties that were previously decided on the merits (*see Northern Assur. Co. v Square D. Co.*, 201 F.3d 84, 87 [2d Cir. 2000]). *Res judicata* bars parties from re-litigating the same cause of action, as well as, "prevents litigation of a matter that could have been raised and decided in a previous suit, whether or not it was raised" (*Murphy v Gallagher*, 761 F2d 878, 879 [2d Cir 1985]).

Res judicata will apply when three requirements are met: "(1) the previous action involved an adjudication on the merits; (2) the previous action involved the parties, or those in privity with them; and (3) the claims asserted in the subsequent action were or could have been raised in the prior action" (*Pike v Freeman*, 266 F.3d 78, 91 [2d Cir 2001], *citations omitted*).

The function of a court upon being presented with an application for relief under Article 78 is to determine whether, upon the proof presented to the administrative agency, the agency's determination had a rational basis or was illegal, arbitrary, capricious or an abuse of discretion. Disposition of the proceeding is limited to the facts and record adduced before the agency when the administrative determination was rendered (*see Fanelli v New York City Conciliation and Appeals Bd.*, 90 AD2d 756, 455 NYS2d 814 [1st Dept 1982]; *aff'd* 58 NY2d 952, 460 NYS2d 534 [1983]). It is also well settled that a Court should give deference to the Zoning Board's interpretation of its own Code and it will not be overturned by a court unless unreasonable, irrational or without basis or foundation (*see Ferraris v Zoning Bd. of Appeals of the Village of Southampton*, 7 AD3d 710, 776 NYS2d 820 [2d Dept 2004]).

In considering Tino's application in 2006, the Board found that the application was factually different from the application submitted in 2003 regarding the planned structural construction of the restaurant building, in that the applicant was only seeking to add an additional 20 motel units on a two story building instead of a three story building with 35 additional motel units as had been sought in 2003. Furthermore, since Tino's repaired, modified and updated the motel's plumbing system, it resulted in a decrease in effluent

to within acceptable treatment limits as per an inter-municipal agreement. Therefore, it was not precluded by the doctrine of res judicata (*see Zoning & Land Use, Administrative Res Judicata* by Anthony S. Guardino, NYLJ 4/18/06 p. 16, col. 1; *Hunt v Zoning Bd. of Appeals of Inc. Vil. of Malverne*, 27 AD3d 464, 812 NYS2d 581 [2d Dept 2006]; *accord Moore v Town of Islip Zoning Bd. of Appeals*, 28 AD3d 772, 813 NYS2d 542 [2d Dept 2006]).

The record also indicates that petitioner seeks to declare the September 20, 2006 decision of the Board, filed in the Clerk's Office of the Town of Huntington on October 3, 2006, null and void because it was issued in violation of the State Environmental Quality Review Act and its implementing regulations is without merit in fact and law. While there may have been an issue as between the Board and another town agency as to who would act as the lead agency, this issue was rendered moot and academic when the agency did not appeal the stalemate as per 6 NYCRR 617.6(b)(5)(I) as to who would be the lead agency under SEQRA as set forth in ECL § 8-0111(6) and the Board properly assumed its lead agency role (*see Coca-Cola Bottling Co. of New York, Inc. v Bd. of Estimate of the City of New York*, 72 NY2d 674, 536 NYS2d 33 [1988]).

Furthermore, the record amply supports the Board's adherence to the provisions of Article 8 of the Environmental Conservation Law in its classification of the action as a Type I and in issuing a Negative Declaration. The Board's decision was only arrived at after extensive consultations with other governmental agencies and consideration of all of the evidence submitted in support of and in opposition to the application during three public hearings (*see Toys "R" Us v Silva*, 89 NY2d 411, 654 NYS2d 100 [1996]). The matter before the Board constituted a Type I action under SEQRA, which would require the preparation of an EIS if the potential for at least one significant environmental effect existed (*see Matter of S.P.A.C.E. v Hurley*, 291 AD2d 563, 739 NYS2d 164 [2d Dept 2002]; *lv app den* 98 NY2d 615, 752 NYS2d 1 [2002]).

However, after taking a hard look at the environmental impact of the proposed reconstruction, the Board found that there would be no significant adverse impact on the environment and determined that an EIS would not be required (*see* 6 NYCRR 617.7[a][2]; *Village of Chestnut Ridge v Town of Rambo*, 45 AD3d 74, 841 NYS2d 321 [2d Dept 2007]; *Spears v Town of Cortlandt*, 44 AD3d 866, 844 NYS2d 84 [2d Dept 2007]; *Matter of Merson*, 90 NY2d 742, 665 NYS2d 605 [1997]; *Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 626 NY2d 1 [1995]).

The record indicates that since the Board determined the reconstruction of the restaurant motel would not have a significant affect on the environmental, its decision was rationally based (*see Cathedral Church of St. John the Divine v Domitory Auth. of the State of New York*, 224 AD2d 95, 645 NYS2d 637 [3d Dept 1996]). As such, the Negative Declaration was properly issued and an EIS was not legally mandated.

The Court of Appeals has repeatedly noted that local zoning boards have broad discretion in considering applications for area variances and the judicial function in reviewing such decisions is a limited one (*see Matter of Ifrah v Utschig*, 98 NY2d 304, 308, *supra*; *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613, *supra*). A determination may be set aside only where the record

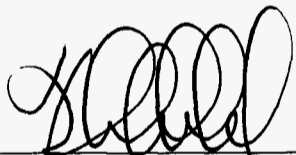
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reveals that the Board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure (see *Matter of Milburn Homes, Inc. v Trotta*, 7 AD3d 531, 776 NYS2d 312 [2d Dept 2004]; *Matter of Leon Petroleum, LLC v Board of Trustees of Inc. Vil. of Mineola*, 309 AD2d 804, 765 NYS2d 656 [2d Dept 2003]; *Matter of Kuhlman v Board of Zoning Appeals of Town of Brookhaven*, 305 AD2d 683, 759 NYS2d 896 [2d Dept 2003]; *Matter of Inguant v Board of Zoning Appeals of Town of Brookhaven*, 304 AD2d 831, *supra*; *Matter of Cashy v Goehringer*, 303 AD2d 753, 756 NYS2d 865 [2d Dept 2003]; *Matter of Rina v Baum*, 300 AD2d 665, 754 NYS2d 644 [2d Dept 2002]). A determination of a Board shall be sustained on judicial review if it has a rational basis and is supported by substantial evidence (see *Matter of Inlet Homes Corp. v Zoning Bd. of Appeals of Town of Hempstead*, 2 NY3d 769, *supra*; *Matter of Ifrah v Utschig*, 98 NY2d 304, *supra*; *Matter of Sasso v Osgood*, 86 NY2d 374, *supra*).

Under the particular facts and circumstance of this matter, the Court finds that the Board's determination was supported by substantial evidence in the record, was not arbitrary and capricious and had a rational basis. A Board is vested with wide discretion and can "change its views" and "refuse" to duplicate previous error (*Josato, Inc. v Wright*, 35 AD3d 470, 826 NYS2d 381 [2d Dept 2006]; *app den* 9 NY3d 805, 842 NYS2d 781 [2007]). "As with board determinations on variances, a reviewing court is bound to examine only whether substantial evidence supports the determination of the board. Where substantial evidence exists, a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record" (*Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 196, 746 NYS2d 662 [2002], *citation omitted*) or second guess the agency (see *Schodack Concerned Citizens v Town Bd. of the Town of Schodack*, 48 AD2d 130, 544 NYS2d 49 [3d Dept 1989]). "Substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably, probatively and logically" (*300 Gramaton Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181, 408 NYS2d 54 [1978]).

Accordingly, the petition is denied and the motion is granted as determined herein. This constitutes the Order and Judgment of the Court.

DATED: 12/13/00



 THOMAS F. WHELAN, J.S.C.