

**Matter of B.L.R. Assoc., Inc. v The Board of Trustees
of the Inc. Vil. of Williston Park**

2007 NY Slip Op 32855(U)

September 7, 2007

Supreme Court, Nassau County

Docket Number: 2188-07/

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

In the Matter of the Proceeding By

B.L.R. ASSOCIATES, INC.,

Petitioner,

ORIGINAL RETURN DATE: 03/05/07
SUBMISSION DATE: 07/13/07

For a Judgment Pursuant to Article 78 CPLR
Annuling a Resolution Issued By

INDEX No.: 002188/07

THE BOARD OF TRUSTEES OF THE
INCORPORATED VILLAGE OF
WILLISTON PARK,

MOTION SEQUENCE #1

Respondent.

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This Petition pursuant to Article 78 of the CPLR for a judgment annulling a Resolution by respondent Board of Trustees of the Village of Williston Park ("Board") dated January 4, 2007, which denied petitioner B.L.R. Associates, Inc.'s ("O'Brien's") application to amend its Special Exception Permit is denied.

Petitioner O'Brien's is a tenant at 605-607 Willis Avenue in Williston Park. The property is in a Business District Zone (see Village Code §230-8). Pursuant to Village Code § 230-8(A)(2)(a), "a restaurant, eating establishment or other similar facility" is permitted "only when authorized as a special exception by the Board of Trustees after a public hearing." The premises has been operated as a tavern/bar pursuant to a Special Exception Permit for approximately 40 years with petitioner being the operator for approximately the last 15 years.

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On September 7, 1993, O'Brien's Special Exception Permit was modified to permit live music in the form of soft-rock, Irish or folk music. However, "[d]ue to the proximity of the premises to nearby residences and apartments, and giving due regard to the preservation of peace and tranquility of the neighborhood," that modification of the Special Exception Permit was granted subject to ten restrictions.

These restrictions limited the live music to a group of not more than four (4) performers and was restricted to the "stage" area at the north side of the interior of the premises. The music was limited to soft-rock, Irish or folk type music. Heavy metal and hard rock music were expressly prohibited, as were loud drums, brass instruments, bass guitar or other percussion instruments. Only piano, string guitar, electric keyboard and vocalists were permitted. Live music was restricted to one night on a weekend (either Friday night or Saturday night) and was required to end no later than 12:00 midnight. On Sundays, piano music only was permitted until no later than 9:00 P.M. During times when live music was offered, at least one of the applicant's principals was required to be on the premises. No dancing, dance floor or karaoke was permitted. The doors of the premises were required to be kept closed at all times while live music was being performed or the jukebox was playing. "Sound stop" paneling was required to be added to the east and west sides of the stage area. Patrons were not permitted to dine, drink or otherwise congregate in the rear yard of the premises, nor was it to be used for outdoor cooking or barbecuing. Lastly, the restrictions required that all Village ordinances regulating noise be strictly obeyed and all laws, ordinances, rules and regulations of the New York State Fire Prevention and Building Code, Nassau County Department of Health and State Liquor Authority regarding operation of a bar/restaurant facility and the consumption of alcoholic beverages on the premises, including rules and regulations regarding occupancy, be complied with.

On or about September 30, 2005, O'Brien's sought to amend its Special Exemption Permit. It sought permission to provide classic rock and rock music including use of a bass guitar and drum; to provide live music two (2) nights per week on Friday and Saturday until 2:00 A.M., as well as on major holidays such as Thanksgiving, New Year's Eve, Christmas Eve, St. Patrick's Day, Memorial Day, Independence Day, Labor Day and Columbus Day; and, to provide live music by a disc jockey (DJ) and karaoke.

A hearing on O'Brien's application was held on June 19, 2006.

In support of O'Brien's application, Bernard Kavanagh, O'Brien's president, stated that "sound stop" paneling had been installed in the front and rear of the building; there is no dancing or dance floor; and, that he is always present when live music is played. He further stated that live music is limited to four members and it is performed only in the stage area. He said that the doors are guarded by security when live music is played and that the front doors are only opened for patrons' use and the rear doors are only opened for the employees' business use. He also stated that O'Brien's has been in compliance with the Village's, State's and County's laws and ordinances.

In opposition to O'Brien's application, James Gallagher, who lives in an abutting residence, stated that in 2000, the soft rock changed to "screaming guitarists and drum rolls and group songs," and that "when a band plays to a packed house, the loudness of the music and the partyers reach stadium level. . . ." He noted that at one point 21 summonses were outstanding against O'Brien's. And, he expressed concern that if this application was granted, a nearby new establishment, Connolly's, might seek similar privileges, creating "a neighborhood of escalating cabaret." When questioned, Mr. Gallagher said that the music often went past 12 midnight but he acknowledged that his repeated calls to the police somewhat put a rest to that. He also stated that he heard the music in his bedroom and that his trinkets vibrate from the drums and bass guitars. Both Mr. Gallagher and Maura Gallagher, his daughter, spoke of numerous violations involving the instruments used, like drums, electric guitar and karaoke, which were not allowed. Maura also spoke of the patrons' conduct, like urinating in the street, discarding beer bottles, noise, etc. Mr. Gallagher also spoke of the loud patrons exiting O'Brien's. Mr. Gallagher's wife Virginia, as well as other nearby residents David Augusto and Chris Fritz, stated that the rear door was not kept shut. Mr. Augusto complained of litter, like drug paraphernalia, broken beer bottles, liquor bottles, etc., that he had to clean up, as well as people urinating in his driveway. He considered all of this a threat to his young children. May Falletta, another nearby resident, complained of limited parking due to the number of patrons as well as the litter and noise. These sentiments were echoed by Charlie James and Rudy Rosenberg, still other nearby residents. A Petition signed by a number of neighborhood residents objecting to the requested amendment was also submitted to the Board.

By Resolution dated January 4, 2007, O'Brien's application to modify its Special Exception Permit was denied. In its Resolution, the Board noted that the principal of Town Realty Company which owns the four apartment houses across the street from O'Brien's submitted a letter in which he complained of "chaotic and boisterous situations arising from the present and past conduct of [O'Brien's patrons] that greatly interfere[d] with the tenants' sleep and relative quiet enjoyment." The principal also complained of "rowdiness, especially at midnight closing time, and requested that the instant application be disapproved." The Board further noted that numerous residents spoke about violations of the existing restrictions; the need to call police when the music did not stop at midnight; music being heard in nearby homes due to the failure to keep the rear door secured shut and on account of the front door being opened; drums and screaming guitars; patrons screaming as they exited due to how loud the music had been inside; and, nearby residents' complaints of personal property vibrating in their homes. The Board noted that residents also complained about public lewdness, including patrons urinating in driveways and litter in the street such as drug paraphernalia, used condoms, beer and liquor bottles, and broken bottles and garbage. The Board noted that a Petition signed by 20 residents of 610 Willis Avenue objecting to O'Brien's application on account of the noise and boisterousness caused by the premises had been submitted.

O'Brien's presently challenges the Board's determination as arbitrary, capricious and not supported by substantial evidence. O'Brien's maintains that the Board's determination is based exclusively on community opposition. It further maintains that the Board has acted improperly by

denying its application while allowing two similar nearby establishments, Memories and The Gathering Lounge, to operate as they sought.

The same principles apply to the judicial review of a denial of a Special Exception Permit as apply to a review of a denial of variances (Retail Property Trust v Board of Zoning Appeals of Town of Hempstead, 98 NY2d 190, 196 (2002)). Thus, the determination of the Board must be reviewed under the “arbitrary and capricious standard” set forth at CPLR 7803(3) (Halperin v City of New Rochelle, 24 AD3d 768, 770-771, lv to app disp. 6 NY3d 890 (2006), lv to app disp. 7 NY3d 708 (2006); see also, Matter of Lemir Realty Corp. v Larkin, 11 NY2d 20, 24 (1962) (“special exception grants or denials . . . [are] for court review purposes administrative with the result that they are subject to review ‘as to reasonableness’ in an Article 78 proceeding”). “When reviewing the determinations of a Zoning Board, courts consider ‘substantial evidence’ only to determine whether the record contains sufficient evidence to support the rationality of the Board’s determination.” (Matter of Sasso v Osgood, 86 NY2d 374, at p. 384 n3 (1995)).

“Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure” (Matter of Pecoraro v Town of Hempstead, 2 NY3d 608, 613 (2004), citing Matter of Ifrah v Utschig, 98 NY2d 304, 308 (2002); Matter of Twin County Recycling Corp. v Yevoli, 90 NY2d 1000, 1002 (1997); Matter of Cowan v Kern, 41 NY2d 591, 598 (1977)). “A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence (Matter of Pecoraro v Town of Hempstead, supra, at p. 613, citing Matter of Ifrah v Utschig, supra, at p. 308; Matter of Fuhst v Foley, 45 NY2d 441, 444 (1978)). “[A] reviewing court should refrain from substituting its own for the reasoned judgment of the zoning board” (Matter of Pecoraro v Town of Hempstead, supra, at p. 613). “It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them” (Matter of Cowan v Kern, supra, at p. 599). “Thus, the determination of a municipal land use agency must be confirmed if it ‘was rational and not arbitrary and capricious.’ ” (Halperin v City of New Rochelle, supra, at p. 772, quoting Matter of Sasso v Osgood, supra at 384.) “A determination will be deemed rational if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition” (Halperin v City of New Rochelle, supra at p. 772).

“Zones which qualify for special exception permits represent a threshold legislative acceptance that the specified use accords with the general municipal zoning plan.” (Wegmans Enterprises, Inc. v Lansing, 72 NY2d 1000, 1001 (1988), citing Matter of Robert Lee Realty Co. v Village of Spring Val., 61 NY2d 892, 893 (1984); Matter of Pleasant Val. Home Constr. v Van Wagner, 41 NY2d 1028, 1029 (1977)). “Unlike the unnecessary hardship standard governing variances, a special exception permit is available upon a showing of compliance with legislatively imposed conditions pertaining to the intended use.” (Wegmans Enterprises, Inc. v Lansing, supra, citing Matter of North Shore Steak House v Board of Appeals, 30 NY2d 238, 243-244 (1972); see also, Retail Property Trust v Board of Zoning Appeals of Town of Hempstead, supra; Metro Enviro

Transfer, LLC v Village of Croton-on-the-Hudson, 7 AD3d 625 (2nd Dept. 2004), lv to app granted 4 NY3d 731 (2004), aff'd. 5 NY3d 236 (2005)). “It does not follow, however, that requests for special exceptions must always be granted subject only to the imposition of reasonable conditions” (Matter of Tandem Holding Corp. v Board of Zoning Appeals of Town of Hempstead, 43 NY2d 801, 802 (1977)). “Entitlement to a special exception is not a matter of right” (Matter of Tandem Holding Corp. v Board of Zoning Appeals of Town of Hempstead, supra, citing Matter of Lemir Realty Corp. v Larkin, supra, at p. 24). In fact, “[b]oard action refusing to grant a ‘special exception’ is by definition and in essential character discretionary and not a denial of a right. Otherwise, there would be no point in listing certain uses as the permitted ones in a use district and listing others as permissible only when specially, exceptionally and affirmatively authorized by the board” (Matter of Lemir Realty Corp. v Larkin, supra, at p. 24 citing Matter of Reed v Board of Stds. & Appeals, 225 N.Y. 126 (1931); Barkmann v Town of Hempstead, 294 N.Y. 805 (1945)).

A petitioner’s failure or inability to comply with the applicable conditions constitutes sufficient grounds upon which a Zoning Board may deny that petitioner’s application (see, Matter of Tandem Holding Corp. v Board of Zoning Appeals of the Town of Hempstead, supra, at p. 802; Wegmans Enterprises, Inc. v Lansing, supra, at p. 1001; Retail Property Trust v Board of Zoning Appeals of Town of Hempstead, supra, at p. 195). “While a zoning board of appeals retains discretion to deny a special exception for failure to comply with a legislative condition, such a determination must nonetheless be supported by substantial evidence” (Retail Property Trust v Board of Zoning Appeals of Town of Hempstead, supra, at p. 196, citing Matter of Twin County Recycling Corp. v Yevoli, supra, at p. 1002). “[A] zoning board may not base the denial of a special exception solely on community objection.” (Retail Property Trust v Board of Zoning Appeals of Town of Hempstead, supra, citing Matter of Twin County Recycling Corp. v Yevoli, supra, at p. 1002.) Nevertheless, “[i]t has been held that the comments of neighboring residents, however emotionally tinged, taken in conjunction with the personal knowledge and familiarity which board members themselves have of a projected site, may suffice to support a conclusion that the proposed use would have an adverse impact on neighboring properties” (Roginski v Rose, 97 AD2d 417, 422 (2nd Dept. 1983), aff'd. 63 NY2d 735 (1984) citing Brick Hill Constr. Corp. v Zoning Bd. of Appeals of Town of Somers, 74 AD2d 810, 811 (2d Dept. 1980), aff'd. 53 NY2d 621 (1981)).

Contrary to O’Brien’s assertions, the Board’s determination denying the modification of its Special Exception Permit on the ground that the best interests and safety of the community would not be served thereby is amply supported by the evidence in the record and accordingly is not arbitrary, capricious or an abuse of discretion (Metro Enviro Transfers, LLC v Village of Croton-on-the-Hudson, supra).

That similar nearby establishments have been permitted to operate under fewer restrictions does not mandate a different result.

“The mere fact that consents were granted to owners of premises somewhat similarly situated does not in itself show that consent was arbitrarily refused to this applicant. The question is not whether someone else has been favored. The question is whether the petitioner has been illegally oppressed. Exercise of discretion in favor of one confers no right upon another to demand the same decision. Unlimited discretion vested in an administrative board by ordinance is not narrowed through its exercise. Calculated failure to lay down general standards in the ordinance should not be nullified by interpretation that each case passed upon creates a standard that must be generally followed thereafter. The council may refuse to duplicate previous error; it may change its views as to what is for the best interests of the city; it may give weight to slight differences which are not easily discernible.” (Matter of Larkin, Co. v Schwab, 242 NY 330, 336 (1926))

O’Brien’s contention that its patrons’ offensive behavior cannot be attributed to it fails to take into account the indisputable logical connection between the nature of its business, i.e., a bar/tavern which, at times, provides music, and its patrons’ behavior. To shift the burden on the authorities to remedy the resulting unpleasant or illegal conditions as O’Brien’s suggests not only completely ignores the way that the property is zoned, i.e., subject to special exception permits, but the function and purpose of the Board to act in the best interests of the community (see, Metro Enviro Transfers, LLC v Village of Croton-on-Hudson, supra, at p. 626). Similarly, to require the Board to address these problems and concerns via restrictions ignores the history of the property to the detriment of the community. Lastly, that a bar/tavern is a permitted use under the Village Code, does not dictate that O’Brien’s application for a modification of the permit it already possesses be granted. Its permit is subject to restrictions as it is a special use. The denial of the additional privileges sought hardly equates with a denial to use the premises as a bar/tavern.

The Petition is denied and this proceeding is dismissed without costs.

This decision constitutes the order and judgment of the court.

Dated: 9-7-07

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HON THOMAS P. PHELAN

~~THOMAS P. PHELAN~~
ENTERED J.S.C.
 SEP 13 2007
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