

**Matter of Hamptons Tennis Co., Inc. v Zoning
Bd. of Appeals of the Town of E. Hampton**

2007 NY Slip Op 33592(U)

October 30, 2007

Supreme Court, Suffolk County

Docket Number: 0032727/2006

Judge: Arthur G. Pitts

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

Supreme Court of the State of New York
IAS Part 43 - County of Suffolk

P R E S E N T: HON. ARTHUR G. PITTS

COPY

In the Matter of the Application of
 HAMPTONS TENNIS COMPANY, INC., and
 BTC ASSOCIATES, L.P.,

ORIG. RETURN DATE: 12/22/06
FINAL SUBMIT DATE: 8/16/07
MOTION SEQ. NO.: 001-MG

Petitioners,

For a Judgment under Article 78 of the Civil
 Practice Law and Rules

PLTF'S/PET'S ATTY:
ESSEKS, HEFTER & ANGEL, LLP
By: Theodore D. Sklar
108 East Main Street
P.O. Box 279
Riverhead, New York 11901

-against-

ZONING BOARD OF APPEALS OF THE TOWN
 OF EAST HAMPTON,

Respondents.

DEFT'S/RESP'S ATTY:
Zoning Board of Appeals of the Town of East Hampton
Attn: Fred Overton, Town Clerk
159 Pantigo Road
East Hampton, New York 11937

CAHN & CAHN, LLP
445 Broadhollow Road, Suite 332
Melville, New York 11747

Upon the following papers numbered 1 to 18 read on this motion article 78
 Notice of Motion/OSC and supporting papers 1-10; Notice of Cross-Motion and supporting papers _____;
 Affirmation/affidavit in opposition and supporting papers 11-13; Affirmation/affidavit in reply and supporting papers _____;
 Other 14-18; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that the petitioners Hamptons Tennis Company, Inc. and BTC Associates L.P.'s ("Hamptons Tennis") application for a judgment, pursuant to CPLR Article 78, annulling the determination of the respondent Zoning Board of Appeals of the Town of East Hampton which denied its request for the issuance of a certificate of occupancy for a seasonal ice rink located at 178 Buckskill Road, East Hampton, Suffolk County, New York is granted to the extent that the determination of the respondent Zoning Board of Appeals for the Town of East Hampton dated October 27, 2006 is vacated and this matter is remanded to the respondent for rehearing. It is further

ORDERED that the rehearing of this matter is directed to be held within sixty (60) days of service of the within order with notice of entry. It is further

ORDERED that the preliminary injunction granted by this Court on July 30, 2007 shall continue to remain in effect until further order of this Court.

Petitioner Hamptons Tennis operates a tennis club located at 178 Buckskill Road, East Hampton, Suffolk County, New York. The subject property consists of 3.1 acres and is improved with a clubhouse and ten tennis courts. The site plan for the property was approved by the East Hampton Planning Board on February 11, 1976 and a certificate of occupancy was issued on May 25, 1976. On or about December 15, 2004 the petitioners filed an application for a building permit to convert four of the ten tennis courts for seasonal use as an ice rink. The rink would be 200' x 85', be surrounded by dasher boards with glass above the boards and be frozen through the use of an ice mat system which would be kept cold through the use of a chiller, a large capacity type air conditioner which would be located on the side of the rink. On January 12, 2005 the building permit was issued.

On January 21, 2005 without the benefit of a certificate of occupancy, the ice rink was opened to the public. In February, 2005 the Chief Building Inspector of the Town of East Hampton, Donald T. Sharkey inspected the premises. In December, 2005 the petitioners sought the issuance of the certificate of occupancy averring the work was completed pursuant to the building permit previously issued. The request for the certificate of occupancy was denied by letter from Mr. Sharkey dated January 19, 2006 wherein he stated that "at the present time, the property is not in conformance with the building permit issued on January 12, 2005 and therefore the certificate of occupancy cannot be issued for the property at this time."

On March 17, 2006 the petitioners filed an appeal from the Chief Building Inspector's decision denying its request for the issuance of the certificate of occupancy with the respondent Zoning Board of Appeals of the Town of East Hampton. ("ZBA") Said appeal asserted that the determination of the Chief Building Inspector was flawed in that the denial letter did not specify the basis of the denial, did not identify the work required to be done to bring the premises in compliance and did not direct that the nonconforming work be completed in conformity with the building permit. The petitioners further asserted that the work at the premises was completed in conformance with the existing laws of the Town and the building permit previously issued.

A public hearing on the petitioners' appeal was conducted by the respondent ZBA on August 29, 2006. The Town's Chief Building Inspector did not appear and did not testify, however a letter prepared by Mr. Sharkey was referenced by the ZBA Chairman during the hearing. Such letter provides that "no mention was made on the handwritten application submitted by the property owner or specified to me in any way to include the following structures, which were all installed at one time or another: Dasher board and glass; electrical power generator on trailer body; ADA compliant ramp and deck to ice rink; zamboni storage hut.....and these structures were installed on the property without the benefit of a building permit."

By determination dated October 27, 2006 the respondent ZBA denied the petitioners' appeal. By previous decision and order of this Court dated July 30, 2007 the Town of East Hampton's application for a preliminary injunction enjoining the petitioners herein from operating the subject ice rink facility was

granted upon a finding that the building permit did not include structures subsequently placed on the property and that a site plan has not been approved by the Town's Planning Board as required by Local Law No. 25 of 2005.

Notwithstanding the previous decision of this Court, the petition presently at bar seeks a judgment reversing and annulling a determination dated October 27, 2006 by the respondent ZBA which denied an appeal of the Chief Building Inspector decision dated January 19, 2006 denying the petitioners' request for a certificate of occupancy and directing the issuance of such certificate of occupancy or in the alternative, remanding the appeal to the ZBA directing it to grant the appeal, reverse the determination made by the Chief Building Inspector denying the request and directing him to inform the petitioners what work was not completed in conformity with the building permit to construct the seasonal ice rink together with an order directing the petitioners to complete the work in conformity with the building permit.

Pursuant to Town Law 267-a (4) a zoning board of appeals has the authority to hear appeals from any determination made by an administrative official. "Judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion. (see *Matter of Inlet Homes Corp., v Zoning Bd. Of Appeals of Town of Hempstead*, 2 NY3d 769 [2004]; *Matter of Pecoraro v. Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 [2004]; *Matter of Ifrah v. Utschig*, 98 NY2d 304, 308 [2002]. Thus a determination of a zoning board should be sustained if it has a rational basis (see *Matter of Sasso v. Osgood*, 86 NY2d 374, 384 n 2 [1995]; see also *Matter of Pecoraro v. Board of Appeals Town of Hempstead*, supra; *Matter of Ifrah v. Utschig*, supra ; *Matter of Efraim v. Trotta*, 17 AD3d 463[2005] " (*Ram v. Town of Islip, et al*, 21 AD3d 493, 494, 801 NYS2d 40 [2nd Dept 2005])

In the matter at bar, the respondent ZBA denied the petitioners' appeal of the Chief Building Inspector's determination denying the issuance of a certificate of occupancy. Such decision of the ZBA was based substantially upon a written memorandum prepared by Mr. Sharkey submitted on the day of the public hearing. Mr. Sharkey did not appear at the public hearing and was not available to testify on the record.

It is without dispute that the petitioners were not given prior notice of the memorandum prepared by Mr. Sharkey and that no reason was given for his refusal to issue the certificate of occupancy or advisement as to how the property could conform with the building permit. Although it is well established that zoning board of appeals are not bound by the formal rules of evidence (*Silveri v Nolte*, 128 AD2d 711, 513 NYS2d 205 [2nd Dept 1987]), where evidence has been received under circumstances which denies a party an opportunity to appraise or rebut it, Courts have deemed such conduct sufficient to support a judgment annulling the ZBA's determination. (see *Stein v Board of Appeals of the Town of Islip*, 100 AD2d 590, 473 NYS2d 535 [2nd Sept 1984]) Herein, because of Mr. Sharkey's failure to appear at the public hearing and the respondents reliance on memorandum not given to the petitioners prior to the hearing, it is clear that the petitioners were not given an opportunity to rebut such evidence. Furthermore, the petitioners were estopped from questioning Mr. Sharkey as to why he refused to issue a certificate of occupancy and order the work completed in conformity with the building permit as required by East Hampton Town Code 102-15

(A) (1). Accordingly, under the circumstances presented herein the petition is granted to the extent that this matter is remanded to the respondent ZBA for rehearing wherein the petitioner will be given an opportunity to question the Chief Building Inspector on the record as to his decision and determination denying a certificate of occupancy as well as what would be required of the petitioners to conform the subject property to the issued building permit.

This shall constitute the decision and order of the Court.

Submit judgment.

Dated: Riverhead, New York
October 30, 2007



J.S.C.

CHECK ONE: FINAL DISPOSITION NON-FINAL DISPOSITION DO NOT SCAN