

Matter of Cipriano v Giannadeo
2007 NY Slip Op 34161(U)
December 19, 2007
Supreme Court, Suffolk County
Docket Number: 0000341/2006
Judge: Paul J. Baisley
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.

MEMORANDUM

COPY

SUPREME COURT - SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

IAS PART 36

By: Baisley, J.S.C.

Dated: 12/19/2007

INDEX NO.: 341/2006

MOT. NO. 001 MOT D

-----X

In the Matter of the Application of
RACHEL CIPRIANO and GIOVANNI CIPRIANO,

Petitioners,

-against-

ADRIENNE GIANNADEO, Chairperson, DOMINICK
S ALERNO, EDWARD P. HOGAN, EDWARD A.
BENZ and WILLIAM F. VALENTINE, collectively
constituting the BOARD OF ZONING APPEALS OF
THE TOWN OF SMITHTOWN,

Respondents,

PETITIONER'S ATTORNEY:

RIVKIN RADLER LLP
926 Reckson Plaza
Uniondale, New York 11556-0926

RESPONDENT'S ATTORNEY:

VALERIE MANZO, ESQ.
16 De Mont Street
Smithtown, New York 11787-1906

For Relief Pursuant to Article 78 of the
New York Civil Practice Law and Rules.

-----X

Petitioners Rachel Cipriano and Giovanni Cipriano commenced this Article 78 proceeding to annul, vacate and reverse so much of the December 14, 2005 decision of the respondent Board of Zoning Appeals of the Town of Smithtown (the "Board") as denied their application for a certificate of existing use and/or variances for the restaurant they own and operate.

In June 2002 petitioners purchased a residentially-zoned parcel located on Route 25A in the Town of Smithtown. The parcel is improved with a single-family residence in which petitioners reside with their family and a 784-square-foot restaurant structure in which petitioners operate a pizzeria/restaurant known as "Nick's Pizza and Clam Bar" (the "Clam Bar"). The record reflects that the restaurant structure has been in existence for approximately 60 years, during which time it has been operated as a varying succession of food-service establishments, including an ice cream stand, a pizza stand and a luncheonette, and has become something of a historic icon in Town of Smithtown, if not Long Island, history. In 1950 the zoning for the parcel was changed from commercial to residential, rendering the restaurant use non-conforming.

The record reflects that originally, the restaurant structure consisted of a 12' x 20' foot enclosed stand with covered front and side porches, and that patrons consumed their comestibles in their vehicles or at outdoor tables provided for their use. The record further reflects that during the 1940's, the original structure's two 160-square-foot covered side porches were enclosed to create an indoor dining area in addition to the outdoor dining that was available on the 8' x 28' covered front porch and the area adjoining the structure. It appears that historically the outdoor dining area was

located between the restaurant and the residence; however, the record reflects that sometime between 1992 and 1994 the outdoor dining area was relocated to an 810-square-foot area on the opposite side of the restaurant, away from both petitioners' residence and neighboring residences. At the time of the relocation, the dining area was paved with concrete, and a 180-square-foot wooden deck with stairs was constructed to provide access to the concrete dining area from the covered front porch.

At the time petitioners purchased the restaurant in 2002, the reconfigured outdoor dining area and deck had been in existence, apparently without incident or complaint, for approximately ten years. In 2004, however, petitioners were served with several notices of Code violations predicated on neighbor complaints about traffic and parking. It appears that under petitioners' stewardship, the scope and quality of the Clam Bar's menu offerings had been enhanced, resulting in increased patronage. In response to the additional traffic and parked vehicles on the adjoining roadways which became byproducts of the restaurant's success, community opposition to the Clam Bar among a small but vocal group of neighboring residents fulminated. Although petitioners had apparently relied on letters-in-lieu issued by the Town Building Department in 1973, 1986 and 2000 to establish the legality of the restaurant operation as a prior non-conforming use, it appears that a certificate of existing use ("CEU") for the restaurant had never been obtained as required by a 1973 amendment to the Code of the Town of Smithtown (the "Code").

Accordingly, in 2004, petitioners applied to the respondent Board of Zoning Appeals for a CEU for the restaurant. After a public hearing, the Board granted a CEU for an "open-front" restaurant,¹ limited to the dimensions of the restaurant structure as it existed before the side porches were enclosed (12' x 20'), and denied a CEU as to the 810-square-foot concrete patio, the 180-square-foot wooden deck, an outside bar and arbor that had been added by petitioners in 2004, and as to maintenance of the dumpster in its present location.

Petitioners thereupon commenced an Article 78 proceeding, under Index No. 28624/2004, which was resolved when the Board agreed to grant petitioners a rehearing. Petitioners thereupon submitted a new application which requested that the Board grant a CEU for a preexisting non-conforming use as to the existing restaurant and patio with indoor and outdoor dining, or, in the alternative, grant variances as to any uses/structures deemed by the Board not to be entitled to a CEU. In addition, petitioners sought permission to construct a proposed 440-square-foot addition to the rear of the restaurant building, together with construction of additional parking and accessory uses.

On December 13, 2005, after a public hearing, the Board issued a decision that granted a CEU as to an "open-front" restaurant building measuring 560 square feet with an 8' x 28' foot covered front porch, and granted a variance to expand a legal nonconforming use and legalize an existing 224-square-foot one-story rear addition. The Board denied petitioners' application as to the

¹ Prior to 1973, the Code did not differentiate between different types of restaurants. In 1973 the Code was amended to include the definition of an "open-front restaurant," which is "[a]n eating establishment where food and/or beverages are purchased at open counters and may be consumed on the premises outside the building, whether in parked vehicles or seated at outdoor tables or counters." The definition of "restaurant" was amended to provide as follows: "An eating establishment in which food and/or beverages are prepared and served to patrons seated at tables and/or counters inside the building. The term 'restaurant' shall not include the types of eating or drinking establishments commonly known as 'open-front restaurants,' 'curb-service roadside stands,' 'counter-service restaurants' or establishments of the type at which food and/or beverages are consumed on the premises outside the building, nor shall it include a tavern, bar, inn, discotheque or any other similar use." Code §322-3 [Amended 6-26-1973].

310-square-foot concrete patio and 180-square-foot wood deck, outside bar and arbor, outside storage and accessory uses along the north side of the structure, and the dumpster in its present location. The Board furthermore restricted outdoor dining to a 300-square-foot area between the house and the restaurant. Finally, the Board denied petitioners' application to construct an addition to the restaurant building. Petitioners thereafter commenced the instant Article 78 proceeding challenging the determination to the extent that it denied petitioners' application.²

The CEU and variance granted by the Board legalized the existing 784-square-foot enclosed structure with 8' x 28' covered front porch. Implicit in that determination was the Board's acknowledgment, amply supported by the record, that the enclosure of the structure had been completed prior to the zoning change in 1950 (the date of the subsequent addition or additions to the rear of the restaurant was unclear from the record). The decision of the Board also expressly acknowledged that both indoor and outdoor dining had been a feature of the structure for decades prior to the 1950 zoning change, as testified to by numerous witnesses and as reflected by the substantial documentary and photographic evidence submitted by petitioners. The legal non-conforming use of the building as a restaurant had been recognized and acknowledged by the Town Building Department in the form of three separate letters-in-lieu issued in 1970, 1986 and 2000. The record thus abundantly demonstrated petitioners' entitlement to a certificate of existing use for the premises as a "restaurant" featuring both indoor and outdoor dining. In characterizing the structure as an "open-front restaurant," however, the Board effectively proscribed indoor dining on the premises. That result is inconsistent with the Board's grant of a CEU to the entire restaurant structure which the Board concedes has been used for indoor dining since the 1940's. In light of the foregoing, the delineation of the Clam Bar as an "open-front restaurant" is irrational, arbitrary and capricious and not supported by the record.

In addition, the Board found that both the outdoor dining that existed prior to 1950 and the construction of the concrete patio and wooden deck constituted an expansion of the prior nonconforming use. The Board specifically found Code §322-74(B), which petitioners argued governed the application (and which was the basis of the Building Department's denial of a building permit), to be inapplicable. That section provides that: "A building or structure used by a nonconforming use at the effective date of this chapter may not be reconstructed, structurally altered, restored or repaired to an extent exceeding in aggregate cost 75% of the fair market value of such building or structure, unless the use of such building or structure is changed to a conforming use." The Board ignored petitioners' argument that no permit was required for the concrete patio and that the construction of the wooden deck, although concededly done without a building permit, was a mere "structural alteration" to the restaurant building and not an expansion of the restaurant use. The decision of the Board found that "the applicants request to expand the building and use, not to reconstruct it." The Board then applied Code §322-83(C) to petitioners' alternative request for a variance legalizing the "enlargement or extension." That section authorizes the Board:

"(a) To grant a permit for the enlargement or extension of a nonconforming use or building on the lot occupied by such use or building on the effective date of this chapter, provided that:

² The testimony and evidence adduced upon the record of the original hearing were incorporated into the record of the second hearing, and the record of the original Article 78 proceeding commenced under Index No. 28624/04 is hereby incorporated into and made a part of the record of the instant proceeding.

- “(1) Such enlargement or extension was arranged, intended or designed for such nonconforming use or building on the effective date of this chapter.
- “(2) Such enlargement or extension shall not exceed in all seventy-five percent (75%) of the fair market value of such use or existing building on the effective date of this chapter.
- “(3) All parking and truck-loading requirements of Article IX are complied with.”

The Board then denied petitioners a variance legalizing the patio and deck, predicated on its finding that the existence of an outdoor dining area before the restaurant use became nonconforming does not “indicate an intention on the original owner’s behalf to expand the open-front restaurant by constructing a 150 sq. ft. deck and 810 sq. ft patio to accommodate outdoor dining.” The Board’s determination is arbitrary and capricious and unsupported by the facts or the applicable law.

In light of its acknowledgment that both indoor and outdoor dining on the premises preceded the change in zoning, the Board’s determination that the outdoor dining that existed prior to 1950 is an expansion of a nonconforming use is irrational. The nonconforming use *is* that of a restaurant with both indoor and outdoor dining. Accordingly, the pre-1950 use of the property for outdoor dining is a nonconforming use for which a CEU should have been granted. The mere relocation of the outdoor dining from one side of the building to the other is not an “expansion” but a continuation of the use, and the fact that the use is presently being conducted on a concrete surface on the other side of the building does not in itself enlarge or extend the use. *See, Matter of Tartan Oil Corp. v. Board of Zoning Appeals of the Town of Brookhaven*, 213 A.D.2d 486, 623 N.Y.S.2d 902 (2d Dept. 1995). In addition, no evidence or testimony was adduced upon the hearing as to the size of the original outdoor dining area, nor was it established as a matter of fact that outdoor dining took place exclusively on the covered front porch and in the area between the restaurant and the residence. Accordingly, there is no support in the record for the Board’s determination to restrict outdoor dining to a 300-square-foot area between the restaurant and the residence – an area that has not been used for outdoor dining for nearly 15 years, is closer to the complaining neighbors than the current outdoor dining area, and that is currently bisected by a fence.

Moreover, it is well established that “a mere increase in the volume or intensity of [a nonconforming use] is not necessarily an extension or enlargement of such use...In order to effectuate an impermissible extension or enlargement, there must be a change in volume or intensity which results in a variation or alteration of the specific type of use.” *Incorporated Village of Laurel Hollow v. Owen*, 247 A.D.2d 585, 669 N.Y.S.2d 222 (2d Dept. 1998). The Board expressly conceded that an increase in the number of seats provided for outdoor dining does not constitute an expansion of the use. Accordingly, the fact that petitioners (or their predecessors in interest) may have added additional outdoor tables does not impermissibly expand the use.

The construction by petitioners’ predecessors in interest of a wooden deck connecting the front porch to the patio area is also not an “expansion” of the use because the deck is not used for outdoor dining but merely to provide access from the restaurant building to the patio. The Court is constrained to agree with petitioners that the construction of the deck at most constituted a “structural alteration” to the building to which the deck is annexed, and that the applicable Code provision is §322-74(B). Accordingly, the Board was required to consider the cost of the

construction in relation to the fair market value of the restaurant. Although no specific evidence was presented by petitioners as to the cost of the construction of the patio and deck, it is inconceivable that the cost was in excess of 75% of the fair market value of the restaurant as testified to by petitioners' expert.

The record establishes that the relocation of the outdoor dining area to the concrete patio, and the construction of a wooden deck to provide access to the patio, is an accessory use necessary and incidental to petitioners' continued use of the premises as a restaurant with outdoor dining, and does not increase the degree of non-conformity. In light of the foregoing, the Board should have granted so much of petitioners' application as sought to legalize the use of the patio and deck for outdoor dining and its failure to do so was arbitrary and capricious.

As to petitioners' request to construct a 440-foot addition to the restaurant building, the Board properly denied petitioners' application. The record reflects that the purpose of the proposed construction is to enable petitioners to operate the restaurant on a year-round, rather than a seasonal, basis. That is a significant change from the historical use, which is principally that of a seasonal restaurant emphasizing outdoor dining, and does constitute an expansion of the use. Accordingly, the Board properly applied Code §322-83(C) to find that such an expansion was never intended. Although the test that the Board applied improperly used square footage rather than the fair market value standard delineated in the Code, the result is proper in light of the public policy that limits expansion and seeks eventual elimination of all nonconforming uses. *Matter of Offshore Restaurant Corp. v. Linden*, 30 N.Y.2d 160, 331 N.Y.S.2d 397 (1972). Moreover, petitioners did not meet the criteria of Town Law §267-b for a use variance to expand a nonconforming use.

The Board also granted a variance to permit outdoor storage of a dumpster, but conditioned approval on the dumpster's being relocated to within 30 feet of North Country Road and at least 50 feet from the side lot line and Pia Boulevard. The effect of the Board's decision is to require petitioners to locate the dumpster in the existing parking lot which will reduce the amount of available parking. This decision was apparently predicated solely on the Board's otherwise unexplained determination that "[t]he variance to permit a dumpster behind the residence will have an impact on the surrounding neighborhood." In light of the detrimental impact on the petitioners, who will have to sacrifice existing parking spaces for which a certificate of existing use has been granted, this determination is arbitrary and capricious and not supported by the record.

In light of all of the foregoing, the determination of the Board is vacated and annulled to the extent that the Board is directed to grant petitioners a certificate of existing use for a restaurant with indoor and outdoor dining, to approve the concrete patio and wooden deck as lawful accessory uses of the restaurant use, and to approve the location of the dumpster in its existing location; and the matter is remitted to the Board for further proceedings consistent with this decision.

Petitioners are directed to serve a copy of this decision on respondents.

Dated: December 19, 2007

RONALD J. BAISLEY, JR.

J.S.C.