

<b>Matter of Ehrlich v Incorporated VII. of Sea Cliff</b>
2008 NY Slip Op 32407(U)
July 24, 2008
Supreme Court, Nassau County
Docket Number: 2697-07/
Judge: Joseph P. Spinola
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**SHORT FORM ORDER**  
SUPREME COURT, STATE OF NEW YORK  
COUNTY OF NASSAU

***ACTION #1***  
**Trial/IAS Part 19**  
**Index No. 07-22697**  
**Sequence No. 01**  
**Submit Date 3/28/07**

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**In the Matter of the Application of**

**ROBERT EHRLICH, 100 ROSLYN AVENUE, LLC,**  
**and SEA CLIFF COFFEE COMPANY, INC.,**

Petitioners,

- against -

**THE INCORPORATED VILLAGE OF SEA CLIFF,**  
**EILEEN KRIEB as Mayor of the Village of Sea cliff**  
**and as form Mayor of the Village of Sea Cliff,**  
**CLAUDIA MOYNE, as former Mayor of the Village of**  
**Sea Cliff, RICHARD A. SIEGEL, as Village Attorney for the**  
**Village of Sea Cliff, THE BOARD OF TRUSTEES FOR**  
**THE INCORPORATED VILLAGE OF SEA CLIFF,**  
**PETER HAYES, ROBERT HAIM and ELENA**  
**VILLAFANE, as former and current Members of the Board**  
**of Trustees of the Village of Sea Cliff, PAUL MARCHESE,**  
**as former Trustee of the Village of Sea Cliff, the ZONING**  
**BOARD OF APPEALS OF THE INCORPORATED**  
**VILLAGE OF SEA CLIFF, GEORGE BEVAD,**  
**THOMAS POWELL, JOHN BRADY, DINA EPSTEIN,**  
**JAMES O'DONNELL, and PATRICIA HARRIGAN,**  
**constituting current and former members of the Board of**  
**the Zoning Board of Appeals, the PLANNING BOARD**  
**OF THE INCORPORATED VILLAGE OF SEA CLIFF,**  
**JOHN G. NAGY, FRED EDER, GERARD IZZO,**  
**NORMAN PARSONS and LAURIE MARTONE,**  
**constituting the current and/or former members**  
**of the Planning Board of the Incorporated Village of Sea**  
**Cliff, and DAVID DERIENZA and JEFFREY MONGNO,**  
**as current and former Building Inspectors for the**  
**Incorporated Village of Sea Cliff,**

Respondents

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**INCORPORATED VILLAGE OF SEA CLIFF,**

Plaintiff,

**ACTION #2  
Trial/IAS Part 19  
Sequence No. 01  
Index No. 07-22177  
Submit Date 3/28/07**

- against -

**100 ROSLYN AVENUE, LLC and  
SEA CLIFF COFFEE COMPANY, INC.,**

Defendants  
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**The following papers read on these motions:**

- Notice of Motion/Order to Show Cause..... X**
- Cross-Motions..... X**
- Answering Affidavits.....**
- Replying Affidavits..... X**

**PRESENT: HON. JOSEPH P. SPINOLA**

**PRELIMINARY STATEMENT**

These proceedings concern a fractious dispute between the owner of property within the Village of Sea Cliff and the Zoning Board of Appeals. In Action No. 1 the property owner (Ehrlich) seeks a judgment under Article 78 of the Civil Practice Law and Rules ordering the Respondents to issue a permanent and unconditional Certificate of Occupancy for the premises located at 100 Roslyn Avenue; granting his March 2002 application in its entirety; damages in the amount of \$100,000 on causes of action Fourth-Ninth; and counsel fees associated with the special proceeding.

Action No. 2 by the Village of Sea Cliff seeks a preliminary injunction prohibiting Ehrlich from operating a sushi restaurant; consolidation of the action with Action No. 1; and dismissal of the Article 78 petition in its entirety.

## BACKGROUND

Ehrlich is the beneficial owner of 100 Roslyn Avenue, Sea Cliff, New York, known as Section 21, Block 150, Lots 662, 625, 652 - 654 on the Nassau County Tax Map.<sup>1</sup> At the time of acquisition, the premises were burdened by a restrictive covenant dated April 7, 1989 between Ehrlich's Grantor and the Incorporated Village of Sea Cliff.<sup>2</sup> In return for the grant of a permanent Certificate of Occupancy for the premises, it was agreed, *inter alia*, that "... no business shall occupy the front building which involves or engages in the cooking or preparation of food for consumption on or off the premises".

After installing an unrelated business in the rear of the two buildings on the premises, he applied to the Village for permission to operate a coffee bar in the front building. His intention was to operate Monday-Friday from 7:00 A.M.-10:30 P.M., and on weekends from 7:00 A.M.-11:00 P.M. Located in a Business "A" District, a restaurant is permitted by special permit.<sup>3</sup> On November 6, 2001 he submitted an application to the Board of Appeals for a modification of its prior restriction.<sup>4</sup> The Board rendered a written decision after a meeting on February 26, 2002, same which was forwarded to Ehrlich under cover of letter dated February 28, 2002.<sup>5</sup>

The Board's decision granted the application for special permit, albeit with significant restrictions.<sup>6</sup> By Application dated March 2, 2002 Ehrlich sought relief from them. Specifically, he requested longer hours (7:00 A.M. - 10:30 P.M. Monday-Saturday, 7:00 A.M.- :00 P.M. on Sundays); outdoor seating with 3 tables, 2 seats each; a lounge area with toaster oven and microwave cooking; 1-person office in building; and delivery by tractor trailer once per month.<sup>7</sup>

Hearings on the application were conducted on June 18 and July 16, 2002, and February 24, March 30, and May 24, 2004. In the interim, Ehrlich obtained a Draft Environmental Impact Statement (DEIS) as required by the Board. The Village Planning Board issued a negative finding under SEQRA (State Environmental Quality Review

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<sup>1</sup> Exh. "H" to Motion in Action No. 2.

<sup>2</sup> Exh. "C" to Motion in Action No. 2.

<sup>3</sup> Petition of Ehrlich at ¶ 41.

<sup>4</sup> Exh. "I" to Opposition to Petition.

<sup>5</sup> Exh. "J" to Opposition to Petition.

<sup>6</sup> *Id.*

<sup>7</sup> Exh. "K" to Opposition to Petition.

Act).<sup>8</sup> The application for outdoor seating and a once per month truck delivery were withdrawn.<sup>9</sup> The Zoning Board of Appeals rendered its decision on December 6, 2004.<sup>10</sup>

After summarizing the history of the application process, the Board granted the application for a special permit and variances to occupy approximately 810 square feet divided into a coffee bar, lounge, and office and permitting the preparation of foods by microwave or toaster oven, without the use of a stove, oven or similar apparatus requiring the installation of an exhaust fan. The permitted hours of operation were from 7:00 A.M. to 10:30 P.M. Monday - Saturday, and from 7:00 A.M. to 5:00 P.M. on Sundays. A total of 17 off-street parking spaces and 1 loading space were required. Occasional live music in the lounge area, not requiring a cabaret license, and not audible beyond the interior of the premises was also permitted. There were 10 specified conditions, and the Special Permit was to expire in 3 years, subject to renewal upon further application.<sup>11</sup>

Action No. 2, for injunctive relief pursuant to Village Law § 7-714, does not appreciably disagree with the foregoing factual background. Rather, it is based upon the facts that the 3-year Special Permit extended, in December 2004, has expired, no application for a renewal has been made, and Ehrlich has expanded his operation to a full-scale restaurant, with on-site cooking, and service of alcohol, despite the lack of approval from the State Division of Alcohol Beverage Control.<sup>12</sup> The factual basis for the opposition is contained in the Affidavit of Eileen Krieb in Support of the Motion for Preliminary Injunction and in Opposition to the Article 78 Petition.

The essence of the Village's position is that Ehrlich received a 3-year Special Permit to operate a 28-seat coffee shop, with a specific prohibition against cooking on the premises. The current use of the premises also violates the pre-existing April 7, 1989 Restrictive Covenant which Ehrlich took title subject to when he purchased the premises. Among the other representations in the Krieb affidavit are that the operation of a 70-seat restaurant obstructs traffic, inhibits the ingress and egress of fire trucks from the nearby firehouse, includes unauthorized outdoor seating, includes cooking in commercial-grade ovens, and involves the dispensing of alcohol to patrons without the requisite license.

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<sup>8</sup> Exh. "S" to Opposition to Petition at pp. 8, 9.

<sup>9</sup> *Id.* at pp. 7, 8.

<sup>10</sup> Exh. "L" to Opposition to Petition.

<sup>11</sup> *Id.* at pp. 16 — 18.

<sup>12</sup> Exh. "W" to Affidavit in Opposition.

## DISCUSSION

Ehrlich's Article 78 Petition is a compendium of his grievances against the Village, its present and former Trustees, employees and counsel. He demands issuance of a permanent Certificate of Occupancy, the grant of his March 2002 application, and monetary damages on the Fourth through Ninth Causes of Action.

The scope of review is whether the Zoning Board of Appeals of the Village of Sea Cliff abused its discretion, as a matter of law, when it acted upon the Petitioner's requests. *Matter of Pecoraro v. Town of Hempstead*, 2 N.Y.3d 608, 610 (2004). The authority of Courts to review decisions of local zoning boards is a limited one. They "... may set aside a zoning board determination only where the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure". *Id.* at 613. (Internal citations omitted). A determination of a zoning board should be sustained if it has a rational basis and is supported by substantial evidence. *Id.* The rationale for the limited role of the Courts was stated in *Matter of Cohen v. Kern*, 41 N.Y.2d 591, 599 (1977). It is local officials, more familiar with their community, who are in a better position to determine sensitive planning decisions affecting their community. Courts should refrain from substituting their own judgment for those of local officials, provided that they are reasoned, and are not unreasonable or arbitrary. *Id.*

This case is somewhat of an oddity in that the Petitioner actually received essentially everything requested from the Board. He requested expanded hours, the right to serve heated, but not cooked, food, and occasional musical entertainment, all of which were granted. The Special Permit was limited to three years, and required a request for renewal not earlier than ninety days from its expiration. The Court concludes that the determination and conditions imposed by the Board in this respect were reasonable. There is no evidence that the Petitioner applied for an extension. The Court is not in a position to direct the Board to issue a permanent Certificate of Occupancy when it appears that the Petitioner neither applied for one, nor even took the administrative step of requesting an extension of the existing permit. The Petitioner has not exhausted his administrative remedies. *Adar v. Village of Lake Success*, 160 A.D.2d 829 (2d Dept. 1990).

In *Adar* the Plaintiffs sought relief some three years after the Board of Zoning Appeals denied the application for a variance for the requirement that each one-family home have a garage suitable to accommodate an automobile. The Plaintiffs' predecessor in interest had converted the garage to a den, without benefit of a variance or permit. Here the Petitioners obtained a variance by Decision dated December 6, 2004. Not surprisingly, there was no challenge to the determination, which essentially favored the Petitioners.

Without further application for modification or for a variance to conduct a full-

service restaurant, the Petitioners request the Court to grant them such a benefit. It is far beyond the authority of the Court to determine zoning issues in the Village of Sea Cliff, or anywhere else. The Petitioners must administratively apply for the relief they seek. If denied by the Building Department, they may apply to the Zoning Board of Appeals, and if unsuccessful in that forum, they are entitled to pursue Article 78 relief if they believe that the Board acted contrary to law.

The Petitioner also seeks a directive from the Court that his March 2002 application should be granted in all respects. The Board's decision on that application was rendered in December 2004. Village Law § 179-b limits the time within which an Article 78 proceeding can be brought to 30 days from the date the determination sought to be reviewed is filed with the Village Clerk. This proceeding was commenced by filing in December 2007, far beyond the period of limitations.

The Petitioners' fundamental complaint appears to be that they were singled out for special scrutiny as a result of a conspiracy among all or some of the Respondents. For these actions they demand damages of not less than \$100,000 on each of the Fourth-Ninth Causes of Action. The nature of the claims in each of them are as follows:

FOURTH: Respondent Marchese tainted the procedures involving the March 2002 application by failing to recuse himself, and exerting undue influence over the other Respondents;

FIFTH: Respondents relied on their own self-serving determinations in requiring the Petitioners to prepare a DEIS and SEQRA;

SIXTH: Respondents legislative policy and acts described in the Petition were "unreasonable, irrational, arbitrary and capricious, and do not substantially advance a legitimate government interest";

SEVENTH: Respondents' requirement that Petitioner prepare a DEIS and submit to SEQRA review was "merely a ruse", and imposed for the sole reason of imposing costs and burdensome procedures upon the Petitioner;

EIGHTH: Respondents imposition of DEIS and SEQRA requirements were not motivated by environmental concerns, since they were not required of other applicants, but rather as a ruse to impose costs and inconvenience on the Petitioner;

NINTH: Respondents abused their discretion by permitting the process of acting on Petitioners' application to be tainted by the Respondent Marchese, and others acting at his behest or direction.

Aside from the fact that each of the foregoing claims are time barred, none of them

state a claim upon which relief can be granted. Marchese lived across the street from the subject premises and obviously had strong opposition to the application. But there is no evidence that he negatively impacted the Board in an inappropriate fashion. Again, the Board granted the application. In addition, it is the Board's obligation to make its own determination under the State Environmental Quality Review Act as to whether or not a further inquiry is required. This Court would have to conclude, as a matter of law, that the Zoning Board of Appeals abused its discretion by requiring the Petitioner to submit to a draft environmental impact study. Whether or not the Board has had similar applications in which they did not do so is not the issue. The exercise of discretion in favor of other applicants does not entitle the Petitioner in this action to the same relief. *Larkin Co. v. Schwab*, 242 N.Y. 330 (1926). The issue, rather, is was it unreasonable for them to do so in this case. The Court is not prepared to say that it was.

New York State's Environmental Quality Review Act is found in N.Y. Environmental Conservation Law § 8-0101, *et seq.*, and the regulations adopted pursuant to the statute are set forth in New York Code of Rules and Regulations § 617 (Part 617). Government agencies are required to look carefully at proposed development, and only if it clearly appears that no adverse impact could result, is it authorized to issue a "negative declaration". If any adverse impact could occur a draft environmental impact statement is required. Given issues such as the adequacy of septic systems, parking, and traffic congestion in the vicinity of a firehouse, it would be impossible to conclude that the determination that there was a possibility of an adverse impact was arbitrary or capricious.

In their affirmation in opposition to the motion to dismiss the Article 78 proceeding, the Petitioners raise legal challenges to both the statutory authority of the Zoning Board of Appeals to issue special permits and the 1989 restrictive covenant which precludes cooking on the premises. With respect to the Village of Sea Cliff Zoning Ordinance, they claim that § 138-1402 is overly broad, and grants unfettered authority, unlimited by the language of Village Law § 7-725(b), which provides as follows:

**§ 7-725-b Approval of special use permits**

1. Definition of special use permit. As used in this section the term "special use permit" shall mean an authorization of a particular land use which is permitted in a zoning local law, subject to requirements imposed by such local law to assure that the proposed use is in harmony with such local law and will not adversely affect the neighborhood if such requirements are met.

2. Approval of special use permits. The village board of trustees may, as part of a zoning local law, authorize the

planning board or such other administrative body that it shall designate to grant special use permits as set forth in such local law.

...

4. Conditions attached to the issuance of special use permits. The authorized board shall have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed special use permit. Upon its granting of said special use permit, any such conditions must be met in connection with the issuance of permits by applicable enforcement agents or officers of the village.

The language of Village Zoning Law § 138-1402 is that "(i)n granting a special permit, the Zoning Board of Appeals, in its sole discretion, shall have the power to impose whatever conditions it deems necessary in order to effectuate the purposes of this chapter". Defendant claims that this language conflicts with the words "reasonable conditions and restrictions as are directly related to and incident to the proposed special permit".

Action No. 2 seeks consolidation of both actions. The Court notes a signed but undated Stipulation Consolidating Actions Nos. 1 and 2. Consolidation or joint trials are generally preferred in the interest of judicial economy. Neither party is entitled to a trial by jury on equitable actions. The claims for monetary relief by Petitioners in Action No. 1 are simply an addendum to his requests for equitable relief in the form of a permanent Certificate of Occupancy. The Respondents in Action No. 1 and the Plaintiff in Action No. 2 seek a dismissal of the Article 78 proceeding and a temporary injunction prohibiting the use of the premises as a full-service restaurant, with cooking on the premises and the service of alcohol. In fact, they seek an injunction prohibiting the use as a restaurant in any capacity.

Civil Practice Law and Rules § 630 sets forth the grounds for granting a preliminary injunction. It provides in pertinent part as follows:

**§ 6301. Grounds for preliminary injunction and temporary restraining order**

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation

of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff . . . .

During the course of a trial in United States District Court, in connection with another matter between the parties, Mr. Ehrlich testified that he has a commercial stove, oven and hooded vent leading to the roof for cooking at the subject premises.<sup>13</sup> Under these circumstances, there appears to be no factual controversy that the premises are operating contrary to the permit issued by the Village Zoning Board of Appeals. Nor does it appear that the Defendant in Action No. 2 has filed an application for the extension of the permit, which expired on December 6, 2007. The Defendants are operating a restaurant without a permit and in violation of the restrictive covenant between the Defendants' predecessor in interest and the Village of Sea Cliff.

The Defendants are preliminarily enjoined from occupying the premises in a manner contrary to the restrictions and limitations set forth in the Decision of the Sea Cliff Zoning Board of Appeals dated December 6, 2004, and filed in the Office of the Village Clerk on December 7, 2004.

The Court has considered the position taken by the Defendants in Action No. 2 that the Village of Sea Cliff is without authority to regulate zoning in the Village. The claim is that the enabling statute conferring upon the Zoning Board of Appeals the authority to hear and determine special permit applications is invalid. The basis for this position is that the language of the Village Zoning Law § 138-1402 confers unfettered discretion on the Board, and the language goes beyond the authorization contained in Village Law § 7-725-b(4). The latter statute provides, in part, as follows:

**§ 7-725-b Approval of special use permits**

1. Definition of special use permit. As used in this section the term "special use permit" shall mean an authorization of a particular land use which is permitted in a zoning local law, subject to requirements imposed by such local law to assure that the proposed use is in harmony with such local law and will not adversely affect the neighborhood if such requirements are met.

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<sup>13</sup> Exh. "X" to Affidavit in Opposition to Article 78 Petition.

2. Approval of special use permits. The village board of trustees may, as part of a zoning local law, authorize the planning board or such other administrative body that it shall designate to grant special use permits as set forth in such local law.

...

4. Conditions attached to the issuance of special use permits. The authorized board shall have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed special use permit. Upon its granting of said special use permit, any such conditions must be met in connection with the issuance of permits by applicable enforcement agents or officers of the village.

The language of Village Zoning Law § 138-1402 is that "(i)n granting a special permit, the Zoning Board of Appeals, in its sole discretion, shall have the power to impose whatever conditions it deems necessary in order to effectuate the purposes of this chapter". Defendant claims that this language conflicts with the words "reasonable conditions and restrictions as are directly related to and incident to the proposed special permit".

"... as a general proposition of law, a municipality may properly enact a zoning ordinance authorizing it to impose reasonable conditions in granting a special use permit". *Matter of Summit School v. Neugent*, 82 A.D.2d 463, 466 (2d Dept. 1981). In so doing, however, those charged with enforcing zoning ordinances must not cross the line between the use of real property and the details of the operation of the facility. *Id.*

In Summit the Court was dealing with a private school enterprise, dealing with learning disabled and handicapped children. The Zoning Board of Appeals granted a variance to Summit for the operation of a day and/or resident students, which variance contained 14 conditions subsequent. Summit agreed in writing to comply with the conditions.

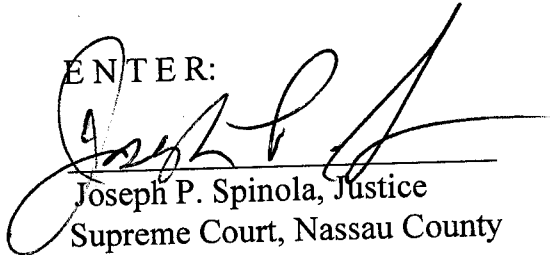
The Court determined that Summit may be precluded from protesting the conditions by virtue of a prior waiver of a statutory or constitutional right to challenge the official action of the municipality with respect to zoning, but such waiver is ineffectual where the right concerns a matter of public policy. *Id.* at 468, citing *Brous v. Town of Hempstead*, 272 A.D. 31 (2d Dept. 1947). Whether or not Ehrlich's predecessor in title's

waiver to conduct cooking on the premises is unenforceable because it involves public policy or public morals is certainly nebulous.

But, at this juncture, the Court need not decide this issue as to the validity of the Ordinance *vis-a-vis* the Village Law. Ehrlich's right to conduct any type of restaurant, coffee bar or otherwise, expired on December 6, 2007. He is currently functioning without any authority to do so. He is free to make whatever further application to the Village that he desires, for a coffee shop or full-service restaurant. If the Board declines to grant the requested relief, he is entitled to pursue his remedy within 30 days of the denial. Having not done so with respect to the December 2004 decision, the propriety of the Board's decision is not before the Court.

Because the special use permit has expired, and it does not appear that an application for extension or modification was made within the 90-day window for doing so, the operation of the premises as a restaurant of any type violates the Village Ordinance and the Petitioners in Action # 1, Defendants in Action # 2 are hereby enjoined from operating as a restaurant of any type at the subject premises.

This constitutes the Decision and Order of the Court.

ENTER:  
  
Joseph P. Spinola, Justice  
Supreme Court, Nassau County

Dated: July 24, 2008  
Mineola, NY

**ENTERED**

AUG 12 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**