

**Matter of American Chophouse Enter., LLC v
Town of Huntington**

2008 NY Slip Op 32902(U)

September 30, 2008

Supreme Court, Suffolk County

Docket Number: 18049/2007

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 18049/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

In the Matter of the Application of

AMERICAN CHOPHOUSE ENTERPRISES,
 LLC, and PORT DOCK AND STONE CORP.,

Petitioners,

-against-

for a Judgment Pursuant to Article 78 of the Civil
 Practice Law and Rules and other relief against

THE TOWN OF HUNTINGTON, PLANNING
 BOARD OF THE TOWN OF HUNTINGTON,
 PAUL MANDELIK, JANE DEVINE,
 MITCHELL SOMMER, AVRUM ROSEN,
 LORRAINE SANTOIANNI, STEVEN
 SCHNITTMAN and LYNN HEALY each as
 Members of the PLANNING BOARD OF THE
 TOWN OF HUNTINGTON,

Respondents.

ORIG. RETURN DATE: MAY 8, 2008
 FINAL SUBMISSION DATE: MAY 29, 2008
 MTN. SEQ. #: 006
 MOTION: MG

ORIG. RETURN DATE: JUNE 26, 2008
 FINAL SUBMISSION DATE: JULY 10, 2008
 MTN. SEQ. #: 007
 MOTION: MG

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Upon the following papers numbered 1 to 8 read in this _____
ARTICLE 78 PROCEEDING

Notice of Amended Verified Petition and supporting papers 1-3; Verified Answer to Amended;
 Petition 4; Notice of Motion and supporting papers 5-7; Memorandum of Law 8; it is,

ORDERED that this amended verified petition for a judgment,
 pursuant to Article 78 of the CPLR: (a) vacating "Condition 5" of a resolution filed
 by respondent PLANNING BOARD OF THE TOWN OF HUNTINGTON
 ("Planning Board") with the Town Clerk on May 15, 2007 ("Resolution"), which
 seeks to exact two public access easements as a condition of approving an

amended site plan that petitioner AMERICAN CHOPHOUSE ENTERPRISES, LLC ("American") had submitted for approval; (b) upon such vacatur, remanding the matter to the Planning Board for the filing of a resolution without Condition 5, on the ground that such condition was arbitrary, capricious, an abuse of discretion, and contrary to law; and (c) awarding costs and disbursements of this proceeding to petitioners, is hereby **GRANTED** to the extent provided hereinafter. Respondents have filed a verified answer to the amended verified petition; and it is further

ORDERED that this motion by petitioners for an Order, pursuant to CPLR 2221 (d), granting leave to reargue a portion of this Court's decision and Order dated April 14, 2008, which denied American's motion for an Order compelling respondent TOWN OF HUNTINGTON ("Town") to issue building permits, schedule inspections, and issue certificates of occupancy, is hereby **GRANTED**. Upon reargument, petitioners' motion is **GRANTED** to the extent provided hereinafter. The Court notes that respondents have not interposed opposition to this application.

The factual and procedural history of this Article 78 proceeding was recited in detail in this Court's Order dated April 14, 2008, as well as in the Order of even date issued by this Court in a related action entitled, *Town of Huntington and Huntington Sewer District v. Port Dock and Stone Corp., and American Chophouse Enterprises, LLC a/k/a Prime Restaurant*, under index number 26493/2007. The gravamen of petitioners' argument is that the Town is unreasonably refusing to issue a building permit and certificate of occupancy for American's outdoor porch/deck/patio, and is refusing to process two other building permit applications of American's in connection with American's cabana and walk-in freezer, as a result of American's refusal to accede to the Town's request with respect to the two easements.

Within the aforementioned Order in this matter, the Court directed American to re-notice the petition, pursuant to CPLR 7804 (f), adding PORT DOCK AND STONE CORP. ("PDSC") as an additional party, and directed respondents to serve and file an answer to the petition within five days after service of the Order with notice of entry. American has now served a notice of amended verified petition, adding PDSC as an additional petitioner, and respondents have filed a verified answer to the amended verified petition.

Petitioners allege that the Town is improperly trying to exact two easements from petitioners' property as a condition of approval of petitioners' site plan for an unrelated porch/deck/patio area and cabana, in violation of Town Law, controlling case law, and the parties' Stipulation dated October 31, 2006 ("Stipulation"). Petitioners contend that the Town cannot condition site plan approval on land donation for public recreational purposes, and that pursuant to Town Law § 274-a (4), any conditions imposed must be directly related to and incidental to a proposed site plan. Petitioners argue that the Town's action of imposing "Condition 5" on petitioners in the May 9, 2007 Resolution passed by the Planning Board was irrational, arbitrary, capricious, *ultra vires*, contrary to law, and in violation of the parties' Stipulation. Petitioners further argue that the second proposed easement sought across petitioners' property would violate a parking variance granted by the Zoning Board of Appeals on or about January 19, 2006. Finally, petitioners assert that pursuant to the subject lease agreement, American has no authority to grant such easements in the property.

Petitioners have also filed the instant motion to reargue a portion of this Court's Order dated April 14, 2008, which, among other things, denied American's motion for an Order compelling respondent Town to issue building permits, schedule inspections, and issue certificates of occupancy. As discussed, respondents have not filed opposition to this application. Specifically, American had sought an Order directing the Town to: (1) issue a certain building permit under identification number 04-10-07-18, in connection with American's outdoor porch/deck/patio area, to conduct site inspections of the work promptly thereafter, and to issue a certificate of occupancy for the improvements made pursuant to such permit; and (2) process with diligence certain building permit applications bearing identification numbers 04-10-07-19, in connection with American's cabana, and 04-10-07-20, in connection with American's walk-in freezer.

On American's prior motion to compel, the Court found that American, by notice of motion, sought what was tantamount to a writ of mandamus to compel the Town to act, although the motion was not denominated as such. The Court noted that proceedings in the nature of mandamus to compel are authorized pursuant to Article 78 (see CPLR 7801; 7803 [1]). Therefore, the Court held that an Article 78 proceeding in the nature of mandamus to compel the issuance of building permits and a certificate of occupancy, with the notice requirements attendant thereto (see CPLR 7804 [c]), would be the proper procedure to obtain such relief. The Court cited to American's original notice of

verified petition, which merely sought a judgment vacating "Condition 5" of the Resolution and remanding the matter to the Planning Board for the filing of a resolution without "Condition 5," with no mention of mandamus to compel.

In the instant application to reargue, petitioners allege that the original petition included in its prayer for relief a judgment, "directing the issuance of the requested building permits and certificate of occupancy forthwith." The Court was mindful of such language in the petition, but denied American's motion based upon the relief sought in the notice of verified petition, which was devoid of any such language.

Notwithstanding the foregoing, the Court finds that petitioners have filed this petition seeking, among other things, a judgment directing the issuance of the requested building permits and certificate of occupancy, and that respondents are on notice of such relief requested, having been served with a verified petition and an amended verified petition, and having served opposition to American's original motion to compel.

Petitioners have informed the Court that on May 30, 2008, the Town released to American two (porch/deck/patio area and walk-in freezer) of the three building permits sought. As such, the only relief remaining concerns the building permit application bearing identification numbers 04-10-07-19, in connection with American's cabana.

In the related action referenced hereinabove, the Town seeks, among other things, a permanent injunction enjoining American from utilizing its outside deck and terrace located at the rear of the premises as a restaurant and/or bar. By Order dated April 14, 2008, this Court denied the Town's application for a preliminary injunction, finding:

[T]he Town's affiants make conclusory allegations that the violations of the Town Code cause risks to the health, safety and welfare of the public, without specifying a single deficiency in the engineering or construction of the project, or any indication whatsoever of substandard materials or workmanship which violate any applicable building, fire or health department standard or requirement. In addition, the Town has failed to make any specific objections to the

applications, plans, drawings, and other information submitted to the Town by American and its construction professionals in attempts to secure the necessary permits and certificates of occupancy. American alleges it complied with all requirements, demands, and additional demands imposed by the Town, and notwithstanding, the Town has failed to issue the necessary permits. The Court notes that American alleged that the Town's Plans Examiner "signed off" on American's drawings and submissions pertaining to the outdoor decks, fire pit protection, and structure and awning. The Town has not refuted this allegation.

In addition, American has alleged that the subcontractors who performed the electrical, plumbing, concrete, and other work separately obtained approvals from the Town, the Town inspected the work, and the construction is of high quality, structurally sound, and built to Code. Moreover, American argues that its use of the premises is within the scope of the prior, permitted use, to wit: a waterside restaurant with outdoor patio area. Again, the Town has not refuted these allegations.

Town of Huntington and Huntington Sewer District v. Port Dock and Stone Corp., and American Chophouse Enterprises, LLC a/k/a Prime Restaurant, Index No. 26493/2007, Short Form Order, April 14, 2008 (Farneti, J.), at 13-14.

In sum, the Court found that American had submitted competent proof that it complied with all of the Town's requests and demands, and that the existing construction and renovations were of high quality and built to Code. The Court further found that the Town failed to make any specific objections to the applications, plans, drawings, and other information submitted to the Town by American in attempts to obtain the necessary permits and certificates.

Mandamus to compel the performance of an official duty may only be granted where the act sought to be compelled is ministerial in nature and involves no exercise of discretion, and where the applicant has demonstrated a clear legal right thereto (*see Savastano v Prevost*, 66 NY2d 47 [1985]; *Jordan's Partners v*

Goehringer, 204 AD2d 453 [2d Dept 1994]; *Cohalan v Caputo*, 94 AD2d 742 [2d Dept 1983]). American has alleged that the Town's Plans Examiner "signed off" on American's drawings and submissions pertaining to the outdoor decks, fire pit protection, structure and awning, and the Town has not refuted that allegation. As such, the act of issuing the building permit and certificate of occupancy is now merely ministerial in nature, and petitioners have demonstrated a clear right to such relief. Therefore, under the circumstances presented, the Court finds that the building permit and certificate of occupancy is the proper subject of mandamus to compel (see e.g. *Friends Academy v Superintendent of Div. of Bldg.*, 134 AD2d 497 [2d Dept 1987]; *Filmways Communications of Syracuse, Inc. v Douglas*, 106 AD2d 185 [1985]).

In view of the foregoing, this motion by petitioners to reargue a portion of this Court's decision and Order dated April 14, 2008, which denied American's motion for an Order compelling respondent Town to issue building permits, schedule inspections, and issue certificates of occupancy, is hereby **GRANTED**. Upon reargument, petitioners' motion is **GRANTED** to the extent that respondents shall issue a building permit upon American's building permit application, bearing identification number 04-10-07-19, relative to American's cabana, schedule an inspection, and issue a certificate of occupancy within sixty (60) days of the date of this Order with notice of entry.

As discussed hereinabove, petitioners' amended verified petition herein seeks a judgment vacating "Condition 5" of the May 9, 2007 Resolution of the Planning Board, which attempts to exact two public access easements as a condition of approving American's amended site plan, and upon such vacatur, remanding the matter to the Planning Board for the filing of a resolution without Condition 5, on the ground that such condition was arbitrary, capricious, an abuse of discretion, and contrary to law. The Court notes that respondents have interposed a verified answer to the petition containing general denials, along with two objections in point of law, to wit: petitioners fail to state a cause of action, and petitioners have no cause of action against respondents.

In a proceeding under Article 78 of the CPLR when reviewing a determination of an administrative tribunal, courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence (*Pell v Board of Education*, 34 NY2d 222 [1974]; *Matter of Isaksson-Wilder v New York State Div. of Human Rights*, 43 AD3d 921 [2007]; *Allen v Bane*, 208 AD2d 721 [1994]). This approach is the same when the issue

concerns the exercise of discretion by the administrative tribunal (*Pell v Board of Education*, 34 NY2d 222, *supra*). The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious (*Gilman v N.Y. State Div. of Hous. & Cmty. Renewal*, 99 NY2d 144 [2002]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 43 AD3d 1057 [2007]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact (*Pell v Board of Education*, 34 NY2d 222, *supra*).

“Condition 5” in the May 9, 2007 Resolution seeks to exact two public access easements as a condition of approving an amended site plan that American had submitted for approval. However, pursuant to the parties’ Stipulation of October 31, 2006, American agreed to provide, as lessee of the premises, one easement to the Town approximately eight (8) feet in width along the entire waterfront area of the property, but only “at such time as the TOWN is ready to construct and open the promenade for public use along the entire eastside of Huntington Harbor. No such public access will be allowed until the TOWN actually constructs and opens the east promenade around Huntington Harbor.”

Therefore, the parties had agreed that: (1) the easement along the waterfront would be conveyed only when the Town had obtained the necessary access rights from other owners of neighboring properties, had implemented plans to construct the promenade, and had begun construction; and (2) only one easement was to be conveyed along the waterfront, not a second easement from New York Avenue across American’s property to the water for public ingress and egress. Thus, the Court finds that “Condition 5” is contrary to the spirit and intent of the parties’ Stipulation.

Moreover, the Court finds that the attempt to exact two easements from the property as a condition of approval of American’s site plan for an unrelated porch/deck/patio area and cabana, violates Town Law and controlling case law. A planning board cannot condition site plan approval on land donation for public recreational purposes (*see Kamhi v Yorktown*, 74 NY2d 423 [1989]; *Riegert Apartments Corp. v Planning Bd. of Clarkstown*, 57 NY2d 206 [1982]; *Moriarty v Planning Bd. of Sloatsburg*, 119 AD2d 188 [2d Dept 1986]). In addition, pursuant to Town Law § 274-a (4), any conditions imposed must be

“reasonable” and “directly related to and incidental to a proposed site plan” (Town Law § 274-a [4]; *Smith v Town of Mendon*, 4 NY3d 1 [2004]).

Here, the Court finds that the imposition of “Condition 5” by respondents violates the parties’ Stipulation, Town Law § 274-a (4), and controlling case law. As such, the Court holds that the decision by the Planning Board to insert “Condition 5” into the May 9, 2007 Resolution was arbitrary, capricious, and without a rational basis in fact and law.

Accordingly, this amended verified petition for a judgment vacating “Condition 5” of the May 9, 2007 Resolution, and upon vacatur, remanding the matter to the Planning Board for the filing of a resolution without Condition 5, is **GRANTED**.

The foregoing constitutes the decision and Order of the Court.

Dated: September 30, 2008


HON. JOSEPH FARNETI
Acting Justice Supreme Court