

Matter of Bagels of Peninsula, Inc. v Bond
2009 NY Slip Op 30748(U)
March 26, 2009
Supreme Court, Nassau County
Docket Number: 022719/08
Judge: Arthur M. Diamond
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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**In the Matter of the Application of
BAGELS OF PENINSULA, INC**

Plaintiff,

-against-

**KENNETH BOND, SALVATORE PIZZOLO, GEORGE
MALEKIAN, JERRY FRUSCI and JON BRANDT
Constituting THE BOARD OF APPEALS OF THE
INCORPORATED VILLAGE OF VALLEY STREAM,
THE BOARD OF APPEALS OF THE VILLAGE OF
VALLEY STREAM and THE INCORPORATED
VILLAGE OF VALLEY STREAM.**

Defendants.

TRIAL PART: 19

NASSAU COUNTY

INDEX NO: 022719/08

MOTION SEQ: 1

SUBMIT: 2/13/09

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The following papers having been read on this motion:

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Application by petitioner Bagels of Peninsula, Inc. pursuant to CPLR article 78 for an order vacating and setting aside the Decision of respondents dated October 21, 2008 and filed with the Clerk of the Incorporated Village of Valley Stream on November 26, 2008, and holding that the Code of the Village of Valley Stream does not require the installation of a sprinkler system for a restaurant until the occupancy of same reaches 75 or more persons is granted, and the decision dated October 21, 2008 is vacated and annulled as the Village Code requires sprinklers in a restaurant only if its occupancy is 75 or more persons.

Petitioner avers that the Code of the Village of Valley Stream requires a restaurant to install a full sprinkler system only when it is occupied by 75 or more persons, and that the Village Board of Zoning Appeals erroneously upheld a determination by the Village's Chief Fire Inspector Frank

Roca that sprinklers are required if the building is occupied by 50 or more persons. Petitioner relies upon Chapters 11 and 66 of the Code, while respondents rely upon Chapter 99.

The Code of the Village of Valley Stream is divided into 101 Chapters. Chapter 11 governs Building Sprinklers and Elevator Inspections, Chapter 66 governs Public Assembly, and Chapter 99 governs Zoning.

With reference to sprinkler requirements, Chapter 11 classifies buildings by groups “in respect to the occupancy or use, the fire hazard and the number and physical condition of the occupants” (Code of the Village of Valley Stream, § 11-2). Code § 11-3 requires the buildings identified in Subdivision E of § 11-2 to be fully sprinklered. Subdivision E states:

Group E: Public Assembly. Buildings in which the primary or intended occupancy or use is the assembly for amusement, athletic, civic, *dining*, educational, entertainment, patriotic, political, recreational, religious, social, sports or similar purposes, *as defined in Chapter 66, § 66-1*, of this Code (emphasis supplied).

Thus public assembly, including dining, is defined by the public assembly chapter for sprinkler purposes (Code of the Village of Valley Stream § 11-2[E]).

The referenced definition in Chapter 66 states that a Place of Public Assembly is:

A room or space which is occupied by 75 or more persons and which is used for educational, recreational or amusement purposes, and shall include but not be limited to assembly halls in school structures, dance halls, cabarets, nightclubs, *restaurants*, any room or space used for public or private banquets, feasts, socials, card parties or weddings, lodge and meeting halls or rooms, skating rinks or gymnasiums (emphasis supplied).

Thus according to the explicit direction of the chapter governing sprinklers for dining establishments and restaurants only a room or space which is occupied by 75 or more persons requires the space to be fully sprinklered in all areas.

Respondents argue that the definition of Public Assembly Space in Chapter 99 (Zoning) conflicts with the definition in Chapter 66 (Public Assembly). The definition in Chapter 99 states:

Public Assembly Space --A room, assembly hall or area which is occupied by 50 or more persons and is used for educational, recreational, political, religious, civic, fraternal or amusement purposes or other places of similar-type occupancy. (Code of the Village of Valley Stream § 99-202).

Respondents acknowledge that § 99-202 does not mention dining or restaurants, and they rely on the broad category of “other places of similar-type occupancy”. It is noted that an express

definition for restaurant immediately follows. Respondents argue that the Zoning chapter definition of “ Public Assembly Space” adopted in 1994, which states that its “greater restrictions’ shall control, is later than the definition in Chapter 66 and therefore supercedes.

The only question presented in this proceeding is whether the definition of Public Assembly Space in Chapter 99 of the Code addressing Zoning is applicable to Chapter 11 of the Code addressing Building Sprinklers. There is no need to employ the statutory rules of construction such as “*noscitur a sociis*” and “*ejusdem generis*” presented by the parties (McKinney's Statutes § 239). And were the court to apply any rule that the later enacted sections of the Code govern over earlier ones, Chapter 11 directing attention to Chapter 66 for a definition of Public Assembly Space was “amended in its entirety” in June of 1999.

Turning to an analysis of the relevant sections of the Code and the jurisdiction of CPLR article 78, among the questions that may be reviewed pursuant to CPLR 7803 is whether a determination “was affected by an error of law” (CPLR 7803 [3]), “such as an allegation that [an] agency improperly interpreted or applied a statute or regulation” (Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, Civil Practice Law & Rules, 7803, C 7803:1 p 213). Accordingly, petitioner may properly challenge the Board’s interpretation of the Code of the Village of Valley Stream (hereinafter the Code).

The standard to be used in resolution of this proceeding is clear. Although statutory construction is “the function of the courts”, where “the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited' * * * The administrative determination is to be accepted by the courts ‘if it has ‘warrant in the record’ and a reasonable basis in law’ (*Howard v. Wyman*, 28 NY2d 434 [1971]). Moreover, “[w]here the interpretation of a statute or its application involves knowledge or understanding of underlying operational practices or entails the evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute” (*New York Life Ins. Co. v. State Tax Commission*, 80 AD2d 675, 676 [3d Dept 1981], *affd* for reasons stated in the memorandum at the Appellate Division, 55 NY2d 758 [1981]). However, agency expertise, operational practices, factual data and inferences drawn therefrom are not at issue here. Rather the rule to be applied is that stated in by the court in *New York Life*:

where as here, the question is one of pure statutory reading and analysis,

dependent only on accurate apprehension of legislative intent, there is little basis to rely upon any special competence or expertise of the administrative agency . . .

(New York Life Ins. Co. v. State Tax Commission, supra).

Here no deference to expertise need be accorded as there is no broad term to be defined. Nor is there any need to determine which part of the Code was enacted later to determine which governs, for Chapter 11 governing Building Sprinklers was “amended in its entirety” in 1999 and refers to Chapter 66 for a definition of “Public Assembly”, not to Chapter 99. Nor need the court determine whether the existence of a definition for “restaurant” in Chapter 99 precludes its inclusion in a definition of Public Assembly in that Chapter. The determinative reference negating the applicability of Chapter 99 definitions is in Chapter 99 itself.

Section 99-202 (Definitions) explicitly states, “*As used in this chapter*” the following terms “shall have the meanings as indicated” (emphasis supplied). Accordingly, the definition of Public Assembly Space defined in Chapter 99 applies only to the term Public Assembly Space “as used” in Chapter 99. The term Public Assembly Space as defined in Chapter 66, the chapter explicitly directed by Chapter 11, is the legislatively identified definition for Chapter 11.

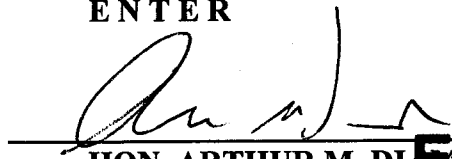
The court is sympathetic to the concern of the Chief Fire Inspector and the Village of Valley Stream to provide protection to the citizens of Valley Stream. However, where as here the language of the ordinance is unambiguous, indeed is explicit and precise, the course to be followed to enforce greater restrictive requirements for sprinklers is an amendment of the appropriate section of the Village Code. To do otherwise invites arbitrary enforcement and litigation.

The court notes that the Return did not include the full section regarding definitions for Chapter 99 (Exhibit 6), and significantly omitted the limitation on the use of Chapter 99 definitions which was determinative, while the other sections were presented in full (Exhibits 3, 5). The court will infer that the omission was not intentional nor intended to mislead, and reminds counsel of the duty to bring to the attention of the court any authority which is “known to the lawyer to be directly adverse to the position of the client and which is not disclosed by opposing counsel” (Code of Professional Responsibility 22 NYCRR §1200.37[B][1]; see, *Cicio v. City of New York*, 98 AD2d 38 [2d Dept 1983]).

This constitutes the decision and order of this Court.

DATED: March 26, 2009

ENTER



HON. ARTHUR M. DIAMOND
J. S.C.

ENTERED

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NASSAU COUNTY

COUNTY CLERK'S OFFICE

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