

**Kar-McVeigh, LLC v Zoning Bd. of Appeals of the  
Town of Riverhead**

2010 NY Slip Op 32522(U)

September 7, 2010

Supreme Court, Suffolk County

Docket Number: 09-40122

Judge: Peter Fox Cohalan

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procedures of New York and the Town Ordinances; and further permanently enjoining and restraining the respondents and any individuals acting on their behalf or under their direction from delaying or interfering with the review and processing of the petitioner's two-story site-plan applications and directing the respondents to comply with all applicable laws, rules and regulations of New York and the Town; declaring that the petitioner's temporary tent and barn/catering facility as proposed are permitted accessory uses to the petitioner's legal, nonconforming restaurant use and do not constitute extensions of said legal, nonconforming restaurant use; entry of judgment in favor of the petitioner against the respondents for compensatory damages including but not limited to loss of income and property value with interest and reasonable attorney's fees and costs.

In the amended verified petition, dated October 16, 2009, the petitioner asserts it owns the property located at 370 Manor Lane, Jamesport, New York, designated as SCTM No. 0600-047.00-02-003.00 and operates a restaurant business known as the Jamesport Manor Inn at the premises and seeks to develop the premises consistent with two submitted site plan applications including the installation of a temporary tent for restaurant use and construction of a barn/catering facility to be installed or constructed in accordance with the applicable area setbacks for the Agricultural Protection Zone (APZ) in which the premises is located.

As stated in this Court's decision, dated August 23, 2007 in **Barbato v Zoning Board of Appeals of the Town of Riverhead and Kar-McVeigh, LLC**, "[t]he respondent ZBA, in a five page decision, dated October 14, 2004, denied a use variance requested by Kar-McVeigh to establish catering as a principal use on the subject premises but did grant a further extension of the variances previously granted and also found that there was no intent to abandon the restaurant use previously permitted as a 'legal pre-existing nonconforming use' for this property. The ZBA also found that catering is a type of restaurant use that can be a principal or accessory use and 'is a permitted use where a restaurant use is permitted.'"

Based upon the Town Board's denial of petitioner's application, for the catering facility at the premises, the petitioner seeks a determination as stated above.

On a motion pursuant to CPLR §7804(f) to dismiss a petition, only the petition is to be considered by the trial court and all of its allegations are deemed to be true (**In the Matter of Michael DePaoli v Board of Education, Somers Central School District, et al**, 92 AD2d 894, 459 NYS2d 883 [2<sup>nd</sup> Dept 1983]; **In the Matter of Abraham Cutcher v Ewald B. Nyquist et al**, 39 AD2d 810, 332 NYS2d 478 [3<sup>rd</sup> Dept 1972]). Only affidavits submitted by the petitioner and exhibits attached to the petition may be considered on such a pre-answer motion (**In the Matter of Green Harbour Homeowners' Association, Inc. v Town of Lake George Planning Board et al**, 1 AD3d 744, 766 NYS2d 739 [3<sup>rd</sup> Dept 2003]) and the petition is to be accorded the benefit of every possible inference (see, **Golden Horizon Terryville Corp. v Prusinowski**, 63 AD3d 930, 882 NYS2d 174 [2<sup>nd</sup> Dept 2009]).

42 USC §1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State \*\*\*, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...” “In the land-use context, 42 USC §1983 protects against municipal actions that violate a property owner’s rights to due process, equal protection of the laws and just compensation for the taking of property under the Fifth and Fourteenth Amendments to the United States Constitution” (***Bower Assocs. v Town of Pleasant Valley***, 2 NY3d 617, 626, 781 NYS2d 240 [2004], citing ***Town of Orangetown v Magee***, 88 NY2d 41, 49, 643 NYS2d 21 [1996]). However, “42 USC §1983 is not simply an additional vehicle for judicial review of land-use determinations” (***Bower Assocs. v Town of Pleasant Valley***, supra).

Procedural due process is designed to insure that there will be no deprivation of rights otherwise created without notice and opportunity to be heard (***Lai Chun Chan Jin v Board of Estimate of the City of New York***, 92 AD2d 218, 460 NYS2d 28 [1<sup>st</sup> Dept 1983]). The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property. Whether a party’s interest in a land-use regulation is protected by the Fourteenth Amendment depends upon whether it has a legitimate claim of entitlement to the relief being sought (***Twin Town Little League, Inc. v Town of Poestenkill***, 249 AD2d 811, 671 NYS2d 831 [3<sup>rd</sup> Dept 1998]).

“In order to establish a deprivation of a property right in violation of substantive due process, the claimant must establish (1) a cognizable or vested property interest, not the mere hope of one and (2) that the municipality acted without legal justification and motivated entirely by political concerns. As for the second element of the test, only the most egregious official conduct can be said to be arbitrary in the constitutional sense” [citations omitted] (***Sonne v Board of Trustees of Village of Suffern***, 67 AD3d 192, 887 NYS2d 145 [2<sup>nd</sup> Dept 2009]). The denial of a permit - even an arbitrary denial repressible by an Article 78 or other state law proceeding - is not tantamount to a constitutional violation under 42 USC §1983. Significantly more is required (***49 East Maple Avenue, Inc. v Loniewski***, 50 AD3d 628, 854 NYS2d 757 [2<sup>nd</sup> Dept 2008]). Moreover, the denial of an application for permission to develop property does not implicate a protectable property interest if the governmental authority has the discretion to grant or deny the application. For example, “New York case law involving subdivision approval indicates that granting subdivision approval is discretionary” (***Bower Assocs. v Town of Pleasant Valley***, supra). Furthermore, where an issuing authority has discretion in approving or denying a permit, a clear entitlement can exist only when that discretion is so narrowly circumscribed that approval of a proper application is virtually assured (***Bower Associates v Pleasant Valley***, 2 NY3d 617; ***Orangetown v Magree***, 88 NY2d 41 [1996]; ***Huntington Yacht Club v Inc. Village of Huntington Bay***, 272 AD2d 327, 708 NYS2d 120 [2<sup>nd</sup> Dept 2003]).

Here the respondents move pursuant to CPLR §7804(f) which provides “Objections to Point of Law. The respondent may raise an objection to a point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer. If the motion is denied, the court shall permit the respondent to answer, upon such terms as may be just; and unless the order specified otherwise, such answer shall be served and filed within five days after service of the order with notice of entry; and the petitioner may re-notice the

matter for hearing upon two days' notice. The petitioner may raise an objection in point of law to new matter contained in the answer by setting it forth in his reply or by moving to strike such matter on the day the petition is noticed or re-noticed to be heard."

CPLR §7804(f) provides that when a motion to dismiss a petition has been denied, the respondent must be given an opportunity to answer and it is error to grant a petitioner affirmative relief before a respondent has had an opportunity to respond to the allegations contained therein, (*In the Matter of Brian Rauer v State University of New York, University at Albany, et al*, 159 AD2d 835, 552 NYS2d 983 [3<sup>rd</sup> Dept 1990]). If there are questions of law and fact to be determined, a party which unsuccessfully moves to dismiss the petition must be permitted to answer. However, where only questions of law are at issue, the resolution of which are dispositive, then the action can be concluded without providing an opportunity for an answer (*In the Matter of Bayswater Health Related Facility v New York State Department of Health et al*, 57 AD2d 996, 394 NYS2d 314 [3<sup>rd</sup> Dept 1077]).

#### THE AMENDED VERIFIED PETITION DATED OCTOBER 16, 2009

In the first cause of action asserting that the ZBA resolution, adopted on August 27, 2009 and filed on September 14, 2009, is invalid and void, contrary to State and Town law, is arbitrary and capricious and constitutes an abuse of discretion, is irrational and unsupported by substantial evidence in the record and is therefore null and void, the Court finds that the petitioner has stated a cognizable cause of action.

In the second cause of action wherein the petitioner seeks declaratory relief as a matter of law that its proposed restaurant and catering facilities are permitted accessory uses to its legally nonconforming restaurant use and seeks an order that the Town comply with its ordinances, State law, and that respondents' actions and determinations violate Town Zoning Code §§ 108-22(c), 108-51(A), and the APZ definition of accessory use as set forth in Town Zoning Code §108-22(c) and articles of the United States and New York State Constitutions which forbid actions which deprive any person of property without due process of law, the Court finds that the petitioner has stated a cognizable cause of action.

In the third cause of action sounding in equity wherein the petitioner states it has no adequate remedy at law and seeks dismissal of the ZBA's determination, dated October 14, 2004, and a determination that the ZBA rulings are precluded by the principles of res judicata and collateral estoppel, and reversal of the Town Planning Director's letters, dated April 8, 2008 and January 19, 2009, as the petitioner's proposed catering facilities are customary and incidental accessory uses, the Court finds that the petitioner has stated a cognizable cause of action.

In the fourth cause of action sounding in equity wherein the petitioner seeks reversal of the ZBA's determination refusing to review the petition on the basis that the respondent violated Town Law §267-a because the Town Planning Director failed to file his letter, dated April 8, 2008, within five business days with the Town Clerk's Office, as required, the Court finds that the petitioner has stated a cognizable cause of action.

In the fifth cause of action asserting that the respondents violated Town Law §267-a as the ZBA resolution, dated September 14, 2009, was not filed within five business days of the ZBA public hearing in the Town Clerk's office, the Court finds that the petitioner has stated a cognizable cause of action.

In the sixth cause of action asserting that the respondent ZBA lacked jurisdiction to entertain the petitioner's application on August 27, 2009 after the petitioner requested an adjournment of the meeting because the Town's own ordinance required posting of a sign advising of the meeting seven days prior to any adjourned hearing, and the petitioner did not waive the irregularity and the public was not prejudiced, the Court finds that the petitioner has stated a cognizable cause of action.

In the seventh cause of action asserting that it has been deprived of due process by the actions and determinations of the ZBA and Town officials acting under the color of state law and depriving the petitioner of its property and its development according to the Town Zoning Code, and due process, the Court finds that the petitioner has stated a cognizable cause of action.

In the eighth cause of action asserting it has been caused irreparable injury by the respondents' actions which prevent it from exercising its constitutional rights and property rights, the Court finds that the petitioner has stated a cognizable cause of action.

Accordingly, the motion (002) for an order granting dismissal of the petition pursuant to CPLR §7804(f) is denied.

Dated: September 7, 2010

  
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J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION