

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

2010 NY Slip Op 33517(U)

December 20, 2010

Sup Ct, Suffolk County

Docket Number: 09-40122

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

COPY

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE (#001) 11-20-09
MOTION DATE (#004) 10-27-10
ADJ. DATE (#001) 10/27/10
Mot. Seq. # 001 - MD
004 - MotD CaseDisp

-----X	:	
KAR-MCVEIGH, LLC,	:	CIARELLI & DEMPSEY
	:	Attorney for Petitioner
For a Judgment Under Article 78 of	:	737 Roanoke Avenue
The Civil Practice Law and Rules,	:	Riverhead, New York 11901
	:	
Petitioner,	:	SMITH, FINKELSTEIN, LUNDBERG,
	:	ISLER
- against -	:	and YAKABOSKI, LLP
	:	Attorney for Respondents
THE ZONING BOARD OF APPEALS OF THE	:	456 Griffing Avenue
TOWN OF RIVERHEAD, AND THE TOWN	:	Riverhead, New York 11901-0203
OF RIVERHEAD, NEW YORK,	:	
	:	
Respondents.	:	
-----X	:	

Upon the following papers numbered 1 to 47 read on this Article 78 proceeding and cross motion for declaratory judgment: Notice of Petition and supporting papers (001) 1 - 11; Notice of Motion and supporting papers (004) 12-25; Answering Affidavits and supporting papers 26-37; Replying Affidavits and supporting papers; Other 38; 39-47; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (001) by the petitioner, Kar-McVeigh, LLC., pursuant to CPLR §7804, has been rendered academic based upon the petitioner's cross-motion (004) which seeks substantially the same relief and therefore is denied as moot;¹ and it is further

ORDERED that cross-motion (004) by the petitioner brought, pursuant to CPLR §7804 [e], §3215, and §2214, and NYCRR §202.27, and §130-1.1, for an order annulling, reversing and vacating the resolutions of the Zoning Board of Appeals and the Town of Riverhead, dated August 27, 2009 and September 14, 2009, relating to the petitioner's property located at 370 Manor Lane, Jamesport, New York, and declaring as a matter of law that such zoning resolutions and determinations are void, ultra vires, and ineffective, as against the petitioner, as they were adopted contrary to the laws and procedures of the State of New York and the Town of Riverhead ordinances is granted; and for further order permanently enjoining and restraining

¹ It is noted in cross-motion (004) that the petitioner further seeks to withdraw motion (001).

the respondents herein, or others acting at the respondents' behalf or directions, from delaying or interfering with the review and processing of the petitioner's two site-plan applications according to all applicable laws, rules, and regulations of the State of New York and the Town of Riverhead is granted and the respondents are mandated permanently from delaying or interfering with the review and processing of the petitioner's two site-plan applications and are directed to schedule this case for further hearing concerning the two site-plans within 20 days of the date of this order; declaring that the petitioner's temporary tent and barn/catering facility, as proposed under their pending site-plan applications, are permitted accessory uses to the petitioner's legal, nonconforming restaurant use and do not constitute extensions of such legal, nonconforming restaurant use and do not require a special permit is granted; and for further order for an Inquest on petitioner's compensatory damages including but not limited to loss of income and property value with interest and awarding the petitioner reasonable attorneys fees based upon the respondents' dilatory and frivolous conduct in this action is denied; and the petitioner is directed to serve a copy of this order with notice of entry upon the respondents within 20 days of the date of this order.

This is a hybrid Article 78 proceeding and plenary action for declaratory and injunctive relief by the petitioner. In the amended verified petition, dated October 16, 2009, the petitioner asserts it owns the premises located at 370 Manor Lane, Jamesport, New York, in the Town of Riverhead, (hereinafter Town), New York (hereinafter premises), designated as SCTM No. 0600-047.00-02-003.00. The petitioner operates a restaurant business known as the Jamesport Manor Inn at the premises which it seeks to develop 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 (hereinafter APZ) in which the premises is located.

The petitioner purchased the 4 acre premises, improved with a two-story restaurant with a second-story apartment, in February 2004. The restaurant building, originally known as the Captain Dimon House and now known as the Jamesport Manor Inn, is a registered historic landmark and was rebuilt by the petitioner in 2006 after the building was destroyed by fire before it was completely rebuilt.

In September 1998, the Zoning Board of Appeals of the Town (hereinafter ZBA) granted the prior owners a use variance permitting a third principal use of the premises as a motel with 12 cottages, a swimming pool, and tennis courts as accessory uses to the motel in addition to the restaurant. At that time the premises were in the Town's Agricultural A zoning use district.

In May 2002, the ZBA granted the prior owners a further extension and modification of the use variance amending the motel use to change the 12 previously granted 400 sq. ft. cottages as follows: 3 cottages of 800 sq. ft. each 1 cottage of 1,000 sq. ft. and the remaining cottages of 400 sq. ft. The variance further permitted a tennis court and clubhouse to be built as additional accessory uses to the motel use, the third permitted use along with the permitted restaurant and apartment uses.

On April 27, 2004, the petitioner filed a use variance application seeking permission to

renovate the restaurant and substitute a catering facility to its rear as the third principal use in return for abandoning the motel use along with the previously permitted accessory uses. In the alternative, there was a request for a determination as to whether catering is an incidental and customary accessory use to a restaurant use.

On June 22, 2004, the Town Board adopted a new zoning map rezoning the subject premises to the newly enacted APZ. That rezoning was adopted in accordance with the Town's Comprehensive Plan, dated November 2003, in particular Policy 5.4D (hereinafter Policy 5.4D), that endorsed the granting of use variances to protect the nature of historic sites.

In or about March 2008, the petitioner submitted a site-plan application for a "temporary tent for catering use" as an accessory use to the primary restaurant use. On April 8, 2008, the Town Planning Director Richard Hanley (hereinafter Hanley) sent a letter to the petitioner rejecting the site plan application and indicating the proposal constituted "an expansion of the pre-existing non-conforming restaurant use thereby requiring a Special Permit from the Town Board."

The petitioner then submitted a second site-plan application for a permanent accessory barn structure to be used as a catering facility. On January 16, 2009, Hanley rejected the application because the proposed catering facility represented "an expansion of the pre-existing nonconforming, principal use" rather than constituting a permitted accessory use to the permitted restaurant use.

On February 12, 2009, the petitioner filed two ZBA applications challenging Hanley's April 8, 2008 and January 16, 2009 letters and seeking an interpretation of whether the proposed addition of the temporary accessory tent for catering and the barn accessory structure for catering constituted "expansions of the principal, nonconforming restaurant use." The petitioner contended that Hanley's April 8, 2008 letter had not been filed within the mandatory 5 day deadline established under Town Law §267-a, nor any time before February 12, 2009, and despite the same and the law, by letter, dated April 1, 2008, the ZBA rejected the tent application as not having been made within 60 days of Hanley's April 8, 2008 letter. The petitioner claims that when it requested proof that the letter had been filed with the Town pursuant to Town Law §267-a that the ZBA advised the petitioner's counsel that the letter was placed in the Town Planning Department file maintained on the petitioner.

Thereafter, the petitioner's ZBA application for the barn as an accessory catering facility was posted for a public hearing on April 23, 2009, for a determination as to whether catering was an incidental and customary accessory use to a restaurant use. The petitioner claims that there was no opposition to the application at the meeting of April 23, 2009 at which the petitioner testified through its principals in favor of the application and no contrary legal arguments were made. The ZBA adjourned the hearing to May 14, 2009 and subsequently granted the petitioner's adjournment requests for public hearings scheduled for May 14, 2009, June 11, 2009, June 25, 2009 and July 23, 2009 during which time, upon notice to the ZBA, the petitioner discussed alternate approaches with the Town Board. The petitioner states that at no time did the ZBA question or deny the requests for the adjournments. On July 23, 2009, the

petitioner requested an adjournment to August 27, 2009, which the ZBA granted, without any mention by the ZBA that this would be a final adjournment.

On August 21, 2009, the petitioner requested an adjournment of the August 27, 2009 public hearing in order to present to the ZBA additional cost information which the ZBA sought. The ZBA, in another application before it involving the Captains Hawkins House restaurant in Jamesport, had requested similar information which had been supplied to the ZBA, after which the ZBA had allowed the Captain Hawkins House the proposed accessory catering tent as a permitted accessory use. In this case, the ZBA's counsel notified the petitioner's counsel by letter that the adjournment would not be granted. The petitioner provided the ZBA with additional support information and its adjournment request. However, on August 25, 2009, the Town Planning Department staff would not permit the petitioner's counsel to post notice of the continued hearing because the Town Code §108-76 required posting at least 7 days before a hearing. On August 27, 2009, the petitioner's counsel appeared before the ZBA to request the adjournment, at which time the ZBA began to hear public comment and to conduct the public hearing. After the public hearing was concluded the ZBA voted 3-1 to dismiss the petitioner's application based on a willful failure by the petitioner to post a notice of the hearing.

The petitioner asserts that this ZBA resolution was written and read by a ZBA member before the 3-1 vote was taken, but the same resolution was not filed in the Town Clerk's office within the 5 days required by Town Law §267-a. The petitioner also claims that on September 14, 2009 the ZBA filed a resolution different from the resolution purportedly passed on August 27, 2009 dismissing the petitioner's application. The petitioner seeks to vacate that resolution and have a review by the ZBA of the two site-plan applications on their merits.

ARTICLE 78 PROCEEDING

In the Matter of Edwin A. Pell, Jr. v Board of Education of Union Free School District No. 1 of the Town of Scarsdale and, et al, 34 NY2d 222, 356 NYS2d 833 [1974], the Court found at p.839, "In Article 78 proceeding ... that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; ... the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is 'substantial evidence'...." The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious'... 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'. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts. ... The proper test is whether there is a rational basis for the administrative orders, *the review not being of determination made after quasi-judicial hearings required by statute or law*. Where, however, a hearing is held, the determination must be supported by substantial evidence, CPLR 7803(4); And where a determination is made and the person acting has not acted in excess of his jurisdiction, in violation of lawful procedure, arbitrarily, or in abuse of his discretionary power, including discretion as to the penalty imposed, the courts have no alternative but to confirm his determination, CPLR 7803(3). Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard...." and ... "A court may not substitute its judgment for that of the board or body it

reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion.”

In ***Gramatan Avenue Associates v State Division of Human Rights***, 45 NY2d 176, 408 NYS2d 54 [1978], the Court stated “generally speaking, upon a judicial review of findings made by an administrative agency, a determination is regarded as being supported by substantial evidence when the proof is so substantial that from it an inference of the existence of the fact found may be drawn reasonably.... The concept of substantial evidence, a term of art as related to administrative decision making, is rather easily verbalized, but, when put to use in respect to a particular determination, frequently causes difficulty and disagreement. It is related to the charge or controversy and involves a weighing of the quality and quantity of the proof Essential attributes are relevance and a probative character. Marked by its substance, its solid nature and ability to inspire confidence, substantial evidence does not rise from bare surmise, conjecture, speculation, or rumor. More than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence, or evidence beyond a reasonable doubt.... Whether an administrative agency determination is shored up by substantial evidence is a question of law to be decided by the courts, it having been stated with some frequency that insufficient evidence is, in the eyes of the law, no evidence.... The reviewing court should review the whole record to determine whether there is a rational basis set forth in its findings of fact supporting the agency’s decision.”

EXPANSION OF PRE-EXISTING NONCONFORMING PRINCIPAL USE VERSUS A PERMITTED ACCESSORY USE TO THE PERMITTED RESTAURANT USE AND SPECIAL PERMIT

The Court must determine in the first instance whether the proposed catering facility represents “an expansion of the pre-existing nonconforming principal use” rather than constituting a permitted, incidental and customary accessory use to the permitted restaurant use. Here this Court finds that the proposed catering facility represents a permitted, incidental and customary accessory use to the permitted restaurant use and that a special permit is not required for such catering facility.

While the overriding policy of zoning is aimed at the ultimate elimination of nonconforming uses, a property owner is allowed to have an accessory use of the property so long as such use is truly incidental to the nonconforming use and does not change the basic nature of the use of the property (see, ***Androme Leather Corporation v City of Gloversville, et al***, 1 AD3d 654, 766 NYS2d 462 [3rd Dept 2003]). In this case this Court finds that the proposed catering facility does not change the basic nature of the use of the property and restaurant.

The petitioner’s April 27, 2004 application was granted by the ZBA on October 14, 2004. The ZBA’s determination under Appeal #04-39 defined the petitioner’s application as seeking in part, “a determination as to whether catering is an incidental and customary accessory use to a restaurant use.” Significantly, the ZBA declared that “catering is a type of restaurant use,

which is a permitted use where a restaurant use is a permitted use” and “since it is not a use in the Town Zoning Code specifically excluded or requiring a special permit, catering can be a principal or accessory use where a restaurant use is permitted.” The catering issue having been decided, the ZBA in its decision recognized the historic site’s entitlement to the restaurant use variance consistent with Policy 5.4D.

The ZBA decision, dated October 14, 2004, was challenged in an Article 78 petition filed by neighbors of the subject premises in ***The Matter of Barbato v ZBA*** (Index #27300-04) This Court’s decision, dated August 23, 2007, was delayed after the restaurant building burned down in 2006. This Court ultimately dismissed the petition and found that the ZBA had granted an extension of a prior use variance to operate a restaurant known as the Jamesport Manor Inn, with “catering permitted as an accessory use....” The petition states that the ZBA opposed the neighbor’s Article 78 petition and the ZBA’s counsel affirmed that the ZBA had “determined that catering was a type of use that was a customary and incidental use to a restaurant use.”

On May 23, 2007 and June 8, 2007, the ZBA granted the petitioner permits and a certificate of occupancy for demolition and rebuilding the damaged restaurant. Subsequent to the rebuilding of the restaurant building, the petitioner explored constructing a structure to the rear of the premises as an accessory structure for catering purposes consistent with the plan that had been submitted to the ZBA and which the ZBA had adjudicated. During the course of that review, the Town Planning Department staff issued a report, dated February 7, 2006, which found that “the (catering facility) is dependent upon a ruling that found catering to be a customary activity of restaurants.” On August 23, 2007, this Court’s finding in ***The Matter of Barbato v ZBA, supra***, that affirmed the ZBA’s decision that catering was an “incidental and customary accessory use” to the restaurant answered that question. The Town Planning Department staff raised an additional question about whether the catering activity had to be “accessory and subordinate to a primary restaurant use.” In APZ §108-22(c), an accessory use, building, or structure are all defined as having to be “customarily incidental, not subordinate to the primary use.” The only restriction for an accessory use in the APZ zone is that the accessory use be located “on the same lot” as the primary use. The petition states that in light of the Town’s misconstruction of the applicability of a “subordinate” test, the petitioner, in compliance with the Town’s improper directive for a special permit, submitted an application to the Town Board. The special permit for granting an increase in restaurants seats was issued by the Town Board in Resolution 2007-275, dated March 30, 2007, which determination was made subject to the “final Supreme Court determination in the ***Barbato*** case”, which decision was issued August 23, 2007. On September 13, 2008, the petitioner formally advised the Town that it had no need of the special permit which had expired on March 20, 2008.

In or about March 2008, the petitioner submitted a site-plan application for a “temporary tent for catering use” as an accessory use to the primary restaurant use. On April 8, 2008, Hanley sent a letter to the petitioner rejecting the site plan application indicating the proposal constituted “an expansion of the pre-existing non-conforming restaurant use thereby requiring a special permit from the Town Board.” Hanley stated that the restaurant located upon the premises was a pre-existing non-conforming use and as such did not conform to the existing

zoning. He further stated that pursuant to APZ §108-51A, such non-conforming uses might only be expanded if the Town Board approved an expansion by special permit. Hanley stated that the addition or use of a temporary tent for restaurant or catering would be considered an expansion of the pre-existing, nonconforming restaurant use which required a special permit, and therefore the submission for site plan approval could not be considered by the Town Planning Board. Hanley also commented that on March 20, 2007 the applicant received special permit approval for the expansion of its restaurant use with specified conditions, and should the applicant wish to expand its restaurant use, it had the ability to do so within the parameters of the existing special permit. Hanley, in a letter, dated January 16, 2009, advised the petitioner's counsel that Hanley's office was in receipt of the amended site plan application, and he stated that, as previously explained in his letter, dated April 8, 2008, the submission could not be considered by the Town Planning Board as it contained plans for an expansion of a pre-existing nonconforming use that required a special permit.

Based upon the foregoing, Hanley failed to consider the ZBA's prior decision on appeal, and this Court's prior decision that catering was an "incidental and customary accessory use" to the restaurant. The Town Planning Department staff also addressed the additional question about whether the catering activity had to be "accessory and subordinate to a primary restaurant use." In APZ §108-22(c), an accessory use, building, or structure are all defined as having to be "customarily incidental, not subordinate to the primary use."

The petitioner then submitted a second site-plan application for a permanent accessory barn structure to be used as a catering facility. On January 16, 2009, Hanley rejected the application because the proposed catering facility represented "an expansion of the pre-existing nonconforming, principal use" rather than constituting a permitted accessory use to the permitted restaurant use.

Here, Hanley disregarded and improperly interpreted the prior findings and decisions of the ZBA and this Court in *The Matter of Barbato v ZBA, supra*, where the Court found that catering was an "incidental and customary accessory use" to the restaurant, and that catering activity was customarily incidental and not subordinate to the primary restaurant use, and did not require a special permit. In this case, the petitioner is not seeking to expand the prior nonconforming principal use of the restaurant but is proposing a catering facility which is a permitted accessory use to the restaurant. Further, in response to the petitioner's April 27, 2004 application granted by the ZBA on October 14, 2004, the ZBA declared under Appeal #04-39 "catering is a type of restaurant use, which is a permitted use where a restaurant use is a permitted use," and "since it is not a use in the Town Zoning Code specifically excluded or requiring a special permit, catering can be a principal or accessory use where a restaurant use is permitted."

Accordingly, Hanley's opinions, in his letters of April 8, 2008 and January 16, 2009, that the proposed catering facility was an expansion of the pre-existing nonconforming, principal use rather than a permitted accessory use to the permitted restaurant use, and that a special permit was required for such catering proposal are vacated based upon the collateral estoppel of the determinations by this Court and the ZBA as indicated above and also pursuant to the

Town Zoning Code, as set forth above, are precluded by res judicata (see, **Siegel v Zoning Board of Appeals of Village of Irvington, et al**, 73 AD3d 936, 899 NYS2d 862 [2nd Dept 2010]; **Kogel, et al v Zoning Board of Appeals of Town of Huntington, et al**, 58 AD3d630, 871 NYS2d 638 [2nd Dept 2009]). The proposed accessory catering barn/tent facilities are included in the permitted restaurant use (see, **Matter of Woitaszek v Town of Newstead**, 87 AD2d 1000, 450 NYS2d 130 [4th Dept 1982]). Additionally, the power to interpret the provisions of the local zoning law is vested exclusively in the ZBA (**Mialto Realty, Inc. v Town of Patterson et al**, 112 AD2d 371, 491 NYS2d 825 [2nd Dept 1985]). Hanley is not a member of the ZBA and his determination is improper and without legal effect.

TIMELINESS OF THE APPLICATION TO REVIEW THE DETERMINATION OF RICHARD HANLEY

The second issue for this Court's determination is the timeliness of the application to review Hanley's decision, dated April 8, 2008, denying the site plan for the subject premises because the proposed catering use in the proposed temporary tent constituted an expansion of a pre-existing nonconforming restaurant use. F.J. McLaughlin (hereinafter McLaughlin), Chairman of the ZBA, advised the petitioner's counsel in a letter, dated April 1, 2009, that the application to review Hanley's April 8, 2008 decision had to be made within 60 days and therefore the ZBA lacked jurisdiction to review it.

Town Law §267-a 5(a) provides each order, requirement, decision, interpretation or determination of the administrative official charged with the enforcement of the zoning local law or ordinance shall be filed in the office of such administrative official, within 5 business days from the day it is rendered, and shall be a public record. Alternately, the Town Board may, by resolution, require that such filings instead be made in the Town Clerk's office.

The petitioner, in a letter, dated April 16, 2009, requested of the ZBA's counsel proof of the filing of Hanley's decision pursuant to Town Law §267-a (see, **Barsic v Young et al**, 22 AD3d 488, 802 NYS2d 829 [2nd Dept 2005]). To date, no proof of the same has been submitted by the ZBA to this Court for this Court's review to determine the date of filing. Thereafter, however, the ZBA conducted a hearing on April 23, 2009 for Appeal #09-29 to review Hanley's determinations, rendering moot the timeliness of the application.

Accordingly, the application for the appeal is deemed to have been timely made and any objection is deemed waived by the ZBA who thereafter conducted the hearing which is the subject of this petition .

REVIEW of PROCEEDINGS

A transcript of the hearing conducted by the ZBA on April 23, 2009 for Appeal # 09-29 has been submitted, indicating the presence of counsel for both the applicant and the ZBA. The petitioner's counsel informed the ZBA that in 2004, the owners intended to operate a restaurant and catering business on the subject premises. He stated that the restaurant was 2700 sq. ft. and that the rest of the premises, except for the garage and patio, was vacant. The

owners of the premises previously came to the ZBA and obtained a reinstatement of their nonconforming restaurant use and a determination from the ZBA that catering was a permitted accessory use on the site. The site-plan had been submitted in November 2008. The petitioner sought to maintain the existing restaurant as is and construct an accessory building in the rear yard, a barn, in which catered parties would be accommodated. The petitioners counsel further advised the ZBA that a temporary tent was proposed for use during the summer months over the existing 30 ft. x 40 ft. patio designed as an amenity to the current restaurant which had been there since 1850. There would be no structural encroachments on the set-backs.

The petitioner's counsel countered Hanley's opinion stated in the letter of April 16, 2008 that the proposed site plan constituted an expansion of a nonconforming use and therefore a special permit was needed and stated that a special permit was not necessary as there was no application for expansion of a nonconforming use restaurant; that the ZBA in 2004 determined that catering was an incidental and customary accessory use to the restaurant and, with regard to catering activity, that it was customarily incidental and not subordinate to the primary restaurant use.²

Also at that April 23, 2009 hearing, Matt Kar (hereinafter Kar), a principal of the petitioner, testified that there were two wineries in Jamesport that had less land and were permitted to use their land for catering. He stated that he was being deprived from using any of the outside property at the Manor, (Jamesport Manor Inn) and that despite the same, his taxes had risen from \$6,000 to \$22,000. He noted that there was no one present who opposed the application. Kar further testified that there was to be no kitchen in the proposed barn/catering facility and no ovens for food preparation, just a warming oven. The proposed barn was to resemble what the Manor had been like from the 1850's i.e. a post and beam barn, beautiful with a country feel and which would replace the existing barn/garage on the property. A member of the ZBA replied, "Sort of what Martha Clara" (winery) has with "all those barns up there, which they use for catering." Kar further testified that the tent would be right by the Manor so that people could enjoy the gardens and the surrounding area for cocktails, but it would not be used for dining.

No further transcripts of the meeting have been provided to the petitioner by the ZBA, despite being requested. The petitioner's counsel, in a letter, dated September 9, 2010, advised this Court that in response to his request for written transcripts in place of the CDs/DVDs given him, the ZBA has only provided incomplete copies.

The transcripts provided establish that Martha Clara and other wineries in Jamesport have barns/structures/tents from which catering is conducted. The petitioner also submits that on November 13, 2008 the ZBA considered and granted an application under Appeal # 08-65 for the Captain Hawkins House, a country inn in Jamesport, with an accessory restaurant use within the inn which was the principal structure. The application sought an area variance to

² Part of the recording of the transcript provided by the Town to the petitioner was not reproduced and the testimony skipped to disc three of the recordings.

allow a catering tent to be installed as a separate structure as an accessory use to the restaurant. The ZBA, in its determination allowing the outside catering tent for the Captain Hawkins House, stated that it recognized its October 14, 2004 determination (Kar-McVeigh Appeal #04-39) that catering was a type of restaurant use that could be, unless specifically excluded, a permitted use where a restaurant use was permitted. The petition states that the ZBA permitted catering to be conducted at the Captain Hawkins House in a temporary tent as an accessory structure by granting a variance of the restriction that the accessory use had to be located within the principal structure and by this determination, the ZBA allowed a separate catering facility as a permitted accessory use to an accessory restaurant (located within the inn) while granting the variance to allow the second accessory use to be conducted in a separate structure.

In ***Cowan v Kern et al, Constituting the Zoning Board of Appeals of the Town of Smithtown***, 41 NY2d 591, 394 NYS2d 579 [1977], the Court stated

“the mere fact that one property owner is denied a variance while others similarly situated are granted variances does not, in itself, suffice to establish that the difference in result is due either to impermissible discrimination or to arbitrary action. The mere fact that consents have been granted to owners of premises somewhat similarly situated does not in itself show that consent was arbitrarily refused to this applicant. The question is not whether someone else has been favored. The question is whether the petitioner has been illegally oppressed.... There are, of course, extreme cases where analogy is so complete, where grant of consent under similar circumstances has been so frequent, both before and after refusal in one instance, that inference arises that the refusal is the result of unfair discrimination and oppression.... An applicant must establish that the denial of a variance will result in the infliction of either significant economic hardship or practical difficulty.”

At that April 23, 2009 hearing, Gail Kar, also a principal of the petitioner, testified that when their plans were submitted they were advised they needed a special permit. After speaking with members of the Town Board and the Town Planning Board, and being advised how to change the plans, that they did everything they were told. However, during the time they were doing that, the Manor burned down in October 2005 and had to be rebuilt. Although the reconstruction cost 40% more, the Manor was restored to the way it had been. She stated that from the prior determinations it was clear that catering would be permitted out of the restaurant on the property. She stated they would not be able to operate the business if they could not cater. After spending \$2,000,000.00 the “rug was pulled out.” She testified that they cannot pay their debt on the building without the catering. Here, the petitioner has established that denial of the application for the proposed catering facility would result in the infliction of significant economic hardship (see, ***Gregory et al v Board of Appeals of the Town of Cambria et al***, 57 NY2d 865, 456 NYS2d 39 [1982]). Other facilities, such as the Captain Hawkins House and local wineries, have been permitted to establish separate catering facilities

outside the principal structure.

Based upon the foregoing, the failure of Hanley and the Town Planning Board to abide by the prior Court and ZBA decisions is unfair discrimination and oppression.

McLaughlin sent a letter, dated September 14, 2009, to the petitioner's counsel advising him that, pursuant to Town Law §267, a Public Hearing was held by the ZBA on August 27, 2009 on the appeal to review Hanley's decision denying a site-plan because the proposed catering use in the proposed barn constituted an expansion of a pre-existing nonconforming restaurant use, and the appeal was dismissed.

The ZBA's determination of Appeal #09-29, dated August 27, 2009, states that the application "is dismissed due to the applicant's willful intent to frustrate due process and prevent an orderly and timely hearing of this matter. Applicant not only failed, but wilfully refused to properly post notice of a continued hearing and subsequently appeared at the continued hearing unprepared to proceed without sufficient excuse notwithstanding its knowledge of the Board's intent to proceed."

Town Law §267(4) provides that "notice of a hearing be advertised at least once in a newspaper of general circulation in the town at least five days before the hearing is conducted." Town Law §267(5) provides "The zoning board of appeals shall fix a reasonable time for the hearing of the appeal and give public notice thereof by the publication in the official paper of a notice of such hearing at least five days prior to the date thereof" (*In the Matter of Levandowski et al v Zoning Board of Appeals of the Town of Murray et al*, 29 Misc2d 198, 217 NYS2d 957 [Supreme Court of New York, Special Term, Orleans County 1961]). The petitioner's counsel, in a letter, dated August 21, 2009, requested an adjournment of the August 27, 2009 public hearing. The ZBA's counsel apprised the petitioner's counsel, in a letter, dated August 24, 2009, that the hearing would not be adjourned. Town Code §108 requires that the posting of the property and notice to the owners of record of every property which abuts, on each and every property on any public or private street which is across from the premises under appeal and the filing of an affidavit stating the same is also required. Here, the petitioner's counsel was only informed that the hearing would not be adjourned until 3 days or less of the scheduled hearing, thus depriving him of the opportunity to comply with the posting and notice requirements.

The Court notes that the ZBA, in dismissing the petitioner's appeal because of failure to post in compliance with Town Code §108 and Town Law §276(5), has changed its policy without notice to the petitioner. In a letter, dated April 1, 2009, McLaughlin informed the petitioner's counsel that the requirements of Town Code §108 (as set forth in the preceding paragraph) and added, "If these requirements are not met, the hearing will be adjourned until the posting and mailing notices are properly done."

The Court finds that the ZBA's decisions to dismiss the appeal was not predicated upon a rational basis or the exercise of discretion, and instead was arbitrary and capricious. The ZBA in dismissing the appeal because of a failure to properly post notice significantly deviated from

the instructions given by McLaughlin in his letter of April 1, 2009. The ZBA's dismissal of the appeal pending before it is not justified on the basis that the petitioner failed to comply with Town Code §108. The petitioner's counsel was previously advised that if the posting and notice requirements were not met, the hearing would be adjourned until such posting and notice were properly done. The dismissal of the appeal was not based on substantial evidence.

Here, this Court has already found that the Hanley's decisions, in his letters of April 8, 2008 and January 16, 2009, that the proposed catering facility was an expansion of the pre-existing nonconforming, principal use rather than a permitted accessory use to the permitted restaurant use, and that a special permit was required for such catering proposal were precluded by the principal of collateral estoppel and such decisions by Hanley were vacated based upon the preclusive effect of the decisions of this Court, the ZBA and the Town Zoning Code.

At the hearing commenced on April 23, 2009, as supported by copies of the transcript of the hearing, there was no opposition to the petitioner's application, testimony was taken, no contrary legal arguments were made, and the ZBA adjourned the hearing to May 14, 2009. The petitioner was then granted adjournments of the public hearings set for May 14, 2009, June 11, 2009, June 25, 2009 and July 23, 2009 during which time the petitioner was discussing alternate approaches with the Town Board and the ZBA was notified of the same. At no time did the ZBA question or deny the requests for the adjournments. On July 23, 2009, the petitioner requested an adjournment which was granted by the ZBA to August 27, 2009, without mention by the ZBA that this would be a final adjournment. On August 21, 2009, the petitioner requested the ZBA to grant an adjournment so that the petitioner could present additional cost information which the ZBA had sought. Similar information had been supplied by the Captain Hawkins House application at the request of the ZBA, after which the ZBA had granted the proposed accessory catering tent as an accessory use to the restaurant.

At the April 23, 2009 hearing, Gail Kar testified to the financial hardship should the catering proposal not be granted and thus additional cost information was being submitted. "To establish deprivation of reasonable use, or hardship as it is frequently termed, to obtain an original variance an owner must provide a record which shows that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances; and (3) the use to be authorized by the variance will not alter the essential character of the locality" (***In the Matter or Levandowski et al v Zoning Board of Appeals of the Town of Murray et al, supra***; see Town Law §13). Here, the petitioner was in the process of gathering and producing such additional cost information sought by the ZBA when the adjournment was requested.

On August 25, 2009, the Town Planning staff did not permit the petitioner's counsel to post the sign on that day as it would not be permitted as Town Code, §108-76 required posting at least 7 days before a hearing. On August 27, 2009, the petitioner's counsel appeared before the ZBA to request the adjournment, at which time the ZBA began to hear public comment and conduct the public hearing and allegedly took a statement made by an individual who resided outside the geographical area in which the subject premises was located, which petitioner

asserts suggested a formal communication process between the ZBA, the Town Planning staff and interested parties. Prior to the commencement of the hearing, the petitioner asserts that McLaughlin announced to the public that the record on the application was already "extensive." After the public hearing was conducted, the ZBA voted on a resolution to dismiss the petitioner's application based on a willful failure by the petitioner to post a notice of the hearing. The petition claims that this resolution was in writing and read by a ZBA member before the 3-1 vote was taken and that this resolution was not filed in the Town Clerk's office within the 5 days required by Town Law


§267-a. On September 14, 2009, the ZBA filed a written resolution purportedly different from the August 27, 2009 resolution dismissing the petitioner's zoning application due to the "petitioner's willful intent to frustrate due process and prevent an orderly and timely hearing of the matter."

It defies logic that the ZBA would dismiss the appeal on the basis that the petitioner failed to timely post notice of the hearing, and yet people appeared to present testimony on substantive issues, which gives rise to the inference that notice was somehow provided. There has been no submission to demonstrate that the ZBA advised the petitioner that the adjournment of the hearing from July 23, 2009 to August 27, 2009 was a final adjournment, despite giving the petitioner permission to submit additional cost information which the ZBA and the Town Planning Board requested. The ZBA did not base its dismissal of the petitioner's appeal on the testimony and evidence submitted, but instead upon a failure of the petitioner to provide notice. The petitioner claims that the ZBA had not previously denied adjournments and did not advise the petitioner that the August 27, 2009 adjournment was final.

The Court determines that the resolution to dismiss the appeal on the basis of notice and not upon the merits of the appeal clearly demonstrates that there is no rational basis in the ZBA's actions. While this Court does not have the power to upset the decision of an administrative tribunal on a question of fact, the Court finds that there has been no decision on the petitioners's appeal to the ZBA based upon substantial evidence. 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. Here, the ZBA's decision is without foundation in fact, without sound basis in reason, and without regard to the facts. The ZBA and Hanley have disregarded and misinterpreted substantial evidence, such as the prior determinations of this Court and the ZBA, and the applicable provisions of the Town Code, in their decisions in this case. While a Court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion, the Court finds that the decision under review constitutes an abuse of discretion as it is arbitrary, unreasonable, and is not based upon substantial evidence affecting the merits of the petitioner's claim.

Accordingly, the petitioner's application is granted in all respects and the ZBA is directed to review and grant the two site-plans previously submitted subject to set-backs and compliance with the applicable laws, rules, and regulations of the state and the Town Code.

Dated: December 20, 2010



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION