

Matter of Town of Hempstead v Board of Appeals of the Town of Hempstead
2011 NY Slip Op 32538(U)
September 20, 2011
Sup Ct, Nassau County
Docket Number: 12635/07
Judge: Karen V. Murphy
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

**In the Matter of the Application of
THE TOWN OF HEMPSTEAD,**

Index No. 12635/07

Petitioner(s),

Motion Submitted: 6/29/11

Motion Sequence: 001

For Judgment pursuant to CPLR Article 78

-against-

**THE BOARD OF APPEALS OF THE TOWN OF
HEMPSTEAD AND SCOTTY'S MARINA, INC.,**

Respondent(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....XX
- Reply.....XX
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....X

Hybrid proceeding pursuant to CPLR article 78 to review so much of a determination of the respondent Board of Appeals of the Town of Hempstead, dated November 30, 2008, as granted a special exception to Scotty's Marina, legalizing the current use of a deck structure to be utilized for outdoor dining purposes; and (2) for a declaratory judgment to the effect, *inter alia*, that Board exceeded its jurisdiction in rendering the challenged determination.

The respondent Scotty's Marina ["Scotty's"] owns a fishing station and restaurant in Point Lookout, New York, attached to which is a deck structure currently used for outdoor dining. While the restaurant itself is located on upland property owned exclusively by Scotty's, the deck extends into Reynolds Channel over water-submerged, foreshore land owned by the Town of Hempstead (Pet [dated July, 20, 2007] ¶¶ 7-9) (*see, The Town of Hempstead v. The Bd. of Appeals of the Town of Hempstead*, 2010 WL 4155285, 2010 N.Y. Slip. Op. 32882(U) (Supreme Court, Nassau County 2010); *Town of Hempstead v. Board of Appeals of Town of Hempstead*, 15 Misc.3d 1116(A), 839 N.Y.S.2d 437, 2007 WL 1017658 [Supreme Court, Nassau County 2007]).

By decision dated December, 2005, and after extensive hearings were conducted, the respondent Hempstead Town Board of Appeals ("the Board"), granted Scotty's application for a special exception authorizing, among other things, outdoor dining on the deck, subject to stated conditions (*see*, Decision dated December 2, 2005; *see also, Town Building Ordinance, Article XXVII, § 272[C][10]*).

In granting the application, the Board considered, *inter alia*, the historical use and pre-existing status of the deck as an integral part of Scotty's marina, and observed that, *inter alia*: (1) Scotty's possessed existing littoral and/or riparian rights with respect to the abutting, water-submerged portion of Reynolds Channel under the deck structure; (2) that after considering all the relevant factors, the proposed dining use represented an appropriate and reasonably incidental exercise and/or extension of those existing rights relative to the operation of the marina; (3) that the "mere consumption of food" on the deck would not transform the deck into a "restaurant" upon the facts presented, especially since there was to be no bar or waiter service thereon; and (4) that the outdoor dining use would not adversely impact upon the community or negatively affect upon the "orderly and reasonable" use of any adjacent properties (Decision, ¶¶ 20-23).

Thereafter, by verified petition dated July of 2007, the Town of Hempstead commenced the within hybrid proceeding and action for stated declaratory relief and a judgment annulling the Board's determination. The Town's petition alleges, *inter alia*, that the Board lacked the statutory authority to assess the issue of riparian rights; that its determination in this respect expropriated the Town's exclusive authority to establish "the nature and extent of Scotty's . . . riparian rights (Pet., ¶ 23); and that, in any event, the Board's riparian rights analysis is legally incorrect.

The respondents, the Board and Scotty's, have answered and denied the material allegations of the petition. The matter is now before the Court for substantive review and resolution on the merits. Upon the record presented, the Board's determination should be confirmed and the petition dismissed on the merits.

It is settled that “[t]he judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them” (*Matter of Cowan v. Kern*, 41 N.Y.2d 591, 599, 363 N.E.2d 305, 394 N.Y.S.2d 579 (1977) *see generally*, *Matter of Pecoraro v. Board of Appeals of Town of Hempstead*, 2 N.Y.3d 608, 613, 814 N.E.2d 404, 781 N.Y.S.2d 234 (2004); *Ifrah v. Utschig*, 98 N.Y.2d 304, 308, 774 N.E.2d 732, 746 N.Y.S.2d 667 [2002]). “The crux of the matter is that the responsibility for making zoning decisions has been committed primarily to quasi-legislative, quasi-administrative boards composed of representatives from the local community . . . [who] . . . generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community” (*Matter of Pecoraro v. Board of Appeals of Town of Hempstead*, *supra*, quoting from, *Matter of Cowan v. Kern*, *supra*).

With these principles in mind, the Court agrees that the challenged determination is rationally based upon the extensive evidentiary record developed before the Board. More specifically, the evidence supports the Board’s findings relative to, *inter alia*, the commercial nature of the surrounding location and the absence of any meaningfully negative impact upon the surrounding properties and the adjacent neighborhood. Further, the Board’s finding that, for the purposes of the application, the deck was not tantamount to the operation of a “restaurant,” is not irrational, arbitrary or capricious. Rather, its finding in this respect is rationally predicated upon relevant evidence, which supports the conclusion that the proposed outdoor dining use is qualitatively and functionally distinct from the restaurant maintained by Scotty’s on its adjacent, upland property.

Although the Town may disagree with this interpretation of the evidence (Pet., ¶ 25), “[w]here a rational basis for the determination exists, “a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record” (*Matter of Retail Prop. Trust v. Board of Zoning Appeals of Town of Hempstead*, 98 N.Y.2d 190, 196, 774 N.E.2d 727, 746 N.Y.S.2d 662 (2002) *see*, *Gebbie v. Mammina*, 13 N.Y.3d 728, 729, 914 N.E.2d 142, 885 N.Y.S.2d 450 (2009); *Rossney v. Zoning Bd. of Appeals of Inc. Village of Ossining*, 79 A.D.3d 894, 895, 914 N.Y.S.2d 190 [2d Dept., 2010]).

Contrary to the Town’s assertions, the Board’s determination constituted a permissible exercise of its jurisdictional authority, *i.e.*, its authority to grant special permits and exceptions for, *inter alia*, outdoor dining, as referenced in the applicable provisions of the Town (*Code Town Building Ordinance, Article XXVII, § 272[C][10]*). Significantly, and in general, “[t]he issue of conformity with zoning regulations is within the primary jurisdiction of the Town Zoning Board” (*Matter of Ashley Homes of L.I., Inc. v. O’Dea*, 51 A.D.3d 911, 912, 858 N.Y.S.2d 337 (2d Dept., 2008) quoting from, *Thurman v. Holahan*, 123 A.D.2d 687, 688, 507 N.Y.S.2d 52 [2d Dept., 1986]). The fact that the Board also considered riparian rights principles in aid of its permit analysis, does not establish

that the Board must thereby have exceeded its jurisdictional authority or otherwise “expropriate[d],” the Town’s allegedly exclusive authority to “establish rules governing riparian rights” (Pet., ¶ 23).

Moreover, it is undisputed that a permit authorizing the erection and maintenance of the subject deck in the waterway was *already* in place prior to the Board’s ruling, having previously been issued by the Town’s own Department of Conservation and Waterways in 1998 (H. Tr., at 129-130; 176-177; Return Exh., “B”) (*cf.*, *Town of Hempstead v. Oceanside Yacht Harbor*, 38 A.D.2d 263, 265-266, 328 N.Y.S.2d 894 [2d Dept., 1972]). Additionally, the Board had before it, a memorandum authored by the Department’s Commissioner in 2005, which suggested that the proposed dining use, as described in a letter authored by Scotty’s counsel, constituted in general, a permissible exercise of the rights granted to Scotty’s in connection with the 1998 permit (Denby Aff., Exh., “D”).

Further, and putting aside the pre-existing approval which existed here, Towns and/or other municipal owners of underwater property do not possess unilateral or unfettered authority to determine whether, in the first instance, a landowner possesses stated riparian rights (*see, e.g.*, *Town of Oyster Bay v. Commander Oil Corp.*, 96 N.Y.2d 566, 571, 759 N.E.2d 1233, 734 N.Y.S.2d 108 (2001); *Tiffany v. Town of Oyster Bay, supra*; *City of New York v. Gowanus Indus. Park, Inc.*, 65 A.D.3d 1071, 1073, 886 N.Y.S.2d 427 [2d Dept., 2009]). In any event, the Board’s construction of the riparian rights concepts it considered in rendering its permit determination, was not irrational or erroneous, *i.e.*, its conclusion, in sum, that the dining use was a reasonably incidental exercise and/or proper extension of Scotty’s rights relative to the operation of the marina. It is settled that the extent to which an alleged use may or may not constitute an appropriate exercise of an upland owner’s riparian rights, is a fact-intensive inquiry founded upon a broad constellation of considerations relevant to the particular property and circumstances at issue (*see, City of New York v. Gowanus Indus. Park, Inc., supra* *see also, Town of Hempstead v. Oceanside Yacht Harbor, Inc., supra*).

It bears noting in this respect that the Town has not suggested that: (1) the outdoor dining use would, in any practical sense, impinge upon the actual exercise of any landowner’s riparian rights; or (2) that the dining component of the dock’s use, as opposed to its approved presence in the water, would impair, or even affect, the navigable quality and character of the adjacent waterway in any discernable fashion (*see, Town of Oyster Bay v. Commander Oil Corp., supra*).

Rather, the Town’s objections apparently focus solely on the “outdoor dining” activity to be conducted on the approved waterway structure, which, insofar as the record indicates, would primarily impact, if at all, the surrounding, upland properties, locations over which municipal building departments and/or a Zoning Board of Appeals typically exercise

jurisdiction and/or permitting-issuing authority. Nor has the Town argued that the Board acted irrationally in concluding that the proposed outdoor use would have no discernable, negative impact upon the surrounding community and neighborhood.

Lastly, the record before the Court indicates that the Town did not, in oral argument before the Board, itself affirmatively raise any claim that the outdoor dining use required the issuance of a use variance (*cf.*, Return Exh., "H" Tr., at 215-216 *see also*, Tr. 220-221; Pet., ¶¶ 27-29 *cf.*, *Kearney v. Village of Cold Spring Zoning Bd. of Appeals*, 83 A.D.3d 711, 713, 920 N.Y.S.2d 379 [2d Dept., 2011]).

The Court has considered the Town's remaining contentions and concludes that they are lacking in merit.

Accordingly, it is,

ORDERED that the petition is denied, the determination is confirmed and the proceeding is dismissed on the merits, and it is further,

ORDERED and declared, that the respondent Town of Hempstead Board of Appeals, did not act in an *ultra vires* fashion and/or without jurisdictional authority in issuing the challenged portions of the subject determination.

The foregoing constitutes the Order of this Court.

Dated: September 20, 2010
Mineola, N.Y.


J. S. C.

ENTERED
SEP 23 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE