

JBS Props. Inc. v Zoning Bd. of Appeals Town of Shelter Is.

2012 NY Slip Op 32154(U)

August 13, 2012

Supreme Court, Suffolk County

Docket Number: 2011-10246

Judge: Jeffrey Arlen Spinner

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SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI – COUNTY OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

COPY

JBS PROPERTIES INC,
Petitioners.

For a Judgment under Article 78 of
The Civil Practice Law and Rules

- against -

**ZONING BOARD OF APPEALS TOWN OF
SHELTER ISLAND; JOANN PICCOZZI,** as
Chairperson and Members of the Town of Shelter Island
Zoning Board of Appeals; **WILLIAM W. BANKS,** as
Town of Shelter Island Building/Zoning Inspector;
MARY WILSON, as Town of Shelter Island Building
Permits Coordinator,

Respondents.

- and -

**MADELEINE McCLELLAN, MICHAEL
McCLELLAN, LORI BEARD RAYMOND, GREG
RAYMOND, LISA SHAW and THOMAS
HASHAGEN,**

Intervenors.

INDEX NO: **2011-10246**

MTN SEQ NO: 003 - MotD
ORIG MTN DATE: 04/22/11

MTN SEQ NO: 004 – MG
ORIG MTN DATE: 05/18/11

FINAL MNT DATE: 07/18/12

UPON the following papers numbered 1 to 6 read on this Motion:

- Petition [003] (Paper 1);
- Intervenors’ Order to Show Cause [004] (Paper 2);
- Respondents’ Answer, Return & Opposition to [003] (Papers 3-4);
- Respondents’ Response to [004] (Paper 5);
- Petitioner’s Reply (Paper 6);

it is,

ORDERED, that, in light of the fact that the record herein is incomplete, Respondents are hereby given the opportunity to correct the record and supplement the Return herein; and the application of Proposed Intervenors is hereby granted.

Petitioner moves this Court for an Order, pursuant to Article 78 of the CPLR, annulling the interpretation made by the Town of Shelter Island Zoning Board of Appeals (ZBA) dated

(RR)

February 23, 2011, and received by the Town Clerk on February 24, 2011. Petitioner further moves this Court for an Order directing ZBA to submit to this Court a certified transcript of the proceedings which took place on January 26 and February 16, 2011.

Proposed Interveners-Respondents move this Court for an Order granting movants Madeleine McClellan, Michael McClellan, Lori Beard Raymond, Greg Raymond, Lisa Shaw and Thomas Hashagen leave to intervene, upon the grounds that movants are interested persons, with long standing and special concerns regarding the subject matter of these proceedings, and as such will be adversely affected unless included as parties.

Petitioner owns two adjacent lots: 1) located at 11 Sterns Point Road (Lot 1), described on the Suffolk County Tax Map as SCTM# 700-12-1-40.3; and 2) located at 66 West Neck Road (Lot 2) described on the Suffolk County Tax Map as SCTM# 700-14-1-38.1. In January 2009 the previous owner, Jeanne Fenkle, merged the two lots into one, pursuant to a condition of approval granted by the Suffolk County Department of Health Services. Both lots are located in an A-Residential Zoning District, however Lot 1 has been issued a Certificate of Occupancy for a legally pre-existing nonconforming use as a bar, inn and restaurant, while Lot 2 has been vacant following the merger. Lot 1 received a Certificate of Compliance, dated January 5, 2011, signed by William W. Banks, in his capacity as the Town of Shelter Island Building Inspector & Zoning Officer. Lot 1 had also received a Certificate of Occupancy on January 5, 2011, and a Building Permit on April 18, 2006, both signed by William W. Banks in his capacity as a Building Inspector of the Town of Shelter Island.

In the fall of 2010, around October 5th through November 26th, the Attorney for the Town of Shelter Island, the Town Supervisor, Building/Zoning Departments, and ZBA received phone calls, letters and petitions from the proposed interveners, who are local residents and neighbors of Petitioner's property, concerning the expansion of Lot 1's non-conforming use onto Lot 2. Petitioner had cleared Lot 2 and constructed a driveway or parking lot on the property, leading from the street Lot 2 fronts to the established bar, inn, and restaurant located on Lot 1.

The residents requested an interpretation and explanation of the Town Code regarding zoning, specifically lot mergers, and non-conforming use issues, including expansion of said use. The two petitions signed by Petitioner's neighbors were in regards to: residents' opposition to the additional commercial use on the lot located at 66 West Neck Road; expansion of Petitioner's non-conforming use from 11 Sterns Point Road; zoning changes to either lot; and changes of use or expansion of the lot located at 11 Sterns Point Road without a public hearing.

On December 28, 2010, the Shelter Island Town Board held a work session to allow neighbors to voice concerns regarding the expansion of Petitioner's use from Lot 1 onto Lot 2, at which time the President of Petitioner-Corporation, John Sieni, was present. At the conclusion of the work session, the above mentioned issues were referred to the Building Department which, in turn, requested that an interpretation be made by Respondent ZBA. That request was sent by Mary Wilson, Building Permit Coordinator of the Town of Shelter Island, by letter dated January 4, 2011. The letter omits any references to Petitioner's property, and specifically references a request for an interpretation of Zoning Ordinance Section 133-23 C, which pertains to

nonconforming use extension(s). In pertinent part, the letter directs the following four questions to the ZBA:

1. Does clearing of land and/or the installation of a driveway constitute an expansion of a non-conforming use?
2. When a parcel with a pre-existing, non-conforming business use is merged with another second property within the same residential zoning district, what impact would that have on the non-conforming status of the original and combined property?
3. What activities expand the non-conforming business use further in the residential zone?
4. To what extent can the second property be developed to benefit the nonconforming use on the original property?

Commencing on January 13, 2011, ZBA published a legal notice in the Shelter Island Reporter for one week, advertising an upcoming hearing to be held on January 26, 2011, for, among other issues, “3) the application of the Building Department for an interpretation of whether certain development activities constitute an expansion of a nonconforming commercial use under Section 133-23(c).” Said notice was without any indication that the hearing was intended for the Petitioner’s property specifically, but rather solely stated its purpose was for an interpretation of the Zoning Ordinance.

At the January 26th ZBA hearing, the neighbors and an attorney representing the proposed interveners were present to voice their opinions regarding the interpretation of the Zoning Ordinance in question. Neither Petitioner nor his legal representative were present. Although no certified transcript of said public hearing has ever been provided to the Court as part of the Return herein, attachments purported to be the hearing transcripts indicate that the interpretation “... is not specific to any one nonconforming use or any specific location. The interpretation would apply to all nonconforming uses on Shelter Island.” Before the conclusion of the meeting, the proposed interveners, through their legal representative, submitted a letter representing their concerns, and again Petitioner’s property was specifically named.

Respondent ZBA concluded by permitting submissions of additional written comments until February 9, 2011, and left the issue of interpretation open until February 16, 2011. Petitioner did not make any submissions during this time, and was not notified of the February 16th meeting. There have been no submissions to this Court pertaining to any notifications regarding the ZBA meeting set for February 16th.

At the February 16th ZBA meeting, the board discussed their decisions that: clearing land does not constitute expansion; buying land adjacent to a nonconforming use property does not expand the nonconforming use; and installing a driveway does not constitute expansion. However, ZBA further concluded that anything that aids or supports the commercial use of an adjoining property would be considered expansion of a nonconforming commercial use, and that a merged property cannot be developed in any way to aid or support the nonconforming commercial use. The Town Attorney drafted a resolution to reflect the board’s decision, dated February 23, 2011, which was filed on February 24, 2011.

It is well established that, the judicial responsibility when reviewing a zoning board's decision is to determination solely if the action was illegal, arbitrary and capricious, or an abuse of discretion. (See: CPLR 7803). Great deference is given to local officials and therefore the Court will sustain a Zoning Board's decision if: it has a rational basis, and is supported by substantial evidence. (See: *Ifrah v Utschig*, 98 NY2d 304 [2002]; *Halperin v City of New Rochelle*, 24 AD3d 768 [2 Dept 2005]); *Mejias v Town of Shelter Is. Zoning Bd. of Appeals*, 298 AD2d 458 [2 Dept 2002]). Further, to overturn a zoning board's interpretation of its zoning ordinance, the court must find it unreasonable or irrational. (See: *Mejias v Town of Shelter Is. Zoning Bd. of Appeals*, 298 AD2d 458 [2 Dept 2002].)

The Court notes that, pursuant to CPLR 7802(d) and controlling case history, in an Article 78 proceeding, an intervention by an interested person is at the sound discretion of the court, and is limited to persons "specially and beneficially interested" in the Court's determination. (See: *Virgo v Zoning Bd. of Appeals of Town of Irondequoit*, 28 Misc2d 886 [Sup Ct 1961]).

Further, that for persons to have legal standing to challenge a decision made by the Zoning Board of Appeals, they must establish that they are aggrieved parties, such that their properties are within the immediate vicinity of the subject property and the property of other petitioners. (See: *Mueller v Anderson*, 60 Misc2d 568 [Sup Ct 1969]).

The papers submitted to this Court are incomplete and unclear as to whether the interpretation made by ZBA regarding expansion of nonconforming uses was considered as a generality, made for general purposes regarding the entirety of Shelter Island, or was it rather made with specificity, aimed directly with Petitioner's property in mind. It is noted that the original correspondence of the residents, voicing their concerns, which clearly seems to be the nexus of the referral of this matter for interpretation, were with specific regards to Petitioner's property. No notice was given to Petitioner of either the ZBA's January 26th or February 16th meetings, even though he was present at the initial December 28th Town Board work session.

Notwithstanding the generality or specificity of ZBA's consideration, the Court notes that, according to the papers submitted, the Town of Shelter Island had in their employ, at the time of this referral, a Building Inspector & Zoning Officer, demonstrated by a signed Certificate of Compliance sent to Fenkle, dated January 5, 2011. In the same time period, ZBA received their request for interpretation from the Building Permits Coordinator. Pursuant to Shelter Island Town Code, Section 133-32(F)(1), the ZBA will interpret the meaning of, "any provision of this chapter upon referral by the Building Inspector/Zoning Officer or the Planning Board."

Further, without certified transcripts of the ZBA's meeting minutes, the Court cannot determine if ZBA's decision was founded upon a rational basis, supported by substantial evidence. Without such records the Court cannot determine if the decision has been arbitrary, capricious, illegal or an abuse of discretion.

ORDERED, that the Proposed Interveners-Respondents provided sufficient evidence showing they will be sufficiently and beneficially interested and effected by the determination of this Court, along with Respondent's support for their Motion to Intervene and lack of opposition

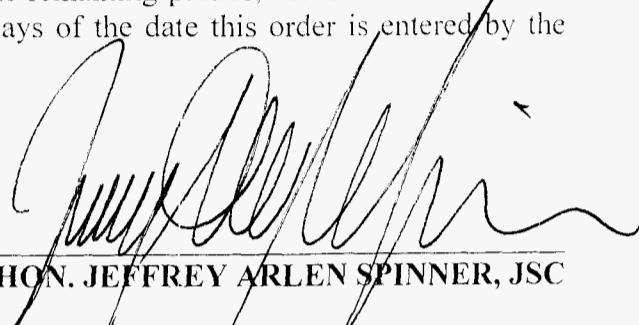
made by Petitioner, and therefore the application of Proposed Interveners for an Order granting their Motion to Intervene is hereby granted, and the caption is amended as set forth at the top of this decision; and it is further

ORDERED, that, pursuant to CPLR 7804(e), certified transcripts be submitted to this Court by October 24, 2012, regarding all relevant ZBA meetings and Town Board Meetings and/or minutes in regards to the interpretation of nonconforming use expansion and/or Petitioner's property, including but not limited to: December 28, 2010, January 16, 2011, February 16, 2011, and February 24, 2011; and it is further

ORDERED, that, pending submission of these missing documents, no enforcement actions be made against Petitioner and its business operation, and that this matter be calendared for this Court's Motion Calendar for October 24, 2012; and it is further

ORDERED, that Counsel for Respondents herein are hereby directed to serve a copy of this order, with Notice of Entry, upon Counsel for all the remaining parties, the Clerk of this Court and the Suffolk County Clerk within twenty (20) days of the date this order is entered by the Suffolk County Clerk.

**DATED: Riverhead, New York
August 13, 2012**



HON. JEFFREY ARLEN SPINNER, JSC

FINAL DISPOSITION

NON-FINAL DISPOSITION

SCAN

DO NOT SCAN

TO:

Scarlato & Baldwin, PLLC 45 Division Street, P.O. Box 2600 Sag Harbor, New York 11963	
Gilmartin & Bregman 320 Hampton Road Southampton, New York 11968	
Shelter Island Town Attorney 39 North Ferry Road, P.O.B. 970 Shelter Island, New York 11965	