Supreme Court of the State of New York
IAS Part XXI - County of Suffolk

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

JBS PROPERTIES INC,

Petitioners,

For a Judgment pursuant to 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-

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

Intervenors.

DECISION & ORDER

INDEX NO: 2011-10246

MTN SEQ NO: 001 - CASEDISP
ORIG MTN DATE: 04/22/11

FINAL MTN DATE: 05/14/14

UPON the following papers numbered 1 to 9 read on this Petition and Motions:

- Petition[003] (Paper 1);
- Proposed Intervenors' Order to Show Cause [004] (Paper 2) - [Granted on 08/13/12];
- Respondents' Answer, Return & Opposition [003] (Papers 3-4);
- Respondents' Response to Intervenors [004] (Paper 5) - [Granted on 08/13/12];
- Petitioner's Reply [003] (Paper 6);
- Respondents' Compliance with an Order of this Court [003] (Paper 7);
- Petitioners' Motion [005] (Paper 8);
- Intervenors' Opposition [005] (Paper 9);

it is,

ORDERED, that the Petition [003] herein is hereby granted solely to the extent set forth herein below; and that Petitioner's application [005]

Petitioner moves this Court [003] for an Order annulling the interpretation rendered by the Respondent

Town of Shelter Island Zoning Board of Appeals (ZBA), dated February 23, 2011, and filed with the Shelter Island Town Clerk on February 24, 2011, which interpreted a section of the Shelter Island Town Code regarding non-conforming uses because:

1. The interpretation was unlawfully commenced in violation of the Shelter Island Town Code; and
2. The affected property owner was not notified of the hearing on the interpretation; and
3. The decision was arbitrary, capricious, irrational, not supported by the evidence and in violation of New York law.

Petitioners move this Court [003] for an order granting its request for Judicial Notice of certain governmental records be taken, pursuant to CPLR 4511(b).

Petitioner JBS Properties owns the real property (Premises) at the center of controversy in the instant action. Said Premises consists of two adjacent lots, totaling 2.2 acres. Lot One is located at 11 Sterns Point Road (Suffolk County Tax Map No. 700-14-1-40.3) and Lot Two is located at 66 West Neck Road (Suffolk County Tax Map No. 700-14-01-38.1). Both properties are located in the Hamlet of Shelter Island, Town of Shelter Island, County of Suffolk, State of New York. Both lots are also located in an A-Residential Zoning District. In 2011, Lot One was issued a Certificate of Occupancy for a legally pre-existing nonconforming use as a bar, inn and restaurant. Lot Two is currently vacant.

In January 2009, the previous owner of the Premises merged Lot One and Lot Two, pursuant to a condition of approval granted by the Suffolk County Department of Health Services. According to the record, the two lots were merged because the Inn increased from four to eight rooms and thus additional acreage was required to accommodate the requisite septic system upgrade.

In January 2011, Petitioner purchased the Premises. Petitioner alleges that at the time it purchased it was a single merged property. Furthermore, Petitioner alleges that the Town of Shelter Island deemed the property to be a single lot. In support of this allegation, Petitioner provides evidence demonstrating that as early as July 2011, the Town of Shelter Island's final tax rolls for 2011-2012 referred to the merged property as a commercial use classification, "Inn, Lodge, Bar, Restaurant."

On January 4, 2011, Respondent WILSON (WILSON), the Permit Coordinator for the Town of Shelter Island, requested that ZBA provide specific interpretations of Section 133-23(c) of the Zoning Ordinance of the Town of Shelter Island. Specifically, WILSON referred the following request for interpretation to ZBA:

(1) Does clearing land and/or the installation of a driveway constitute an expansion of a non-conforming use;
(2) When a parcel with a pre-existing nonconforming 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 and combined property;
(3) What activities expand the nonconforming use further in the residential zone; and
(4) To what extent can the second property be developed to benefit the nonconforming use on the original property.

Beginning on January 13, 2011, ZBA published a notice that ran for one week in a weekly newspaper published in the Town of Shelter Island. The Notice as posted read as follows:

"NOTICE IS HEREBY GIVEN, that the following hearings will be held by the Shelter Island Zoning Board of Appeals on the 26th day of January, 2011, at the Shelter Island Town Hall, 38N. Ferry Road, Shelter Island, New York. Applications are scheduled to begin at 7:30 p.m., or thereafter. Applications may be heard in the order they appear in the notice. . .

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). All Persons wishing to be heard should appear at the aforementioned times and place."

On January 26, 2011, ZBA held a public hearing to discuss WILSON's above referenced request. This notice was without any indication whatsoever that the hearing was intended to discuss the Premises; and neither Petitioner nor Petitioner's legal representative attended this hearing.

On February 16, 2011, ZBA again held a meeting and further discussed said request; again Petitioner was not notified of this meeting; and again, neither Petitioner nor its legal representative attended this meeting.

On February 23, 2011, the Shelter Island Town Attorney drafted a resolution to reflect the decision of ZBA; which ZBA adopted. On February 24, 2011, the Town Attorney filed the resolution with the Town Clerk. The resolution stated that ZBA found the following:
(1) Clearing land is not an expansion of a non-conforming use;
(2) Buying land adjacent to a nonconforming property is not an expansion of a nonconforming use;
(3) Installing a driveway is not an expansion of a non- conforming use;
(4) But anything that aids or supports the commercial use of an adjoining property is an expansion of a nonconforming use."

On March 24, 2011, Petitioner filed the instant petition to annul said interpretation. On August 13, 2012, this Court granted Intervenors their status in the instant matter, and this Court further determined the following:
(1) The record was incomplete;
(2) Certain transcripts were to be submitted by October 24, 2012, regarding all ZBA meetings and Town Board meetings regarding Petitioner's property; and
(3) No enforcement actions were to be taken against Petitioner and its business operation pending further determination and Order of this Court.

Petitioner seeks to have ZBA's interpretation annulled for the following reasons:
(1) Petitioner was not notified of the hearing held to consider said interpretation, pursuant to Shelter Island Town Code § 133-34;
(2) Petitioner argues the interpretation was unlawfully commenced, in violation of Shelter Island Town Code;
(3) Petitioner claims the decision of ZBA was arbitrary, capricious, and irrational, not supported by the evidence, and is in violation of the Laws of the State of New York.

As a threshold matter, it is well settled law in the State of New York that a Court may not substitute its

own judgment for that of the reviewing board (*see:* ***Janiak v Planning Board of the Town of Greenville***, 159 AD2d 574 [2 Dept], *appeal denied*, 76 NY2d 707 [1990]; ***Mascony Transport and Ferry Service v Richmond***, 71 AD2d 896 [2 Dept 1979], *aff'd*, 49 NY2d 969 [1980]). Therefore, if the decision rendered by the reviewing board is within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is arbitrary, capricious or unlawful (*see:* ***Castle Properties Co v Ackerson***, 163 AD2d 785 [3 Dept 1990]). Furthermore, the determination of a reviewing board must be sustained if it is rational and supported by substantial evidence, even if the reviewing Court would have reached a different result (*see:* ***PMS Assets Ltd v Zoning Board of Appeals of Village of Pleasantville***, 98 NY2d 683 [Ct of App, 2002]).

Respondents contends that Petitioner has not been aggrieved by the decision of ZBA because the decision affects Petitioner no differently than any owner of a similar non-conforming use property, and thus Petitioner lacks standing to bring the instant proceeding. Respondents' aforesaid contention is unconvincing.

It is clear that Petitioner's property, the Premises herein, was unquestionably the subject of the hearing conducted by ZBA. It is uncontested that the Shelter Island Town Board specifically discussed the Premises herein, and the concerns of neighbors with possible incursions of allegedly non-conforming commercial uses into the residentially zone, vacant Lot Two of the Premises. It is uncontested that, after said discussion, the Town Board referred the matter for an opinion, and that WILSON then referred it to ZBA. It is uncontested that ZBA then advertised and held hearings based on the specific questions posed to it by WILSON.

If this is unconvincing, then a review of the specific questions would be educational. The first question includes the words "...and/or the installation of a driveway...". The second question includes the words, "...When a parcel with a pre-existing nonconforming business use is merged with another second property within the same residential zoning district...". Were the Court to look beyond the facts that demonstrate that ALL the questions posed directly relate to the Premises herein, immediately after discussions regarding said Premises were conducted by the Town Board and referred for an interpretation, the inclusion of the reference to a "driveway", and the reference, very specifically, to the merging of a "nonconforming business use" with a second property "within the same residential zoning district", leaves nothing to question. It would be nothing less than ridiculous to ask the Court to believe that this was mere coincidence.

It is clear that Petitioner was entitled to receive notice of the January 26, 2011 ZBA hearing, because it is clear that Petitioner owns THESE Premises that was affected by the discussions at this hearing. The Town Board had not discussed this as a town-wide problem, nor did they discuss other properties with like circumstances, when they referred this matter. They discussed THESE Premises, and the alleged expansions of THIS non-conforming use on THESE Premises. This was NOT theoretical, it was specific and practical to THE Premises herein. Respondents' contention that Petitioner's property was not the intended subject of discussion at the aforementioned hearing is nothing less than farcical.

"In a proceeding pursuant to CPLR Article 78 to review a determination of a zoning board of appeals, a zoning board's interpretation of its zoning ordinance is entitled to great deference, and judicial review is [generally] limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion" (*see:* ***Ferraris v Zoning Bd of Appeals of Vill of Southampton***, 7 AD3d 710 [2004];

Brancato v Zoning Bd of Appeals of City of Yonkers, NY, 30 AD3d 515 [2006]).

The problem in the instant case is that the Court cannot reach the question of whether ZBA's interpretation was arbitrary, capricious, or violative of whatever standard without considering first whether ZBA deprived Petitioner of due process rights by failing to timely notify Petitioner about the public hearing which would be determinative of whether certain activities would be permitted on its Premises under the Town Code, as same is, to a great extent, fact-based (*see:* ***Matter of Incorporated Vil of Atl Beach v Zoning Bd of Appeals of Town of Hempstead***, 94 NY2d 842 [1999]; ***New York Botanical Garden v Bd of Standards & Appeals of City of New York***, 91 NY2d 413 [1998]). In the instant matter, it would appear impossible for ZBA to reach a conclusion that was NOT arbitrary, capricious and unlawful, absent an adequate record, a mandatory requirement in reaching a fact-based determination, when the record has been distilled by failing to provide a directly affected party of its opportunity to place any facts in the record.

Petitioner claims that it was not timely notified of ZBA's hearing, and that ZBA's failed to provide Petitioner with adequate notice violated Shelter Island Town Code § 133-34. Oddly, Respondents' response is to claims that Petitioner had ample time to submit evidence on the record in connection with Petitioner's desire to expand the pre-existing nonconforming use. The Court is confronted by the conundrum of this proposition. How would same be possible without proper notice to the property owner?

It is clear to this Court that ZBA failed to provide Petitioner with adequate notice pursuant to Shelter Island Town Code § 133-34 regarding the ZBA hearing in question. ZBA did not send Petitioner any letters or other documentation to notify Petitioner of the hearing. ZBA merely published a notice that failed to address itself to the specific Premises that was the cause of said hearing; the specific Premises that would be affected by the determination of said hearing. Clearly, ZBA did not adequately notify Petitioner of the hearing.

This Court must next address the central and overriding issue in the instant action: whether failing to provide Petitioner with adequate notice regarding the ZBA hearing dated February 23, 2011 constitutes a denial of Petitioner's procedural due process rights. This question must be answered in the affirmative.

The United States Supreme Court has consistently determined that the right to be heard is fundamental to our system of justice (*see:* ***Mullane v Central Hanover Bank & Trust Co***, 339 US 306 [1950]; ***Matter of Jones v Berman***, 37 NY2d 42 [1975]). Furthermore, the United States Supreme Court has established that procedural due process in the context of an agency determination requires that the agency provide an opportunity to be heard in a meaningful manner at a meaningful time (*see:* ***Mathews v Eldridge***, 424 US 319, 333, [1976]).

This Court declines to address the merits of the instant action, with regard to interpretation of the Shelter Island Town Code, unless and until ZBA has provided Petitioner with a meaningful opportunity to be heard, at a meaningful time. Petitioner is entitled to make its arguments before ZBA, and ZBA must afford Petitioner the opportunity to argue its case and provide evidence in order for ZBA to make an informed decision, allowing the Court to then make an informed review of the determination so rendered. ZBA MUST provide adequate notice specifically to Petitioner, by mailing at least one letter to Petitioner's address of record.

The Court finds ZBA's remaining arguments unavailing, and concludes ZBA lacked a rational basis for failing to properly notify Petitioner of the hearing affecting the Premises herein, and therefore rendering a determination that was arbitrary, capricious, outside the scope of ZBA's authority and illegal. ZBA improperly exercised its authority, and therefore the instant Petition must be granted.

As to Petitioner's motion for an order granting Judicial Notice of certain governmental records be taken, pursuant to CPLR 4511(b), first the Court notes that Petitioner properly cites ***Kingsbrook Jewish Medical Center v Allstate Ins Co***, 61 AD3d 13 [2 Dept 2009], setting forth that case law supports Judicial Notice of public documents that are generated in a manner which assures their reliability, such as the documents submitted for Judicial Notice herein, by Petitioner; and second, that this Court issued a short Order to allow Respondents to submit further documents for the Court's review that were a requisite part of a proper Record; and therefore said Motion is herein granted, even though same is rendered rather meaningless in light of this Court's inability to reach the issues of ZBA's determination, absent its failure to properly notify Petitioner of the hearing, as set forth herein above.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED and **ADJUDGED,** that the above referenced Petition [003] is hereby granted, and this matter is hereby remanded to Respondent ZBA was a proper hearing, on notice to Petitioner and any other parties necessary in order to render a decision properly, by the mailing procedures set forth in the Shelter Island Town Code; and it is further

ORDERED and **ADJUDGED,** that the above referenced Motion [005] is hereby granted; and it is further

ORDERED and **ADJUDGED,** that this Court hereby retains jurisdiction over this proceeding, for all purposes; and it is further

ORDERED, that Counsel for Petitioner are hereby directed to serve a copy of this Order, with Notice of Entry, upon Counsel for all the remaining parties, and upon 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, 2014

HON. JEFFREY ARLEN SPINNER, JSC

✓ FINAL DISPOSITION	NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

* The Court gratefully acknowledges the assistance of Andrew Schnissel, Intern in Part 21 and Law Student at Touro College, Jacob D Fuchsberg Law Center.