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INDEX NO. EF005221-2020
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERTA. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY
---------- _X
JOHN KING and DOUGLAS DUCHIN,
Petitioner,
- against -

JAKE LINDSAY (Chair), GARY POMPAN,
MARY DARBY, DAVID CHRISTENSEN, and NANCY HAYS,
constituting the BOARD OF ZONING APPEALS OF THE VILLAGE OF TUXEDO PARK; and JOHN C. LED WITH, IV, as Building Inspector of THE VILLAGE OF TUXEDO PARK,
Respondents,

For a Judgment Pursuant to Article 18 of the Civil Practice Law and Rules.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF005221-2020

DECISION, ORDER AND JUDGMENT

Motion Dates: December 1,2020

The following papers numbered 1 through 18 were read and considered on (1) a petition pursuant to Article 78 to annul and set aside a determination made by Respondents, dated June 24,2020, which, in effect, denied them a certificate of occupancy; (2) a motion by the Petitioners for a preliminary injunction; (3) a motion by the Respondent John C. Ledwith to dismiss the petition; and (4) a motion by the Respondents Jake Lindsay, Gary Pompan, Mary Darby, David Christenson and Nancy Hays, as the members of the Zoning Board of Appeals of Tuxedo Park, to dismiss the proceeding.

Notice of Petition- Petition- Exhibits A & B 1-3
Order to Show Cause- Churgin Affirmation- Exhibits A & B 4-6
Notice of Motion- Nugent Affirmation- Ledwith Affidavit- Doherty Affidavit- Exhibit A- Memorandum of Law 7-12
Notice of Motion- Terhune Affirmations- Exhibits 1-5- Memorandum of Law 13-16
Churgin Affirmation - Exhibit A 17-18

Upon the foregoing papers it is hereby,

ORDERED, that the petition and motions are decided as set forth herein.

Factual/Procedural Background

The Petitioners John King and Douglas Duchin own a residence in the Village of Tuxedo Park ("Village"), County of Orange, State of New York. The Village of Tuxedo Park is a gated, lake community consisting almost exclusively of residences, many of them mansions on extensive acreage.

This proceeding, and a prior proceeding, concern efforts by the Petitioners to obtain a Certificate of Occupancy (hereinafter "C/O") for the premises that does not limit the use to "seasonal use."

The following background facts are not in dispute.

Sometime prior to 2010, the Petitioners purchased the subject residence, which was in a state of significant disrepair. The residence was built before the adoption of the Village code, and is out of compliance with the code as adopted in many ways. However, the residence is "grandfathered" in. There was no certificate of occupancy.

In 2010, the Petitioners applied to the Village of Tuxedo Park Board of Architectural Review (hereinafter "BAR") to obtain approval to make extensive renovations to the property. Under the Village of Tuxedo Park Zoning Code (hereinafter "Code"), the BAR was authorized to review and approve site plans.

On January 18, 2013, after the Petitioners completed the work, the Village issued a C/O for the property limited to "seasonal use (May 1 through September 30) single family."

In 2017, the Petitioners installed a mini-heat/air conditioning unit in the residence to accommodate year-round comfort.

Thereafter, the Petitioners requested issuance of a new C/O for unrestricted (rather than

"seasonal") use of the residence.

By letter dated October 3,2018, the Respondent John Ledwith, the Village building inspector, informed the Petitioners that their request constituted a "change of use" of the property, which would require a survey of the property and variances, etc.

The Petitioners appealed Ledwith's determination to the Respondent Board of Zoning Appeals for the Village of Tuxedo Park (hereinafter "BZA").

On August 8,2019, the BZA denied the appeal without reaching the merits of Ledwith's determination. Rather, the BZA held, *inter alia*, the Petitioner's appeal was, in effect, an untimely "collateral attack on the 2013 Certificate of Occupancy, from which no direct appeal was timely filed."

In 2019, the Petitioners commenced a prior CPLR article 78 proceeding to set aside the BZA's determination.

By Decision and Order dated January 21, 2020, the Court granted the petition.

The Court held that the appeal before the BZA was not an untimely collateral challenge to the 2013 C/O. Rather, the Court noted, there had been at least one significant and relevant change to the property after the 2013 C/O was issued *{i.e.*, the installation of heating/cooling system), and the Petitioners were entitled to seek a new C/O based on the same.

Thus, the Court remitted the matter to the BZA for a determination as to whether Ledwith properly concluded that the Petitioners' proposed year round use of the property constituted a "change of use" under the Code, requiring compliance with the Code as currently written before a new or amended C/O would issue.

In so doing, the Court noted that, although it appeared that the BZA was not inclined to

annul Ledwith's determination, “this will not necessarily be the case,” and that the BZA should be afforded an opportunity to render a determination on the merits. Nonetheless, the Court noted: “Given the delay resulting from the failure to have reached the substance of the Petitioners' appeal, the Court trusts that the [BZA] will move with all due speed in rendering a decision on the merits.”

On June 24,2020, the BZA rendered the determination challenged in this proceeding.

The BZA held that the Village Code did not distinguish between seasonal and year-round residential use, and that the transition from one to the other did not constitute a ‘“change of use' or ‘conversion' as a matter of law."

However, the BZA held, this did not mean that the Petitioners were entitled to a C/O without the seasonal restriction.

Rather, the BZA held, the seasonal restriction did not arise from a provision in the Village Code, but was a “condition” imposed by the BAR when it approved the Petitioners’ site plan in 2010; which condition was adopted by the Board of Trustees when it approved the building permit.

Further, the BZA held, it lacked the authority to annul such a condition. Thus, it remitted the matter back to Ledwith "to determine whether he has the authority to lift the 'seasonal use only' condition.”

Proceeding at Bar

The Petitioner commenced this proceeding to challenge the BZA’s determination.

Initially, the Petitioners assert, the BZA did not move with “all due speed.” Rather, the BZA did not meet from January 2020 until June of 2020.

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Ultimately, the Petitioners note, the BZA made the following findings:

1. That the Village Code did not distinguish between seasonal and year-round residential use, and that a transition from one to the other does not constitute a "change of use" or "conversion" as a matter of law.

2. That the property at issue was and is a legal single-family residential under the Code.

3. That the issuance of a C/O with a seasonal limitation was improper because the Village Code did not provide for such a limitation.

However, despite the same, the BZA did not direct the issuance of C/O.

Rather, the Petitioners note, the BZA held that the seasonal limitation was a "condition" imposed by the BAR when it granted site plan approval in 2010, and that the BZA was without authority to change or negate such a "condition." Thus, the BZA remitted the matter to Ledwith "to determine whether he has the authority to lift the 'seasonal use only' condition imposed in 2010 by the Board of Architectural Review upon site plan approval and the Board of Trustees when it approved the building permit."

Consequently, the Petitioners assert, Ledwith is now tasked with determining whether he has the legal authority to "lift" the "seasonal use only" condition placed in 2010 (a decade ago) by the Board of Architectural Review ("BAR") and the Village Board ("VB"), despite the BZA having found unequivocally that "there is no authority in the Tuxedo Park Code to limit a single family residential use to a seasonal duration."

The Petitioners argue that this "charade"confirms that the Court was right when it expressed concern that the BZA was not inclined to annul Ledwith's determination, regardless of the facts. That is, although the BZA was compelled to concede that the Code did not authorize a seasonal limitation, the BZA, in an effort to "illegally thwart" the Petitioners' rights,'"trumped

up another technical objection without merit, just as it did in its decision in 2019, when it ignored the issue of lack of authorization for a seasonal use restriction, and instead found a different technical issue that had no merit."

In sum, the Petitioners assert, if there is no authority in the Code to limit the use of the property to a seasonal duration, then there is no authority for BAR or any other body to impose such a condition.

Accordingly, the Petitioners argue, the BZA's decision to remit the matter to Ledwith, rather than taking the action required by law (issuance of an unconditional C/O), was done in bad faith, is contrary to law, and is "irrational, illogical, circuitous, and arbitrary." Indeed, the asserts, it "is yet another stalling tactic to avoid issuing the legally required CO, and keep the Petitioners running in circles."

As a consequence, the Petitioners argue, they have been unlawlully deprived of their right to use their home from October 1st through April 30th for the last three years.

This is true, they note, even though they had spent the prior five years (2013 until 2018) complying with the limitation.

The Petitioners argue that the Respondents' bad-faith denial of their property rights, combined with the BZA's very belated but unequivocal determination that there is not, and never has been, any authority in the Code to impose a seasonal use restriction, warrants the Court granting temporary, preliminary, and permanent injunctive relief against enforcement of the illegal seasonal use restriction.

In sum, they assert, the Court should issue a decision: Reversing that portion of the determination which (1) remits a legal question to Ledwith and (2) leaves the seasonal use

restriction in effect; annulling the determination of Ledwith denying issuance of a certificate of occupancy for a single-family dwelling without any seasonal use restriction; and directing the building inspector to issue the requested certificate of occupancy for a single-family dwelling without any seasonal use restriction.

The Petitioners also move for an order granting a temporary restraining order as to the above relief.

The Respondent Ledwith opposes the requested relief and cross moves to dismiss the petition.

In support of his motion, and in opposition to the Petitioners' petition and motion, Ledwith submits an affirmation from counsel, Brian Nugent.

As relevant background, Nugent asserts as follows.

The Village of Tuxedo Park Code § 100-51 vests site plan approval authority under New York State Village Law § 7-725-a with the BAR.

In general, such an authorized body may impose "such reasonable conditions and restrictions as are directly related to and incidental to a proposed site plan."

Here, he asserts, on June 1,2010, when the BAR approval of Petitioners' application/site plan, the BAR imposed a condition that "use of the finished structure would be seasonal use only, and the Building Inspector would determine the exact dates of the seasonal use."

Moreover, he notes, the Petitioners were present at the June 1,2010, BAR meeting, and were therefore aware of the source of the seasonal restriction.

Nonetheless, Nugent notes, the Petitioners did not make any application with the BAR to remove the condition, but rather "improperly sought to have the condition removed by

Ledwith."

Thus, he argues, "it was Petitioners' initial decision to pursue the wrong path of addressing the seasonal use condition that brought the underlying proceeding to the BZA and subsequently to this Court."

In any event, he asserts, neither the BZA nor Ledwith have the authority or power to summarily strike down a site plan condition imposed by the BAR.

Rather, he argues, if the Petitioners believe that the circumstances that led to the imposition of the condition are no longer applicable, they should raise that issue with the BAR, which imposed the condition based upon safety concerns associated with the Village roadway during the winter months, as well as concerns with the extremely narrow and dangerous stairway that accesses the Petitioners' property.

In sum, he asserts, there are three main reasons to deny the Petitioners relief.

First, the limitation of seasonal use was a condition imposed by the BAR in approving the site plan, and the Petitioners have failed to exhaust administrative remedies by seeking amendment or repeal of the condition from the BAR.

Second, the condition is enforceable, as the BAR, in approving the Petitioner's site plan, was entitled to impose any condition thereon that was rationally and directly related to the same; regardless of whether it is expressly permitted by the Village Code.

Third, the Petitioners failed to join a necessary party-the BAR.

Further, he asserts, the Court cannot grant any of the relief sought by Petitioners, as doing so would allow a collateral attack on the BAR site plan condition without requiring Petitioners to pursue their administrative remedies.

Nugent notes that he had appended an affidavit from Ledwith in which Ledwith notes that

the seasonal use restriction implicated health and safety issues, not only for Petitioners, but for their guests and emergency services, all of whom may need access to the property during inclement weather, such as when snow or ice cover the steep pedestrian access and adjacent roads.

Thus, he asserts, the Court need not engage in a fact-finding analysis as to the merits of the health, safety and welfare conditions, as the Petitioners have not exhausted the administrative remedies concerning the same by raising such issues before the BAR. ,

Further, he argues, the Petitioners should not be granted any injunctive relief because they have not demonstrated a likelihood of success on the merits, irreparable harm in the absence of such injunction and that the balancing of the equities favor an injunction.

For example, he asserts, although the Petitioners claim that they would suffer irreparable harm if they are required to leave their home during the COVID pandemic, that assertion is undermined by the undisputed fact that Petitioners have never been legally authorized to use the premises outside of the seasonal use. Thus, they have clearly been using some other residence or premises during the winter months for at least the past ten years.

Moreover, he asserts, upon information and belief, the Petitioners have not utilized their premises during the pendency of the motion practice in this action, even though the Respondents "graciously agreed not to enforce the seasonal use condition as the COVID pandemic continued."

Finally, he argues, pursuant to CPLR § 6313, a temporary restraining order may not be granted "against a public officer, board or municipal corporation of the state to restrain the

performance of statutory duties."

Here, Nugent asserts, it is the duty of Ledwith to enforce the seasonal use condition

imposed by the site plan for the Petitioners' property.

The remaining Respondents (hereinafter "BZA Respondents") also move to dismiss the petition.

In support of their motion, and in opposition to the petition and the Petitioners' motion, the BZA Respondents submit an affirmation from counsel, Alyse Terhune.

Terhune makes the same or similar arguments to those made by Ledwith *{supra).*

In addition, Terhune asserts, it appears that the Petitioners' "real motive to seek permanent removal of the seasonal restriction is because they intend to sell the Tuxedo Park house, as evidenced by the 'storybook cottage' for sale listing in the Certified Record at page 75." Further, she argues, the "listing falsely states that 'although currently zoned for use from May 1st through October 31, it is pre-wired for mini-split heat and A/C in order to qualify for year round occupancy. '" '

Terhune asserts that, as previously explained in the BZA's 2019 decision, the seasonal condition was imposed due to the property's failure to comply with most of the Village's Zoning Code Minimum Area and Bulk Regulations requirements. For example, she argues, "[t]he steep, dilapidated, '100 steps'" at the property are the only way the Petitioners, their guests and emergency responders can access the residence. The steps, "which are not ideal in warmer months, are unreasonably hazardous when covered in wet leaves, snow or ice." Moreover, she notes, there is no off street parking for the property. Thus, the Petitioners currently unlawfully park on the narrow streets framing a triangle near their property. Terhune asserts that, while parking along those streets is tolerated in the summer, it will obstruct snow plows and emergency vehicles in the winter.

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Terhune notes that Village Law § 7-725-a, from which the BAR'S authority flows, allows planning boards to consider numerous site plan elements including, but not limited to, "parking, means of access, screening, signs, landscaping, architectural features, location and dimensions of buildings, adjacent land uses and physical features meant to protect adjacent land uses as well as any additional elements specified by the village board of trustees in such local law."

Thus, she argues, “while the BZA cannot know the mind of the BAR or the Board of Trustees in 2010, it is not unreasonable to assume that the seasonal condition - which is easily enforced by the Village and followed by the property owner - was not just warranted in this case but mandated by the spirit of the enabling statute: NY Village Law § 7-700 authorizes a village to govern the property within its borders ‘For the purpose of promoting the health, safety, morals, or the general welfare of the community.’"

Moreover, she asserts, “the Record is replete with historical records and references to the fact that the [Petitioners’] house had always been occupied only during the fair-weather months. More importantly, once abandoned, as here, pre-existing nonconforming properties lose grandfather status and must comply with the zoning law.”

Thus, she argues, the BAR and Board of Trustees “relied in good faith on these representations when allowing the long vacant and seriously dilapidated nonconforming property to be renovated and inhabited, where, as here, any right to occupy the pre-existing, nonconforming property had long since been abandoned, upon information and believe on or about 1994 when the prior owner, Oppen, vacated the property.”

In addition, she asserts, although a BZA generally stands in the shoes of the building inspector, and has the authority to correct his or her misreading, misapplication or

misinterpretation of the zoning law, a BZA cannot remove a presumptively lawful and reasonable condition of use imposed by a planning board.

Indeed, she argues, "enjoining the enforcement of the condition puts Tuxedo Park in an impossible position by opening the Village up to liability it had reasonably worked to avoid and - more importantly - in thwarting its efforts to ensure the health and safety of its residents and other persons within its boundaries, which is, in fact, the primary mandate of any municipality. Significantly, this harm could very literally be irreparable, and incurred by persons not a party to this action. As the days get shorter and the likelihood of snowy and icy weather increases, it grows ever more imperative that the Court lift the TRO and deny Petitioners a preliminary injunction."

Alternatively, she asserts, if Petitioners merely want to stay in the house beyond October 1st, they could seek a reasonable expansion of time from the Building Inspector, who was authorized by the BAR to set the length of occupation in the first instance.

In any event, she argues, the BZA did not act in bad faith.

For example, she asserts, when the Court remitted the matter to the BZA in January 2021 pursuant to the prior decision *{supra)*, the BZA had two new members and a new attorney, and time was needed to familiarize everyone with the matter. Further, she notes, BZA held a meeting in February, but was unable to field a quorum because some of its members were out of state. Thereafter, she notes, the COVID shut-down was put into effect.

Finally, she argues, it is the Petitioners who have acted in bad faith by refusing to seek a site plan amendment before the BAR, as suggested in the June 2020 BZA decision. Instead, she opines, the Petitioners "obfuscate their true arguments and drag the BZA into Court even though

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they concede that the BZA has no authority to lift the seasonal condition." This is true, she notes, even though the BAR and Board of Trustees "likely relied heavily on Petitioners' numerous claims that they only wanted to use the property as a 'summer retreat' from their New York City residence when those boards permitted restricted occupation in consideration of the precarious access over Village land and absence of off-street parking."

In reply, the Petitioners submit an affirmation from counsel, Joseph Churgin.

Initially, Churgin asserts, the basis of the Respondents' motions are "a new claim, made now for the first time in this proceeding," that the seasonal use limitation was a "condition" imposed by the BAR for site plan approval. Churgin argues that the Respondents are wrong on multiple grounds.

First, he asserts, the BAR has no authority to condition site plan approval on a restriction of a use that is allowed as a matter of right. Rather, the BAR is limited by the general types of conditions addressed in Village Law 7-725-a(2) and Code § 100-54(A). Here, he argues, the seasonal restriction is not permitted by such provisions.

Moreover, he contends, none of the cases cited by Respondents support their claim that BAR's authority includes the authority to restrict a use permitted by right.

Thus, he asserts, the BAR lacked the authority to impose the seasonal use restriction, and the restriction is void *ab initio.*

Second, he asserts, the Court remitted the matter to the BZA in the prior proceeding *{supra)* to determine one issue only, to wit: whether the proposed unrestricted use was a "change of use." The Court did not invite the BZA to issue a new and different determination based on a ground not previously raised. Indeed, he notes, no new factual evidence was presented to BAR,

as it was tasked only with interpreting the Code provisions as applied to the facts already developed. In fact, he notes, the record before BAR and the Court in this proceeding is the same as the record in the first proceeding except for the minutes of the subsequent meetings of the BZA on June 3,2020, and June 24,2020.

Third, he argues, even assuming that BAR had the authority to impose a seasonal use condition (which it did not), there is no evidence in the record that BZA imposed the restriction based on any health, safety, and welfare concerns arising from the access staircase, or off-street parking, or otherwise. Indeed, he asserts, there is no evidence that these issues were raised or discussed in the (appended) minutes of the 2009 and 2010 meetings which resulted to the seasonal restriction. Rather, he argues, those issues were first raised a decade later in the BZA determination at issue.

Churgin notes that counsel for Ledwith submitted new affidavits from Ledwith and from Deputy Village Clerk Elizabeth Doherty concerning those issues. However, he asserts, the affidavits were not before the BZA, and should not be considered in this proceeding.

In any event, he argues, the affidavit are “basically harmless, because they do not support the respondents' claim that BAR imposed the seasonal use condition as a matter of public health, safety, and welfare.” In fact, he argues, they show the opposite. For example, he asserts,

Ledwith's affidavit is largely a “rehash” of his prior affidavit, and “confirms that his determination denying issuance of an unrestricted CO was based solely on his belief that the change from seasonal use to year-round use was a change in use requiring variances from the Code, and was not based on BAR'S decade-old condition of seasonal use.”

Otherwise, Churgin asserts, the Respondents had raised numerous "red herring

arguments, such as the Village's potential liability for injuries incurred if someone falls in the winter (someone could just as easily fall in spring and summer mud, or trip over rocks on the path)." In any event, he argues, the Village could require the Petitioners to maintain the portion of the path used by them for access, and hold the Village harmless.

As to injunctive relief, Churgin asserts that the Petitioners have shown all of the necessary elements. Indeed, he asserts, both of the Petitioners are now in their 80's, and were forced to vacate the property and return to "densely populated New York City during the Covid crisis. Their usual winter home is Mexico, a Covid hot spot. They should not be prevented from returning to the safer location in Tuxedo Park before May 1,2020, if they so choose."

Further, they argue, the injury to the Village's "is self-inflicted," as the Village declined to sell the stairs/path to the Petitioners, despite the building inspector's recommendation that it do so in 2015, as the Village had done in the past at other locations.

Moreover, he opines, the possibility of a fall on the path is no more or less likely in any particular season, given the unmaintained rocky nature of the path. That is, mud in spring can be just as slippery as snow or ice in winter.

In sum, he argues, the Village's concerns with liability for injury on the portion of the foot path owned, but not maintained, by the Village, used to access Petitioners' property, could have been easily remedied by sale of that portion of the path to Petitioners. Instead, "the Village chose to illegally restrict the petitioners' use by right to only warm weather months."

Discussion/Legal Analysis

Initially, the Court notes, the Village has not acted in good faith in deciding the Petitioners' application for a C/O without a seasonal limitation.

Regardless of whether the Village was obligated to consider the Petitioners' application for site plan approval and a C/O in 2010, the Village did in fact consider and approve a site plan and subsequently issue a C/O, albeit restricted.

Further, there was apparently no problems between the parties for the following several years, during which the Petitioners abided by the restriction.

In 2018, now several years ago, the Petitioners sought issuance of a new unrestricted C/O,

Ledwith denied the request on the ground that the application would result in a "change of use" of the property, which required a new survey of the property and variances, etc.

On August 8,2019, almost a year later, the BZA denied the Petitioners' appeal without addressing the merits of Ledwith's determination. Rather, the BZA held, *inter alia,* that the Petitioners' appeal was, in effect, an untimely collateral attack on the 2013 C/O.

On appeal to this Court, the ZBA's determination was reversed. The Court found no merit to the ZBA's conclusion that the Petitioners' appeal was merely an untimely challenge to the 2013 C/O. Thus, the matter was remitted to the BZA for a determination on the merits. The Court noted the delays that had already ensued, and encouraged prompt action.

On June 2020, some five months later, the BZA determined that Ledwith was incorrect and that the new C/O would result in a "change of use." However, the BZA did not direct the issuance of a new, unrestricted C/O. Rather, it held for the first time that the restriction in the original C/O arose not from the Village Code, but was a "condition" placed on the grant of site plan approval by the BAR, which the BZA was powerless to alter or annul. That is, that the Petitioners' appeal was, in effect, an untimely challenge to the BAR's 2010 determination.

However, the Court notes, although the BAR's decision was made in 2010, and was

known or knowable by both Ledwith and the BZA at the time of the 2018 application by the Petitioners at bar, neither raised the "condition" argument as an issue, nor denied the application based on that ground. Further, at no subsequent time did either indicate some reason why the issue was not raised initially.

The Court finds that all of this suggests a demonstrable lack of good faith by the Respondents in reaching the merits of the Petitioners' application, which has now been delayed for years.

Regardless, for the reasons discussed *infra,* the Court finds no merit to the BZA's conclusion that the seasonal limitation was an enforceable condition placed on the grant of site approval by the BZA which precludes the issuance of a C/O without seasonal limitation.

In general, it is well settled that a zoning board is vested with great discretion and may impose conditions upon the granting of an area variance to preserve the peace, comfort, enjoyment, health, or safety of the surrounding area. *Gomez* v. *Zoning Bd. of Appeals of Town of Islip,* 293 A.D.2d 610 [2nd Dept. 2002], Such conditions are deemed reasonable if they (1) are directly related and incidental to the proposed use of the property, (2) are consistent with the spirit and intent of the zoning ordinance and (3) minimize any adverse impacts resulting from the variance. Where the record reveals illegality, arbitrariness, or abuse of discretion, a court may set aside a zoning board's determination. *Gomez* v. *Zoning Bd. of Appeals of Town of Islip,* 293 A.D.2d 610 [2nd Dept. 2002],

Further, zoning boards may not impose conditions which are unrelated to the purposes of zoning. *St. Onge* v. *Donovan,* 71 N.Y.2d 507 (1988). Thus, for example, a zoning board of appeals is without authority to impose conditions that are unrelated to the purposes of zoning or

that are neither expressly nor implicitly authorized by zoning regulations; to impose conditions whose vagueness could be read to be more restrictive than what the zoning code allows; to impose conditions that have no factual support in the record; to impose conditions that regulate the conduct of the applicant's business, rather than land-use; or to impose conditions merely believed to be in the municipality's interest that are not directly related to the proposed use of the property, and are not designed to minimize the adverse impacts on the neighborhood. *NY ZONING § 29:31; St. Onge* v. *Donovan,* 71 N.Y.2d 507 (1988). A zoning board may also not condition a variance upon a property owner's agreement to dedicate land that is not the subject of the variance application; or impose a condition that seeks to regulate the details of the operation of an enterprise, rather than the use of the land on which the enterprise is located. Such conditions are invalid because they do not seek to ameliorate the effects of the land use at issue, and are thus unrelated to the legitimate purposes of zoning. *St. Onge* v. *Donovan,* 71 N,Y.2d 507 (1988).

In general, a zoning board has no power to impose standards, requirements or conditions which are not set forth in the zoning ordinance. *Community Synagogue* v. *Bates,* 1 N.Y.2d 445 (1956); *Milt-Nik Land Corp.* v. *City of Yonkers,* 24 A.D.3d 446 [2nd Dept. 2005]; *Schlosser v. Michaelis,* 18 A.D.2d 940 [2nd Dept. 1963].

Here, the Village of Tuxedo Park Zoning Code (hereinafter "Code") creates a BAR and vests it with the authority to review and approve site plans as set forth in Village Law § 7-725-a, "consistent, however, with any site plan regulations of the Village, for all proposed structures, as that term is defined in § 100-2 of the Code of the Village (Zoning)." *Code § 100-51 [A] & [E],*

Village Law § 7-725[4] provides:

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> Conditions attached to the approval of site plans. The authorized board shall have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to a proposed site plan. Upon its approval of said site plan, any such conditions must be met in connection with the issuance of permits by applicable enforcement agents or officers of the village.

**See also, St, Onge* v. *Donovan,* 71 N.Y.2d 507 (1988).

The Village Code § 100-54 sets forth various criteria for considering a site plan. For example, subsection A provides:

> In approving site plans, the Board of Architectural Review shall take into consideration conformance with the applicable zoning regulations of the Village, parking, means of access, screening, signs, landscaping, architectural features, location and dimensions of buildings, adjacent land uses and physical features meant to protect adjacent land uses, tree removal, extreme slopes, regulated wetlands, utilities, orientation of structure on the lot, tailoring to the natural terrain, over development of the site given the physical and other environmental features of the site, proximity to roads, adjacent structures and neighboring properties, visibility of the structure, appropriateness with the Village's listing on the National Register of Historic Places, and any other considerations or criteria that the Village Board of Trustees, by resolution or local law, may, from time to time, impose upon the Board of Architectural Review.

The remaining provisions concern, in the main, the look and quality of the buildings and surrounding landscaping, and how they fit with the existing buildings and landscaping.

There are no provisions in the Village Code which expressly address safety concerns arising from snow or ice, off-site parking, or narrow or dangerous access ways, etc.

Judicial review of site plan approval, and any conditions imposed thereon, may be brought in a proceeding pursuant to CPLR article 78. *Home Depot, U.S.A.* v. *Town Bd. of Town of Hempstead,* 63 A.D.3d 938 [2nd Dept. 2009].

Determinations concerning the same by boards must be affirmed if rational and not arbitrary and capricious. *Richter* v. *Delmond,* 33 A.D.3d 1008 [2nd Dept. 2006].

The imposition of a condition in granting site plan approval must be supported by

evidence, other than generalized testimony by neighbors. *Richter* v. *Delmond,* 33 A,D.3d 1008 [2nd Dept. 2006]. Thus, the imposition of condition which has no objective factual basis in the record, but instead rests on subjective considerations such as general community opposition, must be set aside. *Richter* v. *Delmond,* 33 A.D.3d 1008 [2nd Dept. 2006]. A planning board may not impose conditions that are not reasonably designed to mitigate some demonstrable defect. *Richter* v. *Delmond,* 33 A.D.3d 1008 [2nd Dept. 2006].

Initially, it is noted, as a threshold issue, although neither Ledwith nor the BZA previously raised the issue of seasonal limitation in the C/O being a "condition" imposed by the BAR, in general, estoppel may not be invoked against a municipality to prevent it from discharging statutory duties, such as enforcing zoning laws, even where there are harsh results. *Parkview Associates* v. *City of New York,* 71 N.Y.2d 274 (1988); *Warner* v. *Town of Kent Zoning Bd. of Appeals,* 144 A.D.3d 814 [2nd Dept. 2016]. Exceptions to this general rule may be made in unusual factual situations to prevent injustice, but only in the "rarest cases." *Parkview Associates v. City of New York,* 71 N.Y.2d 274 (1988); *Warner* v. *Town of Kent Zoning Bd. of Appeals*, 144 A.D.3d 814 [2nd Dept. 2016].

Here, the Court does not find such an unusual factual situation. Thus, the Respondents are not estopped from raising the issue of whether the BAR imposed the seasonal limitation as a condition of the grant of subdivision approval, although that issue is being raised for the first time.

Initially, it is noted, as a factual matter, the seasonal use limitation on the property was expressly listed as a "condition" for the approval of site plan by the BAR.

However, it does not appear that the BAR did, or could have, imposed such a permanent

limitation on the use of the property.

It does not appear disputed that, without the limitation, the use of the Petitioners' property as a year round residence, although not permitted under the Village Code as it currently exists, is nonetheless a permissible use because the property pre-existed the enactment of the Village Code and is therefore "grandfathered" in.

Further, as noted throughout, the Village Code does not provide for a residential category of "seasonal use."

Thus, had the BAR imposed a permanent seasonal use only restriction on the property, it would have been limiting an otherwise permissible use of the property (i. *e.*, year round use).

Further, given that the Village Code does not provide for a residential category of "seasonal use," such a limitation would not appear either expressly or implicitly authorized by the Village's zoning regulations.

However, this is arguably judicial review of the BAR'S 2010 determination, and is not the basis of the Court's determination. Indeed, if such were the case, the Respondents' exhaustion and timeliness arguments would need to be determined.

Rather, regardless, and more significantly in the Court's view, is the lack of any support in the record for the Respondents' contention that the BAR imposed the seasonal use limitation as a condition of site plan approval to remedy safety and other issues identified to exist at the property during the winter months.

As noted *supra,* the imposition of a condition in granting site plan approval must be supported by evidence, and must be reasonably designed to mitigate some demonstrable defect.

Here, the Respondents have submitted some evidence that concerns over the "100 Steps"

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and the lack of on-site parking at the Petitioners' property were known to the Village prior to 2010.

However, nowhere in the minutes of the meetings, or in the decision arising from the proceedings before the BAR which resulted in the 2010 site plan approval, is there any evidence, or even an indication, that any member of the public or the BAR, or anyone else, raised such safety issues at the proceedings, and that the BAR agreed that such safety concerns existed, and imposed the seasonal use condition as a permanent remedy to the same.

Indeed, the Court notes, the historical use of the property was seasonal, and there is no evidence that the Petitioners sought or were interested in other than seasonal use of the property when they applied for site plan approval in 2010. Indeed, the property was not suited for year round living in 2010, and the Petitioners abided by the seasonal limitation for some 7 or 8 years before seeking a new C/O. Otherwise, as noted in the prior appeal before this Court, the factual circumstances have changed significantly since the 2010 site plan approval. Consequently, the condition imposed by the BAR addresses an issue no longer extant.

In sum, the Court finds that the BAR's 2010 site plan approval does not bar review of the Petitioners' most recent application for a C/O without seasonal limitation.

Thus, the matter is remitted to Respondents for a determination on the merits of the application.

Finally, given, *inter alia,* the apparent otherwise permissible use of the property for year round living, the long delays that have occurred, and the apparent lack of good faith by the Respondents in rendering a determination of the Petitioners' application on the merits, the Court grants the Petitioners a preliminary injunction prohibiting the Respondents from enforcing the

seasonal limitation until the Petitioners' application is decided. *In re Rice,* 105 A.D.3d 962 [2nd Dept. 2013]; *Automated Waste Disposal, Inc.* v *Mid-Hudson Waste, Inc.,* 50 A.D.3d 1072 [2nd Dept. 2008]; *CPLR 6301, CPLR 6311.*

As it is agreed that the seasonal use limitation set forth in the 2013 C/O is not based on a statute or Code provision, such an injunction will not prevent the Respondents from performing their lawful duties.

However, with exceptions not here relevant, "prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction * * *CPLR 6312 (b); Ying FungMoy* v *Hohi Umeki,* 10 A.D.3d 604 [2nd Dept. 2004], The amount of the undertaking, which is fixed in the court's discretion, must be rationally related to the amount of potential damages that might be sustained. *S.P.Q.R. Co., Inc.* v *United Rockland Stairs, Inc.,* 57 A.D.3d 642 [2nd Dept. 2008].

Here, within two weeks of the date of this order, the parties are to make submissions concerning the proper amount of such an undertaking.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, ADJUDGED and DECREED, that the petition is granted, and the determination dated June 24,2020, is annulled and set aside; and the matter is remitted for further proceedings in accordance herewith; and it is further,

ORDERED, ADJUDGED and DECREED, that the Respondents motion for a preliminary injunction is granted as set forth herein; and it is further,

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ORDERED, ADJUDGED and DECREED, that the motion by the Respondent John C. Ledwith to dismiss the petition is denied; and it is further,

ORDERED, ADJUDGED and DECREED, that the motion by the Respondents Jake Lindsay, Gary Pompan, Mary Darby, David Christenson and Nancy Hays, as the members of the Zoning Board of Appeals of Tuxedo Park, to dismiss the proceeding is denied.

The foregoing constitutes the decision and order of the court.

Dated: February 17,2021
Goshen, New York

ENTER

HON. ROBERT A. ONOFRY, J.S.C.

VIA NYSCEF

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