STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER

CAMILLA KERR BRADLEY, as Trustee of the JOHN ATWATER BRADLEY Irrevocable Trust,

Petitioner,

-against-

TOWN BOARD OF THE TOWN OF GARDINER and BRUCE TERWILLIGER, BUILDING DEPARTMENT AND CODE OFFICER,

Respondents.

DECISION AND ORDER
Index No.: EF2023-474

Supreme Court, Ulster County
Present: Hon. Kevin R. Bryant, J.S.C.

Appearances:

Petitioner:
Allan B Rappleyea / Ryan Thomas Dwan
CORBALLY GARTLAND AND RAPPLEYEA LLP
35 Market Street
Poughkeepsie, NY 12601

Respondents(s):
David Norman Yaffe
HAMBURGER & YAFFE, LLP
191 New York Ave.
Huntington, NY 11743

Bryant, K.:

On February 28, 2023, an Order to Show Cause and verified petition was filed by Camilla Kerr Bradley, as Trustee of the John Atwater Bradley Irrevocable Trust (hereinafter referred to as "Petitioner") seeking, *inter-alia*, an Order staying "enforcement of [a] February 15, 2023 Resolution" issued by the Town Board of the Town of Gardiner, declaring

that Petitioner does not require a license to "continue" operating a campground on its property, or alternatively, either finding that the denial of said license was unconstitutional due to an alleged prior

non-conforming use, or ordering Respondents to grant said license; and

Petitioner having requested certain temporary relief in said Order to Show Cause and the Court, after receiving objections from counsel for Respondents, having denied said temporary relief[1]; and

Answers, memorandum of law and an Administrative Record and other submissions having been filed with the Court; and

A Notice of Motion having been filed by Respondents seeking, *inter-alia*, dismissal of the proceedings pursuant to CPLR §3211; and

An affirmation in opposition, memorandum of law, and reply affidavit having been submitted to the Court;

NOW, for the reasons set forth herein, the Petition is hereby denied and dismissed[2].

Findings of Fact

Petitioner is the owners of real property located in the Town of Wallkill referred to as "the Reserve". Petitioner alleged that "[a]mong other things, the Reserve has functioned and conducted activities as a campground for over fifty years". In June 2020, the Town of Wallkill Code Enforcement Officer (hereinafter referred to as "CEO") visited the property, presumably in response to a complaint filed with the Town. After said visit, Petitioner's received an e-mail which stated, in relevant part "I am forwarding you the newly revised chapter 200 regarding

[1] Respondents letter setting forth objections to the requested relief were filed through NYSCEF on March 2, 2023, after counsel for Respondents appeared for Respondents and "consented" to efiling.
[2] In determining this Petition, the Court has considered the documents specifically cited herein as well as all other documents electronically filed in this matter as appearing on NYSCEF.

campgrounds. Take note of section Section 200-45.3C, this is regarding existing campgrounds. I believe you fall into this category"[3]. Thereafter, on April 26, 2021, Petitioner received a letter from the CEO which indicated that site plan approval and a campground license were required to continue operation. Petitioner alleged that in May 2021, documentation was provided to the Town establish that the campground use pre-existed the enactment of the provision of the Zoning Code at issue.

After further communications between Petitioner and the Town, on July 22, 2021, a Notice of Violation was issued for operating a campground without a license[4]. A license application was filed in October 2021. By resolution dated February 7, 2023, the application was denied for a litany of reasons that are outlined in the written resolution. Most significantly, the Board found that the application was defective and incomplete for ten reasons including, but not limited to the failure to submit an Environmental Assessment Form (hereinafter referred to as "EAF") as required by SEQRA and the failure to submit a map/plan that indicates the location of the zoning districts that bisect the subject property. The Board further found that he Petitioner seemingly illegally erected structures for year-round use without authorization and required permits and that Petitioner previously constructed Geo Domes on the property that "appear to be permanent structures that have been installed without building permits and proper authorizations". In addition, the Board found that the applicant has not established a compliant and adequate water supply, sanitation system and drainage system[5].

Rather than comply with the Board's resolution, Petitioner filed the instant Article 78 proceeding which, in essence, asks this Court to interject itself into this administrative process

[3] NYSCEF doc. 4
[4] It is not clear how, if at all, the Town pursued this Notice of Violation or whether it is still outstanding.
[5] NYSCEF doc. 16

prior to the Board having an opportunity to evaluate and make determinations on a complete application. According to Petitioner, the decision of the Board was improperly influenced by members of "Friends of the Shawangunks", an organization which had made numerous false and inflammatory communications to the Town regarding the use of the property. Petitioner further claims that they previously submitted conclusive proof to the CEO of a pre-existing non-conforming use and that this alleged non-conforming use is entitled to constitutional protection. With regard to the requested EAF, Petitioner argues that no such form is required by the Town of Gardiner Code, nor was one requested at the time the application was submitted. Petitioner also outlined disagreements regarding the sufficiency of the map that was submitted and has attached numerous emails between the parties regarding this requirement. Petitioner alleges that the Geo Domes on the property are not permanent structures and that, with regard to the water supply, sanitation and storm water drainage systems, "Petitioner has been in regular contact with DOH and has engaged an engineering firm to assist her and is confident this process will conclude [and] [t]he DOH has not issued any violation" [6].

Petitioner's "declaratory" action requests that this Court find that the "alleged license requirement does not extend to the Reserve because it was a pre-existing non-conforming use when the ordinance was adopted". Petitioner alleged that "the evidence overwhelmingly establishes that Petitioner overtly used the Reserve as a campground prior to Chapter 200 of the Town of Gardiner Code's adoption [and] Petitioner provided voluminous records to Respondents in support of the fact that the Reserve has been operating as a campground for decades"[7]. Notably, Petitioner does not allege that Respondents have made any binding administrative decision regarding these claims either by way of an interpretation from the CEO or from a

[6] NYSCEF doc. 1, page 9
[7] NYSCEF doc. 19, page 2

determination by the Zoning Board of Appeals (hereinafter referred to as "ZBA"). Rather, Petitioner seemingly is requesting that this Court bypass the applicable administrative process and make determinations regarding the alleged pre-existing use in the first instance. Petitioner further argues that the denial of their license application is unconstitutional and argue that "when a zoning ordinance is enacted, non-conforming uses or structure in existence when the ordinance is enacted are constitutionally protected.

Respondents filed the instant motion on March 24, 2023, requesting dismissal of the petition pursuant to CPLR §3211(1)(5)(7) and (8). Initially, Respondents argues that this Court does not have personal jurisdiction insofar as Petitioner failed to serve the petition in accordance with this Court's directive in the Order to Show Cause. Specifically, counsel argues that the OSC required email service upon Respondents and service was made on counsel who had yet to file a Notice of Appearance in the instant matter. Counsel further argues that the matter must be dismissed on the merits as the action of the Board was fully in compliance with the provisions of the Town Code. Further, counsel argues that Respondents properly found that the submitted application was incomplete and appropriately and reasonable denied it on these grounds. Counsel argues that Petitioner failed to exhaust its administrative remedies when it failed to resubmit the application with the additional information and documents requested by the Board. Respondents cite to a litany of provisions in the Town Code in support of this argument. According to Respondent, "[f]ollowing the vote and enactment of the resolution . . . the petitioner did not file a revised application attempting to cure any of the aspects of the application that caused the Town Board to determine that it was defective and incomplete and was otherwise improperly made"[8].

[8] NYSCEF doc. 27, para. 34

Petitioner responds that service on counsel was appropriate as counsel filed a letter regarding the request for temporary relief and was marked "Consented by" in NYSCEF. With regard to the merits, counsel for Petitioner argues that Respondents are asking this Court to place the burden of proof regarding the alleged pre-existing non-conforming use on Petitioner rather than placing the burden on Respondents as the party moving for dismissal to show that the documentary evidence "conclusively refutes the plaintiff's allegations". With-regard-to the argument that Petitioner has failed to exhaust their administrative remedies, counsel argues that this rule "is not an inflexible one" and that Petitioner does not have to exhaust administrative remedies because any further requests for a license "reasonably appears to be futile"[9]

Applicable Law

"This Court's review of this type of administrative determination is limited to ascertaining whether there is a rational basis for the action in question or whether it is arbitrary or capricious[10]" (Matter of Liu v. State of New York, 169 A.D.3d 1198 (3rd Dept., 2019)). "[I]t is the responsibility of the administrative agency to weigh the evidence and choose from among competing inferences therefrom and, so long as the inference drawn and the ultimate determination made are supported by substantial evidence, it is not for the court to substitute its judgment for that of the administrative agency" (Matter of Supreme Energy, LLC v. Martens, 145 A.D.3d 1147 (3rd Dept., 2016)). See also, Matter of Watson v. NYS Justice Center, 152 A.D.3d 1025 (3rd Dept., 2017). "The substantial evidence standard is a minimal standard that is less than a preponderance of the evidence and demands only that a given inference is reasonable and plausible, not necessarily the most probable" (Matter of Buffalo Teachers Fedr. Inc. v. NYSPERB, 208 A.D.3d 127 (3rd Dept., 2022)).

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[9] NYSCEF doc. 39, page 5

[10] Internal citations, quotations and punctuation omitted in all quotations contained herein.

"It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (Matter of Baywood, LLC v. Office of the Medicaid Inspector Gen., 188 A.D.3d 1193 (2nd Dept., 2020)). See also, Matter of Shining Star Home Care, LLC v. Zucker, 215 A.D.3d 1090 (3rd Dept., 2023); Matter of 5055 N. Blvd., LLC v. Incorporated Vil. of Old Brookville, 201 A.D.3d 932 (2nd Dept., 2022). "The exhaustion rule, however, is not an inflexible one. It is subject to important qualifications. It need not be followed . . . when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury" (Watergate II Apts. v. Buffalo Sewer Auth., 46 N.Y.2d 52 (1978)). Also, Lehigh Portland Cement Co. v. NYS Dept. of Envtl. Conserv., 87 N.Y.2d 136 (1995); Town of Oyster Bay v. Kirkland, 19 N.Y3d 1035 (2012).

"[A] constitutional claim that may require the resolution of factual issues reviewable at the administrative level should initially be addressed to the administrative agency having responsibility so that the necessary factual record can be established. Moreover, merely asserting a constitutional violation will not excuse a litigant from first pursuing administrative remedies that can provide the requested relief" (Matter of Schultz v. State of New York, 86 N.Y.2d 225 (1995)). See also, Matter of Shining Star Home Care, LLC v. Zucker, 215 A.D.3d 1090 (3rd Dept., 2023); Matter of Baywood, LLC v. Office of the Medicaid Inspector Gen., 188 A.D.3d 1193 (2nd Dept., 2020).

Finally, with regard to Petitioner's claim of a pre-existing non-conforming use, it is well accepted that "non-confirming uses that predate the enactment of a zoning ordinance are constitutionally protected and will grudgingly be permitted to continue notwithstanding the

contrary law of the ordinance" (Matter of Tri-Serendipity v. LLC v. City of Kingston, 145 A.D.3d 1264 (3rd Dept., 2016)). "As a general rule, a nonconforming use of real property that exists at the time a restrictive zoning ordinance is enacted is constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance . . . A party seeking to overcome a restrictive zoning ordinance must demonstrate that the property was indeed used for the nonconforming purpose, as distinguished from a mere contemplated use" (Jones v. Town of Carroll, 15 N.Y.3d 139 (2010)). See also, Matter of Red Wing Props., Inc. v. Town of Rhinebeck, 184 A.D.3d 577 (2nd Dept., 2020)).

Conclusions

It is the finding of this Court, for the reasons set forth by Petitioner, that this Court has personal jurisdiction over Respondents. The Order to Show Cause provides that service was to be completed by email transmission on or before March 10, 2023. In a letter to the Court objecting to temporary relief, counsel for Respondents indicated that he was in the process of being retained. Nevertheless, counsel consented to representation on the NYSCEF system on March 3, 2023. According to the affidavit of service, service was completed by electronic transmission on March 6, 2023. It is the finding of this Court that under these circumstances, service by NYSCEF was sufficient.

With-regard-to Respondents' request that this Court dismiss the action pursuant to CPLR §3211 this Court finds that under the circumstances, dismissal is warranted due to Petitioner's failure to exhaust its administrative remedies prior to bringing this proceeding. In this regard, rather than present any persuasive reason to disrupt the finding of the Board that the application was incomplete, or alternatively, to comply with the findings of the Board and resubmit their application, Petitioner asks this Court to intervene in an administrative process

that has not run its course. In this regard, the Court notes that Petitioner had the right to request that the CEO provide an interpretation regarding their alleged non-conforming use and, in-the-event that Petitioner disagreed with the opinion of the CEO, Petitioner could have appealed that determination to the Zoning Board of Appeals[11].

Had Petitioner properly pursued this course, the ZBA would have conducted a hearing, considered evidence and created a full record regarding Petitioner's pre-existing non-confirming use claim. Similarly, it is the responsibility of the Town Board or the ZBA to hold a hearing regarding the various factual disputes, including, but not limited to the issue of whether the GeoDomes are permanent structures, whether Petitioner's use of the property as a campground has remained consistent since prior to the enactment of the Code or whether it has been abandoned. The fact that such a hearing has not taken place, and there are no specific findings-of-fact for this Court to review, precludes this Court from intervening at this juncture. In this regard, this Court notes that "[c]onclusions without supporting facts are insufficient . . . Findings of fact should be made in a manner such that the parties may be assured that the decision is based on evidence of record, uninfluenced by extralegal considerations" (Bowers v. Aron, 142 A.D.2d 32 (3rd Dept., 1988)). With-regard-to Petitioner's claim that the Town Board erroneously denied their request for a permit, Petitioner failed to submit the additional requested documents and essentially advised the Board that they should consider the application as withdrawn[12]. As such, Petitioner never received a final determination from the Board on their application and there is no final action for this Court to review.

[11] See, Town of Gardiner Code, §§220-27; 220-59

[12] While counsel disagree regarding the precise context of Petitioners assertion that the application should be deemed withdrawn, the record is clear that Petitioners chose not to address the application deficiencies outlined by the Board in its resolution.

This Court has considered Petitioner's argument that Respondent are inappropriately attempting to place the burden of proof on Petitioner and finds their position to be wholly without merit. Contrary to Petitioner's argument, Respondents arguments have nothing to do with the applicable burden of proof. Respondents reviewed the application that was submitted and found that it was incomplete in numerous ways. This Court has also considered Petitioner's argument that they were not required to exhaust administrative remedies because a further application for a license "reasonably appears to be futile because . . . clear conflicts of interest have existed and tainted Petitioner's application for a license throughout the process" and "it was apparent to Petitioner that her application was futile, and she was forced to commence this proceeding"[13].

This Court has reviewed the record below and finds no basis to conclude that a refiled application would be futile or that the Board was predisposed or biased against Petitioner. To the contrary, the comprehensive resolution set forth clear and fully reasonable requirements regarding necessary documentation and information for the Board to consider. These requirements are, for the most part, fully in accord with the applicable Town Code and where not required by the Code, clearly in furtherance of the development of a complete record[14]. Moreover, while Petitioner argues that the Board has been unduly influenced by "Friends of the Shawangunks" and states that "[s]everal members of the Town of Gardiner Environmental Conservation Commission are also board members of the Friends", Petitioner has not set forth any clear connection between this organization and the Town Board nor have they established

[13] NYSCEF doc. 39, page 5
[14] Given the standard of review in an Article 78 proceeding, absent a clear showing of intentional dilatory tactics, it is hard to imagine a basis to fault an administrative board for requiring an applicant to submit additional documentation to ensure that there is an adequate consideration of all relevant information prior to a determination on an application.

any specific erroneous factual determination that was made as the result of some undue influence.

As such, the petition is dismissed based on the failure to exhaust administrative remedies. With-regard-to Petitioner's request for declaratory relief, it is the finding of this Court that the request that this Court address the existence or lack of a pre-existing non-conforming use entitled to protection is not ripe for judicial review until and unless Petitioners resubmit and receive an adverse ruling on the application. In this regard, as noted by Respondents, Petitioners have not sought a formal opinion from the CEO. If they sought such an opinion, it could be reviewed by the Zoning Board of Appeals and any adverse decision by the ZBA could be properly reviewed in an Article 78 proceeding. Petitioners are not free to simply bypass these initial administrative steps and seek direct Court intervention.

The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

Dated: June 6, 2023
Kingston, New York

ENTER,

Kevin R. Bryant

HON. KEVIN R. BRYANT, J.S.C.