

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

IN THE MATTER OF

TYLER BOOTH AND
THE FORSYTH-WARREN TAVERN LIVING HISTORY
FARM AND MUSEUM,

Petitioners,

Index No.:

Hon. Frank A. Sedita, III

-against-

TOWN OF CAMBRIA, NEW YORK, TOWN OF CAMBRIA
ZONING BOARD OF APPEALS, and JAMES P. MCCANN in his
official capacity as the Town of Cambria Building Inspector,

Respondents.

FOR A JUDGMENT PURSUANT TO ARTICLE 78 OF THE NEW
YORK CIVIL PRACTICE LAW AND RULES.

VERIFIED PETITION

Petitioners TYLER BOOTH AND THE FORSYTH-WARREN TAVERN
LIVING HISTORY FARM AND MUSEUM (“Petitioners”), by and through their attorneys,
HODGSON RUSS LLP, for their Verified Petition (the “Petition”), respectfully allege as
follows:

PRELIMINARY STATEMENT

1. Without notice or opportunity to be heard, the Town of Cambria Zoning
Board of Appeals revoked three special permits issued to Petitioners. This resulted in Petitioners
being forced to cease operation of the historic Forsyth-Warren Tavern Living History Farm and
Museum. After prior litigation between the parties resulted in a dismissal without prejudice,

Petitioners re-file this Article 78 to have the arbitrary, capricious, and unlawful decision overturned so their permits can be restored and they can resume operations of the historic property.

PARTIES

2. Petitioner TYLER BOOTH (“Mr. Booth”) is an individual domiciled in Niagara County and is the owner of real property located at 5182 Ridge Road, Lockport, New York 14094 (the “Property”).

3. Petitioner THE FORSYTH-WARREN TAVERN LIVING HISTORY FARM AND MUSEUM (the “Museum,” and collectively with Mr. Booth, “Petitioners”), is a non-profit educational corporation organized and existing pursuant to the laws of the State of New York. The Museum conducted business at the Property.

4. Respondent TOWN OF CAMBRIA, NEW YORK (the “Town”) is a duly-constituted municipal corporation with a principal place of business of 4160 Upper Mountain Road, Sanborn, New York 14132.

5. Respondent TOWN OF CAMBRIA ZONING BOARD OF APPEALS (the “ZBA”), is a municipal board within the Town under Town Law § 267(2) and § 1203 of the Town’s Zoning Ordinances

6. Upon information and belief, Respondent JAMES P. MCCANN is an individual domiciled in Niagara County and was at all times relevant, and still is, the building inspector and code enforcement officer for the Town.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”).

8. Venue is proper in Niagara County pursuant to CPLR §§ 506 and 7804(b) as this is where the subject property is located, where the parties are domiciled, and where all relevant decisions related to this proceeding occurred.

FACTUAL BACKGROUND

The Museum

9. The Museum is of local historic importance as it is an intact example of an early nineteenth century pioneer homestead from the first phase of Euro-American settlement of the Niagara Frontier. On the site are a former tavern and barn that, despite minor modifications, retain the basic elements of their architectural integrity in terms of their setting, design, and construction. The Museum is historically significant for its association with John Forsyth and Ezra Warren, early settlers who founded the hamlet of Warren’s Corners. It is further significant for its association with the War of 1812 when soldiers were housed in the tavern and the barn was used to store supplies.

10. Mr. Booth is the director of the Museum. He is the current owner of the Museum, which was previously co-owned with his late mother, Dr. Lizbeth Booth.

11. The Museum property was an abandoned roughly five-acre parcel (including several historic structures) in the Town that was purchased from the United States Department of Housing and Urban Development in 2017.

12. The intention was to have a multiple-phase establishment of a house farm and museum that would result in the complete, historically appropriate restoration of the Property into a working living history farm and museum.

13. After establishing a governing board to create the non-profit museum, a number of approvals were sought and obtained to proceed with this effort. These include special use permits after approval by the County Planning Board, and a variance from the Department of State Board of Review.

14. On September 1, 2021, the Building Inspector filed criminal information with the Town Justice Court and directed the Museum to cease operations. A copy of this information is attached as **Exhibit A**.

15. Following the filing of the criminal information, on October 25, 2021, the ZBA—without notice to Petitioners and in violation of law—revoked Petitioners’ special use permits identified as Z-UV-2018, Z-SP-2018-007, and Z-SP-2019-006 (collectively, the “Permits”).

16. The Town later rescinded the charges as confirmed by the Town Court in a letter dated May 5, 2022. A copy of this letter is attached as **Exhibit B**.

17. The Permits remained revoked, however. Petitioners have been deprived of the ability to operate as a result of the ZBA’s unlawful conduct.

18. Petitioners have been aggrieved by this conduct and their only remedy is this Court as there is no administrative remedy available since the ZBA acted contrary to law, without notice to Petitioners and in violation of their due process.

19. Even if such administrative remedies existed, such efforts would have been futile.

20. If the ZBA were concerned with the law, it would have ensured Petitioners had notice and opportunity to be heard on the issue. But this did not occur.

The Prior Article 78 Challenge

21. Petitioners timely commenced an Article 78 challenge on November 23, 2021 seeking annulment of the Town's illegal revocation of the Permits under Index No. E176381/2021. A copy of the verified petition in this prior Article 78 is attached as **Exhibit C**.

22. On, June 15, 2022, this Court dismissed the prior Article 78 without prejudice, allowing Petitioners to refile.

23. Consistent with CPLR § 205(a), Petitioners have refiled this proceeding within six months of the Order and Judgment, which was served with Notice of Entry on July 29, 2022. A copy of the Order with Notice of Entry is attached as **Exhibit D**.

24. This proceeding is therefore timely.

The Subject Challenge

25. Petitioners bring this special proceeding to review the improper and unlawful determination of the ZBA to terminate the Permits without notice to Petitioners and without a legal and factual basis warranting such action.

26. The Town granted Petitioners three special permits to operate.

27. The first permit, Z-SP-2018-007, granted Petitioners the right to host public and private events and setting forth permissions to do so. The Town granted this first permit on September 24, 2018. It then granted a year extension on September 23, 2019. The permit was set to expire September 23, 2024.

28. The second permit, Z-UV-2018-002, granted Petitioners the right to have a barn on the Property to use for antique sales. The Town granted this second permit on September 24, 2018.

29. The third permit, ZSP-2019-006, granted Petitioners the right to have a museum on the Property. The Town granted this third permit on May 20, 2019.

30. A copy of the Permits are attached as **Exhibit E**.

31. On October 25, 2021, the ZBA then held a meeting and, at the request of the Building Inspector, revoked the Permits.

32. The ZBA did so without taking testimony or evidence, giving notice to Petitioners or the public, or affording Petitioners an opportunity to be heard.

33. The ZBA memorialized its determination in a letter dated October 25, 2021. A copy of the minutes from the ZBA's meeting at attached as **Exhibit E**.

34. The ZBA also did not provide notice to the Petitioners or the public and therefore, failed in its duty to provide notice.

35. The ZBA also did not seek or vote to rehear any of the Permits as required.

36. Upon information and belief, on or around November 1, 2021, Town Prosecutor Gary Billingsley sent a letter to Petitioners' former counsel advising that the Permits were terminated on October 25, 2021 "for failure to provide the Building Inspection Department with plans showing the change of use to the two buildings from residential to business and agricultural to business by a certified design professional that meets the NYS Building Code requirements, and for failure to obtain a Certificate of Occupancy."

37. Following the Town Prosecutor's letter, Petitioners commenced the initial Article 78 on November 23, 2021, which was dismissed without prejudice.

38. Petitioners previously contested the information used to justify the ZBA's determination.

39. For example, Petitioners already provided the Town an expert report demonstrating code compliance. A copy of this report is attached as **Exhibit G**. This report included sketches of the Property.

40. Petitioner personally delivered architectural blueprints from Long Associates Architects, fire protection shop drawings from ADT Security, and submitted a request to Town of Cambria Building Department for an inspection for a change of use from residential to business on June 28, 2019.

41. Additionally, Petitioners provided a floor plan to the Town, which the Building Inspector's Office confirmed in an email on July 8, 2019. A copy of this email is attached as **Exhibit H**. In this email, additional materials were sought.

42. On July 25, 2019, blueprints were delivered to the Town containing the Tavern and Barn, with identified exit signage, fire alarm, and carbon monoxide detectors, all certified by architects, Long Associates Architects.

43. Petitioners sent an email to the Building Inspector on the same day that included a digital copy of the same blueprints as well as a digital copy of National Register of Historic Places Registration Form (NPS Form 10-900) and requested an inspection of the Property.

44. In addition to the Permits, Petitioners also obtained a variance from the New York State Department of State Board of Review allowing it to operate in the manner it was prior to the ZBA's unlawful revocation. A copy of this variance determination is attached as **Exhibit I**.

45. The Town certainly had sufficient information to grant the three Permits, issued on different dates.

46. To later claim it lacked information is not only contrary to its own conduct, but also the record.

47. The ZBA's determination was made in violation of lawful procedure, affected by an error of law, and was irrational, arbitrary, capricious, and an abuse of discretion. Accordingly, the ZBA's determination should be annulled and vacated.

AS AND FOR A FIRST CAUSE OF ACTION

Annuling the ZBA's Improper Decision to Revoke Petitioners' Permits

48. Petitioners repeat and reallege the foregoing paragraphs as if fully set forth herein.

49. Without notice, the Building Inspector made a request as a non-member of the ZBA seeking to revoke the Permits.

50. The Town Building Inspector offered the unfounded accusation that Petitioners violated the Town of Cambria Zoning Ordinances at the ZBA meeting.

51. The ZBA entertained this improper request for the first time without sufficient notice to Petitioners.

52. The ZBA's findings are not supported by an objective factual basis in the record.

53. The Permits had only four (4) conditions in common: (1) Adequate parking is provided; (2) A berm to be constructed on the South lot line; (3) Any additional ingress or egress needs to be permitted; and (4) Petitioners were to abide by the Town of Cambria Zoning Ordinances.

54. None of these conditions were cited as a basis for the determination

55. Instead, the meeting minutes reflect that the Permits were revoked for "failure to provide the Building Inspection Department with plans showing the change in use to the two buildings from residential to business and agricultural to business by a certified design

professional that meets the NYS Building Code Requirements and failure to obtain a Certificate of Occupancy.”

56. The ZBA determined that the alleged violations of the Town Zoning Ordinances raised by the Building Inspector were a violation of the conditions of the Permits, and as such, revoked the Permits.

57. But the Town rescinded its claim that Petitioners failed to deliver plans sought.

58. The Town also rescinded its claim that Petitioners violated the Code.

59. The voluntary withdrawal of the charges in Justice Court have a preclusive effect related to the conduct as alleged in the criminal information. The Town cannot argue that it may litigate the issue when it discontinued the criminal proceeding voluntarily.

60. There is no basis for the Town’s contention that it does not have the necessary information.

61. Petitioners provided the Town more than sufficient information as demonstrated by the record.

62. Presumably, in satisfaction for what Petitioners submitted, the Town granted the Permits.

AS AND FOR A SECOND CAUSE OF ACTION

Petitioners had a Pending Application which Served to Stay Any Enforcement Action Under the Town Zoning Code and New York Town Law

63. Petitioners repeat and reallege the foregoing paragraphs as if fully set forth herein.

64. The Town was barred from taking any enforcement action under the Town Zoning Code and Town Law.

65. Petitioners were granted a hearing for administrative review on April 26, 2021 following a refusal of inspection for a Certificate of Compliance by the Building Inspector. A copy of the ZBA's agenda from this day is attached as **Exhibit J**.

66. This hearing was tabled on April 26, 2021 pending the scheduling and execution of a special meeting.

67. A stay was in place while the application and administrative review were pending under Zoning Code § 1203(4)(c). As provided therein:

An appeal stays all proceedings in furtherance of the action appealed from, unless the Building Inspector from whom the appeal is taken certified to the Board of Appeals after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate of a stay would, in his opinion, cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the Board of Appeals or by a court of record on application, on notice to the Building Inspector and on due cause shown.

68. This tracks the language of Town Law § 267-a(6).

69. There were no imminent perils to life or safety based on the allegations raised.

70. The Town did not seek injunctive relief at the time to overcome the stay or otherwise seek an exception to proceed.

71. The purpose of the stay is to obtain a definitive ruling.

72. The ZBA never reached the application or otherwise rendered a decision on it given its unlawful revocation of the Permits.

73. Despite this illegal conduct, there was a stay in place that barred any enforcement action.

74. The Town's action in violation of the stay is void.

AS AND FOR A THIRD CAUSE OF ACTION

Annulling the ZBA's Improper Decision to Revoke Petitioners' Permits for Failure to Provide Petitioners Due Process

75. Petitioners repeat and reallege the foregoing paragraphs as if fully set forth herein.

76. Notice and opportunity to be heard are the touchstones of due process.

77. Here, the ZBA acted without providing notice or opportunity to be heard to Petitioners.

78. Petitioners had no prior notice of these allegations or the ZBA's meeting.

79. The ZBA acted to immediately revoke the Permits but failed to provide legally-sufficient notice and also failed to vote or otherwise authorize a rehearing of the Permits in accordance with Town Law § 267-a(12), which provides:

A motion for the zoning board of appeals to hold a rehearing to review any order, decision or determination of the board not previously reheard may be made by any member of the board. A unanimous vote of all members of the board then present is required for such rehearing to occur. Such rehearing is subject to the same notice provisions as an original hearing. Upon such rehearing the board may reverse, modify, or annul its original order, decision or determination upon the unanimous vote of all members present, provided the board finds that the rights vested in persons acting in good faith in reliance upon the reheard order, decision or determination will not be prejudiced thereby.

Town Law § 267-a(12).

80. A rehearing requires a unanimous vote of the members present. *Id.*

81. Were such a rehearing vote to be held, the ZBA was obligated to carry out the notice provisions of the original hearing. *Id.*

82. A public hearing and notice are required for any special permits under Town Zoning Code § 1100.

83. No such notice was provided.

84. The ZBA instead decided to take up an unlawful *ex-parte* determination which harmed Petitioners and deprived them of their legal rights, including due process right for notice and opportunity to be heard, and their vested right to the Property and the Permits.

85. The ZBA's own agenda from the October 25, 2021 meeting had no mention of Petitioners, the Permits, or the Property. A copy of the agenda is attached as **Exhibit K**.

86. Aside from the absence of any action item on the ZBA agenda for October 25, 2021, further demonstrative of this lack of notice is any reference of Petitioners, the Permits,

or the Property on the public hearing notice for the hearings held on October 25, 2021. A copy of the public hearing notice is attached as **Exhibit L**.

87. Nevertheless, as the transcript of the October 25, 2021 ZBA meeting indicates, a motion was made to revoke the Permits based on the request of the Building Inspector. A copy of this transcript is attached as **Exhibit M**.

88. Confirming the baseless nature of the request to revoke the Permits, the Building Inspector acknowledged that he had the plans from Petitioners: “I have a copy of the plans or a readout from Trautman Associates that they paid for, I did not, that I agree with.” Ex. M at 2.

89. The Building Inspector’s admission he received the plans negates the claim that Petitioners did not submit the necessary information.

90. The Building Inspector also discusses a handicap bathroom, for which Petitioners already obtained a variance from the State. *See* Ex. M at 1.

91. Furthermore, the Building Inspector highlighted the limitations with historic properties: “There’s a lot of things in this historical . . . building you can’t touch, some of the structure and that, because of that but the ramp can’t go in.” *See id.* at 2 (ellipsis added).

92. Going on the word of the Building Inspector, who appears to not have been sworn, and without any notice to or argument or submission from Petitioners, the ZBA went ahead and revoked the Permits on October 25, 2021.

93. Petitioners had a vested right in the Property and the Permits.

94. Respondents deprived Petitioners their vested right to the Property and the Permits, as well as deprived them of their due process rights.

95. The arbitrary, capricious, and unlawful conduct of the ZBA should be overturned and the Permits reinstated.

AS AND FOR A FOURTH CAUSE OF ACTION

Respondents Conduct is a Violation of Petitioners' Equal Protection Rights

96. Petitioners repeat and reallege the foregoing paragraphs as if fully set forth herein.

97. The Equal Protection Clause requires property owners be treated equally and uniformly under the law.

98. From the outset of this matter, there has been a particularly unsettling discontent by the Building Inspector and Petitioners. Much of this is discussed in the initial lawsuit. *See generally* Ex. C.

99. While Respondents' animus toward Petitioners is neither known or understood, it exists nonetheless. Upon information and belief, this hostility is motivating the conduct against Petitioners.

100. To illustrate this, on April 22, 2019, when Mr. Booth's mother, Dr. Lizbeth Booth, was alive and a co-owner of the Museum, she met with the Building Inspector, along with the President of the Museum's governing board.

101. The Building Inspector was openly hostile at the meeting, stating that if Mr. Booth's business partner and mother, Dr. Booth, were not present, that he would throw Mr. Booth out of his office.

102. The Building Inspector also indicated that building codes were "irrelevant" because he could force Petitioners to install an elevator or tear their building down if he wanted to.

103. Petitioners submitted applications for building permits during this meeting, which the Building Inspector denied without explanation or justification there and then.

104. Petitioners also submitted fourteen bound copies of relevant information at this time to explain the mission statement and strategic plan for the then-proposed museum.

105. Petitioners also submitted another copy of the previously submitted site plan during this meeting.

106. Around the same time, Mr. Booth had been called an "asshole" during a conversation with the Building Inspector's secretary.

107. Upon information and belief, Respondents have engaged in a pattern of conduct that is directed at harming Petitioners.

108. This conduct has resulted in selective enforcement and targeted treatment of Petitioners in a manner that is neither uniform nor proper.

109. Upon information and belief, the Building Inspector has also recently engaged in harming Petitioners' reputation in discussions with businesses and individuals in the Town.

AS AND FOR A FIFTH CAUSE OF ACTION

The ZBA's Improper Revocation of the Permits Constitutes an Unlawful Taking

110. Petitioners repeat and reallege the foregoing paragraphs as if fully set forth herein.

111. The ZBA's unlawful revocation of the Permits precluded Petitioners' use of the Property.

112. Petitioners had a reasonable investment-backed expectation that they would be able to continue using the Property as allowed under the Permits.

113. The ZBA's illegal action prevented Petitioners' use of the Property in the manner allowed under the Permits, and therefore constitute a taking in violation of the U.S. and New York State Constitutions, and other applicable law.

114. Petitioners have suffered damages as a result.

115. These damages include the monetary damages, as well as funds obtained through fundraising, grants, and donations.

116. In addition, as a result of the ZBA's illegal action, the Museum's inability to operate impacts its provisional charter.

117. Under the New York State Education Department, there are minimum hour requirements that the Museum be open to the public.

118. If this Court grants Petitioners the relief sought and reinstates the Permits, Petitioners will have to seek another five-year provisional charter to be eligible for an absolute charter thereafter.

119. This significantly impacts grants and charitable contributions.

120. It also requires additional efforts and expenses to seek another provisional charter.

121. But for the Town's unlawful conduct, this would not be necessary.

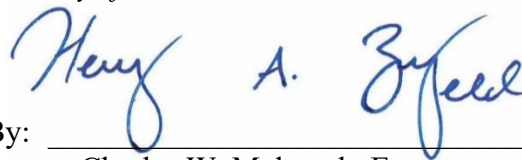
WHEREFORE, Petitioners seek an Order and Judgment as follows:

- (1) Declaring the Respondents' procedure for the revocation without proper and adequate notice to Petitioners and without the opportunity to be heard arbitrary, capricious, and contrary to law, and violative of due process;
- (2) Declaring Respondents' conduct violated the stay imposed under the Town Zoning Code and New York Town Law § 267-a(6);
- (3) Annuling the Respondents' determination to revoke Petitioners' permits and reinstating the Permits or otherwise directing the Town reissue the Permits;
- (4) Determining the Respondents' conduct constituted an unlawful taking;
- (5) Granting just compensation and damages to Petitioners for the unlawful taking in an amount to be determined at trial, but which exceeds \$500,000; and
- (6) Granting such other and further relief as the Court may deem just and proper.

Dated: December 10, 2022
Buffalo, New York

HODGSON RUSS LLP

Attorneys for Petitioners



By: _____

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VERIFICATION

STATE OF NEW YORK)
) SS:
COUNTY OF NIAGARA)

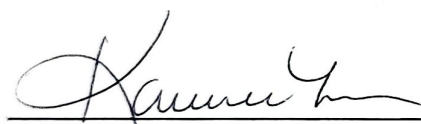
TYLER BOOTH, being duly sworn, deposes and says:

I am a Petitioner in the above-captioned matter. I have read the foregoing Verified Petition and know the contents thereof. The contents are true to my own knowledge except as to matters stated upon information and belief, and as to those matters, I believe them to be true. I am united in interest with Petitioner FORSYTH-WARREN TAVERN LIVING HISTORY FARM AND MUSEUM.



TYLER BOOTH

Subscribed and sworn to before me
this 7th day of December, 2022



Notary Public

KAREN A. FRYE
Notary Public, State of New York
Qualified in Niagara County
Reg. # 01FRS030625
My Commission Expires 7-18-24