

161 A.D.3d 1413  
Supreme Court, Appellate Division,  
Third Department, New York.

In the Matter of [CATSKILL HERITAGE ALLIANCE, INC.](#), Appellant–Respondent,

v.

CROSSROADS VENTURES,  
LLC, Respondent–Appellant,

and

Town of Shandaken Zoning Board of Appeals,  
et al., Respondents. (Proceeding No. 1.)

In the Matter of [Catskill Heritage Alliance, Inc.](#), Appellant,

v.

Town of Shandaken Zoning Board of Appeals,  
et al., Respondents. (Proceeding No. 2.)

525285

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Calendar Date: March 29, 2018

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Decided and Entered: May 17, 2018

### Synopsis

**Background:** After town's planning board issued special use permit to developer of proposed vacation resort and approved site plan with conditions, environmental group brought first article 78 proceeding in which it sought annulment of board's determination. Following denial of developer's motion to dismiss, the Supreme Court, Ulster County, [Mott, J.](#), granted petition in part, annulled board's determination, and remitted so that town's zoning board of appeals (ZBA) could address particular issue prior to new determination by planning board. Cross-appeals were taken. Petitioner commenced second article 78 proceeding after ZBA, upon remittal, interpreted zoning code, and planning board again issued special use permit and approved site plan with conditions. The Supreme Court, Ulster County, [Mott, J.](#), dismissed second proceeding, and petitioner appealed.

**Holdings:** The Supreme Court, Appellate Division, [Eugene P. Devine, J.](#), held that:

[1] Supreme Court properly annulled planning board's determination that detached residential buildings were permitted under the zoning code and remitted so that ZBA could provide its own interpretation, and

[2] ZBA rationally determined that detached residential buildings were permitted “lodges” and, thus, planning board properly issued special use permit and approved site plan.

Affirmed.

See also [2018 WL 1747804](#).

West Headnotes (8)

#### [1] [Zoning and Planning](#)

[🔑 Decisions Reviewable](#)

Appeal from final judgment in article 78 proceeding concerning issuance of special use permit brought up for review an earlier order denying appellant's motion to dismiss.

[Cases that cite this headnote](#)

#### [2] [Zoning and Planning](#)

[🔑 Power and Authority](#)

Town's zoning board of appeals (ZBA), not its planning board, had authority to interpret its zoning code.

[Cases that cite this headnote](#)

#### [3] [Zoning and Planning](#)

[🔑 Maps, plats, or plans;subdivisions](#)

Where developer of proposed vacation resort applied to town's planning board for special use permit and site plan review, and environmental group opposed application by arguing that many of the proposed structures were prohibited under town's zoning code, to the extent that there were pertinent ambiguities in the zoning code, planning board was obliged to request interpretation from town's zoning board of appeals (ZBA)

before rendering its determination. *N.Y. Town Law § 267-b*.

[Cases that cite this headnote](#)

**[4] Zoning and Planning**

🔑 [Hotels, lodging, and short-term rentals](#)

Town's planning board rationally determined that conference center and community centers, as components of proposed vacation resort, were “integral” and “clearly accessory” to the overall project, and thus permitted under town's zoning code in light of zoning board of appeals' (ZBA) prior interpretation of code.

[Cases that cite this headnote](#)

**[5] Zoning and Planning**

🔑 [Power and Authority](#)

**Zoning and Planning**

🔑 [Directing further action by local authority](#)

Where developer of proposed vacation resort applied to town's planning board for special use permit and site plan review, environmental group opposed application by arguing that many of the proposed structures were prohibited under town's zoning code, and, despite pertinent ambiguities in code concerning whether detached duplexes and multiple-unit buildings were permitted lodges or prohibited new multifamily dwellings, planning board interpreted code, issued special use permit, and approved site plan with conditions, Supreme Court properly annulled planning board's determination and remitted so that town's zoning board of appeals (ZBA) could determine whether detached residential buildings were permitted under code; ZBA, not planning board, had authority to interpret zoning code. *N.Y. Town Law § 267-b*.

[Cases that cite this headnote](#)

**[6] Zoning and Planning**

🔑 [Construction by board or agency](#)

Interpretation of zoning code by town's zoning board of appeals (ZBA), which was rendered upon the facts of developer's proposal and was not an issue of pure legal interpretation, would be afforded deference by reviewing court and would only be disturbed if irrational or unreasonable.

[Cases that cite this headnote](#)

**[7] Zoning and Planning**

🔑 [Hotels, lodging, and short-term rentals](#)

Town's zoning board of appeals (ZBA) rationally determined that detached duplexes and multiple-unit buildings which developer sought to build as part of proposed vacation resort were permitted “lodges,” not prohibited new multifamily dwellings, and so planning board properly issued developer a special use permit and approved site plan; zoning code defined multiple dwellings as structures with three or more dwelling units and stated that rooms in boardinghouse, dormitory, motel, inn, or similar buildings did not constitute dwelling units, and though code did not define “lodge,” ZBA properly found permanence of residency as key in distinguishing lodges from multiple dwellings, and defined “lodge” as including structures containing one or more units of lodging and sleeping accommodations for transient occupancy in connection with special permitted use of hotel or lodge development and/or vacation resort held under common ownership, so long as users had primary residence elsewhere.

[Cases that cite this headnote](#)

**[8] Zoning and Planning**

🔑 [Hearing and evidence](#)

Chair of town's zoning board of appeals (ZBA) was not disqualified from participating in rendering interpretation of zoning code in connection with proposed project due to the fact that he had performed logging and plowing work on the project property that predated the proposed project by decades and had no connection to the project itself.

[Cases that cite this headnote](#)**Attorneys and Law Firms**

**\*729** Braymer Law, PLLC, Glens Falls ([Claudia K. Braymer](#) of counsel) and Caffry & Flower, Glens Falls ([John W. Caffry](#) of counsel), for appellant-respondent, and appellant.

Whiteman Osterman & Hanna LLP, Albany ([John J. Henry](#) of counsel), for respondent-appellant.

McCabe & Mack, LLP, Poughkeepsie ([Daniel C. Stafford](#) of counsel), for respondents.

Before: [Garry](#), P.J., Egan Jr., [Devine](#), [Aarons](#) and [Rumsey](#), JJ.

## MEMORANDUM AND ORDER

[Devine](#), J.

**\*730** (1) Cross appeal from a judgment of the Supreme Court (Mott, J.), entered October 17, 2016 in Ulster County, which partially granted petitioner's application, in proceeding No. 1 pursuant to CPLR article 78, to annul a determination of respondent Town of Shandaken Planning Board issuing permits to respondent Crossroads Ventures, LLC, and (2) appeal from a judgment of said court, entered July 20, 2017 in Ulster County, which dismissed petitioner's application, in proceeding No. 2 pursuant to CPLR article 78, to review a determination of respondent Town of Shandaken Planning Board issuing a special use permit to respondent Crossroads Ventures, LLC.

Respondent Crossroads Ventures, LLC has long endeavored to build a vacation resort partially located in the Town of Shandaken, Ulster County. As zoned by chapter 116 of the Code of the Town of Shandaken (hereinafter zoning code), a vacation resort is allowed in the area with a special use permit and site plan approval from respondent Town of Shandaken Planning Board. "Vacation resort" is not defined in the zoning code and, in 2000, Crossroads requested an interpretation and definition of the term to determine what uses would be allowed as part of one. Respondent Town of Shandaken Zoning Board of Appeals (hereinafter

ZBA) replied by analogizing a vacation resort to a "[h]otel or motel or lodge development" where "[a]ll uses integral to the hotel, motel or lodge development ... [and] clearly accessory to" it, as well as other uses allowed as of right or by permission in the area, were allowed (Code of Town of Shandaken § 116-40[O]). The project thereafter underwent a prolonged assessment under the State Environmental Quality Review Act (*see* ECL art 8), during which a scaled-back, but still quite substantial, plan emerged (*Matter of Catskill Heritage Alliance, Inc. v. New York State Dept. of Envtl. Conservation*, 161 A.D.3d 11, 14-15, 74 N.Y.S.3d 401, 2018 N.Y. Slip Op. 02516, \*2, 2018 WL 1747804 [2018]). The project now has a variety of aspects that include two hotels, a conference center, community centers and additional lodging scattered among several duplexes and multiple-unit buildings.

In 2013, as the environmental review wended its way toward a conclusion, Crossroads applied to the Planning Board for a special use permit and site plan review. The Planning Board issued the permit and approved the site plan with conditions, prompting petitioner to commence proceeding No. 1. Following unsuccessful motions by Crossroads and the Planning Board to dismiss the petition, Supreme Court issued an October 2016 judgment finding that the Planning Board properly determined that non-habitational structures fell within the "clear definition of [permissible] accessory uses" to the resort, but improperly resolved an ambiguity in the zoning code as to whether the detached duplexes and multiple-unit buildings were permitted uses in the area. Supreme Court accordingly granted the petition in part, annulled the Planning Board's determination and remitted so that the ZBA could address the propriety of the residential structures prior to a new determination by the Planning Board.

Upon remittal, the ZBA interpreted the zoning code and made clear that the detached residential units were permitted "lodges." The Planning Board again granted Crossroads' application, issued a special use permit and approved the site plan with conditions. Petitioner then commenced proceeding No. 2 to challenge the ZBA's determination and the Planning Board's new approval which, following joinder of issue, Supreme Court dismissed **\*731** in a July 2017 judgment. Petitioner and Crossroads cross-appeal from the October 2016 judgment, and petitioner appeals from the July 2017 judgment.

[1] [2] [3] Crossroads first contends that Supreme Court should have granted its motion to dismiss proceeding No. 1.<sup>1</sup> It is the ZBA, not the Planning Board, with the authority to interpret the zoning code (see Code of Town of Shandaken § 116–68[A]; *Matter of Woodland Community Assn. v. Planning Bd. of Town of Shandaken*, 52 A.D.3d 991, 993, 860 N.Y.S.2d 653 [2008]; *Matter of Swantz v. Planning Bd. of Vil. of Cobleskill*, 34 A.D.3d 1159, 1160, 824 N.Y.S.2d 781 [2006]). When Crossroads applied to the Planning Board for a special use permit and site plan review, petitioner argued that many of the proposed structures were prohibited under the zoning code. To the extent that there were pertinent ambiguities in the zoning code, the Planning Board was obliged to request an interpretation from the ZBA before rendering its determination (see Code of Town of Shandaken § 116–68[A][2][a]; *Matter of Woodland Community Assn. v. Planning Bd. of Town of Shandaken*, 52 A.D.3d at 993, 860 N.Y.S.2d 653). The petition in proceeding No. 1 alleged that some of the proposed uses were prohibited—a claim that, if the zoning code was unclear, would need to be first dealt with by the ZBA—and that the Planning Board lacked authority to approve any application containing them absent a use variance issued by the ZBA. Therefore, affording the petition a liberal construction, accepting its allegations as true and providing petitioner with every favorable inference, it stated a claim (see *Nomura Home Equity Loan, Inc., Series 2006–FM2 v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 582, 69 N.Y.S.3d 520, 92 N.E.3d 743 [2017]).

[4] [5] Turning to the merits of that claim, in light of the ZBA's 2000 interpretation of the zoning code, the Planning Board rationally determined that the conference center and community centers were “integral” and “clearly accessory” to the overall project and permitted under the zoning code (Code of Town of Shandaken §§ 116–4[B]; 116–40[O][4], [5]). The 2000 ZBA interpretation did not offer an opinion regarding the detached duplexes and multiple-unit buildings, a problem in that they were not accessory structures due to their status as habitations (see Code of Town of Shandaken § 116–4[B]) and could be viewed as either permitted lodges or prohibited new multifamily dwellings under the zoning code (see Code of Town of Shandaken §§ 116–10, 116–40[A][1]; [O]). An interpretation of the zoning code was needed on that point and, rather than devising its own interpretation, Supreme Court properly annulled the Planning Board's

determination and remitted so that the ZBA could provide one (see *Town Law § 267–b; Matter of Woodland Community Assn. v. Planning Bd. of Town of Shandaken*, 52 A.D.3d at 993, 860 N.Y.S.2d 653; *Matter of Jordan's Partners v. Goehringer*, 204 A.D.2d 453, 454–455, 611 N.Y.S.2d 626 [1994]).

[6] [7] Turning to proceeding No. 2, the ZBA considered, upon remittal, how to view the detached residential buildings under the zoning code. Inasmuch as the interpretation that followed was rendered upon the facts of Crossroads' proposal and was not an “issue ... of pure legal interpretation,” it “is afforded deference and \*732 will only be disturbed if irrational or unreasonable” (*Matter of Lumberjack Pass Amusements, LLC v. Town of Queensbury Zoning Bd. of Appeals*, 145 A.D.3d 1144, 1145, 42 N.Y.S.3d 473 [2016] [internal quotation marks and citation omitted]; accord *Matter of Blanchfield v. Town of Hoosick*, 149 A.D.3d 1380, 1382, 53 N.Y.S.3d 226 [2017]). The zoning code defines multiple dwellings as structures with “three or more dwelling units,” but states that rooms in “[a] boardinghouse, dormitory, motel, inn ... or other similar building” do not constitute dwelling units (Code of Town of Shandaken § 116–4[B]). A new multiple dwelling is prohibited in the project area, but a lodge development is not. A lodge is not defined in the zoning code, but the ZBA pointed out that a lodge is commonly defined as a transient residence, such as an inn or similar building having rooms that are excluded from the zoning code's definition of a dwelling unit contained in a multiple dwelling. The permanence of the residency is key, in other words, and the ZBA therefore defined a “lodge” as including structures “containing one or more units of lodging and sleeping accommodations for transient occupancy in connection with the special permitted use of hotel or lodge development and/or vacation resort held under common ownership” so long as the users had a primary residence elsewhere. The ZBA observed that the proposed buildings were intended for transient occupancy—either as a rental or as a timeshare purchase—and explicitly concluded that they were permitted lodges as a result. The ZBA's interpretation was entirely rational and will not be disturbed. It follows that the Planning Board, with the 2000 and 2017 ZBA interpretations of the zoning code in hand, rationally determined “that the proposed project ‘compli[ed] with any legislatively imposed conditions on an otherwise permitted use’” so as to warrant the issuance of a special use permit and site plan approval (*Matter of*

*Kinderhook Dev., LLC v. City of Gloversville Planning Bd.*, 88 A.D.3d 1207, 1209, 931 N.Y.S.2d 447 [2011], *lv denied* 18 N.Y.3d 805, 2012 WL 400025 [2012], quoting *Matter of Retail Prop. Trust v. Board of Zoning Appeals of Town of Hempstead*, 98 N.Y.2d 190, 195, 746 N.Y.S.2d 662, 774 N.E.2d 727 [2002]; see *Matter of Frigault v. Town of Richfield Planning Bd.*, 128 A.D.3d 1232, 1234, 9 N.Y.S.3d 708 [2015], *lv denied* 26 N.Y.3d 911, 2015 WL 7288988 [2015]).

[8] Petitioner's remaining contentions do not require extended discussion. Assuming without deciding that petitioner was persuasive in arguing that the ZBA violated the Open Meetings Law (see Public Officers Law art 7) in the leadup to issuing its 2017 interpretation, petitioner has not demonstrated "good cause warranting the exercise of our discretionary power to invalidate the ZBA's determination" (*Matter of Oakwood Prop. Mgt., LLC v. Town of Brunswick*, 103 A.D.3d 1067, 1070, 960 N.Y.S.2d 535 [2013], *lv denied* 21 N.Y.3d 853, 2013 WL 1800446

[2013]). Lastly, the chair of the ZBA was not disqualified from participating in rendering that interpretation due to the fact that he performed logging and plowing work on the project property that predated the proposed project by decades and had no connection to the project itself (see *Matter of Heustis v. Town of Ticonderoga Planning Bd.*, 11 A.D.3d 868, 869–870, 784 N.Y.S.2d 187 [2004]). Petitioner's remaining contentions have been examined and found to lack merit.

ORDERED that the judgments are affirmed, without costs.

Garry, P.J., Egan Jr., Aarons and Rumsey, JJ., concur.

#### All Citations

161 A.D.3d 1413, 77 N.Y.S.3d 728, 2018 N.Y. Slip Op. 03579

#### Footnotes

- 1 Crossroads' appeal from the final judgment in proceeding No. 1 brings up for review the earlier order denying its motion to dismiss (see *Matter of Saratoga Lake Protection & Improvement Dist. v. Department of Pub. Works of City of Saratoga Springs*, 46 A.D.3d 979, 981 n 1, 846 N.Y.S.2d 786 [2007], *lv denied* 10 N.Y.3d 706, 857 N.Y.S.2d 38, 886 N.E.2d 803 [2008]).