

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D35276
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_____AD3d_____

Argued - May 8, 2012

MARK C. DILLON, J.P.
RANDALL T. ENG
LEONARD B. AUSTIN
SANDRA L. SGROI, JJ.

2011-06138

DECISION & ORDER

Town of Oyster Bay, appellant, v John C. Baker,
respondent.

(Index No. 4533/11)

Leonard Genova, Town Attorney, Oyster Bay, N.Y. (Matthew M. Rozea of counsel),
for appellant.

Hutchinson & Hutchinson, P.C., Oyster Bay, N.Y. (Richard L. Hutchinson of
counsel), for respondent.

In an action, inter alia, for permanent injunctive relief, the plaintiff appeals, as limited
by its brief, from so much of an order of the Supreme Court, Nassau County (Jaeger, J.), dated May
25, 2011, as denied that branch of its motion which was to preliminarily enjoin the defendant from
using certain real property in connection with the defendant's landscaping business.

ORDERED that the order is affirmed insofar as appealed from, with costs.

To obtain preliminary injunctive relief based on a violation of its zoning ordinances,
a town need not satisfy the traditional three-part test for injunctive relief, but is required "only [to]
show that it has a likelihood of ultimate success on the merits and that the equities are balanced in
its favor" (*First Franklin Sq. Assoc., LLC v Franklin Sq. Prop. Account*, 15 AD3d 529, 533; *see*
Town of Southhampton v County of Suffolk, 88 AD3d 988, 989; *Town of Huntington v Pierce Arrow*
Realty Corp., 216 AD2d 287, 288; *Incorporated Vil. of Freeport v Jefferson Indoor Mar.*, 162 AD2d
434, 436). To obtain relief, a town must "come forward with a strong prima facie showing that the
defendants are violating its zoning ordinance" (*Town of Oyster Bay v Sodomsky*, 154 AD2d 455,
455; *see Town of Oyster Bay v Dyott*, 246 AD2d 531). Here, the Town of Oyster Bay failed to make

a prima facie showing that the nonconforming use of the subject property had been abandoned and, thus, that the use of the subject property as a landscaping business was not a lawful, preexisting nonconforming use. Consequently, the Supreme Court correctly denied that branch the Town's motion which was to preliminarily enjoin the defendant from using his real property in connection with his landscaping business (*see Town of Islip v Modica Assoc. of NY 122, LLC*, 45 AD3d 574, 575; *Town of Southampton v Sendlewski*, 156 AD2d 669, 670; *Town of Oyster Bay v Sodomsky*, 154 AD2d 455; CPLR 4401).

DILLON, J.P., ENG, AUSTIN and SGROI, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court