

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

845

CA 12-01990

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

IN THE MATTER OF BAKER HALL, DOING BUSINESS
AS BAKER VICTORY SERVICES,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

CITY OF LACKAWANNA ZONING BOARD OF APPEALS
AND CITY OF LACKAWANNA, RESPONDENTS-APPELLANTS.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR
RESPONDENTS-APPELLANTS.

DAMON MOREY LLP, CLARENCE (COREY A. AUERBACH OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered July 25, 2012 in a proceeding pursuant to CPLR article 78. The judgment granted in part the petition and annulled the determination of respondent City of Lackawanna Zoning Board of Appeals.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking, inter alia, to annul the determination of respondent City of Lackawanna Zoning Board of Appeals (ZBA) that a residential treatment facility (RTF) proposed by petitioner is not a permitted use in the mixed residential (MR) district in which petitioner sought to construct it. We conclude that Supreme Court properly granted the petition to that extent. Although "[t]he interpretation by a zoning board of its governing code is generally entitled to great deference by the courts . . . , an interpretation that runs counter to the clear wording of a [code] provision is given little weight" (*Matter of Emmerling v Town of Richmond Zoning Bd. of Appeals*, 67 AD3d 1467, 1467-1468 [internal quotation marks omitted]). Here, the ZBA's determination that the proposed RTF is not permitted in an MR district is contrary to the clear wording of Lackawanna City Code (City Code) § 230-80 and the sections of the multiple residence law that are incorporated by reference therein (*see generally Matter of McGrath v Town of Amherst Zoning Bd. of Appeals*, 94 AD3d 1522, 1523-1524, lv denied 19 NY3d 809).

Finally, we note that, inasmuch as petitioner did not take a

cross appeal from the judgment, it is precluded from obtaining the affirmative relief it seeks (see *Millard v Alliance Laundry Sys., LLC*, 28 AD3d 1145, 1148; see generally *Hecht v City of New York*, 60 NY2d 57, 61).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court