Matter of Amendola v Zoning Bd. of Appeals of Town of Islip
2007 NY Slip Op 30315(U)
March 9, 2007
Supreme Court, Suffolk County
Docket Number: 0029771
Judge: Arthur G. Pitts

SHORT FORM ORDER

COPY

INDEX NO. 29771/06

Supreme Court of the State of New York
IAS Part 43- County of Suffolk

PRESENT:

HON. ARTHUR G. PITTS
JUSTICE OF THE SUPREME COURT

In the Matter of an Article 78 Proceeding

ANTHONY AMENDOLA,

Petitioner,

-against-

ZONING BOARD OF APPEALS OF THE TOWN OF ISLIP,

Respondent.

ORIG. RETURN DATE: 11/22/06
FINAL SUBMIT DATE: 1/4/07
MOTION SEQ. NO.: 001-MD

PLTF'S/PET'S ATTY:
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DEFT'S/RESP'S ATTY:
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Upon the following papers numbered 1 to 22 read on this motion /article 78 ; Notice of Motion/OSC and supporting papers 1-8 ; Notice of Cross-Motion and supporting papers ____; Affirmation/affidavit in opposition and supporting papers 9-11 ; Affirmation/affidavit in reply and supporting papers 12-17/18-19 Other 20/21/22 ; ~~(and after hearing counsel in support of and opposed to the motion)~~ it is,

ORDERED that petitioner Anthony Amendola's application for a judgment, pursuant to CPLR Article 78, annulling the determination of the respondent Zoning Board of Appeals of the Town of Islip which denied his application for permission to construct a two story dwelling on a plot having an area of 8,880 square feet instead of the required 11,250 square feet and having a floor area ratio of 26.6 percent instead of the permitted 25 percent upon the grounds that the determination of said Board is not supported by substantial evidence, is illegal, arbitrary, capricious, unjust, contrary to law, an abuse of discretion and an unconstitutional taking of property without due process is denied under the circumstances presented herein.

Petitioner Anthony Amendola is the contract vendee of a parcel of vacant real property located on the south side of Fenimore Road, 50 feet east of Connetquot Road, Bayport, Suffolk County, New York. (Suffolk County Tax Map # 0500-432.00-04.00-014.000) The parcel consists of three 25 foot wide lots totaling 10,000 square feet with 1,200 square feet being underwater land and 8,800 square feet being upland. The property is located in an area zoned "residential A" which requires an area of 11,250 square

feet and allows a floor area ratio of 25%. In or about March, 2006 the petitioner filed an application for a variance with the respondent Zoning Board of Appeals for the Town of Islip ("ZBA") seeking permission to erect a two story dwelling on the subject parcel constituting an area of 8,800 square feet instead of the required 11,250 square feet leaving a floor area of 26.6% instead of the permitted 25%.

On May 17, 2006 a public hearing was held on the petitioner's variance application. At the hearing an issue arose as to whether the subject parcel had merged with the parcel adjacent to the east by reason of common ownership. Contract vendor Rolf Wittich is the owner of said adjacent parcel. Petitioner's counsel proffered that although the subject parcel and the parcel adjacent to the east currently share a common owner, they did not merge because the lot lines appearing on a filed map reflected that the two parcels were two separate lots. The ZBA indicated that it would seek advisement from the Town Attorney's Office. On June 21, 2006 the petitioner filed an application with the Town of Islip's Planning Department for a minor subdivision. The Planning Department determined that it had "no jurisdiction - not a subdivision, on old file lot lines." By decision dated September 26, 2006 the respondent ZBA denied the petitioner's application without prejudice upon the petitioner filing an application for a minor subdivision with the Town's Planning Department. Said decision provided in part as follows:

> In the opinion of the Board, when these two lots came into common ownership from 30 odd years ago they fall under th provisions of [T]own Code 68-15 (G)*** [T]he Board believes that by operation of Section 68-15(g) the parcel did merge and lost its nonconforming status except for dimensional regulations of the Code.***
>
> The concept of the provision was if a substandard lot is acquired by an adjoining owner, the plot merges in deed with the adjoining plot and thereafter the merged property would be treated [as] a single unit. Any subsequent splitting which would create less than a conforming lot would be a zoning violation such as this application, where the proposed lot has less area that the ordinance requires. Unquestionably, the purpose of this code provision was an exercise of the Town's zoning power to try to eliminate substandard nonconforming lots or to come as close to conforming with existing parcels as possible.***

In support of the instant petition the petitioner avers that the Department of Planning and Development is vested with the original authority to determine if a merger of the lots had occurred and it determined that it had not. The respondent ZBA is vested only in appellate jurisdiction, does not have

original jurisdiction to determine the necessity of subdivision and because an appeal was not taken regarding such determination they cannot base their decision on the petitioner's failure to obtain the minor subdivision. However, "it is axiomatic that a zoning board of appeals has the power to interpret the provisions of the local zoning ordinance or code [citations omitted] " (***Rembar v. Board of Appeals of the Village of East Hampton,*** 148 A.D.2d 619, 620, 539 N.Y.S.2d 81 [2nd Dept. 1989]) and as such, it was certainly within its province to interpret Islip Town Code 68-15 (G) as constituting a "merger clause."

Furthermore, the decision of the respondent ZBA specifically provides that the "application is DENIED for all the above reasons WITHOUT PREJUDICE to the petitioner's right to file a minor subdivision with the Planning Department if they should choose to do so with regard to this parcel....." It is well settled that prior to seeking review of an administrative determination pursuant to Article 78, said determination must be final. " An agency determination becomes final and binding within the meaning of Article 78 when the petitioner seeking review has been aggrieved by it." (***Mateo v. Board of Education of City of New York,*** 285 A.D.2d 552, 553, 728 N.Y.S.2d 71 [2nd Dept. 2001]) "A petitioner is aggrieved once the agency has issued an unambiguously final decision that puts the petitioner on notice that all administrative appeals have been exhausted." (***Carter v. State of New York, Executive Dept., Div. of Parole,*** 95 N.Y.2d 267, 270, 716 N.Y.S.2d 364 [2000]) In the matter at bar the decision of the respondent ZBA clearly provided that it is without prejudice and grants the petitioner leave to apply to the Town's Planning Department for a minor subdivision which, if granted, may apparently alleviate many of the issues considered by the ZBA. As such, the determination of the ZBA was not final and not ripe for judicial review. Accordingly, the petition is denied.

This shall constitute the decision and order of the Court.

Submit judgment.

So ordered.

Dated: Riverhead, New York
March 9, 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION _____ DO NOT SCAN