MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY — I.A.S. PART 24

In the Matter of the Application of
William C. Raganella IV,
Petitioner,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

- against -

THE TOWN OF HUNTINGTON, and the Members Constituting the Zoning Board of Appeals of the TOWN OF HUNTINGTON,

Respondent.

By: Cohalan, J.S.C.
Dated: April 4, 2007

Index No. 10653-06

Mot. Seq. # 001 - CDISPSUBJ

Return Date: June 5, 2006
Calendar Date: October 4, 2006

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This is an Article 78 special proceeding brought by the petitioner seeking to reverse, annul and set aside a determination and denial by the respondents Zoning Board of Appeals of the Town of Huntington (hereinafter ZBA) of an application for approval of a pre-existing non-conforming use of petitioner's two (2) family dwelling since 1912 on the subject location.

The petitioner, William C. Raganella IV, is the owner of a residential parcel of real estate located at 36 Barrow Court in Huntington, Suffolk County on Long Island New York. This parcel is located in the R-7 Residential Zoning District which permits a single family dwelling. Petitioner's property is described as a permitted non-conforming use with a two (2) family, two (2) story frame dwelling with a detached two (2) car garage. The petitioner's residential house was bought by petitioner's grandfather (sic), William Raganella, Sr., in 1912 and has continued in uninterrupted use as a two (2) family home by the Raganella family members since that time. The Huntington Town Code was adopted in 1934 and specifically authorized the two (2) family use under Town Code §198-102 as a

non-conforming use. The petitioner's father bought the residence in 1979 and owned the permitted non-conforming two (2) family residence from 1979 until 2003. The petitioner thereafter succeeded his father as the record owner of the premises in 2003 and then sought a permit for the continued use of the premises as a two (2) family dwelling. The residence has separate entrances, cooking facilities, electric and water service and mail delivery.

The petitioner, in his application, sought to continue the two (2) family residence at 36 Barrow Court arguing that it is a lawful, pre-existing non-conforming use dating back to 1912 when the property was first bought by his grandfather and before the enactment in 1934 of the zoning code providing for only single family use residences in the area. After an initial hearing on December 1, 2005, a subsequent hearing was conducted by the ZBA on March 23, 2006 which examined the continuous use question for the critical time period of 1996 to 2000, a concern of the ZBA. The petitioner brought in additional testimony besides the original three (3) witnesses to support a determination of continuous use during this time period, including two (2) affidavits from witnesses who rented the upstairs apartment from 1996 to 2000 and five (5) other affidavits from neighbors in the area attesting to the use. The ZBA, in a decision dated March 23, 2006, denied the requested continuation of the pre-existing non-conforming two (2) family use claiming that the Huntington Town Code §198-105 states that a property will lose its non-conforming use if the active and continuous use lapses for a period in excess of one (1) year.

The respondent argues that the petition seeking to continue a non-conforming pre-existing two (2) family use was subject to the provisions of the Huntington Town Code §198-105 and in denying the application made a point of stressing the testimony of a neighbor across the street that there was a lapse of continuous use, stating:

> "There was more than one year gap during this time period, is very credible. This neighbor was in the unique position to be able to make first hand observations of conditions at the subject premises. This testimony was not sufficiently rebutted by applicant."

The ZBA in a three (3) page decision dated March 23, 2006 denied the petitioner's request for a continuation of the non-conforming pre-existing use of the premises. Petitioner thereafter brought this Article 78 proceeding claiming that the ZBA's denial of his application was arbitrary, capricious, against the weight of the substantial evidence presented and legally without merit.

For the following reasons, the petitioner's Article 78 special proceeding seeking to annul the decision of the ZBA is granted as the decision and findings of the respondent ZBA are arbitrary, capricious and against the weight of the substantial evidence

> the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure'] ***Matter of Ifrah v. Utschig***, 98 NY2d 304, 308 ['Local zoning boards have broad discretion in considering applications for variances and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion']; ***Matter of Cowan v. Kern***, supra at 599 ['Where there is a rational basis for the local decision, that decision should be sustained']).

Thus, the determination of the ZBA must be upheld if it is rational, and supported by substantial evidence. ***Khan v. Zoning Board of Appeals of Village of Irvington***, 87 NY2d 344, 639 NYS2d 302 (1996) rehearing den. 87 NY2d 1056, 644 NYS2d 148. The consideration of "substantial evidence" is limited to determining "whether the record contains sufficient evidence to support the rationality of the [Respondent's] determination." ***Sasso v. Osgood***, 86 NY2d 374, 633 NYS2d 259 (1995). When the evidence of opposition is limited and the record reflects the denial was rendered without findings or limited findings, based upon community pressure (which is impermissible), the petitior must be granted and the matter remanded to respondent. See, ***Buckley v. Amityville Village Clerk***, 264 AD2d 732, 694 NYS2d 739 (2nd Dept. 1999.

A review of the record presented establishes that the ZBA in its decision relied on the testimony of Susan Tully who resides at 39 Barrow Court across the street from the petitioner. She described her house which she purchased in 1996 as part of a new development at the end of the court and she opposed the application along with Kay Snute, who moved into the neighborhood in 1999 and who started a petition to oppose the two (2) family application. It was pointed out that Susan Tully works in Manhattan and stated she was "one of the neighbors that is not around much." The ZBA in denying the petitioner's application stated the "Board finds the testimony,,, particularly the neighbor [Susan Tully] directly across the street, that there was a more than one year gap during this period [1996-2000], is very credible." Yet, the witness by her own testimony noted she worked in Manhattan and was "not around much." While highlighting this neighbor's testimony, the ZBA ignored the overwhelming evidence to the contrary. See, ***SCI Funeral Services of New York, Inc. v. Planning Bd. of Babylon***, 277 AD2d 319, 715 NYS2d 744 (2nd Dept. 2000).

Petitioner, in support of his application, brought forth the affidavits of neighbors who lived in this established neighborhood since its beginning. Along with the presented testimony at the hearing of a neighbor, Frank Orelli, and his son, Kevin Orelli, residing at 22 Barrow Court since 1929, petitioner also presented affidavits from Harry Bifulco, residing at 34 Barrow Court since 1915, Lena Sforza, residing at 32 Barrow Court since 1912, Ann Lee, of 82 Carly Avenue in Huntington, who has been visiting friends on Barrow Court since prior

to 1934 and Eugene Cozzolino, residing at 19 Barrow Court since 1931, who all submitted proof in support of the application. These affiants set forth that the petitioner's house has always been used as a two (2) family dwelling. Nader Gebrin stated he rented the apartment at the premises from 1994 until 1996. Mr. & Mrs. Dale Morisco stated they rented the premises from 1997 until 2000. The petitioner brought forth three (3) uninterested witnesses, seven affidavits, including from two separate lessees who rented the apartment at the premises, during the so-called 1996 to 2000 critical period which concerned the ZBA. Their affiants presented defined area within the house on the second (2nd) floor for the apartment with separate entrances, separate electric service, with meters and billing, as well as mail boxes for the apartment.

Even more compelling, the petitioner set forth the particulars of a previous application by Louis Pisa in 1998 wherein the ZBA granted similar relief based upon only two (2) affidavits, one from the petitioner's daughter-in-law and one from a neighbor who visited the house often. In that case, the ZBA stated, "Based upon this testimony, we are constrained to find that this has been a continuous two family house which was in existence prior to the enactment of our Zoning Code in 1934." Notwithstanding this prior holding, the petitioner's application was denied in the face of testimony that the house has remained within the Raganella family since it was built in 1912, passed down from grandfather to father and now to the grandson/petitioner, William Raganella IV, and that it has always been a two (2) family house with the apartment on the second (2nd) floor. The witnesses presented were long time residents of the area whose testimony was ignored while the ZBA accepted the testimony of two (2) vocal critics of the application who were relatively new to the area and who belonged to the new development at the end of Barrow Court. Furthermore, the ZBA never addressed the evidence of the separate entrances, separate mail delivery, separate billing by LIPA (Long Island Power Agency) and the testimony of the claimed apartment residents of the two (2) family dwelling, choosing to ignore their testimony. Instead the ZBA relied on the testimony of Susan Tully, a neighbor who was "not around much", working in Manhattan and Kay Snute who started the petition to prevent the two (2) family home designation. See, ***D'Angelo v. Zoning Bd. of Town of Webster***, 229 AD2d 945, 645 NYS2d 378 (4th Dept. 1996). The Court concludes that the ZBA's determination did not have a rational basis grounded in the substantial evidence presented to it. In fact, the substantial evidence presented was in support of the petitioner's application, not against it. The ZBA's decision to deny the application was against the "substantial evidence" presented in favor of it and, for those reasons, was arbitrary and capricious, especially when the standard set forth in a similar application of Louis Pisa is reviewed alongside the petition presently before the Court.

Based upon the entire record before it, and balancing all the factors established, the ZBA's decision and findings are unsupported and are against the substantial evidence presented in support of the petitioner's application. The respondent's

submitted at the hearings held and the Court remits the matter to the respondent ZBA to grant the necessary permits and certificate of occupancy to legalize the pre-existing non-conforming two (2) family residence.

It is well settled law "that in a proceeding seeking judicial review of administrative action the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary or capricious." ***Flacke v. Onondaga Landfill Systems, Inc.***, 69 NY2d 355, 363, 514 NYS2d 689,693 (1987).

The proper standard for a reviewing court is whether the challenged administrative ruling lacked a rational basis for the action taken and was arbitrary and capricious. As set forth by the court in ***Matter of Halpern v. City of New Rochelle***, 24 AD3d 768, 809 NYS2 98 (2nd Dept. 2005),

> "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis. Under this standard, a determination should not be disturbed unless the record shows that the agency's action was 'arbitrary, unreasonable, irrational or indicative of bad faith' (***Matter of Cowan v. Kern***, 41 NY2d 591, 599; *see* ***Matter of Pell v. Board of Educ.***, 34 NY2d 222, 231 ["Arbitrary action is without sound basis in reason and is generally taken without regard to the facts"]).

The ***Halpern***, supra, court went on to state,

> "The Court of Appeals has long recognized the 'settled rule' that 'in reviewing board actions as to variances or special exceptions the courts...restrict themselves to ascertaining whether there has been illegality, arbitrariness, or abuse of discretion' (***Matter of Lemir Realty Corp. v. Larkin***, 11 NY2d 20, 24 [collecting cases]; see ***People ex rel. Hudson-Harlem Val. Tit. & Mtgw. Co. v. Walker***, 282 NY 400, 405 [determination of zoning board of appeals 'may not be set aside unless it appears to be arbitrary or contrary to law'][collecting cases]). The Court of Appeals has continued to articulate the CPLR 7803 (3) standard of review in zoning cases, emphasizing the deference that must be afforded to local officials in making judgments concerning land use in their community (*see* ***Matter of Pecoraro v. Board of Appeals of Town of Hempstead***, 2 NY3d 608, 613 ['courts may set aside a zoning board determination only where the record reveals that

determination denying the requested relief was arbitrary and capricious and against the weight of the evidence . ***Matter of Ifrah v. Utschig***, supra. Accordingly, the petition is granted, and the matter is remitted to the ZBA to approve and grant the application and certificate of occupancy to legalize (and grandfather in) the pre-existing non-conforming two (2) family residence at 36 Barrow Court in Huntington, New York, in existence since 1912. See, ***Buckley v. Amityville Village Clerk***, supra.

Settle Judgment

The foregoing constitutes the decision of this Court.

J.S.C.