

**Quigley v Zoning Board of Appeals of the Town of
E. Hampton**

2007 NY Slip Op 32295(U)

July 23, 2007

Supreme Court, Suffolk County

Docket Number: 0028146/2005

Judge: Melvyn Tanenbaum

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY**

PRESENT:
Hon. MELVYN TANENBAUM
Justice

MOTION #004-CASE DISP
R/D: 101706
S/D 031507

THERESA K. QUIGLEY, H. THOMAS QUIGLEY,
PATRICIA HOPE,

PLTF'S/PET'S ATTY:
WHITE, FLEISCHNER, FINO ESQS.
140 Broadway, 36th Floor
New York, New York 10005

Plaintiff,

- against -

THE ZONING BOARD OF APPEALS OF THE TOWN
OF EAST HAMPTON, DONALD SHARKEY, CHIEF
BUILDING INSPECTOR OF THE TOWN OF EAST
HAMPTON, CHARLES WADE and CYNTHIA
LOEWEN,

DEFT'S/RESP'S ATTY:
LAURA MOLINARI, ESQ.
159 Pantigo Road
East Hampton, New York 11937

Defendants.

Upon the following papers numbered 1 to 43 read on this motion for an order pursuant to CPLR § _____

Motion/Order to Show Cause and supporting papers 1-7 ; Notice of Cross Motion and supporting papers _____ Answering Affidavits
and supporting papers 8-9 Replying Affidavits and supporting papers 10-11 Other 12-13,
14-43 ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the CPLR Article 78 petition seeking a judgment annulling and setting aside the determination of respondent The Zoning Board of Appeals of the Town of East Hampton ("Zoning Board") dated October 19, 2005 denying petitioners application to rescind the certificate of occupancy issued by the Town Building Inspection dated April 11, 2003 permitting continuation of a legally pre-existing non conforming use as a commercial dog kennel of premises owned by respondents Charles Wade and Cynthia Loewen is determined as follows:

Northwest Kennels was founded by Alfred Staudinger ("Staudinger") and began operation in 1955 on an approximate 7 acre parcel. In 1957 "Staudinger" purchased an adjoining 12 acre parcel. East Hampton's first zoning ordinance was adopted on September 22, 1957. "Staudinger" subsequently conveyed portions of the property in January, 1974 (4 acres), June, 1982 (8 acres) and April, 1988 (3.22 acres). The April 18, 2988 conveyance was completed after the Town Planning Board had approved a subdivision of the original 7 acre parcel.

Respondents Charles Wade and Cynthia Loewen operate a commercial dog kennel on the remaining 4.11 acre parcel at 3 Red Spring Path, East Hampton. Petitioners Theresa Quigley, H. Thomas Quigley and Patricia Hope are neighboring property owners. Respondents "Wade" & "Loewen's" commercial kennel operation constitutes a non-conforming use in the A-5 Residential Zoning District.

In 2001, Respondent "Wade" applied to the Town building inspector for permission to renovate the kennel. By letter dated December 3, 2001 the inspector determined that "a pre-existing, non-conforming kennel exists on the parcel and may be operated as such....". The inspector issued a building permit and a certificate of occupancy ("CO") upon completion of the renovations on April 11, 2003.

In May and June, 2004 petitioners sought revocation of the CO-claiming the use of respondents premises as a kennel had been abandoned and therefore operation of a commercial kennel constituted an illegal non-conforming use. By letter dated December 7, 2004 the building inspector declined to revoke respondents "CO". On February 2, 2005 petitioners filed an appeal with the respondent "Zoning Board".

The "Zoning Board" conducted a public hearing on July 19, 2005. Nine witnesses testified and documents were submitted concerning the kennel's continuous use issue. By determination filed on October 19, 2005, respondent "Zoning Board" affirmed the issuance of the certificate of occupancy for a legal pre-existing non-conforming dog kennel.

Paragraphs #6 & 7 of the Board's decision provide:

6. East Hampton Town Code Section 255-1-40D (2) provides that when a non-conforming use is discontinued for any reason for a period of thirty-six (36) months or voluntarily for eighteen (18) months the use is considered abandoned and may not be resumed. Based on the facts and evidence contained in the record, the Board finds that any cessation of the kennel use due to Mr. Staudinger's illness and subsequent death of cancer in August of 2000 was not a voluntary discontinuance of the kennel use and was an involuntary discontinuance of the use for a period of time. This finding requires the conclusion that for the Board to find abandonment pursuant to the Town Code, the Board must find that a period of thirty-six (36) months passed during which the kennel use ceased completely.
7. The Board finds the evidence of the continuous use of the kennel presented by the property owner in the form of affidavits, the original receipt ledger (copies of which were presented to the Board for the record) and witnesses who testified that the kennel had been continuously operated to be credible and finds that there was no period of discontinuance (thirty-six months as established by East Hampton Town Code Section 255-1-40D (2)) during which the kennel was not operated. The Board finds that the kennel was

subsequently begun again by Alfred Charles Wade in 2002, and that no period exceeding thirty-six months has passed in which the kennel use was discontinued. The Board finds that the certificate of occupancy issued by the Building Inspector for a dog kennel was properly issued.

This petition seeks to set aside the “Board’s” determination claiming that it was arbitrary, capricious and not supported by substantial evidence in the record. In support, movants submit a verified petition together with an attorney’s affidavit and claim that the evidence presented during the hearing revealed that in 1966 when the dog kennel use became non-conforming the premises comprised 19 acres. Petitioners claim that the original owner Alfred Staudinger (respondent Wade’s grandfather) subdivided and sold portions of the property reducing the size of the parcel upon which the kennel was maintained to 4.11 acres. It is petitioners position that the commercial dog kennel use became significantly intensified by the more than 75% reduction in the size of the parcel and that by operation of law the kennel lost its legal non-conforming use status. Petitioners argue that the respondent “Zoning Board’s” conclusion that no Town Code regulation limits the area of property which may be used for a pre-existing non-conforming use is erroneous since the Code provision (255-1-40 (A)) permits a non-conforming use to continue only on the original parcel which it occupied and not on a substantially smaller lot. Petitioners also claim that when “Staudinger” sought to subdivide the property in 1983 for residential purposes the Town Planning Department advised “Staudinger” that he needed a use variance to continue kennel operations. Petitioners contend no use variance or site plan approval was obtained since the owner abandoned commercial dog kennel use on the premises. It is petitioners contention that beginning in 1983 the owner “Staudinger” abandoned the kennel operation and that the building inspectors issuance of “CO” was against the weight of the evidence presented during the hearing. Petitioners claim that affidavits submitted from “Staudinger’s” neighbors and friends reveal that he converted the use of the property from a kennel to residential use from 1986 until his death in 2000. This residential use resulted in the abandonment of the non-conforming use as defined pursuant to Town Code Section 255-1- 4 OD (1). Petitioners also contend their petition is not time barred by the 60 day statute of limitations period (East Hampton Town Code § 255-8-35) and claim no basis exists to dismiss the application based upon laches since they timely filed the appeal to rescind the “CO”.

By Order (Werner, J.) dated August 8, 2006 the issue of the timelines of petitioners application was raised and determined with the Court concluding that petitioners appeal and this CPLR Article 78 proceeding were timely commenced. Justice Werner’s decision is the law of the case and no basis exists to dismiss the petition as time barred (Martin v. City of Cohoes, 37 NY2d 162, 371 NYS2d 687 (1975); Holloway v. Cha Laundry Inc., 97 Ad2d 385, 467 NYS2d 834 (1st Dept., 1983)).

In a proceeding seeking judicial review of administrative action, the court must determine whether there is a rational basis for the decision or whether it is arbitrary and capricious (MATTER OF WARDEN v. BOARD OF REGENTS, 53 NY2d 186, 194, 440 NYS2d 875, 881 (1981)). The determination of responsible local officials in the affected community will be sustained if it has a rational basis and is supported by substantial evidence (MATTER OF FUHST v. FOLEY, 45 NY2d 441, 410 NYS2d 565 (1978)).

With respect to questions relating to the interpretation of the terms of a zoning ordinance, a determination by a Zoning Board is entitled to “great weight and judicial deference as long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute” (Trump-Equitable v. Gliedman, 62 NY2d 539, 478 NYS2d 846 (1984); Applebaum v. Deutsch, 66 NY2d 975, 499 NYS2d 373 (1985); Nadell v. Horsley, 264 AD2d 422, 694 NYS2d 421 (2nd Dept., 1999)). The

determination must be sustained if it has a rational basis and is supported by substantial evidence (Matter of Toys R Us v. Silva, 89 NY2d 411, 654 NYS2d 100 (1996)).

A use of property that existed before the enactment of a zoning restriction that prohibits the use is a legal, non conforming use, but the right to maintain a non conforming use does not include the right to extend or enlarge that use (Matter of McDonald v. Islip Zoning Board of Appeals , 31 AD3d 642, 819 NYS2d 533 (2nd Dept., 2006). Moreover, while in general a zoning ordinance must be strictly construed in favor of a property owner, public policy also dictates that municipal ordinances which restrict a landowner's ability to expand or intensify a prior existing non conforming use will be given effect since the goal is to ultimately phase out these uses (Matter of Harbison v. Buffalo, 4 NY2d 553, 176 NYS 2d 598 (1958); Nadell v. Horsely, supra; Matter of Smith v. Islip Board of Appeals, 202 AD2d 674, 609 NYS2d 912 (2nd Dept., 1994); Matter of Syracuse Aggregate v. Camillus Board of Zoning Appeals, 72 AD2d 254, 424 NYS2d 556 (4th Dept., 1980) affirmed 51 NY2d 278, 434 NYS2d 278, 434 NYS2d 150 (1980)).

East Hampton Town Code §255-1-40 (A) provides:

Nonconforming uses permitted to continue. Every nonconforming use may be continued in the building or upon the lot or land which it occupies after the effective date of this chapter or after the effective date of the amendment or revision thereof which rendered the use nonconforming, unless this chapter or such amendment includes explicit language providing for the limitation or termination of such use.

East Hampton Town Code §255-1-40 (D)(2) provides:

- D. Abandonment. A nonconforming use which is abandoned shall be deemed to have ceased to exist for all purposes hereunder and shall not thereafter be carried on. Such abandonment of a nonconforming use shall occur:

* * *

(2) In the case where the use occupied a building or structure designed primarily to accommodate or facilitate such use, when the use is discontinued for any reason for a period of 36 consecutive months or voluntarily for 18 months.

The issues presented are: 1) whether the "Board's" determination of non-abandonment by continuous use of the premises as a kennel is rational and supported by substantial evidence, and if so: 2) whether the "Board's" finding that no Town Code regulation exists which would limit the area of property which may be utilized for the pre-existing, non-conforming use is rational and consistent with the governing statute.

The evidence presented during the hearing in support of continuous use of the premises as a kennel from 1957 until July, 2000 and from August 17, 2000 (the date "Staudinger" died) through February, 2003 which included documentary proof in the form of business ledgers, bank deposit slips, checks, tax returns, newspaper articles, a promissory note, business invoices and forms together with witness testimony provided an adequate evidentiary basis to support the rationality of respondent's determination that the

kennel use had not been abandoned for a sufficient period of time and was continuous. No grounds exist therefore to annul the "Board's" determination that the prior non-conforming use had not been abandoned.

In the Matter of Syracuse Aggregate v. Camillus Board of Zoning Appeals, supra, the issue was whether a non-conforming use (mining) extended to the boundaries of a 25 acre parcel or was limited to 5 acres previously excavated. The Court stated:

"The test for determining whether a nonconforming use extends to the whole tract or only a part thereof has been previously stated by this court: "whether the nature of the incipient non-conforming use, in the light of the character and adaptability to such use of the entire parcel manifestly implies an appropriation of the entirety to such use prior to the adoption of the restrictive ordinance" quoting Matter v. State of New York, 61 AD2d 38, 42, quoting Matter of Fairmeadows Mobile Vil. V. Shaw, 16 AD2d 137, 142.

The Town Code provision relevant to continuation of a non-conforming use allows the use to be continued "upon the lot or land it occupies" after the zoning ordinance became effective (Code §255-1-40-(A)). A non-conforming use may not therefore be enlarged or expanded pursuant to this Code provision.

The lot upon which Northwest Kennels was located prior to enactment of the 1957 zoning ordinance was an approximate 7 acre parcel. In 1987 the lot owner properly subdivided that parcel. In April, 1988 after a conveyance of a 3.22 acre lot where the kennel was located, the remaining 4.11 acre lot was retained and continuously operated as a kennel. Although petitioners contend that the non-conforming kennel use was intensified as a result of the reduction in the parcel size, the "Board's" finding that no Code provision limits the lot area where the non-conforming use may exist is consistent particularly in this instance since kennel operations have remained upon the 4.11 acres retained by the kennel operator and have not been enlarged or expanded.

Considering the nature of the use in maintaining a kennel on the 4.11 acre parcel, the "Board's" finding that such use did not violate any Code regulation was not irrational, unreasonable nor inconsistent with the relevant statutory language since a commercial kennel need not, of necessity, occupy the dimensions of the original more than 7 acre parcel. Absent enactment of a statute specifically prohibiting such use of the entire parcel, the "Board's" determination cannot be considered arbitrary or irrational (See Petrocelli v. Kings Point Zoning Board, 281 AD2d 423, 722 NYS2d 34 (2nd Dept., 2001)). The petition seeking to annul and set aside the "Board's" determination must therefore be denied. Accordingly, it is

ORDERED, ADJUDGED and DECREED that the CPLR Article 78 petition is denied. The petition is hereby dismissed.

Dated: July 23, 2007

FINAL DISPOSITION

MELVYN TANENBAUM

J.S.C.