

Matter of Straub v Modelewski

2007 NY Slip Op 32481(U)

June 19, 2007

Supreme Court, Suffolk County

Docket Number: 0022759/2006

Judge: Thomas F. Whelan

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as District 0400, Section 194.00, block 02.00 and Lot 015.000. The property consists of a two story, two family house, the subject cottage and a detached garage, all located in an R-5 zoning district under the Code of the Town of Huntington (hereinafter "Code"). The zoning code was enacted in 1934.

Straub states that the property was purchased from Mildred Baist (hereinafter "Baist") in 1991 based upon his reliance of a "Letter in Lieu" dated April 20, 1967, issued by the Director of the Department of Buildings and Housing of the Town of Huntington;¹ that according to the "Letter in Lieu", a certificate of occupancy was not required for the buildings on the property because the structures were erected prior to 1934, before the enactment of the town's Building Code and Zoning Ordinances; that in 2005, the Town of Huntington (hereinafter "Town") issued a summons to Straub based upon a violation of the Town Code that the cottage located on the property did not have a certificate of occupancy for use as an apartment; and that the Town denied Straub's application to legalize the cottage by letter dated January 27, 2006, which directed Straub to appeal to the Board to establish a pre-existing, pre-code, non-conforming use. It is noted that the record before the Court does not indicate any dispute that the property was developed prior to the enactment of the Code in 1934.

On July 13, 2006, by a vote of four to one with one member being absent, the Board denied Straub's application and held that Straub failed to establish the cottage was continuously used as a separate, independent dwelling unit since 1934 when the zoning code was enacted.

Straub now moves for affirmative relief annulling the determination of the Board as it was arbitrary, capricious, irrational, contrary to law, unconstitutional and tantamount to an unlawful taking of Straub's property and an unwarranted abuse of discretion in disregard of Straub's vested rights as a property owner because of the subsequent requirement for a certificate of occupancy and/or certificate of permitted use. Upon the recusal of Justice Tannenbaum, the matter was referred to this Court.

A non-conforming use is the use of land which lawfully existed prior to the enactment of a zoning ordinance and is maintained after the effective date of the ordinance, although it does not comply with use restrictions applicable to the area in which it is situated. Non-conforming uses or structures in existence when a zoning ordinance is enacted are, as a general rule, constitutionally protected and will be permitted to be continued, notwithstanding any contrary provisions in a later enacted ordinance (*see People v Miller*, 304 NY 105 [1952]). "Zoning cannot prohibit an existing use to which property is devoted at the time of the enactment" (*Keller v Haller*, 226 AD2d 639, 640, 641 NYS2d 380 [2d Dept 1996] *citation omitted*). "However, the owner must establish that the allegedly pre-existing use was legal prior to the enactment of the prohibitive ordinance which purportedly rendered it non-conforming" (*Keller v Haller*, 226 AD2d 639, *supra* at 640, *citation omitted*). Although zoning aims at the elimination of non-conforming uses, zoning cannot prohibit an existing use to which the property is devoted at the time of the enactment (*see Matter of Syracuse Aggregate Corp. v Weise*, 51 NY2d 278, 434 nys2D 150 [1980]). Nevertheless, the law generally views non-conforming uses as detrimental to a zoning scheme and the overriding public policy of zoning in New York State and elsewhere is aimed at their reasonable restriction and eventual elimination (*see Matter of Toys R Us v Silva*, 89 NY2d 411, 654 NYS2d 100 [1996]).

The "Letter in Lieu" received by Straub at the time of his purchase of the property, was based upon a submitted affidavit together with a survey noting the buildings on the property.² While the "Letter in Lieu" was issued by the Building Department, it does not bind a municipality to a course of conduct if there is a violation of its own ordinances (*see Sekuterski v Village of Lancaster*, 199 AD2d 983, 608 NYS2d 20 [4th

¹ The record before the Court indicates that the Board did not controvert the statements set forth in the "Letter in Lieu."

² The name and status of the person who submitted the affidavit to the Town was not noted nor stated.

Dept 1993]; *related proceeding at* 199 AD2d 983, 608 NYS2d 131 [4th Dept 1993]). “An individual employee’s action will not bind a municipality to a course of conduct in violation of its own ordinances” (*International Merchants, Inc. v Village of Oldfield*, 203 AD2d 247, 609 NYS2d 341 [2d Dept 1994]). “Furthermore, governmental agencies are generally not subject to the defense of estoppel and this case does not present one of the rarest of cases where estoppel should be invoked” (*Id. citation omitted*). The Board is not estopped from enforcing the provisions of its zoning ordinance because the adoption of a zoning ordinance is a governmental function (*see Premium Bond Corp. v City of Long Beach*, 249 AD 756, 291 NYS2d 834 [2d Dept 1936]; *see also Kantor v Olsen*, 9 AD3d 814, 780 NYS2d 443 [3d Dept 2004]).

The record of the hearing held on July 13, 2006 indicates that there was a colloquy between the chairman of the Board, various board members, Straub’s counsel and a witness regarding the non-conforming status of the cottage and the neighborhood. Indeed, counsel presented several witnesses in this regard and proceeded on a theory of non-conforming use. Thus, he had to show a continuous non-conforming use since the inception of the Town’s zoning. Straub did not raise any objection, nor state any disagreement with the hearing proceeding as to the Board’s determination regarding the question of the non-conforming status of the property. Therefore, it was Straub’s burden to illustrate a continuous non-conforming use of the property prior to the inception of the zoning code in 1934.

During the hearing, Straub presented the testimony of James Straub (hereinafter “J. Straub”), the property manager and father of the owners of the property, who testified that when the property was purchased in 1991, new utility meters were placed in the main house and the cottage; that new plumbing was installed in the cottage to upgrade the heating system, which was inspected and approved by the Town; that there was a tenant in the cottage at the time of purchase; that shortly after the property was purchased, the cottage was without a tenant for approximately three months while being upgraded; and that with the exception of that three month period, the cottage has been continuously used as a residence.

J. Straub also testified that approximately one year after the purchase of the property, he was advised by another party that he should obtain proof that the cottage was a non-conforming dwelling should there be an inquiry as to its status under the zoning law; that he thought the cottage was legal and never envisioned going through a hearing process such as the one being conducted; that he subsequently obtained an affidavit from Baist and Carl Eilers (hereinafter “Eilers”) both dated September 15, 1992, which he drafted and notarized; that it was Baist who located Eilers and brought him to see him; and that Baist was the party from whom Straub purchased the property. The affidavit of Baist states as follows:

1. That she resides at 27 W. 18th St., Huntington Station, N.Y.
2. That she is completely familiar with the premises and buildings known as 24 W. 18th St. Huntington Sta., N.Y. as having previously owned said premises.
3. That the premises have been owned by myself and a relative since construction prior to 1932.
4. That a relative named Carl Eilers of 159 Glen Drive, Ridge, N.Y. personally told her he was born in the premises know as 24 W. 18th St., Huntington Sta., N.Y. on or about April 1917.
5. That both she and Carl Eilers know that a 14' by 22' free standing cottage was built and used continuously and for the same purposes since before 1932 to the present. That use was a residence.

The affidavit of Eilers states as follows:

1. That he resides at 159 Glen Drive, Ridge, N.Y.
2. That he is completely familiar with the premises known as 24 W. 18th Street, Huntington Station, N.Y. including the free standing structures also located upon the property.
3. That he was born in the premises known as 24 W. 18th St., Huntington Sta, N.Y. on or about April 1917.
4. That he knows personally that the buildings, and in particular the cottage building, have been used continuously and for the same purposes since being built by his father, John W. Eilers, prior to 1932.

The Board was informed that Baist was in a nursing home and Straub was unable to locate Eilers. A title report was introduced as evidence of the property ownership by the Eilers and Baist families from 1914 to the date Baist sold the property to Straub. Straub also submitted the affidavits of Howard Baist and Jerry Conway.

Howard Baist stated that he presently resided at 27 W. 18th St., Huntington Station, New York; that he resided there for the past twenty five years; and that during that time period, the cottage was used as a residence.

Jerry Conway, a mason contractor, simply stated that the concrete work done on all of the structures on the property was, in his opinion, pored at the same time and was of the same quality. However, the affidavit did not address the approximate time frame the work was done.

Straub presented several other witnesses who testified at the hearing on his behalf, including John Wilson, Richard Kinch, Carl Conforti and John Breslin.

John Wilson (hereinafter "Wilson"), who resided at 25 W. 18th Street, Huntington Station, New York, testified that he lived at this address his entire life, excluding time in the military; that he was familiar with the original owners, the Eilers, and the cottage; that his first recollection is in 1962 when he was ten years old and he played with one of the Baist children on the property; that the cottage was occupied; that over the ensuing years there was always a tenant living in the cottage; and that he did not remember the names of any of the tenants. He also submitted an affidavit which reiterated his hearing testimony.

Richard Kinch, a registered architect and code enforcement official, employed as a building inspector by the Incorporated Village of Huntington Bay, testified that he inspected the property on behalf of the owners in June of 2005; that in his professional opinion, the cottage was the type typically to be the residence of a caretaker; that it dated to the late 1920's; and that this was based upon his inspection of the timber construction of the building and the configuration of its doors and windows, notwithstanding that it had been subsequently renovated.

Carl Conforti, a landscaper and excavation contractor, testified that he inspected the cast iron waste lines from the cottage and it was in his professional opinion, that the age of the cottage, dated by the cast iron pipes, was in the 1920's or 1930's.

John Breslin, a real estate expert recognized by the Board, testified as to the character of the neighborhood and stated that when cottage was built, it was not out of place as a residence; that should the Board find the testimony of Kinch and Conforti credible, it would be further confirmation of its non-conforming status; that the cottage, as it existed and exists, had no adverse impact on the neighborhood; that he was familiar with some structures in the neighborhood with the same approximate physical set up of the property, however, he did not know their legal statuses; and that they all predated the enactment of the building code.

The Board's decision was based upon Straub's failure to satisfy the non-conforming use standards set forth in the Code § 198-105 which states:

If active and continuous use of a nonconforming use is not carried on for a period of one year, the building or land on which such use was conducted thereafter be used only in conformance with the regulations of the district in which the premises is situated. The casual or intermittent use of land shall not establish the existence of a lawful nonconforming use.

It is well settled law that the scope of judicial review of a Board's determination is limited to an examination of whether it has a rational basis and is supported by substantial evidence (*see Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 287 AD2d 453, 731 NYS2d 54 [2d Dept 2001], *lv tc app granted* 97 NY2d 608, 739 NYS2d 97 [2002], *stay den* 97 NY2d 722, 740 NYS2d 691 [2002], *app disp* 98 NY2d 165, 746 NYS2d 429 [2002]; *Squire v Conway*, 256 AD2d 771, 681 NYS2d 623 [3d Dept 1998]; *New Venture Realty v Fennell*, 210 AD2d 412, 620 NYS2d 99 [2d Dept 1994]; *Fuhst v Foley*, 45 NY2d 441, 410 NYS2d 565 [1978]). Where such evidence exists, the court may not substitute its discretion for that of the Board unless its determination is arbitrary, irrational or contrary to law (*see Kantor v Olsen*, 9 AD3d 814, *supra*; *Matter of Toys R Us v Silva*, 89 NY2d 411, *supra*; *Smith v Board of Appeals of the Tn. of Islip*, 202 AD2d 674, 609 NYS2d 912 [2d Dept 1994]; *Matter of Warden v Board of Regents*, 53 NY2d 186, 440 NYS2d 875 [1981]), "nor inconsistent with the governing statute" (*Dawson v Zoning Board of Appeals of the Tn. of Southold*, 12 AD3d 444, 445, 785 NYS2d 84 [2d Dept 2004] citations omitted).

The foregoing standards of review are likewise applicable to the decisions of zoning boards that determine whether or not landowners have abandoned or otherwise lost their rights to continue a non-conforming use of their premises (*see Estate of Cuomo v Rush*, 273 AD2d 234, 708 NYS2d 695 [2d Dept 2000]). A party who raises a claim of non-conforming use must establish that the use was legally created and pre-dated the enactment of the Town's zoning code (*see Seitz v Humenik*, 271 AD2d 449, 706 NYS2d 119 [2d Dept 2000]; *Squire v Conway*, 256 AD2d 771, *supra*). Additionally, a court may not weigh the evidence or reject the choice made by the zoning board where the evidence is conflicting and room for choice exists (*see Calvi v Zoning Bd. of Appeals of the City of Yonkers*, 238 AD2d 417, 656 NYS2d 313 [2d Dept 1997]).

In its decision, the Board stated that Straub failed to established a continuous use of the property since 1934, when the zoning ordinance was adopted. While the Board found that Straub established non-conforming usage since his purchase of the property, he failed to overcome what the Board stated to be large gaps of time in its usage as an independent living unit in his presentation at the hearing by various witnesses and submitted affidavits and documents. The Board discounted the testimony of Wilson, not for its lack of credibility but solely on the fact that he could not physically describe or name any of the alleged occupiers of the cottage. The Board also rejected as being conclusory the affidavits of Baist and Eilers, in that they did not clearly state that the cottage had been used as an independent living unit and secondly that the affidavits did not provide the names or any description of the alleged tenants of the cottage during the time frame from when the cottage was built to the time it was purchased by Straub. Although the Court would agree that the affidavit of Eilers lacks the specificity as to the usage of the cottage in order to establish its non-conformity, the affidavit of Baist does not. It is specific and she stated that the cottage was used as a residence. As defined in Black's Law Dictionary, West Publishing, Fifth Edition, 1979, the word "residence" is defined as "the personal presence at some place of abode with no present intention of early removal and with purpose to remain for an undetermined period, not infrequently, but not necessarily combined with design to stay." It does not state that a residence has to be rental property. In fact, the cottage was occupied when Straub purchased it from Baist.

Baist's affidavit may have lacked legal formality, but it is an inescapable and undisputed fact that Baist rented the cottage when she sold it to Straub. One year after having sold the property to Straub, Baist had no vested interest in the property and there was no reason for her not to give a forthright and credible

affidavit devoid of any self interest. Furthermore, the undisputed testimony of Wilson established that the cottage was rented to his personal knowledge as far back as 1962 and that both Straub and Baist maintained the cottage (*cf. Carrol v Ingram*, 59 AD2d 85, 397 NYS2d 220 [3d Dept 1977]; *app den* 43 NY2d 642, 401 NYS2d 1027 [1977]; *app dism* 44 NY2d 948, 408 NYS2d 1029 [1978]).

The Board's chief reason for denying the application was that Straub could not provide the names or offer any description of persons who occupied the cottage from 1932 to 1991. While it is true that it is the burden of the applicant to offer proof of the non-conforming status of the cottage, the Court finds that to place this burden on Straub or an octogenarian at this juncture in time to provide the names and descriptions of parties for a period of fifty-seven years as proof of its non-conformity prior to Straub's purchase, is arbitrary and capricious even in view of the overriding public policy in New York to restrict and eliminate a non-conforming use (*see Matter of Toys R Us v Silva*, 89 NY2d 411, *supra*). Here, the Board has arbitrarily set an insurmountable benchmark for Straub, without any articulated basis in fact or law even when one considers the Board's broad discretion in zoning matters.

The Board determined that Straub did not establish that the cottage was a non-conforming structure (*see Vite, Inc. v Zoning Bd. of Appeals of the Town of Greenville*, 282 AD2d 611, 723 NYS2d 239 [2d Dept 2001]; *Spicer v Houlihan*, 158 AD2d 459, 550 NYS2d 943 [2d Dept 1990]). The determination of a zoning board regarding the continuation of said usage must be upheld if it is rational and sustained by substantial evidence, even if the reviewing court would have reached a different result (*see P.M.S. Assets, Ltd. v Zoning Bd. of Appeals*, 98 NY2d 683, 746 NYS2d 440 [2002]; *Matter of Toys R Us v Silva*, 89 NY 2d 411, *supra*; *see also Matter of Homeyer v Town of Skaneateles Zoning Bd. of Appeals*, 302 AD2d 941, 754 NYS2d 611 [4th Dept 2003]).

Since the Board denied Straub's application to legalize the property on the grounds that the non-conforming use was created prior to the enactment of the code and that any such use did not lapse under the code, the Court finds that the Board's conclusion that Straub failed to meet his burden did not have a rational basis (*cf. Seitz v Humenik*, 271 AD2d 449, *supra*; *Matter of McQuade v Zoning Bd. of Appeals of the Tn. of Huntington*, 248 AD2d 386, 669 NYS2d 857 [2d Dept 1998]).

The scope of judicial review of zoning board determinations is limited. In reviewing zoning board actions, a court does not make or substitute its judgment but restricts itself to ascertaining whether there has been any illegality, arbitrariness, capriciousness or an abuse of discretion (*see Inlet Homes Corp. v Zoning Bd. of Appeals Town of Hempstead*, 304 AD2d 758, 757 NYS2d 784 [2d Dept 2003]; *lv app granted* 100 NY2d 516, 769 NYS2d 203 [2003]; *aff'd* 2 NY3d 769, 780 NYS2d 298 [2004]; *Town of Huntington v Five Towns College Real Prop. Trust*, 293 AD2d 467, 740 NYS2d 107 [2d Dept 2002]; *Richard Dudyshyn Contr. Co. v Zoning Bd. Of Appeals of the Town of Mt. Pleasant*, 255 AD2d 445, 680 NYS2d 571 [2d Dept 1998]; *Matter of Lemir Realty Corp. v Larkin*, 11 NY2d 20, 226 NYS2d 374 [1962]). A determination of a local zoning board will be sustained if it has a rational basis and is supported by substantial evidence. Although some of the evidence before the Board may have been conflicting, there was room for choice by the Board in rendering its determination (*see Squire v Conway*, 256 AD2d 771, *supra*). Furthermore, the resolution of credibility issues is for the Board to determine (*see Kessler v Town of Shelter Island Planning Bd.*, 40 AD2d 1005, 338 NYS2d 778 [2d Dept 1972]).

Under the facts and circumstance of this matter, the Court finds that the Board's determination did not have a rational basis, was not supported by substantial evidence in the record and was arbitrary and capricious (*cf. Polsen v Rosenberg*, 295 AD2d 352, 743 NYS2d 879 [2d Dept 2002], *lv app den* 98 NY2d 613, 749 NY2d 475 [2002]; *Ifrah v Utschig*, 98 NY2d 304, 746 NY2d 683 [2002]; *David Park Estates v Trotta*, 283 AD2d 429, 723 NYS2d 885 [2d Dept 2001]; *Bivona v Town of Plattekill Zoning Bd. of Appeals*, 268 AD2d 877, 701 NYS2d 734 [3d Dept 2000]; *Monte v Edwards*, 258 AD2d 584, 685 NYS2d 479 [2d Dept 1999]; *Budget Estates v Roth*; 203 AD2d 287, 610 NYS2d 69 [2d Dept 1994]; *Kroumer v City of Albany*, 192 AD2d 930, 595 NYS2d 891 [3d Dept 1993], *app den* 82 NY2d 656, 602 NYS2d 69 [1994]; *Matter of Consolidated Edison of N.Y. v New York State Div. of Human Rights*, 77 NY2d 411, 568 NYS2d 569 [1991] *rearg den* 78 NY2d 909, 573 NYS2d 470 [1991]).

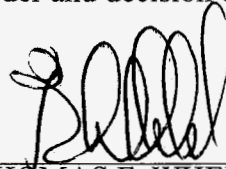
“Substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably probatively and logically” (*300 Gramaton Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181, 408 NYS2d 54 [1978], *citations omitted*). This is not a case where denial was the result of general community opposition (*cf. Matter of Hugel v Campbell*, 276 AD2d 488, 713 NYS2d 697 [2d Dept 2000]; *Matter of Buckley v Amityville Vil. Clerk*, 264 AD2d 732, 694 NYS2d 739 [2d Dept 1999]) as the only neighbor who testified at the public hearing was in favor of the continued use of the cottage as a residential dwelling.

Accordingly, the petition is granted and the July 13, 2006 determination, denying Straub’s application to legalize the non-conforming cottage, is annulled, vacated and set aside (*see E&B Realty, Inc. v. Zoning Bd. of Appeals of Inc. Vil. of Roslyn*, 275 AD2d 779, 713 NYS2d 744 [2d Dept 2001]). Therefore, the matter is remitted to the Board for proceedings consistent with this decision.

Submit judgement upon notice. This constitutes the Order and decision of the Court.

DATED:

6/19/07



THOMAS F. WHELAN, J.S.C.