

House of Daige, LLC v Southold Town Zoning Bd. of Appeals
2007 NY Slip Op 32682(U)
August 10, 2007
Supreme Court, Suffolk County
Docket Number: 0036065/2006
Judge: Sandra L. Sgroi
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SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 001 MotD

Present:
Hon. SANDRA L. SGROI

***REMAND TO ZONING
BOARD OF APPEALS
CASE DISPOSED***

Adj'd Date: 7-5-07
Return Date: 1-31-07

HOUSE OF DAIGE, LLC.,
Petitioner,

WICKHAM, BRESSLER, GORDON & GEASA, P.C.
Attorney for the Petitioner
13015 Main Road, P.O. Box 1424
Mattituck, New York 11952

-against-

SOUTHOLD TOWN ZONING BOARD OF
APPEALS,
Respondent.

SMITH, FINDELSTEIN, LUNDBERG, ISLER AND
YAKABOSKI, LLP.
Attorney for the Respondent Town of Southold
456 Griffing Avenue
P.O. Box 380
Riverhead, New York 11901

Upon the following papers numbered 1 to 70 read on this Proceeding: Notice of Petition, Petition and supporting papers 1-17; Answer 20-22; Exhibits 18-19; 23-24; 69-70; Return of the Southold Town Zoning Board of Appeals 25-68; it is,

ORDERED that this Article 78 proceeding to annul a determination of the Respondent Southold Town Zoning Board of Appeals dated November 28, 2006 upon the grounds that the determination of the Respondent was arbitrary and capricious, an abuse of discretion, erroneous as a matter of law, not supported by substantial evidence, in violation of lawful procedure and in violation of Petitioner's constitutional rights is granted to the extent that this matter is remanded to the Respondent Southold Town Zoning Board of Appeals to determine if the Petitioner is entitled to an area variance to construct a one family residence; and it is further

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ORDERED that the Respondent may not enforce an unrecorded condition against the Petitioner, the present owner of the property, who acquired the lands without knowledge of the existence of the restrictive condition imposed by the decision of the Southold Town Zoning Board of Appeals, Appeal Number 1290, dated October 23, 1969.

The Petitioner, the House of Daige, LLC., is a Limited Liability Company with a principal place of business in Suffolk and it is the owner of the subject property which is located in Greenport, New York. This property is zoned residential and the Petitioner is not seeking a change of use.

On or about March 21, 2006, the Petitioner applied to Southold Town for a building permit to construct a new, single family dwelling on this property. The property is presently improved by a garage occupying 520 square feet. The Petitioner seeks to demolish the garage and construct a single family residence and construct a 600 square foot residence on the small plot.

On March 24, 2006 the Southold Town Building Department disapproved the application because “[t]he proposed construction, on this non-conforming 6,000 square foot parcel, is not permitted pursuant to Article XXIV, Section 100-244, which states that lots, measuring under 20,000 square feet in total size, require a minimum total side yard setback of 25 feet. Following the proposed construction, the dwelling will have a total side yard setback of 20 feet.”

The Petitioner appealed this decision of the Building Department to the Zoning Board of Appeals on May 12, 2006. It is alleged in the Petition that this appeal to the Zoning Board was rejected because the Zoning Board erroneously relied upon the prior, unrecorded restriction on the use of the Petitioner’s property imposed by the decision of the Southold Town Zoning Board of Appeals, Appeal Number 1290, dated October 23, 1969. It appears that the Building Department was not aware of that restriction and the Building Department did not base its denial on that unrecorded restriction.

After the Petitioner appealed the Building Department decision, on May 30, 2006, the Town Building Department issued an amended disapproval on the Petitioner’s May 12, 2006 application. This disapproval recites the unrecorded restriction as an additional ground for denial of the application although it also relies upon the variance required for the setback of the proposed dwelling. It states:

The proposed construction, on this non-conforming 6,000 square foot parcel, is not permitted pursuant to ZBA appeal # 1290, dated September 29, 1969, for a “lot set off.” The Notice of Disapproval included the following condition:

“The smaller lot of 6,000 square feet may never be used for a residence, only an accessory building.”

The Petitioner appealed this Building Department decision to the Zoning Board of Appeals on June 9, 2006. A public hearing on this application was held on September 28, 2006, and, at that time, the record was left open to permit further submissions. The Board of Appeals received further submissions including a copy of the Health Department approval for the construction of the residence and a proposal for alternative relief involving

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a lot line change.

On November 28, 2006, the Zoning Board of Appeals denied the relief requested by the Petitioner and the decision denying the application was filed with the Southold Town Clerk on November 30, 2006. The Petitioner has appealed from that determination and it is that appeal that is decided herein.

In 1969, the Southold Zoning Code required a minimum of lot area of 12, 500 square feet for the construction of a single family dwelling. At that time, Henry C. Bischoff and Nathalie Bischoff owned the property where the Petitioner now wishes to demolish a garage and construct a residence. These prior owners made application to the Zoning Board of Appeals under Appeal No. 1290 for a variance, requesting permission to utilize a portion of their land for the purpose of building a garage. The land upon which the Bischoffs sought to construct the garage was located opposite their home on Ruch Lane, a private road.

The Bischoffs obtained an approval to construct the garage in 1969 and the garage was built and used as an accessory use to their home, which was located opposite the garage and separated by the private road, Ruch Lane. The Zoning Board of Appeals decision in 1969 expressly provided that the land where the garage is located may never be used as a residence. It did not require that this restriction be recorded and the Town took no steps to record the restriction on construction.

Although it appears that the garage was built in or about 1969 after the Zoning Board of Appeals issued its decision, the Town records show that the Building Department issued a Preexisting Certificate of Occupancy (#Z-18633) for it on December 11, 1989. This Certificate was based upon an affidavit signed on December 1, 1989 by the Executor of the Estate of Nathalie Bischoff, which stated that upon belief the garage was constructed prior to 1957 and was used continuously from that time as a garage. The failure to record the restriction and the issuance of this certificate of occupancy foreordained the problem faced by the Petitioner and ensured that an innocent purchaser would not ordinarily become aware of the restriction imposed by the Zoning Board of Appeals.

In 2005, the lot of land that the garage was located upon and the lot of land that the house was built on were sold and, eventually, House of Daige LLC, the Petitioner herein, acquired both parcels. The Petitioner still owns both parcels of land but it now seeks to demolish the garage and build a two story, single family dwelling upon the property where the garage is located.

In its 2006 decision, the Zoning Board of Appeals states that the lot on which the garage is located is not a separate building lot as that term is defined by the Southold Town Code. The Southold Town Code defines and recognizes separate building lots in Town Code § 100-24 which section states:

A lot created by deed or Town Approval shall be recognized by the Town if any one of the following standards apply and if the lots have not merged:

- (1) The identical lot was created by deed recorded in the Suffolk County Clerk's office on or before June 30, 1983, and the lot conformed to the minimum lot requirement(s) set forth in Bulk Schedule AA as of the date of lot creation.
- (2) The lot(s) in question is/are approved by the Southold Town Planning Board.
- (3) The lot(s) in question is/are shown on a subdivision map approved by the Southold Town

Board prior to June 30, 1983.

(4) *The lot(s) in question is/are approved and/or recognized by formal action of the Board of Appeals prior to June 30, 1983.* (emphasis provided by the Court)

The Petitioner, contrary to the position of the Town, alleges that the prior Town action of the Board of Appeals in 1969 by permitting the garage to be built on the lot as a accessory use resulted in a “Town approval” of a substandard lot as the term approval is used in the Code.

As alluded to before in this opinion, in 1969, the Town Zoning Board of Appeals ruled that “the smaller lot of 6,000 square feet may never be used for a residence, only an accessory building.” With the exception of the 1969 ruling of the Town Zoning Board of Appeals, the Town has taken no action that could be considered as an approval of the this small lot, and if the Petitioner is to be successful in its application, it is this 1969 action that must be interpreted as the Board of Appeals’ formal approval of the 6,000 square foot lot as a separate lot. Although the approval issued in 1969 stated that no residence could ever be built on the lot, it did recognize that the 6,000 square foot lot, which has a different tax number than the main lot and has never merged with that main lot, could be improved by the construction of a garage.

The Town has argued that this 1969 approval of the construction of the garage did not result in “Town approval” of the lot as that term is used by Southold Town Code but this Court disagrees with that conclusion. Although the Town sought to restrict the development of the smaller, separate lot by restricting its use to only accessory uses such as a garage, the Town, by permitting construction on a lot that had a separate tax number and was not contiguous to the main lot, recognized that this particular lot existed and certain uses could be constructed upon it by granting the variance on the separate lot.¹ The granting of a variance is a formal action of the Town Board of Appeals.

In *Ioannou v. Southold Town Planning Bd.*, (304 A.D.2d 578, 758 N.Y.S.2d 358), the Appellate Division, Second Department, in another decision involving the same Town, held that a restriction on property imposed by Southold Town that was not in the Petitioner’s chain of title cannot be enforced to restrict the use of the property. The Court stated:

***the petitioner's subdivision application was denied by the appellant due to a condition imposed on a prior owner not to further subdivide the property. As this condition was only filed in the office of the Southold Town Planning Board and was not in the petitioner's chain of title, he cannot be bound by it.

It is undisputed that a purchaser of land, such as the Petitioner, is not chargeable with constructive notice of conveyances which are defined by Statute to include “every written instrument by which any ***interest in real property is created” that are recorded outside of that purchaser's direct chain of title absent notice (see, *Witter*

¹Spot zoning and piecemeal rezoning of an isolated small parcel of land would not have been upheld if it had been an issue (see generally, *Wolfe v. Town Bd. of Town of Islip*, 133 A.D.2d 636, 519 N.Y.S.2d 744) .

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v Taggart, 78 N.Y.2d 234, 237-238, 573 N.Y.S.2d 146, 577 N.E.2d 338; *Andy Assoc. v Bankers Trust Co.*, 49 N.Y.2d 13, 24, 424 N.Y.S.2d 139, 399 N.E.2d 1160; *Ioannou v. Southold Town Planning Bd.*, 304 A.D.2d 578, 758 N.Y.S.2d 358). Restrictive covenants or other similar, written restrictions on property have been construed by the Courts to be a “conveyance”, as that term is defined by the *Real Property Law* (supra). However, it is not as clear whether an unrecorded finding by a Town Zoning Board that a non-conforming, separate plot of land should never be developed as residence if a garage is built upon it is the type of restriction that qualifies under *Real Property Law* § 290 as a “conveyance” (see, *O'Mara v. Town of Wappinger*, 485 F.3d 693, 2007 U.S. App. LEXIS 8608, later proceeding at *O'Mara v. Town of Wappinger*, 8 N.Y.3d 957, 868 N.E.2d 213, 2007 NY Slip Op 3753).

The Court notes that the term “conveyance” is broadly defined in *Real Property Law* § 290 wherein the statute provides that a conveyance “***includes every written instrument, by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected, including an instrument in execution of a power, although the power be one of revocation only***.”

It is apparently an open question whether zoning restrictions or regulations fall within the term “conveyance” as used in the *Real Property Law* (see, *O'Mara v. Town of Wappinger*, supra) although, in the Second Department restrictive covenants imposed by a Town are definitely required to be recorded if the Town seeks to enforce them (see, *Ioannou v. Southold Town Planning Bd.*, 304 A.D.2d 578, 758 N.Y.S.2d 358; *O'Mara v. Town of Wappinger*, 485 F.3d 693, 2007 U.S. App. LEXIS 8608, later proceeding at *O'Mara v. Town of Wappinger*, 8 N.Y.3d 957, 868 N.E.2d 213, 2007 NY Slip Op 3753).

Restrictive covenants are imposed on real property to limit the uses to which the property can be put by the owner and these covenants regulate the kind and style of buildings and businesses that can be erected or maintained on the real property (see, *Bull v. Burton*, 227 N.Y. 101, 124 N.E. 111; *Baddour v. City of Long Beach*, 279 N.Y. 167, 124 A.L.R. 1003, 18 N.E.2d 18, *reargument denied*, 279 N.Y. 794, 19 N.E.2d 90, *appeal dismissed*, 308 U.S. 503, 60 S. Ct. 77, 84 L. Ed. 431; *City of New York v. Delafield 246 Corp.*, 236 A.D.2d 11, 662 N.Y.S.2d 286, *appeal denied*, 91 N.Y.2d 811, 671 N.Y.S.2d 715, 694 N.E.2d 884). These restrictions are deemed to be encumbrances on the real property (see, *Goodrich v. Pratt*, 114 A.D. 771, 100 N.Y.S. 187; *College Point Sav. Bank v. Bonfiglio*, 35 Misc. 2d 971, 231 N.Y.S.2d 438) and as such they should be recorded (see, *Real Property Law* § 345). Further, unless there is actual or constructive notice before or at the time of purchase of the property, or other exceptional circumstances, an owner of land is bound by restrictions only if they appear in some deed of record in the conveyance to himself or his direct predecessors in title (see, *Oak Lane Realty Corp. v. Trinity Evangelical Lutheran Church*, 13 Misc. 2d 708, 172 N.Y.S.2d 95, *aff'd*, 7 A.D.2d 1007, 185 N.Y.S.2d 228, *appeal denied*, 8 A.D.2d 629, 186 N.Y.S.2d 215, *aff'd*, 7 N.Y.2d 984, 199 N.Y.S.2d 492, 166 N.E.2d 501).

The restriction that the Town seeks to enforce is of the type that would qualify as a restrictive covenant. It is undisputed that the Town never recorded the restriction and that the Bischoffs, the former owners of the property, never recorded that restriction. At this time the record before the Court does not indicate that the

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Petitioner or its principals ever acquired any knowledge of that restriction. Therefore, the Town cannot now enforce that unrecorded restriction to deny the application for a Building Permit.

However, the Town may enforce its zoning regulations and it is clear that the Petitioner's wish to construct a house on a small, undersized lot will require area variances. While the Petitioner alleges that the proposed construction will not affect the character of the neighborhood nor would it involve an undesirable change in the surrounding area, the Board of Zoning Appeals based its decision of November 28, 2006, solely upon the unrecorded restriction from 1969 and that 2006 determination did not address the area variances requested by the Petitioner in the detail required by this Court to review the determination.

The lot which the Petitioner seeks to build upon has only 6,000 square feet in area and the Zoning Code requires a lot to consist in this district to consist of a minimum of 40,000 square feet. In the decision of the Town Board of Appeals on May 6, 1985, the Board specifically found that on property located on Ruch Lane "access by emergency vehicles into the rear yard area is limited" (see, Return, Exhibit R-37) and there is no indication that this issue has been considered by any of the parties or that access for emergency vehicles to this area has improved since 1985. The implications of the proposed construction of a two story residence where a garage now exists requires a complete record and proper findings by the Board of Zoning Appeals, the body with the expertise to address those issues (see, *Town Law* § 267-b(3)(b); *Matter of Ifrah v. Utschig*, 98 N.Y.2d 304, 307, 746 N.Y.S.2d 667, 774 N.E.2d 732; see also, *Town Law* § 280-a; *Ramundo v. Pleasant Valley Zoning Bd. of Appeals*, --- N.Y.S.2d ----, 2007 WL 1845126, 2007 N.Y. Slip Op. 05749 (N.Y.A.D. 2 Dept. Jun 26, 2007); *Matter of Khan v. Zoning Bd. of Appeals of Vil. of Irvington* 87 N.Y.2d 344, 639 N.Y.S.2d 302; 662 N.E. 2d782; *Marro v. Libert*, 40 A.D.3d 1100, 836 N.Y.S.2d 691).

Therefore, the Court will remand this matter to the Southold Town Zoning Board of Appeals for the purpose of conducting a full hearing on the Petitioner's plan for proposed new construction of a residence to determine if an area variances should be granted (see generally, *Ferruggia v. Zoning Bd. of Appeals of Town of Warwick*, 233 A.D.2d 505, 649 N.Y.S.2d 946).

Dated:

8/10/07


SANDRA L. SGROI, J. S. C.