

**Matter of Marino v Town of Smithtown**

2007 NY Slip Op 32985(U)

September 19, 2007

Supreme Court, Suffolk County

Docket Number: 0007080/2007

Judge: Arthur G. Pitts

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**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

SUSAN MARINO and VICTOR LABRUNA,

Petitioners,

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

-against-

TOWN OF SMITHTOWN, TOWN OF  
SMITHTOWN BOARD OF ZONING  
APPEALS and TOWN OF SMITHTOWN  
TOWN BOARD,

Respondents.

**ORIG. RETURN DATE: 4/17/07**

**FINAL SUBMIT DATE: 6/21/07**

**MOTION SEQ. NO.: 001-MG**

**002-MD**

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Town of Smithtown

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Upon the following papers numbered 1 to          read on this motion / article 78/dismissal

Notice of Motion/OSC and supporting papers 1-6; Notice of Cross-Motion and supporting papers 7-22; Affirmation/affidavit in opposition and supporting papers 23-24; Affirmation/affidavit in reply and supporting papers 25-26 27-28 Other 29-31  
        ; (and after hearing counsel in support of and opposed to the motion) it is,

ORDERED that the petitioners Susan Marino and Victor Labruna's application for a judgment pursuant to CPLR Article 78 annulling the respondent Town of Smithtown Zoning Board of Appeals denying their application for a certificate of existing use as to their property located at 18 Josephine Lane, Fort Salonga, Smithtown, Suffolk County, New York as well as directing the Zoning Board of Appeals to issue such certificate is granted under the circumstances presented herein. It is further

ORDERED that the respondents Town of Smithtown, Town of Smithtown Town Board and the Smithtown Zoning Board of Appeals cross motions to dismiss the within petition are denied.

Petitioners Susan Marino and Victor Labruna are the owners of the property consisting of 1.3 acres located in a R-43 zoned area known as 18 Josephine Lane, Fort Salonga, Smithtown, Suffolk County, New York. The subject property also contains a driveway, a residence with a patio, a swimming pool, tennis court, garden and shed as well as various small structures. The petitioners purchased the property in 1992. They are also the founders of Angel's Gate Hospice and Rehabilitation Centre for Animals ("Angel's Gate"), a not for profit organization which cares for special needs pets. Presently the petitioners are the owners of approximately 200 special needs animals. They become the owners of the animals upon accepting them into the center.

In 2006 neighbors of the petitioners complained to the respondent Town Board of Smithtown at various meetings. At a meeting held on April 4, 2006 Smithtown Supervisor Patrick R. Vecchio, in response to a complaint regarding Angels Gate, stated that there was no statute in the Town Code which "would allow us to do something." Thereafter, the respondent Town Board directed the Department of Public Safety together with a supervisor from the Town's Animal Shelter to inspect the subject property. On April 18, 2006 the premises was inspected by Chief Building Inspector Robert A. Bonerba together with George Beatty a supervisor from the Animal Shelter. Bonerba's report dated May 4, 2006 concluded that "it is my determination that the property's use is significantly similar in impact and character to an Animal Hospital, a Veterinarian Office or Kennel. A review of the Table of Use Regulations indicates that these similar uses are not permitted in the Residential Zoning Districts. These similar uses are, however, permitted by Special Exception by the Zoning Board of Appeals in certain Business and Industrial Zoning Districts."

At a public hearing held on June 15, 2006 the respondent Town Board proposed amendments to Chapter 322-3 of the Town Zone Ordinance which added the defined term of "animal hospice"

ANIMAL HOSPICE- All or part of the premises, buildings and facilities utilized for the purpose of taking in and providing for the care and treatment of sick, abandoned, homeless, injured, deformed and/or terminally ill animals.

Said amendment added the term "animal hospice" to the list of permitted uses in areas that are not zoned R-43 residential by way of special exception from the Board of Zoning Appeals.

On July 11, 2006 the amendment to Chapter 322 of the Town Zoning Ordinance was passed. Thereafter the respondent Town, through its Chief Building Inspector, served the petitioners with an Inspection Notice citing violations of the amended ordinance stating the premises were being used as "an animal care and rehabilitation facility." On or about July 19, 2006 the petitioners filed an application to the respondent BZA for a certificate of existing use as well as an interpretation of the Town Zoning Ordinance. The application was amended on or about September 6, 2006. In support of the application, the petitioners aver that Chief Building Official's finding that their facility was an

“animal hospital” was in error and that they are entitled to a certificate of existing use because their conduct was lawful prior to the amendment as evidenced by the lack of a violation served prior to the amendment, the need for an amendment in order to issue a violation and that the Town Zoning Ordinance fails to provide that any amendments are to be applied retroactively.

On November 28, 2006 a public hearing was held regarding the petitioner’s request for an interpretation of the amendment and an analysis of the Chief Building Inspector’s finding that the subject property was similar to an animal hospital. On February 13, 2007 the respondent BZA held a second public hearing regarding the petitioners’ application for a certificate of existing use. By written decision dated February 21, 2007 the petitioners application was denied the respondent BZA finding the following:

It is clear from the zoning ordinance that prior to July 2006 an animal rehabilitation facility was not a permitted land use in R-43 residence district. The zoning, then as now, contains the pertinent section on use regulations, section 322-8. That section states that the land shall not be utilized for any use except for a use indicated in the “Table of Use Regulations.” Section 322-4F states that “matters of which there is no specific provision in this chapter shall be deemed to be prohibited.” The Table of Use Regulations, which is also in Section 322-8 states “ Any land use not listed in this table is prohibited.” The table consists of a list of land uses and the districts in which they are permitted. The term “animal rehabilitation facility” does not appear. The most similar term is “animal hospital” which was permitted in 1983 through 2005 but never has been permitted in the R-43 district. ....Clearly, the use was established and continues to this day in violation of the zoning ordinance and thus cannot be determined to be “lawful nonconforming use” commonly known as “grandfathered.” Therefore, the request for the certificate of existing use is denied.

It is well settled that “ ‘the courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious.’ (Cohen and Karger, Powers of the New York Court of Appeals, pp. 460--461; see, also, 8 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 7803.04 Et seq.; 1 N.Y.Jur., Administrative Law, ss 177, 184; *Matter of Colton v. Berman*, 21 N.Y.2d 322, 329, 287 N.Y.S.2d 647, 650--651, 234 N.E.2d 679, 681). The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified \* \* \*

and whether the administrative action is without foundation in fact.' (1 N.Y.Jur., Administrative Law, s 184, p. 609). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." ( *Pell v. Board of Education*, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 839-840 [1974] )

It is well settled that nonconforming uses in existence at the time of a zoning change are entitled to continue despite the contrary ordinance if the pre-existing use was legal when established and, as a general rule, such nonconforming uses are constitutionally protected. It is a factual issue for the Court to determine whether a legal pre-existing use can be established. ( *Spilka v. Town of Inlet*, 8 A.D.3d 812, 778 N.Y.S.2d 222 [3<sup>rd</sup> Dept 2004] ; *Costa v. Callahan*, 41 A.D.3d 1111, 840 N.Y.S.2d 163 [3<sup>rd</sup> Dept 2007] )


Angel's Gate Hospice and Rehabilitation Centre has been located at the subject property since 1993 and has continuously operated in an open and notorious manner as evidenced by various fund raisers held by Angel's Gate with permits issued by the respondent Town. Contrary to the respondents assertions, at a public meeting held on April 4, 2006, prior to the amendment of the Zoning Ordinance, Town Supervisor Patrick Vecchio stated that there was no town ordinance that was violated by the petitioners as to the use of the subject premises. Such assertion was reiterated by the Town Attorney at that same meeting. Clearly, the record before this Court establishes that prior to the amendment of the town zoning ordinance, the petitioner's use of their property was legal and accordingly, the petitioners are entitled to a pre-existing use permit. As such, the findings of the respondent ZBA denying the petitioner's application was arbitrary and capricious without regard to the facts presented and accordingly, the petition pursuant to CPLR Article 78 is granted. The respondents cross motions to dismiss said petition are denied.

This shall constitute the decision and order of the Court.

Submit judgment.

So ordered.

Dated: Riverhead, New York  
September 19, 2007

  
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J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION     DO NOT SCAN