Matter of Pisacano v Modelewski

2007 NY Slip Op 33981(U)

November 19, 2007

Supreme Court, Suffolk County

Docket Number: 0029711/2006

Judge: Peter Fox Cohalan

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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 24

In the Matter of the Application of ARTHUR AND JOSEPH PISACANO,

Petitioners,

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

- against -

Christopher Modelewski, Chairman, Scott M. Frayler, Vice Chairman, Carol Gaughran, Jeffrey N. Naness, James Rogers and Robert F. Slingo constituting the ZONING BOARD OF APPEALS OF THE TOWN OF HUNTINGTON,

Respondents.

For Relief Pursuant to Article 78 of the New York Civil Practice Law and Rules.

By: Cohalan, J.S.C.

Dated: November 19, 2007

Index No. 29711-06

Mot. Seq. # 001 - CDISPSUBJ

Return Date: November 30, 2006
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This is an Article 78 special proceeding brought by the petitioners seeking to reverse, annul and set aside a determination and denial as to one aspect of the petitioners' application for approval and issuance of a certificate of occupancy of a pre-existing non-conforming use of their property alleged to pre-date the enactment of the Huntington Town Code (hereinafter Town Code). The respondents (hereinafter ZBA) granted the relief requested for a two (2) story building fronting on East 17th Street, Huntington Station, Suffolk County on Long Island, New York containing a retail deli/grocery store on the first floor and two (2) apartments on the second floor and also granted an existing barn-like structure and the keeping of farm animals, all of which pre-dated the enactment of the Town Code in 1934, but the ZBA denied the petitioners' additional request to legalize the apartments on a detached structure/garage existing on the site behind the store front.

The petitioners are the owners of a residential parcel of real property located on the north side of East 17th Street in Huntington Station (hereinafter East 17th Street), . This parcel is located in the R-5 Residential Zoning District which permits only single family or two family dwellings if certain area requirements are met or a hardship exception is estab ished. The petitioners applied to the Town of Huntington, Division of Building and Housing, for a certificate of occupancy to legalize a pre-existing non-conforming use of a two (2) story building fronting on East 17th Street containing a deli/grocery store on the ground floor and two (2) accessory apartments upstairs on the second floor; a separate structure/building behind the deli/grocery store containing two (2) apartments as well as an existing separate barn-like structure and the right to keep farm animals. The Town of Huntington, Division of Building and Housing, denied the application in a letter of denial, dated June 7, 2006, and the petitioners appealed to the ZBA which held a public hearing on September 21, 2006.

The petitioners claim these structures were all pre-existing non-conforming uses which pre-dated the enactment of the Town Code in 1934 and produced a number of witnesses to attest to the pre-existing use, including Arthur Pisacano, 70 years of age, whose father previously owned the subject premises. The ZBA, in a decision filed on September 29, 2006, granted the petitioners' request for relief as to the deli/grocery store and the two (2) accessory apartments on the second floor of the building located at 275 East 17th Street and the barn-like structure in back with the right to keep farm animals but denied the request to legalize the detached two (2) story building behind the store front containing an additional two (2) apartments. The ZBA in its decision, noted that a certificate of occupancy on the detached second structure was issued on November 29, 1954 under building permit #007672 which called for a detached one story masonry garage and not a two (2) story structure with two (2) apartments therein.

The petitioners thereafter brought this Article 78 proceeding claiming that the ZBA's denial of that portion of their application which was to legalize the second two (2) story structure in back containing an additional two (2) apartments was arbitrary, capricious and legally without merit.

For the following reasons, the petitioners' Article 78 special proceeding seek ng to vacate and annul the ZBA's decision, dated September 21, 2006, is denied and the special proceeding is dismissed.

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 Court, in ***Halpern***, supra, 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 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']).

The Court, on review of the petition, does not find that the ZBA acted in an arbitrary, capricious or illegal manner or abused its discretion in denying the petitioners' application for a certificate of occupancy for the second structure with apartments. The ZBA found that the structure and store front on East 17th Street with the two (2) accessory apartments as well as the barn-like structure and farm animals were pre-existing non-conforming uses which pre-dated the enactment of the Town Code in 1934. However, the second structure with the two (2) accessory apartments was, apparently, originally a one story masonry garage which received a building permit in 1954 and a certificate of occupancy and was subsequently converted to an illegal two (2) story apartment building accessory structure. This building behind the store front does not enjoy the benefit of "grandfathering" which accompanied the store front structure and the barn-like structure, since that second structure had been constructed sometime in 1954 well after the enactment of the Town Code and was originally designated for a one story masonry garage, not a two (2) story apartment building.

A review of the record presented to the ZBA shows that the petitioners' property was a non-conforming use consisting of a main front dwelling with two (2) family usage and a garage with an attached room, not a second dwelling at the rear of the property. The determination by the ZBA in a reasoned opinion found that the standards set forth in the Town Code in Section §198-2 were properly established and met as to the store front on East 17th Street with the two apartments upstairs and the second barn-like structure in the back with the right to house farm animals and granted that portion of the application. However, the ZBA also found that as to the second structure in the back of the petitioners' property with the two (2) apartments, the evidence established the opposite of a permitted pre-existing non-conforming use and denied the application. This Court finds that the overwhelming evidence before the ZBA established that the structure was built in 1954 pursuant to a Town issued building permit as a one story masonry structure more accurately described as a garage and during the ensuing time period between 1954 and 2007 it was illegally converted into two (2) apartments. This structure is not subject to protection as a permitted pre-existing non-conforming use or by the granting of "grandfather" status as a pre-existing non-conforming building prior to the enactment of the Town Code in1934.

The ZBA's determination in its decision of September 21, 2006 granting the petitioners' application in part and denying it in part was supported by evidence to warrant the granting of a portion of the application; yet the evidence was also sufficient to deny that portion of the petitioners' application seeking to permit the second garage-like structure with the two (2) apartments. This determination by the ZBA was a careful thought out determination based on the evidence presented and was neither illegal, arbitrary, capricious or an abuse of discretion. As the ZBA made clear in its decision of September 21, 2006, after a formal hearing:

> "The Town issued a certificate of occupancy for the garage as a one-story masonry private garage under certificate dated November 29, 1954 based upon approved plans under building permit no. 007672. This certificate is in the record and was not satisfactorily explained by the applicant. They could not explain.*** [I]t appears that even if there was any use of the garage, it clearly was in violation of the certificate of occupancy issued for this structure"

The Court finds a rational basis set forth within the evidence presented during the proceedings before the ZBA to support the decision to deny this one aspect of the petitioners' application. The petitioners' remaining contentions are without merit.

Based upon the entire record before it, and balancing all the factors established, the ZBA could rationally conclude that the construction of the second dwelling characterized as a one story masonry building or garage on the petitioner's property was not a pre-existing non-conforming use subject to the "grandfather" clause but was, instead an illegal conversion of the garage into apartments occurring after 1954 when the building permit was issued, and its determination granting petitioners' application in part and denying it in part was proper based upon the evidence presented and was not arbitrary or capricious. ***Matter of Ifrah v. Utschig***, supra. Accordingly, the petition is denied and the proceeding dismissed.

Settle Judgment

The foregoing constitutes the decision of this Court.

Date: November 19, 2007

J.S.C.