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MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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TOWN OF HEMPSTEAD,
Plaintiff,

- against -

JOSEPH DeMASCO, JOHN LEONARDI, JR.
DANIEL LEONARDI, RICHARD LEONARDI,
PATRICIA MACKEY, and MARTIN DE MASCO,
CO., INC., Defendants.

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HON. JOHN M. GALASSO
J.S.C.
Index No. 10170/05
Calendar No. 2006N0255
Part 41

Decision Reserved: 10/29/07
Decision Dated: 12/05/07

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This matter based upon an action by the Town of Hempstead for a permanent injunction prohibiting defendants from operating their metal salvage yard business came before the undersigned after a mistrial was declared and a new trail ordered by Justice Steven M. Jaeger on March 30, 2007. The mistrial occurred because of the Town's failure to produce some 700 pages of documents in response to a subpoena duces tecum until four days into the bench trial.

The defendants had relied on the Town's prior representations that there were no records in a separate action brought by the defendants herein to enjoin the Town from commencing, continuing or prosecuting any actions against them for operating a salvage yard business after their application to maintain a nonconforming use was rejected by the Town. In that case, Justice Daniel Martin, after addressing several issues, found in favor of the Town and dismissed defendants' complaint for failure to sustain their burden of proof (Index No. 20130/97).

When the undersigned reviewed these prior decisions and in view of the fact defendants had only recently obtained a considerable amount of documents to review, the Court determined that this action would be tried *de novo*, with one exception. Justice Martin's prior conclusion that the Town

of Hempstead's zoning ordinance at issue, Article 7 §63, and its three-year amortization period is constitutional on its face was the law of the case (see *Town of Hempstead v. Romano, 33 Misc 2d 315).*

Now, upon the evidence submitted and the credibility of the witnesses, the Court makes the following findings of fact and conclusion of law.

This action involves what has been referred to at times as a junk, salvage or scrap yard or scrap metal processing business owned and operated by defendants family, the DeMASCO's, since 1927.

In 1929 the Town of Hempstead adopted a new zoning ordinance and for the first time classified the area the business was located as a Residence B Zone. The ordinance also permitted, *inter alia*, educational, religious and recreational uses in the zone as well as a railway passenger station (defendants' property is two blocks away from the Long Island Railroad).

Former Building Zoning Ordinance §1203, now §301, provided that notwithstanding the newly adopted code, and the pre-existing non-conforming uses that were protected,

> *"any automobile or other junkyard in existence at the effective date [January 20, 1930] . . .shall, at the expiration of (3) years from such date, be discontinued."*

In 1933, the Town gave notice of the Town' intention to enforce §1203 of the new Code to Salvatore DeMASCO, the founder of the business and patriach of the family.

There is no evidence that, pursuant to the notice, a hearing was conducted or any other municipal action was taken.

However, the Town Board minutes indicate that in 1935, the Town Attorney was directed to study the legal ramifications of enforcing §1203 in general.

Since there is no evidence whatsoever that the Town took any action against the defendants for a period of approximately 70 years, the Court infers that for whatever reason, in 1935 the Town Attorney believed it to be inadvisable to enforce the new ordinance against the DeMASCOs.

To understand this from a historical perspective, by this time the DeMASCOs had maintained their

business for over eight years during the height of the Great Depression.

When the property was first assessed in 1938 by the Town's Department of Assessment, it was classified for tax purposes as residential property with a dwelling and barn. That classification continued until 1995 when, for the first time, the property was reclassified as a "junkyard."

The evidence indicates that during this period and, indeed, even after this action was commenced in 2005, the Town did business with defendants', awarding them contracts for the disposal of metal scraps and salvage accumulated by the municipality. An on-site dumpster for this purpose was maintained on Town property.

Over the 80 yeas of the business' existence, the surrounding area has been developed by residential properties. In fact, one defendant still lives on the same block as the salvage yard. Defendants have maintained close ties to the community.

The first issue that must be addressed is whether or not defendants' business was of the type the Town meant to be prohibited when it enacted the first zoning code, i.e., whether it was a junkyard within the meaning of §1203 (now §301).

The Court concludes it was.

In the early 1900s it was common nomenclature to refer to all types of rubbish, second-hand junk, and salvage businesses as junkyards or their proprietors as junk dealers. For instance, General Business Law Article 6, effective in 1909, referred to the licensing of junk dealers and specifically included businesses engaged in the buying and/or selling of old metal. During the first trial a long time resident of the area referred to the DeMASCO's business as a junkyard, although the business did not deal in rubbish collection or the buying and selling of second-hand goods.

General Business Law Article 6-C which refers to the licensing of scrap metal processing was added in 1976. These later regulatory statutes and their distinctions came into being as the idea of recycling for environmental purposes entered the public lexicon (*see also Highway Law §89 and General Municipal Law §136*). These statutes, however, had no impact on local zoning laws.

Although the Court finds that today, defendants' are operating what is defined as a scrap metal processing business for licensing purposes, the original appellation of junkyard still applies to this 80-year-old business for zoning enforcement.

Since the zoning ordinance applies to defendants, plaintiff maintains it has an absolute right to enforce the Code and a permanent injunction should be granted.

Defendants assert, that due to the Town's actions in doing business with their company and assessing the property as residential until 1995 and th Town's inaction in failing to enforce the zoning change for 75 years, under the principles of equitable estoppel and laches they should not be enjoined from maintaining their salvage yard.

The Court is well aware that, generally, estoppel or laches is not available as against a municipality in enforcing its zoning law *(Scruggyo-Leftwich v. Rivercross Tenants' Corp., 70 NY2d 849; City of Yonkers v. Rentways, Inc., 304 NY 499, 505).* Yet these doctrines are not foreclosed entirely. They may be invoked as a rare exception *(see Parkway Associates v. City of New York, 71 NY2d 274, 279).*

The undersigned determines that defendants are entitled to the protection of this rare exception. Indeed, unless New York is prepared to be even more restrictive and completely go against the tide of other jurisdictions that recognize, to various extent, equitable estoppel and laches in zoning litigation *(e.g., Tremarco Corp. v. Garzio, 32 NJ 448; Bonsall v. Township of Mendelsohn, 116 NJ Super 337,* cert den. *59 NJ 529),* the Court cannot imagine a situation more demonstrative of the adage that the exception proves the rule.

This is not simply a situation where the municipality granted a building permit or license without having the authority to do so or it failed to enforce its zoning ordinances for a decade or two.

The DeMASCO's have a fourth-generation family-operated business that pre-dated the zoning ordinances. The Town was aware of the nonresidential use of the property and did nothing for 70 years. Its actions in the interim gave an imprimatur to the businesses' continued operation. The extended family maintained its livelihood through the business and some were actually neighbors during the many years. They have been in all other ways cooperative with the municipality and mindful of their neighborhood.

In other jurisdictions, defendants' property would be deemed a legal non-conforming use (see, e.g., *Board of Zoning Appeals, City of Valparaiso v. Beta Tau Housing Corporation, 499 N.E.2d 780).* Even with §1203 and its specific exception for junkyards, this Court does so now.

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In addition, the Court finds that under the traditional rule of constitutional protection of property rights and pre-existing nonconforming uses, the ordinance at issue is unconstitutional as applied to these defendants (*Hempstead v. Romano, supra*).

It is uncontested that there is no other unrestricted land available in Nassau County, if not Long Island, for defendants to relocate their business, which is estimated to be valued at over two million dollars. It is clear that the economic loss defendants would suffer is a substantial one *(see Harbison v. City of New Buffalo, 4 NY2d 553, 564)*.

This is not to say the Town is without recourse. It can insure defendants obtain the proper licenses and permits. It can enforce any nuisance ordinance, such as noise limits. It can be vigilant regarding any health and safety issues or environmental concerns. The Town can even obtain the property by eminent domain after just compensation.

What it cannot do is force defendants out of the scrap metal processing business under these particular facts.

Plaintiff's action for a permanent injunction is denied.

....J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE