

**Matter of Mignone v Zoning Bd. of Appeals of the  
Town of Babylon**

2010 NY Slip Op 32086(U)

August 3, 2010

Supreme Court, Suffolk County

Docket Number: 50419-2009

Judge: Melvyn Tanenbaum

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**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XIII SUFFOLK COUNTY**

**COPY**

PRESENT:  
HON. MELVYN TANENBAUM  
Justice

MOTION #001 Case Disp  
R/D: 04/14/10  
S/D: 04/27/10

\_\_\_\_\_  
In the Matter of the Application of

GABRIELE MIGNONE and ROSARIA  
MIGNONE,

Petitioners,

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

-against-

ZONING BOARD OF APPEALS OF THE  
TOWN OF BABYLON,

Respondent.

PETITIONER'S ATTY:  
SAHN WARD & BAKER, PLLC  
333 Earle Ovington Blvd., Ste. 601  
Uniondale, New York 11553

RESPONDENT'S ATTY:  
PAUL J. MARGIOTTA  
Babylon Town Attorney  
200 East Sunrise Highway  
Lindenhurst, NY 11757

Upon the following papers numbered 1 to 33 read on this motion for an order pursuant to CPLR Article 78  
Notice of Motion/Order to Show Cause and supporting papers 1-6; Notice of  
Cross Motion and supporting papers Answering Affidavits and supporting papers 7-31 Replying Affidavits and  
supporting papers 32-33 Other \_\_\_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this CPLR Article 78 petition seeking a judgment setting aside and reversing the decision of the respondent ZONING BOARD OF APPEALS OF THE TOWN OF BABYLON ("ZONING BOARD") dated December 3, 2009 which declared that petitioners abandoned their nonconforming use of a rear dwelling on their premises and remanding petitioners application for a new hearing with respect to the issue of area variances is granted.

Petitioners GABRIELE MIGNONE and ROSARIA MIGNONE ("MIGNONE") own an approximate 5,416 square foot parcel of land located in a C residential zoning district which permits construction of dwellings on 7500 square foot lots. The parcel borders a river and is improved with an approximate 720 square foot front dwelling and an approximate 693 square foot rear dwelling together with a wooden bulkhead and boat slip. The two buildings were constructed in the 1930's prior to the enactment of the Town's zoning code.

On May 2, 2008 the Town Building Department issued a Certificate of Occupancy confirming that both dwellings located on the parcel were legal nonconforming uses "subject to the condition that one of the dwellings must be owner occupied". On May 8 2008

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petitioners obtained title to the parcel. Beginning in September, 2008 petitioners commenced work around the premises including making repairs to the bulkhead, adding fill material to remedy flood damage and renovating the interiors of both dwellings. On November 14, 2008 the Town Building Department issued a stop work order requiring that petitioners obtain permits to continue work at the premises. On March 5, 2009 petitioner filed a building permit application. By letter dated March 6, 2009 the Town Building Department denied "MIGNONE's" application declaring that petitioners had abandoned their nonconforming use of the premises.

On May 6, 2009 petitioners appealed the Town Building Department disapproval letter and filed an area variance application. A public hearing was held on June 18, 2009 during which petitioner GABRIELE MIGNONE, petitioners' architect and three neighbors testified. By decision dated December 9, 2009 the "ZONING BOARD" denied the application. The "BOARD" determined that the site had been vacant since May, 2008, a period exceeding the 6 month occupancy limitation set forth in the Town Zoning Code Section 213-226. The "BOARD" also found that the variance relief was not in character with the nearby properties; that the variance relief was substantial; that the requested relief would have an adverse impact on the environmental and physical conditions of the neighborhood; that the alleged difficulty was self-created; and that revised plans were required based upon the "BOARD's" determination that petitioners lost the premises nonconforming status.

This petition seeks a judgment annulling the "BOARD's" determination claiming that the "BOARD's" determination of abandonment constitutes an error of law since the Town Code imposes a requirement that cessation of the nonconforming use be voluntary, affirmative and complete. Petitioners claim that the Code provision must be interpreted to require a "complete cessation" standard where abandonment may only result when an owner completely discontinues the use of their property for a period in excess of six months. It is petitioners position that the evidence shows that the "MIGNONES" were present a minimum of two days a week since May, 2008 and were actively engaged in overseeing the repair and renovation work involved in improving the premises. Petitioners claim that under such circumstances the "BOARD's" finding of discontinuance is unsupported by the evidence. Petitioners also argue that applying rules of fundamental fairness and equity requires that the abandonment period be tolled since the "MIGNONES" have worked to improve the premises and therefore should not be penalized by strict application of the Code.

Respondent claims that the "BOARD's" determination has a rational basis and is supported by substantial evidence in the record. Respondent claims that the "BOARD" properly determined that petitioners had abandoned the premises nonconforming use since after the purchase in May, 2008 no one had resided full time in either dwelling. Respondent maintains that the Code provision clearly states that the use "shall be discontinued" and "may not be reinstated"

upon expiration of the six month period. Respondent asserts that the certificate of occupancy also required that one of the dwellings be “owner occupied” and such failure is proof of abandonment. Respondent also claims that the “BOARD’s” area variance denial was rationally based, supported by substantial evidence and neither arbitrary nor capricious.

In a proceeding seeking judicial review of administrative action, the court must determine whether there is a rational basis for the decision or whether it is arbitrary and capricious (Matter of Warden v. Board of Regents, 53 NY2d 186, 194, 440 NYS2d 875, 881 (1981)). The determination of responsible local officials in the affected community will be sustained if it has a rational basis and is supported by substantial evidence (Matter of Fuhst v. Foley, 45 NY2d 441, 410 NYS2d 565 (1978)).

The law is clear that a zoning board has broad discretion in considering an application for a variance and their determination should not be set aside unless there is a showing of illegality, arbitrariness or abuse of discretion. The decision must have a rational basis and be supported by substantial evidence (Matter of Fuhst v. Foley, supra.; Matter of Gowan v. Kern, 41 NY1d 591, 394 NYS2d 579 (1977); Matter of Frink v. Zoning Board of Appeals, 149 AD2d 592, 540 NYS2d 679 (2<sup>nd</sup> Dept., 1989)).

In determining whether to grant an area variance, the Board must consider the following factors:

- 1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;
- 2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
- 3) whether the requested area variance is substantial;
- 4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
- 5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

(Town Law Section 267-b; Sasso v. Osgood, 86 NY2d 374, 633 NYS2d 259 (1995)).

A non-conforming use is a use of land which lawfully existed prior to the enactment of a zoning ordinance, and which 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 contrary provisions of an ordinance (People v. Miller, 304 NY 105, 109 (1952)). "Zoning cannot prohibit an existing use to which the property is devoted at the time of enactment. However an owner must establish that the allegedly pre-existing use was legal prior to the enactment of the prohibitive zoning ordinance which purportedly rendered it non-conforming" (Keller v. Haller et al., 226 AD2d 639, 640, 641 NYS2d 380 (2<sup>nd</sup> Dept., 1996) citing Old Westbury v. Alljay Farms, 100 AD2d 574 affirmed 64 NY2d 798 (1985)). The law generally views non-conforming uses as detrimental to a zoning scheme and therefore public policy is generally aimed at their reasonable restriction and eventual elimination (Buffalo Crushed Stone v. Cheektowaga, 13 NY3d 88, 885 NYS2d 8 (2009)).

Generally abandonment of a nonconforming use requires both an intent to relinquish and some overt act or failure to act, indicating that the owner neither claims nor retains any interest in the subject matter of the abandonment (Matter of Toys "R" Us v. New York Board of Standards and Appeals, 89 NY2d 411, 421, 654 NYS2d 100 (1996) citing 1 Anderson's American Law of Zoning Section 6.65 at p. 678 [Young 4<sup>th</sup> Edition]. However if the zoning provision provides a reasonable lapse period which occurs as a result of an owner's failure to act, the intent to abandon requirement need not be considered (Matter of Toys "R" Us, supra. citing Matter of Prudco Realty Corp v. Palermo 60 NY2d 656, 657-658, 467 NYS2d 830 (1983)).

Babylon Town Code Section 213-226 provides:

#### **Discontinuance of nonconforming uses**

A nonconforming use which shall be discontinued for more than six months shall thereafter be determined to be illegal and in violation of the ordinances, notwithstanding the provisions of Sections 213-225 herein. Upon expiration of the aforesaid six-month period, the said use may not be reinstated, and any structure which shall be in violation of the then controlling ordinances by virtue of this section shall be razed at the expense of the owner.

Petitioners "MIGNONES" acquired vested property rights upon purchasing the premises which included a nonconforming use for two dwellings constructed in the 1930's. The nonconforming use status has been in existence since enactment of the Town Code on July 25, 1954 and was confirmed by the Town's issuance of the April 29, 2008 certificate of occupancy. The certificate of occupancy was apparently secured to facilitate the closing of title from the grantor resident of the premises to the petitioners. The certificate was simply a recitation of the existing

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nonconforming use and the phrase that the nonconforming use was "subject to the condition that one of the dwellings "must be owner occupied" was superfluous and created no additional zoning burden or limitation on the owners vested rights.

Testimony at the hearing established that in May, 2008 both dwellings were in a state of significant disrepair and beginning in September, 2008 petitioners "MIGNONES" commenced renovations of the bulkhead, the land and the dwellings including the addition of fill. Having failed however to obtain the proper building permits, petitioners were issued a stop work order. Petitioners application for a building permit was denied one day after it was submitted to the Town Building Department. The denial contained a finding that petitioners had abandoned their nonconforming use. At the conclusion of petitioner's area variance hearing, respondent "ZONING BOARD's" determination also concluded that petitioners nonconforming use had expired based upon petitioners failure to reside in one of the dwellings for more than six months. The "ZONING BOARD" then also denied the area variances sought largely because of this "ZONING BOARD" nonconforming use "expiration" decision.

There is no dispute that petitioners did not reside full time in either dwelling from the date of closing of title. However the evidence indicates that approximately four months after closing petitioners started to improve the premises by repairs, renovations and improvements of the lot and the dwellings. The repairs were necessary because the prior resident owner had failed to maintain the premises. Moreover both dwellings had sustained significant water damage which petitioners claimed limited habitability until construction repairs could be completed. However once the Town issued a stop work order, petitioners had no alternative and ceased renovations to comply with the municipality's directives and petitioners had no control over how long the process would take.

The effect of enforcement of the Town's declaration of "discontinuance" is that one of petitioner's more than 70 year old houses must be razed since the "MIGNONES" did not reside in the largely uninhabitable dwellings for a six month period. Such action represents an unconstitutional expropriation of vested property rights which the property owners' acquired when they purchased both homes. Petitioners are entitled to a reasonable period of time before any taking occurs and in this case, where the dwellings required repairs and renovation before full time occupancy could be continued, six months was an insufficient period to justify confiscating petitioners vested property rights which is the effect of the Town's actions. The record shows that petitioners commenced work at the premises four months after acquiring the property and for the express purpose of upgrading both dwellings to livable space for themselves and their daughter. The "ZONING BOARD's" determination that petitioners abandoned their nonconforming use of the rear dwelling is therefore irrational, arbitrary and amounts to a confiscatory taking of property since given the circumstances the owners were not permitted a reasonable time period to make use of their vested property rights (149 Fifth Avenue Corp.v. Chin, 305 AD2d 194, 759 NYS2d 455 (1<sup>st</sup> Dept., 2003)).

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With respect to the remaining area variance relief sought by petitioners, the "BOARD's" determination denying each variance was based upon its finding that the nonconforming use had been abandoned. Petitioners are entitled to an expeditious hearing to determine the merits of each area variance sought. Accordingly it is

**ORDERED and ADJUDGED** that petitioners CPLR Article 78 petition is granted to the extent that the respondent "ZONING BOARD's" December 4, 2009 determination finding that petitioners had abandoned the nonconforming use of their premises is annulled, and it is further

**ORDERED** that within thirty days of service of a copy of this Order/Judgment with notice of entry, respondent "ZONING BOARD" is directed to schedule a hearing to determine petitioners application for area variances.

Dated: August 3, 2010

**MELVYN TANENBAUM**

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J.S.C.