

<b>Matter of Prel 32 Realty LLC v Scheyer</b>
2011 NY Slip Op 30722(U)
March 17, 2011
Sup Ct, Suffolk County
Docket Number: 16543/2009
Judge: Joseph Farneti
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI  
Acting Justice Supreme Court

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

PREL 32 REALTY LLC,

Petitioner,

-against-

RICHARD I. SCHEYER, Chairman, KURT PAHLITZSCH, BARBARA O'CONNOR, and JAMES H. BOWERS, all constituting the Board of Zoning Appeals of the Town of Islip,

Respondents.

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

ORIG. RETURN DATE: JUNE 23, 2009  
FINAL SUBMISSION DATE: AUGUST 5, 2010  
MTN. SEQ. #: 003(002)(001)  
MOTION: MD

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Upon the following papers numbered 1 to 10 read on this petition \_\_\_\_\_  
FOR A JUDGMENT PURSUANT TO ARTICLE 78

Notice of Petition and supporting papers 1-3; Affirmation in opposition to petition and supporting papers 4, 5; Memorandum of Law in opposition to petition 6; Verified Answer 7; Respondents' Certified Return 8; Affidavit in support of petition 9; Memorandum of Law in support of petition 10; it is,

**ORDERED** that this verified petition for a judgment, pursuant to Article 78 of the CPLR: (1) annulling and setting aside the determination of respondent BOARD OF ZONING APPEALS OF THE TOWN OF ISLIP ("Zoning Board") dated April 14, 2009; and (2) directing the Zoning Board to grant and issue the relief sought in the application of petitioner PREL 32 REALTY LLC ("petitioner"), is hereby **DENIED** for the reasons set forth hereinafter. The Zoning Board has filed an affirmation in opposition, a memorandum of law, a verified answer and a certified return in response to the verified petition.

Petitioner is the owner of an improved parcel of real property commonly known as 26 Center Avenue, Bay Shore, in the Town of Islip, State of New York ("Premises"). Petitioner informs the Court that when it purchased the Premises on September 29, 2008, there existed a two and one-half story, three-family dwelling, a shed, and a one-car detached garage. The Premises is an irregularly shaped lot located at the southwest corner of Center Avenue and Garfield Avenue; the three-family dwelling fronts Center Avenue, the detached garage in the rear of the Premises fronts Garfield Avenue, and the shed is centrally located in the backyard. The Premises abuts a residential property to the south, and a commercial property to the west (in the rear). Petitioner alleges that the structures thereupon were built in or about 1900, before the Town issued certificates of occupancy and the enactment of the Ordinance of the Town of Islip in 1928. Petitioner alleges that the Premises is located in the Islip Business "1" Zoning District that currently does not permit a three-family dwelling unless at the time such use was commenced, it was maintainable as a matter of right under the statutes, ordinances and general rules of law then in effect in the Town of Islip (see Islip Town Code § 68-14).

On November 13, 2008, petitioner filed an application with the Zoning Board to establish legal nonconforming use of the Premises as a three-family dwelling with a detached garage in the Business "1" Zoning District, in order to obtain a certificate of occupancy. Petitioner alleges that it was required to establish that the Premises was erected prior to July 1, 1938, and used continuously as a three-family residence. Petitioner alleged that such multi-family use was commenced when it was permissible and has continued uninterrupted thereafter until the present time.

At a public hearing conducted on February 3, 2009, petitioner presented testimony from a person familiar with the neighborhood for approximately seventy-five years who described the use of the Premises as a three-family dwelling that was not abandoned or terminated, which information was supported by affidavits from disinterested witnesses. Further, petitioner contends that the chain of title demonstrates the Premises were never subdivided or merged with an adjoining lot, and that a staff member of the Town Planning Department inspected the Premises and confirmed that it was not subdivided. Petitioner alleges that at the hearing, there was no opposition to its application, with the exception of testimony from the residential property owner to the south of the Premises. This property owner alleged that petitioner rents the garage, or had possibly transferred the garage, to its commercial neighbor to the west, who was utilizing it for storage of commercial equipment and/or vehicles.

By decision dated April 14, 2009, the Zoning Board denied petitioner's application. The Zoning Board based its denial upon, among other things, that there had been a change in use of the Premises to a commercial use with respect to the garage, and that by fencing off the garage from the main dwelling and making it accessible from the property to the west, petitioner effectively subdivided the Premises. The Zoning Board found that "there certainly had been a change in the use of the property in that the parcel of property and the frame garage on the west is no longer used with [the] primary property and is now used for commercial rather than residential purposes, which violates one of the requirements to establish a nonconforming use both in spirit and letter." The Zoning Board concluded that the Premises had been changed as to size, shape, and use, and therefore petitioner failed to meet its burden of establishing nonconforming use.

Petitioner then commenced the instant Article 78 proceeding on or about May 27, 2009, to annul and set aside the decision on the grounds that the denial was arbitrary, capricious and irrational. Petitioner argues that the Zoning Board based its denial, in large part, on "unfounded speculation about the accessory [garage]," and at no time determined that the principal structure used as a multi-family residence was altered, changed or abandoned. Petitioner maintains, as supported by the chain of title, that although the accessory garage is fenced-off from the rest of the property, it was never subdivided to an adjoining property owner for use as a public garage. Petitioner claims that it does not rent the garage, or use it as a separate commercial venture, or allow illegal storage anywhere on the Premises. Instead, petitioner indicates that the detached garage is a proper and customary accessory use to the main dwelling, and is used as a garage.

In opposition, the Zoning Board indicates that its decision was neither arbitrary nor capricious, and was based upon the evidence presented after a public hearing on the matter. The Zoning Board maintains that by fencing off the detached garage from the remainder of the property and using it for storage of commercial trucks, the Premises is no longer being wholly used for residential purposes. Moreover, the Zoning Board relied, in part, on the testimony of the residential neighbor who stated that a business once occupied the ground floor of the dwelling and placed business signs out front. The neighbor further testified that the garage area is fenced off and paved, and being used by the commercial neighbor to store commercial vehicles. Thus, the Zoning Board concluded that petitioner is unable to meet the criteria to establish a legal nonconforming use.

In a proceeding under CPLR article 78 when reviewing a determination of an administrative tribunal, courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence (*Pell v Board of Education*, 34 NY2d 222 [1974]; *Matter of Isaksson-Wilder v New York State Div. of Human Rights*, 2007 NY Slip Op 6681 [2d Dept]; *Allen v Bane*, 208 AD2d 721 [1994]). This approach is the same when the issue concerns the exercise of discretion by the administrative tribunal (*Pell v Board of Education*, 34 NY2d 222, *supra*). The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious (*Gilman v N.Y. State Div. of Hous. & Cmty. Renewal*, 99 NY2d 144 [2002]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 2007 NY Slip Op 6879 [2d Dept]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). 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 (*Pell v Board of Education*, 34 NY2d 222, *supra*). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Pell v Board of Education*, 34 NY2d 222, *supra*).

Moreover, local zoning boards have broad discretion in considering land use applications and the judicial function in reviewing such decisions is a limited one (*Pecoraro v Bd. of Appeals*, 2 NY3d 608 [2004]). 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 (*Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*). A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence (*Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*; *Matter of Hannett v Scheyer*, 37 AD3d 603 [2007]; *Matter of B.Z.V. Enter. Corp. v Srinivasan*, 35 AD3d 732 [2006]). Further, a reviewing court should refrain from substituting its own for the reasoned judgment of the zoning board (*Pecoraro v Bd. of Appeals*, 2 NY3d 608, *supra*).

“A use of property that is no longer authorized due to rezoning, but lawfully existed prior to the enactment of the existing zoning ordinance, is a nonconforming use” (*Matter of Toys “R” Us v Silva*, 89 NY2d 411, 417 [1996] [citations omitted]). As such, “[n]onconforming uses are necessarily inconsistent with the land-use pattern established by an existing zoning scheme” and “the overriding public policy of zoning in New York State and elsewhere is aimed at their reasonable restriction and eventual elimination” (*Matter of Toys “R” Us v Silva*, *supra* at 417; see *Matter of Syracuse Aggregate Corp. v Weise*, 51 NY2d 278 [1980]). Pursuant to the Town Code of the Town of Islip, any legal

nonconforming use may be continued as long as the legal nonconforming use is not changed, unless it is changed to a conforming use (see Islip Town Code § 68-15 [A]).

Here, the Court finds that the denial by the Zoning Board had a rational basis and was supported by the evidence presented. After conducting a hearing on the matter in which petitioner appeared by an attorney, the Zoning Board properly considered whether the nonconforming use had been maintained or had been changed, and determined that a portion of the Premises was now being used for commercial purposes in violation of Islip Town Code § 68-15 (A). The Zoning Board based its determination on, among other things, the testimony of the residential neighbor to the south, and an inspection of the Premises by a staff member of the Town's Planning Department. Indeed, a memorandum, dated February 9, 2009, to the chairman of the Zoning Board from the Planning Department indicates that the detached garage is no longer accessible from the dwelling, and that the area is paved and used for the storage of commercial vehicles. The memorandum further recites that "[t]he prime issue here is the fact that although a formal subdivision has not occurred, the property is being utilized partially by a commercial use and partially by a residential multi-family use." While it is undisputed that the Premises have not been subdivided which would immediately terminate any legal nonconforming use (see Islip Town Code § 68-15 [F]), the Zoning Board found that "[t]he concept of splitting off a piece of property even though the title did not convey, but the use certainly was transferred falls under the spirit and intent of Section 68-15 (F)."

In view of the foregoing, the Court finds that the Zoning Board's denial had a rational basis in fact and law, was supported by the evidence presented, and cannot be deemed an abuse of discretion. Accordingly, the instant petition is **DENIED** and this special proceeding is dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: March 17, 2011

  
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HON. JOSEPH FARNETI  
Acting Justice Supreme Court

FINAL DISPOSITION

NON-FINAL DISPOSITION