

Matter of Avramis v Sarachan
2011 NY Slip Op 34263(U)
September 2, 2011
Supreme Court, Tompkins County
Docket Number: 2011-0149
Judge: Robert C. Mulvey
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF TOMPKINS

In the Matter of MARIA AVRAMIS,

Petitioner-Plaintiff,

-vs-

Index No. 2011-0149

ROBERT SARACHAN, et al.,

Respondents-Defendants.

In the Matter of MARIA AVRAMIS,

Petitioner-Plaintiff,

-vs-

Index No. 2011-0551

**BOARD OF ZONING APPEALS OF THE CITY OF
ITHACA, et al.,**

Respondents-Defendants.

**BEFORE: HON. ROBERT C. MULVEY
Supreme Court Justice**

**APPEARANCES: HARRIS BEACH, PLLC
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DECISION & ORDER

Mulvey, Robert C., J.

The parties stipulated to an order signed by the Court on July 21, 2011 consolidating the two actions/proceedings and resolving various issues in the first-captioned matter (Index No. 2011-0149).

In the second-captioned proceeding (Index No. 2011-0551) the petition/complaint seeks the following relief:

-vacatur and annulment of the decision of the City of Ithaca Board of Zoning Appeals on June 2, 2011 pursuant to Article 78 of the Civil Practice Law and Rules;

-declaratory judgment pursuant to CPLR 3017 declaring the rights of the parties with regard to application of the City of Ithaca municipal code;

-mandamus pursuant to Article 78 directing the City of Ithaca Building Commissioner to issue a building permit, compelling the City of Ithaca Planning Board to hear the petitioner's site plan application;

-declaring that Section 325-20 of the City code is unconstitutional as applied.

The respondents Karl Pillemer, Clare McMillan and John Graves move to dismiss the petition/complaint pursuant to CPLR 3211 on the ground that the amended petition and complaint fail to state a cause of action, and for summary judgment granting their counterclaims.

The petitioner/plaintiff cross-moves for summary judgment dismissing the counterclaims of the respondents Pillemer, McMillan and Graves or, in the alternative, conditioning the dismissal of the causes of action against those respondents on their production of documents.

BACKGROUND

The petitioner-plaintiff Avramis (hereinafter "owner") owns a four-unit residential building at 137-139 Hudson Street in the City of Ithaca. She seeks municipal approval for the creation of additional parking spaces in the rear yard.

As a multi-family dwelling, it is a legally non-conforming use in an R-2 district with respect to the number of dwelling units and occupants (R-2 limits residential uses to one or two family dwellings). Section 325-20 of the City Code provides that this

dwelling must have at least six off-street parking spaces. Because the front yard setback of eleven feet is not large enough to accommodate parking spaces, the owner proposes to use the rear yard for six parking spaces. The Code does not limit the number of spaces, yet it specifies that up to 50% of the area may be used.

On June 2, 2011 the BZA determined the following:

-the property is legally non-conforming since the district was rezoned to R-2 in the 1970's;

-a parking area in the rear yard was constructed without the required building permit or site plan review;

-it concurred with the Building Commissioner's conclusion that the creation of additional parking spaces in the rear yard constituted an extension or enlargement of non-conforming use, requiring a use variance.

The owner has also named individuals as defendants/respondents in the second proceeding yet does not seek relief against them. Owner's counsel reports that they are named in the matter only for the purpose of obtaining discovery regarding the cause of action against the City, and because they are necessary parties to the extent that complete relief cannot be obtained in their absence. The parties have stipulated to withdraw the petition and complaint as against respondents/defendants Arnold Rusoff and Denise Rusoff.

DISCUSSION

The question presented is whether rear yard off-street parking is a permitted accessory use for the property. If the answer is yes, a use variance is not required.

1. Standard of Review - BZA

Although the interpretation of a zoning regulation by a zoning board is entitled to deference, the interpretation is subject to judicial review and the ultimate responsibility of interpreting the law is that of the Court, KMO -361 Realty Associates v. Davies, 204 AD2d 547 (2d Dept., 1994) leave to appeal denied 84 NY2d 811 (1994). If the interpretation by the board is irrational or unreasonable, the board's determination will be annulled, *id.* Any ambiguity in the language used in zoning regulations must be resolved in favor of the property owner, *id.* Zoning restrictions affecting nonconforming uses, being in derogation of common-law property rights, should be strictly construed in favor

of the property owner, **Matter of Toys-R-Us v. Silva**, 89 NY2d 411, 421 (1996).

Deference to the zoning board is not required where the question is one of pure legal interpretation, **Matter of Teachers Ins. & Annuity Assn. v. City of New York**, 82 NY2d 35, 41 (1993).

2. Accessory Use

Under the doctrine of accessory use, a landowner is permitted to maintain an accessory use in conjunction with a permitted nonconforming use if the accessory use is truly incidental to the non-conforming use and does not change the basic nature of the use of the property. **Verstandig's Florist Inc. v. Board of Appeals of the Town of Bethlehem**, 229 AD2d 851, 852 (Third Dept., 1996). Key to this determination is whether the provision of parking spaces is compatible with the primary use of the property and whether it will transform the basic nature of the present use. **Id.**

Section 325-3 of the City Code defines "accessory use" as a use, occupancy or tenancy customarily incidental to the principal use or occupancy of the main building.

Section 325-8 provides for district regulations and includes a chart establishing that off-street parking is a permitted and required accessory use in R-1 (single family residential) R-2 (two family residential) and R-3 (multi-family residential) districts.¹

Section 325-20 provides detailed regulations regarding off-street parking and mandates a minimum number of spaces for dwelling units based on the number of bedrooms or sleeping rooms. This provision makes it clear that conforming properties must have off-street parking based on the number of bedrooms in the house.

Section 325-32(c) provides that a non-conforming use may not be extended or enlarged to other structures, nor may a nonconforming use be extended or enlarged to other portions of structures not devoted to such use or to other land except by means of a variance granted by the Board of Appeals.

The word "extension" is defined in Section 325-3 as follows:

¹The Court of Appeals has confirmed that off-street parking is an accessory use of residential property, because it is "clearly incidental to and customarily found in connection with the principal use," **Matter of New York Botanical Garden v. Board of Standards and Appeals, et al.**, 91 NY2d 413 (1998).

“To make a greater or expanded use of a property. This term applies to both uses of structures and to uses of land and indicates a larger scope of operations on the property, including projects that create additional space physically attached to a building or structure. An addition of unrelated individuals residing in a residential structure without a physical addition of space is considered an extension. Extensions also include a greater use of land or property for the operation of any aspect of a use.”

The non-conforming aspects of this property are its four dwelling units and its occupancy maximum of twelve. These non-conforming aspects are not being extended or expanded under the definitions set forth above.

The Court finds that the number of parking spaces existing on the property after the re-zoning of the district in 1977 were not “non-conforming uses” and that installation of parking spaces in the rear yard does not constitute an extension, expansion or enlargement of any non-conforming use of the property. The parking spaces are compatible with the residential use of the property and would not, in any way, transform the basic nature of its present residential use. There is no evidence in the record to support the conclusion that the additional spaces and the relocation to the rear yard would have any bearing on the use or occupancy of the dwelling units.

The respondent City relies chiefly on two trial court opinions, **Mosher v. Crowley** [110 NYS2d 626 (Sup. Ct., Monroe Co., 1952)] and **Vella v. City Zoning Board, City of Rochester** [206 Misc. 941 (Sup. Ct., Monroe Co., 1954)], in which the court did not disturb zoning board decisions which granted use variances to owners who sought to add off-street parking. In **Mosher**, a hospital that was grand-fathered in a residential district sought a permit for construction of a parking area and the court held that the parking lot was an extension of the nonconforming use of the hospital [“the construction of a parking lot upon a portion of the premises not previously used for such a purpose is in fact an extension of a non-conforming use.” (629)].

In **Vella**, a transit company sought a permit to construct an employee parking lot in a zone where parking lots were not permitted, and there was no issue presented as to the need for a use variance given the description of the project under the local ordinance as the physical extension of the non-conforming use. Therefore, **Vella** is not applicable here.

The analysis used in **Mosher** has been supplanted by the analysis used by the

Appellate Division in Verstandig Florist, supra. The physical relocation or expansion of the accessory use was not identified as the sole consideration in determining whether it changes “the basic nature of the use of the property,”id., 852.²

The Appellate Division has addressed two accessory use cases since Verstandig Florist. Both decisions adhere to the Verstandig analysis.

In 1998, it affirmed the lower court’s holding that the installation of a gasoline tank with a plan to introduce gasoline sales at a legal non-conforming marina would change the basic nature of the use of the property because of the increase in the volume and scope of the business on the premises, Matter of Gilchrist v. Town of Lake George Planning Board, 255 AD2d 791 (Third Dept., 1998). In Androme Leather Corporation v. City of Gloversville [1 AD3d 654 (Third Dept., 2003)] a legal non-conforming business that engaged in coloring and finishing of leather sought a permit to expand its operations by engaging in a discrete process known as “beaming” leather. The Court held that beaming was not accessory to its current use, citing the Verstandig criteria, 656. Both of these cases indicate clear expansions of the nature of the use of the properties.

3. Exhaustion of Administrative Remedies

Exhaustion of administrative remedies is not required where the only question at issue is one of law. Sievers v. City of New York, et al., 146 AD2d 473 (First Dept., 1989) appeal after remand 182 AD2d 580 (First Dept., 1992).

4. Motions related to defendants/respondents Pillemer, McMillan and Graves

The Court finds that the owner has failed to demonstrate any basis for relief against these individuals or that they are necessary parties to the proceedings. The complaint/petition is dismissed as against them and their counterclaims are likewise dismissed.

²The record establishes that BZA relied upon Commissioner Radke’s interpretation of New York zoning law in concluding that a use variance was required. Commissioner Radke’s analysis is set forth in a lengthy submission dated April 27, 2011 (R-117) in which she cites Salkin’s New York Zoning Law and Practice on several occasions, most notably for the principle that expansion of a non-conforming use to new land is regarded as an unlawful extension of use in accordance with the Mosher and Vella cases.

CONCLUSION

For the foregoing reasons the determination of the Ithaca City Board of Zoning Appeals made on June 2, 2011 that the installation of parking spaces in the rear yard of the subject property required a use variance is hereby vacated and annulled.

The Court declares the rights and interests of the parties as follows:

1. The required off-street parking provisions of the Ithaca City Code apply to the subject property;
2. The installation of parking spaces in conformity with the said Code provisions does not require a use variance.

The respondent municipal officials are hereby directed to accept the plaintiff/petitioner's application for site plan review.

The motions by respondents/defendants Karl Pillemer, Clare McMillan and John Graves for dismissal of the causes of actions naming them are hereby granted, and the petitioner/plaintiff's motion to dismiss their counterclaims is likewise granted.

All other requests for relief are denied without prejudice.

This shall constitute the Order of the Court.

Hon. Robert
C. Mulvey

Digitally signed by Hon. Robert C. Mulvey
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