[* 1]

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 48

COPY

----------X

In the Matter of the Application of

THERESE MADONIA,

Petitioner-Plaintiff,

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules,

- against -

BOARD OF ZONING APPEALS OF THE TOWN OF BROOKHAVEN and TOWN OF BROOKHAVEN,

Respondents-Defendants.

----------X

By : LaSALLE, J.S.C
Dated: July 31, 2013

Index No. 12-11574
Mot. Seq. # 001 - MOTDCDISPSJ

Return Date: 5-14-12
Adjourned: 1-29-13

GARRETT W. SWENSON, JR., ESQ.
Attorney for Petitioner
76 Bay Road
Brookhaven, New York 11719

ANNETTE EADERESTO
BROOKHAVEN TOWN ATTORNEY
By: Daniel Belano, Esq.
Attorney for Respondents
One Independence Hill
Farmingville, New York 11738

In this hybrid Article 78 proceeding and plenary action, petitioner/plaintiff seeks, inter alia, a judgment annulling a determination by respondent/defendant Zoning Board of Appeals of the Town of Brookhaven, dated March 7, 2012, denying her application for a certificate of existing use for a two-family residence on property she owns in respondent/defendant Town of Brookhaven. She further seeks judgments declaring that she possesses a vested property right to use the property as a two-family residence, and that the denial of her application violated her rights to due process of law and just compensation for the taking of real property. For the reasons set forth herein, the petition is granted only in part, and otherwise is dismissed.

In December 1980, petitioner/plaintiff Therese Madonia purchased real property known as 7 Oakcrest Avenue, Farmingville, New York. The property, improved with a two-family residence, is located in an area that is zoned for single-family residences. In 2011, Madonia received notification from respondent/defendant Town of Brookhaven advising that it could not locate a certificate of occupancy for her residence. Consequently, in October 2011, Madonia filed an application with respondent/defendant Zoning Board of Appeals of the Town of Brookhaven for a certificate of existing use, and a public hearing on the application

(RR

was conducted in December 2011 and January 2012.

Claiming that the residence was constructed as a two-family home more than 60 years ago, and that it has been used continuously as a two-family home since that time, Madonia's representative at the December 2011 hearing submitted an affidavit of Nanette D'Amico Giovanniello, a long-time resident of the neighborhood, averring that the subject property had been used continuously as a two-family residence since 1958, as well as letters from other neighbors supporting Madonia's request for a certificate of existing use. A review of Town records conducted during the hearing revealed that the subject property has been taxed as a two-family residence. Other evidence before the Board of Appeals, including surveys of the property prepared in 1970, 1980 and 2011, showed Madonia's residence, which measures approximately 49 feet by 27 feet, has not changed in size over the years, and that a Town building inspector sent to inspect the property could not determine whether the residence was built as a one-family or two-family home. Additionally, a neighbor, Cathy DeLuca, testified at the hearing she was concerned about tenants parking on the street if Madonia's application was granted.

At the request of the Zoning Board, the matter was held open so Madonia could testify in person on her application for a certificate of existing use, and a further public hearing on the matter was conducted in January 2012. Madonia testified that she has lived at the property since 1980, that it was improved with a two-family residence when she purchased it, and that she rents part of the house to tenants. Madonia also testified that she was advised the residence was constructed as a two-family home by the original owner, Joseph Messina, though she had no firsthand knowledge as to how the house was used prior to 1980. The only other testimony at the further hearing was given by Cathy DeLuca, who again complained about Madonia's tenants parking on the street.

By decision dated March 7, 2012, the Zoning Board denied Madonia's application for a certificate of existing use, stating that it "is not persuaded that the use of a two-family dwelling continuous from the threshold date of 1959 to the present." More particularly, the decision states that Madonia's testimony "is limited to the time period since she took title," and that, while Nanette Giovanniello states in her affidavit that she has been familiar with the residence since 1958, "no information is provided concerning the basis of her familiarity or the continuous nature of her knowledge." The decision states that the lack of information regarding the basis of Giovanniello's knowledge is "significant, where, as here, the '2d Family' area of the dwelling is at the rear of the home, obscured from the public roadway, and measures only 465.2 square feet." It also notes that "at the time a permit for the detached garage was issued to the original owner, the residence was identified as a single family home."

Subsequently, Madonia commenced this hybrid Article 78 proceeding and plenary action. The first cause of action is for a judgment annulling and setting aside the Zoning Board's March 17, 2012 determination denying Madonia's application on the grounds that it was not supported by substantial evidence and was arbitrary and capricious. More specifically, Madonia argues, in part, that certain findings of the Zoning Board were erroneous or not supported by the evidence in the record, and that the Zoning Board improperly disregarded the uncontroverted affidavit of Giovanniello. Madonia also argues that the Zoning Board of Appeals violated her rights to due process by shifting the burden of proof to her "to disprove abandonment of the two-family use without notice to her that the Board was considering this issue," and by requiring evidence "bolstering" the credibility of Giovanniello's affidavit. She further argues the Zoning Board denied her due process by requiring her to satisfy "the applicable criteria under § 85-372," though such provision does not set

forth any criteria. The second cause of action is for declarations that Madonia possesses a vested property right to use the subject property as a two-family residence, and that the denial of the application for a certificate of existing use constitutes an unconstitutional taking of her property. In addition to requesting a judgment annulling and setting aside the Zoning Board's determination and declarations concerning Madonia's vested property rights, the wherefore clause of the petition/complaint seeks a judgment directing respondents/defendants to issue Madonia a certificate of existing use and to refrain from interfering with her use of the subject property as a two-family residence. It also requests that a hearing be held to determine the amount Madonia should be awarded under 42 USC § 1983 for the taking of her property. In opposition, respondents/defendants assert, in part, that, "based on the cumulative testimony adduced at the public hearing and contained in the record attached hereto," the determination by the Zoning Board was justified, as "there was a substantial period of time unaccounted for where no one could testify, and no evidence was produced to the Board that those portions of the subject premises were being continually used as a second family dwelling."

"A primary difference between CPLR article 78 proceedings and declaratory judgment actions is the presence or absence of a judicially imposed remedial order" (***Matter of Dandomar Co., LLC v Town of Pleasant Val. Planning Bd.***, 86 AD3d 83, 89, 924 NYS2d 499 [2d Dept 2011]). The purpose of a declaratory judgment is to determine the rights of the parties "before a 'wrong' actually occurs in the hope that later litigation will be unnecessary" (***Klostermann v Cuomo***, 61 NY2d 525, 475 NYS2d 247 [1984]; *see* ***James v Alderton Dock Yards***, 256 NY 298, 176 NE 401 [1931]). In contrast, an Article 78 proceeding is designed to challenge the actions of state and local governments and corporations, and may result in a judgment affirmatively directing the unsuccessful party to perform an act or refrain from doing so (*see* CPLR 7801, 7803; ***Matter of Dandomar Co., LLC v Town of Pleasant Val. Planning Bd.***, 86 AD3d 83, 924 NYS2d 499; ***Matter of Levine v Board of Educ. of City of N.Y.***, 186 AD2d 743, 589 NYS2d 181 [2d Dept 1992], *lv denied* 81 NY2d 710, 599 NYS2d 804 [1993]).

Further, 42 USC §1983 affords an aggrieved party a civil remedy against "[e]very person who, under color of any statute, ordinance, regulation, custom or usage, of any State * * * subjects, or causes to be subjected, any citizen * * * to the deprivation of any rights, privileges or immunities secured by the Constitution." In the context of land use, 42 USC §1983 protects against municipal actions that violate a property owner's rights under the Fifth and Fourteenth Amendments of the United States Constitution to due process, equal protection of laws, and just compensation for the taking of property (***Bower Assocs. v Town of Pleasant Val.***, 2 NY3d 617, 626, 781 NYS2d 240 [2004]; ***Town of Orangetown v Magee***, 88 NY2d 41, 49, 643 NYS2d 21 [1996]; ***Sonne v Board of Trustees of Vil. of Suffern***, 67 AD3d 192, 200, 887 NYS2d 145 [2d Dept 2009]). However, "42 USC § 1983 is not simply an additional vehicle for land-use determinations" (***Bower Assocs. v Town of Pleasant Val.***, 304 AD2d 259, 263, 761 NYS2d 64 [2d Dept 2003], *affd* 2 NY3d 617, 781 NYS2d 240). Thus, a plaintiff alleging he or she was deprived of property must demonstrate the existence of a protectable property interest (***Huntington Yacht Club v Incorporated Vil. of Huntington Bay***, 1 AD3d 480, 481, 767 NYS2d 132 [2d Dept 2003]; *see* ***Town of Orangetown v Magee***, 88 NY2d 41, 643 NYS2d 21). For liability to be imposed under 42 USC § 1983, a plaintiff also must establish a deprivation of his or her property interest "by conduct which is 'arbitrary as a matter of federal constitutional law'" (***Bower Assocs. v Town of Pleasant Val.***, 304 AD2d 259, 264, 761 NYS2d 64, *quoting* ***Harlen Assoc. v Incorporated Vil. of Mineola***, 273 F3d 494, 505 [2d Cir 2001]; *see* ***Nicolakis v Rotella***, 24 AD3d 739, 806 NYS2d 700 [2d Dept 2005]). To raise a federal constitutional question, the conduct that allegedly deprived the plaintiff of a protected interest must be "'so outrageously arbitrary as to constitute a gross abuse of governmental authority'"

(*Id.*; *see* ***City of Cuyahoga Falls, Ohio v Buckeye Community Hope Foundation***, 538 US 188, 123 S Ct 1389 [2003]; ***Bower Assocs. v Town of Pleasant Val.***, 2 NY3d 617, 781 NYS2d 240; ***Sonne v Board of Trustees of Vil. of Suffern***, 67 AD3d 192, 887 NYS2d 145).

A declaratory judgment action is not the proper vehicle for Madonia to challenge the Zoning Board's March 7, 2012 determination; rather, her remedy is an Article 78 proceeding (*see* ***Greystone Mgt. Corp. v Conciliation & Appeals Bd. of City of N.Y.***, 62 NY2d 763, 477 NYS2d 315 [1984]). Further, Madonia's claim essentially is that the Zoning Board came to the wrong conclusion on her application for a certificate of existing use. No federal constitutional issue has been raised in the papers (*see* ***Sonne v Board of Trustees of Vil. of Suffern***, 67 AD3d 192, 887 NYS2d 145). Accordingly, the second cause of action for declaratory relief and for damages under 42 USC § 1983 is dismissed (*see* ***Matter of Gable Transp., Inc. v State of New York***, 29 AD3d 1125, 815 NYS2d 299 [3d Dept 2006]; *see also* ***Sonne v Board of Trustees of Vil. of Suffern***, 67 AD3d 192, 887 NYS2d 145; ***Bower Assocs. v Town of Pleasant Val.***, 304 AD2d 259, 263, 761 NYS2d 64; ***Goodman v Regan***, 151 AD2d 958, 542 NYS2d 998 [3d Dept 1989]).

As to the first cause of action, the court's role in reviewing an administrative decision is not to decide whether the agency's determination was correct or to substitute its judgment for that of the agency, but to ascertain whether there was a rational basis for the determination (*see* ***Matter of Sasso v Osgood***, 86 NY2d 374, 633 NYS2d 239 [1995]; ***Matter of Chemical Specialties Mfrs. Assn. v Jorling***, 85 NY2d 382, 626 NYS2d 1 [1995]; ***Matter of Warder v Board of Regents of Univ. of State of N.Y.***, 53 NY2d 186, 440 NYS2d 875 [1981]). It is fundamental that when reviewing a determination that an administrative agency alone is authorized to make, the court must judge the propriety of such determination on the grounds invoked by the agency; if the reasons relied on by the agency do not support the determination, the administrative order must be overturned (***Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.***, 77 NY2d 753, 758, 570 NYS2d 474 [1991]; *see* ***Matter of National Fuel Gas Distrib. Corp. v Public Serv. Commn. of the State of N.Y.***, 16 NY3d 360, 922 NYS2d 224 [2011]; ***Matter of Filipowski v Zoning Bd. of Appeals of Vil. of Greenwood Lake***, 101 AD3d 1001, 956 NYS2d 183 [2d Dept 2012]; ***Matter of Alfano v Zoning Bd. of Appeals of Vil. of Farmingdale***, 74 AD3d 961, 902 NYS2d 662 [2d Dept 2010]). Further, the court "may not weigh the evidence or reject the choice made by the zoning board 'where the evidence is conflicting and room for choice exists'" (***Matter of Calvi v Zoning Bd. of Appeals of City of Yonkers***, 238 AD2d 417, 418, 656 NYS2d 313 [2d Dept 1997]).

A local zoning board has broad discretion in considering applications for area variances and interpretations of local zoning codes (*see* ***Matter of Pecorano v Board of Appeals of Town of Hempstead***, 2 NY3d 608, 781 NYS2d 234 [2004]; ***Matter of Cowan v Kern***, 41 NY2d 591, 394 NYS2d 579 [1977]; ***Matter of Marino v Town of Smithtown***, 61 AD3d 761, 877 NYS2d 183 [2d Dept 2009]), and its interpretation of the local zoning ordinances is entitled to great deference (*see* ***Matter of Toys "R" Us v Silva***, 89 NY2d 411, 418-419, 654 NYS2d 100 [1996]; ***Matter of Gjerlow v Graap***, 43 AD3d 1165, 842 NYS2d 580 [2d Dept 2007]; ***Matter of Brancato v Zoning Bd. of Appeals of City of Yonkers, N.Y.***, 30 AD3d 515, 817 NYS2d 361 [2d Dept 2006]; ***Matter of Ferraris v Zoning Bd. of Appeals of Vil. of Southampton***, 7 AD3d 710, 776 NYS2d 820 [2d Dept 2004]). A court, however, may set aside a zoning board's determination if the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or succumbed to generalized community pressure (*see* ***Matter of Pecorano v Board of Appeals of Town of Hempstead***, 2 NY3d 608, 781 NYS2d 234; ***Matter of Cacsire v City of White Plains Zoning Bd. of Appeals***, 87 AD3d 1135, 930 NYS2d 54 [2d Dept], *lv denied* 18 NY3d 802, 938 NYS2d 859 [2011]). "In applying the arbitrary and capricious standard, a court

inquires whether the determination under review had a rational basis . . . [A] determination will not be deemed rational if it rests entirely on subjective considerations, such as general community opposition, and lacks an objective factual basis" (***Matter of Kabro Assoc., LLC v Town of Islip Zoning Bd. of Appeals***, 95 AD3d 1118, 1119, 944 NYS2d 277 [2d Dept 2012]; *see* ***Matter of Ifrah v Utschig***, 98 NY2d 304, 746 NYS2d 667 [2002]; ***Matter of Cacsire v City of White Plains Zoning Bd. of Appeals***, 87 AD3d 1135, 930 NYS2d 54; ***Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh***, 68 AD3d 62, 886 NYS2d 442 [2d Dept 2009], *lv denied* 13 NY3d 716, 895 NYS2d 316 [2010]).

Generally, a nonconforming use of real property that exists at the time a restrictive zoning ordinance is enacted is constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance (***Jones v Town of Carroll***, 15 NY3d 139, 143, 905 NYS2d 551 [2010]; ***Buffalo Crushed Stone, Inc. v Town of Cheektowaga***, 13 NY3d 88, 97, 885 NYS2d 8 [2009]; ***People v Miller***, 304 NY 105, 107, 106 NE2d 34 [1952]). Although the policy of zoning is aimed at the reasonable restriction and eventual elimination of nonconforming uses, existing nonconforming uses are tolerated "because property owners would otherwise suffer undue financial hardship if precipitously faced with discontinuance of an existing nonconforming use and loss of investment due to rezoning" (***Matter of Pelham Esplanade, Inc. v Board of Trustees of Vil. of Pelham Manor***, 77 NY2d 66, 70, 563 NYS2d 759 [1990]; *see* ***Matter of Toys R Us v Silva***, 89 NY2d 411, 654 NYS2d 100; ***People v Miller***, 304 NY 105, 106 NE2d 34; ***Matter of Keller v Haller***, 226 AD2d 639, 641 NYS2d 380 [2d Dept 1996]). To establish a right to a nonconforming use, the person claiming the right must demonstrate that the property was legally used for the nonconforming purpose, as distinguished from a mere contemplated use, at the time the zoning ordinance became effective (***Matter of Syracuse Aggregate Corp. v Weise***, 51 NY2d 278, 284-285, 434 NYS2d 150 [1980]; ***Buffalo Crushed Stone, Inc. v Town of Cheektowaga***, 13 NY3d 88, 98, 885 NYS2d 8).

The issuance of a certificate of existing use to property owners in the Town of Brookhaven is governed by Section 85-21 of the Town of Brookhaven Code, which provides, in relevant part, that "[n]o nonconforming use or structure other than for a sole single-family dwelling on a single lot shall be maintained or renewed without a certificate of existing use." Town Code § 85-21 (D)(3) provides that an application for a certificate of existing use "shall be accompanied by one or more forms of proof of the date of construction and/or erection of the structure," and such proofs "shall include one or more of the following . . . Owner affidavit affirming the applicant's claim . . . Original surveys showing improvements on the site." However, pursuant to Town Code § 85-372 (A) , "[t]he substantial discontinuance of any nonconforming use for a period of one year or more terminates such nonconforming use of a structure or premises and thereafter such structure or premises shall not be used, except in conformity with the provisions of the Town Code."

Here, Madonia presented uncontroverted evidence that the premises was used as a two-family residence since 1958, and the question of whether the nonconforming use at the premises had ever been discontinued was not raised by the Zoning Board at the public hearing. Significantly, no dispute exists between the parties that it was lawful to maintain a two-family residence on the subject property prior to 1959, that the property has been taxed by the Town as a two-family residence, and that Madonia has used the property as a two-family residence from the time she purchased it in 1980. The Zoning Board, however, discounting Giovanniello's affidavit, denied Madonia's application on the ground that she failed to prove continuous use of the two-family residence. As mentioned earlier, the ninth paragraph of the written determination issued by the Zoning Board states that it was "significant" that Giovanniello's affidavit, which is not controverted by any evidence in the record, fails to set forth "the basis of her familiarity" with the property or "the continuous nature of her

knowledge" as to the property's use as a two-family residence. According to the Zoning Board, the lack of additional information about Giovanniello, who is in her mid-70s and has lived in the neighborhood since at least 1958, was "significant," because the second-family area of the dwelling "is at the rear of the home, obscured from the public roadway, and measures only 465.3 square feet." The determination also notes Giovanniello is not a resident of the street where Madonia's property is located.

The Court finds that it was arbitrary and capricious of the Zoning Board to deny Madonia's application based on the supposed lack of "information . . . concerning the basis of [Giovanniello's] familiarity or the continuous nature of her knowledge" regarding the use of the subject premises as a two-family home and her failure to live on the same street (*see* ***Matter of Straub v Modelewski***, 56 AD3d 481, 865 NYS2d 920 [2d Dept 2008]; *see also* ***Matter of E & B Realty v Zoning Bd. of Appeals of Inc. Vil. of Roslyn***, 275 AD2d 779, 713 NYS2d 744 [2d Dept 2000]), and that it was irrational to conclude she did not meet her burden on the application (*see* ***Tomich v Lowery***, 94 AD3d 1134, 942 NYS2d 618 [2d Dept 2012]; ***Town of Ithaca v Hull***, 174 AD2d 911, 571 NYS2d 609 [3d Dept 1991]; ***Matter of Eger v Levine***, 153 AD2d 998, 545 NYS2d 618 [3d Dept 1989]; *see also* ***Matter of Calvi v Zoning Bd. of Appeals of City of Yonkers***, 238 AD2d 417, 656 NYS2d 313). It also was arbitrary and capricious to require evidence substantiating Giovanniello's unconstested allegation of the continuous use of the residence as a two-family home because of the relatively small size of the second-family portion of the residence and the supposed difficulty viewing such portion from the roadway. In addition, there is no basis in the record for the Zoning Board's finding that the residence was identified as a single family home when a permit was issued to the original owner for a detached garage. Although a copy of a certificate of occupancy issued to Joseph Messina in 1974 for a detached garage on the subject premises was included with the Town's return, which does not indicate whether the residence is a single-family or two-family home, the building permit for such garage was not included in the return.

Thus, as the factual evidence in the record does not support the Zoning Board's determination denying Madonia's certificate of use, the Court finds such determination was irrational, arbitrary and capricious. The March 7, 2013 determination at issue, therefore, is annulled, and the matter is remitted to the Zoning Board for the issuance of the requested certificate of existing use.

Submit judgment upon notice.

The foregoing constitutes the Order of this Court.

Dated: July 31, 2013
Riverhead, NY

Hector D. LaSalle

HON. HECTOR D. LASALLE, J.S.C.

__X__ FINAL DISPOSITION **___ NON-FINAL DISPOSITION**