Dorfman v Town of Southold Zoning Bd. of Appeals
2020 NY Slip Op 31870(U)
May 7, 2020
Supreme Court, Suffolk County
Docket Number: 4956/2018
Judge: William G. Ford
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SHORT FORM ORDER "COPY" INDEX NO.: 4956-2018

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE of the SUPREME COURT

Motion Date: 10/26/18
Motion Adjourn Date: 03/21/19
Motion Seq #: 001 - MD

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JESSE DORFMAN, ROBERT WHITE and VIRGINIA GILMOUR for a Judgment purusant to ARTICLE 78 of the CPLR,

Petitioners,

-against-

TOWN OF SOUTHOLD ZONING BOARD OF APPEALS, TOWN OF SOUTHOLD BUILDING DEPARTMENT and MICHAEL I. VERITY, in his official capacity as Building Inspector of the Town of Southold,

Respondent.

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Upon the following papers: Notice of Petition, dated September 17, 2018, with Petition and supporting papers; Affirmation in Opposition to Petition, Verified Answer and Administrative Return, each dated December 5, 2018, and supporting papers; Petitioners' Reply Affirmation, dated January 23, 2019, and supporting papers; it is,

ORDERED that, for the reasons set forth herein, the Article 78 petition (seq. #001) by petitioners, Jesse Dorfman, Robert White and Virginia Gilmour, is hereby **denied** in its entirety and the petition is **dismissed**; and it is further

ORDERED that counsel for respondents shall forthwith serve a copy of this Decision and Order upon counsel for petitioners via facsimile transmission and certified mail (return receipt requested), and shall promptly thereafter file the affidavit of such service with the Suffolk County Clerk; and it is further

ORDERED that, if applicable, within 30 days of the entry of this Decision and Order, that respondents' counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR §8019(c) with a copy of this Decision and Order and pay any fees should any be required.

RST

In this Article 78 proceeding, the petitioners seek a judgment modifying that portion of the "Findings, Deliberations and Determination of August 16, 2018" ("Decision") of the respondent Town of Southold Zoning Board of Appeals ("Board") filed on August 20, 2018. The Decision denied petitioners' appeal of the Building Inspector's April 13, 2018 Notice of Disapproval, which denied petitioners' request for a waiver of the merger provisions of Town Code §280-10 and §280-11. Petitioners allege that the Board's actions violated CPLR Article 78, in that such actions were arbitrary, capricious and/or an abuse of discretion, were in violation of lawful procedure, and were in excess of jurisdiction. Accordingly, the petitioners request an order either granting a waiver of the Town's merger provisions with respect to 350 Bartley Road, Mattituck, New York, Lot 27, or finding that no merger occurred in accordance with the Town's Zoning Code §280-10 and §280-11.

Petitioner Jesse Dorfman ("Dorfman"), a Rockland County resident, is a contract vendee purchaser of the subject property, 350 Bartley Road, Mattituck, Lot 27 ("Subject Lot 27"), which is a nonconforming lot[1] co-owned by petitioners Virginia Gilmour ("Gilmour") and Robert White ("White"). Dorfman intends to build a residence on Subject Lot 27, which is bounded on the east, north, and south by other nonconforming sized lots. Lot 28 to the east is owned solely by Gilmour; Lot 35 to the north is owned by non-parties Linda Gallo and her sisters; and Lot 26 to the south is owned by non-parties Michael and Phyllis Snow. Subject Lot 27, Lot 28, Lot 35 and Lot 26 were originally part of a larger plot of land that was subdivided in 1922 by Lida Bartley.

On February 6, 1946, a certain tract of the subdivision, including Lots 27, 28, 35 and 26, was conveyed to Harold and Marie Kuck. The Kucks gifted Lot 35 to Antonio and Sofia Barucco in 1989. After the Kucks' deaths, Mary Dana inherited Lots 26, 27 and 28 and soon thereafter, in 1995, transferred all three Lots to herself and her husband. In 2001, the Danas transferred a 90 % portion of ownership of Subject Lot 27 to Gilmour and a 10% ownership of Subject Lot 27 to non-party Barbara Ehrnzerhoff. Also, in 2001, the Danas transferred 100% ownership of Lot 28 to Gilmour. Thereafter, in 2017, Ehrnzerhorff transferred her 10% ownership of Subject Lot 27 to White, while Gilmour retained her 90% ownership of Subject Lot 27. Accordingly, White and Gilmour are the current co-owners of Subject Lot 27, while Gilmour remains the sole owner of Lot 28.

On November 17, 2017, Dorfman filed an application with the Town for a merger determination pursuant to Town Code §280-10 for the purpose of building a residence on the nonconforming Subject Lot 27. By Notice of Disapproval, dated November 27, 2017 and renewed January 26, 2018 and April 13, 2018, the Building Inspector, citing Town Code §280-10, concluded that Subject Lot 27 had merged with the adjacent Lot 35 to the north, and with Lot 28 to the east. The petitioners appealed the April 13, 2018 Notice of Disapproval to the Board, seeking a determination that Subject Lot 27 was not merged or, in the alternative, for a waiver of the merger pursuant to Town Code §280-11.

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[1] Southold Town Code §280-4 defines "nonconforming lot" as "[a] lot the area or dimension of which was lawful prior to the adoption, revision or amendment of this chapter but which fails to conform to the requirements of the zoning district in which it is located by reason of such adoption, revision or amendment."

A Public Hearing of petitioners' appeal was held on the record on August 2, 2018. At the Hearing, petitioners' counsel set forth petitioners' arguments and public comments were entertained and recorded. In addition, petitioners submitted supporting documents to the Board. In sum, petitioners argued that Subject Lot 27 and Lot 35 to the north were not merged, since those Lots shared only 35 feet of continuous boundary, not the requisite 50 feet required under Town Code §280-10. They also argued that Subject Lot 27 and Lot 28 to the east were not merged because there was no co-ownership of those Lots, since Gilmour is the sole owner of Lot 28, whereas Gilmour and White co-own Subject Lot 27, and since Town records do not reflect merger in 1983 and both Lots are taxed separately. Petitioners further alleged that even if Subject Lot 27 and Lot 28 had merged, the Town should grant a waiver of such merger under Town Code §280-11.[2]

By written Decision of the Board, dated August 16, 2018 and filed August 20, 2018, the Board agreed that Subject Lot 27 and Lot 35 do not share a contiguous lot line of 50 feet or more. In this regard, the Board concluded that the Notice of Disapproval should be partially overturned, to the extent that Subject Lot 27 is not merged with Lot 35 to the north. However, the Board upheld the Building Inspector's determination that, pursuant to §280-10(A), Subject Lot 27 had merged with Lot 28 on July 1, 1983, during the Kucks' common ownership of those Lots, and that "[Dorfman] has not submitted documentation to the satisfaction of the Board that these lots were NOT merged . . ." (emphasis in original). The Board also denied Dorfman's request for a waiver of the merger. It is from the Board's August 16, 2018 Decision that the petitioners filed this Article 78 proceeding.

In a proceeding pursuant to CPLR Article 78 to review a determination of a zoning board of appeals, the board's interpretation of its own zoning ordinance must be afforded great deference, and judicial review is generally limited to ascertaining whether the board's action was illegal, arbitrary and capricious, or an abuse of discretion (*see* ***Cradit v Southold Town Zoning Board of Appeals***, 179 AD3d 1058, 117 NYS3d 675 [2d Dept 2020]; ***Rada Corp. v Gluckman***, 171 AD3d 1189, 99 NYS3d 342 [2d Dept 2019]; ***Matter of Bartolacci v Village of Tarrytown Zoning Bd. of Appeals***, 144 AD3d 903, 41 NYS3d 116 [2d Dept 2016]). In general, the petitioner has the burden of proving the allegations of his or her petition in a proceeding commenced pursuant to CPLR Article 78 (*see* ***Stanton v Town of Islip Dept. of Planning and Development***, 37 AD3d 473, 829 NYS2d 596 [2d Dept 2007]; ***Poster v Strough***, 299 AD2d 127, 752 NYS2d 326 [2d Dept 2002]).

A determination of a zoning board will be sustained if it has a rational basis and is not arbitrary and capricious (*see* CPLR §7803[1], [3]; ***Matter of Sasso v Osgood***, 86 NY2d 374, 633 NYS2d 259

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[2] The Petitioners also summarily raised an issue regarding Lot 26, that such Lot is similarly situated to Subject Lot 27, in that both are allegedly merged lots. Petitioners contended that while the Town granted a building permit for Lot 26, it denied a building permit for Subject Lot 27. According to Petitioners, such alleged disparity in treatment by the Town renders the Town's actions inconsistent for Subject Lot 27 when compared to Lot 26; however, Petitioners failed to submit proof to establish that those Lots were, in fact, similarly situated and that Lot 26 was a nonconforming lot when its building permit was obtained. Indeed, it is unknown what year the permit was issued for Lot 26. Furthermore, the owners of Lot 26 stated at the Hearing that when their permit was granted, no variance was required, thus indicating that Lot 26 was actually a conforming lot not subject to merger at that time. Petitioners submitted no proof to the contrary to show that Lot 26 and Subject Lot 27 were similarly situated.

[1995]; ***Matter of Nowak v Town of Southampton***, 174 AD3d 901, 106 NYS3d 372 [2d Dept 2019]; ***Matter of 278, LLC v Zoning Bd. of Appeals of the Town of E. Hampton***, 159 AD3d 891, 73 NYS3d 614 [2d Dept 2018]; ***Matter of Conway v Van Loan***, 152 AD3d 768, 58 NYS3d 598 [2d Dept 2017]; ***Matter of Halperin v City of New Rochelle***, 24 AD3d 768, 809 NYS2d 98 [2d Dept 2005]). A zoning board's determination is rational if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition (*see* ***Matter of JSB Enterprises, LLC v Wright***, 81 AD3d 955, 917 NYS2d 302 [2d Dept 2011]; ***Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh***, 68 AD3d 62, 886 NYS2d 442 [2d Dept 2009]; ***Matter of Halperin v City of New Rochelle***, 24 AD3d 768, 809 NYS2d 98 [2d Dept 2005]).

Where a rational basis for the board's determination exists, a court may not substitute its own judgment for that of the board, even if a contrary determination is supported by the record (*see* ***Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead***, 98 NY2d 190, 746 NYS2d 662 [2002]; ***Matter of Route 17K Real Estate, LLC v Zoning Board of Appeals of Town of Newburgh***, 168 AD3d 1065, 93 NYS3d 107 [2d Dept 2019]; ***Matter of 278, LLC v Zoning Bd. of Appeals of the Town of E. Hampton***, 159 AD3d 891, 73 NYS3d 614 [2d Dept 2018]; ***Matter of Conway v Van Loan***, 152 AD3d 768, 58 NYS3d 598 [2d Dept 2017]; ***Matter of Roberts v Wright***, 70 AD3d 1041, 896 NYS2d 124 [2d Dept 2010]).

Town Code §280-10(A) provides that a "nonconforming lot shall merge with an adjacent conforming or nonconforming lot which has been ***held in common ownership with the first lot at any time after July 1, 1983***. An adjacent lot is one which abuts with the parcel for a ***common course of 50 feet or more in distance***. Nonconforming lots shall merge until the total lot size conforms to the current bulk schedule requirements" (emphasis added). By definition set forth in Town Code §280-10(B), "common ownership" means "that the parcel is held by the same person in the same percentage of ownership as an adjoining parcel."

Town Code §280-11 provides that "[i]f a lot has merged pursuant to the provisions of §280-10, the [Board] ***may*** waive the merger and recognize original lot lines upon public hearing and finding that:

> (A) The lot proposed to be recognized has not been transferred to an unrelated person or entity since the time the merger was effected; ***and***
> (B) Upon balancing whether:
>
> > (1) The proposed waiver would recognize a lot that is comparable in size to a majority of the improved lots in the neighborhood;
> > (2) The lot proposed to be recognized is vacant and has historically been treated and maintained as a separate and independent residential lot since the date of its original creation; and
> > (3) The proposed waiver and recognition will not create an adverse impact on the physical or environmental conditions in the neighborhood or district (emphasis added).

The Board's August 16, 2018 Decision correctly determined that Subject Lot 27 was not merged with Lot 35, since those Lots do not abut "for a common course of 50 feet or more in distance," as

required under §280-10(A). The Board also correctly determined that Subject Lot 27 was merged with Lot 28 in accordance with §280-10(A), since those Lots were "held in common ownership" by the Kucks "at any time after July 1, 1983" and also abut for "common course of 50 feet or more in distance."

Petitioners argue that a merger of Subject Lot 27 never occurred, but that even if it had, the Board should waive the merger under the provisions of Town Code §280-11(B). Notably, however, a waiver under Code §280-11 is not mandatory, but is within the discretion of the Board, as it states "and" after paragraph (A) means that for the petitioners to even be considered for a waiver, they would that "[i]f a lot has merged pursuant to the provisions of §280-10, the [Board] ***may*** waive the merger . . ." (emphasis added). Furthermore, based upon the plain meaning of §280-11, the use of the word first have to show that they satisfy the requirements of §280-11(A). If so, only then would an analysis under §280-11(B) be employed.

As applicable here, pursuant to §280-11(A), for waiver of merger to be considered by the Board, there must be a finding that "[Subject Lot 27] has not been transferred to an unrelated person or entity since the time the merger was effected [July 1, 1983]." In denying petitioners' request for waiver of merger, the Board specifically noted the fact that "[t]here have been transfers of ownership outside the [Kuck] family since the time merger was effected." The Board concluded, therefore, that "[b]ecause [Dorfman] is a non-family member, two owners removed from the merger in 1983. . . this application/applicant is ineligible for a waiver of merger." Since the petitioners did not show compliance with the requirements of §280-11(A), the Board was not required to consider whether or not petitioners' met the balancing test set forth in §280-11(B). Accordingly, contrary to petitioners' contention, the Board properly interpreted its own Code by not considering the factors of §280-11(B) after finding that petitioners failed to meet the requirements of §280-11(A).

Petitioners also argue that the Code is ambiguous, and that any ambiguity in the language of a zoning regulation must be resolved in favor of the property owner (*see* ***Matter of Allen v Adami***, 39 NY2d 275, 383 NYS2d 565 [1976]; ***Matter of Barkus v Kern***, 160 AD2d 694, 553 NYS2d 466 [2d Dept 1990]). In this regard, petitioners claim that during the Hearing, a Board member essentially admitted that there is "confusion" in the Code, which means the Code is ambiguous and must be interpreted in favor of the petitioners. A review of the Hearing transcript, however, reveals that a Board member merely acknowledged that the sending of separate tax bills for merged lots and the general public's ignorance of the merger code creates confusion, not that the Code itself is confusing. In any event, one's "confusion" in understanding a code provision does not equate to a *per se* "ambiguity" in the law.

A zoning board's interpretation of its own zoning code is entitled to great deference (*see* ***Matter of New York Botanical Garden v Bd. of Standards and Appeals of City of New York***, 91 NY2d 413, 671 NYS2d 423 [1998]; ***Matter of Nowak v Town of Southampton***, 174 AD3d 901, 106 NYS3d 372 [2d Dept 2019]). Indeed, interpretation of a statute or code must always be to give effect to the plain meaning of the words used (*see* ***Lubonty v U.S. Bank N.A.***, 34 NY3d 250, 116 NYS3d 642 [2019]; ***Town of Aurora v Village of East Aurora***, 32 NY3d 366, 91 NYS3d 773 [2018]; ***Overton v Town of Southampton***, 50 AD3d 1112, 857 NYS2d 214 [2d Dept 2008]). Contrary to petitioners' interpretation, new words or language should not be added into a statute or code to give it a meaning not otherwise

found therein (*see Schoenefeld v State*, 25 NY3d 22, 6 NYS3d 221 [2015]; *Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 667 NYS2d 327 [1997]; *Watkins v Town of North East Zoning Bd. of Appeals*, 136 AD3d 836, 24 NYS3d 521 [2d Dept 2016]).

As set forth herein, petitioners have not established an ambiguity in the language of the Code, nor the Board's interpretation or application thereof, nor that the Board's August 16, 2018 Decision should be set aside as illegal, arbitrary and capricious, or an abuse of discretion (*see Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234 [2004]; *Rada Corp. v Gluckman*, 171 AD3d 1189, 99 NYS3d 342 [2d Dept 2019]; *Hitner v Planning Board of the Town of Patterson*, 168 AD3d 939, 90 NYS3d 898 [2d Dept 2019]). Accordingly, upon review of the administrative record and the parties' submissions in this proceeding, the Court finds that the actions of the Board were not illegal, nor arbitrary and capricious, nor an abuse of discretion, and that the Board's August 16, 2018 Decision has a rational and sound basis in reason with regard to the facts presented (*see Cradit v Southold Town Zoning Board of Appeals*, 179 AD3d 1058, 117 NYS3d 675 [2d Dept 2020]; *Rada Corp. v Gluckman*, 171 AD3d 1189, 99 NYS3d 342 [2d Dept 2019]). All other arguments are without merit.

Based upon the foregoing, the Verified Petition is **denied, and the petition is dismissed.**

Respondent is hereby directed to settle judgment on notice in a manner consistent with the provisions of this Decision and Order.

This constitutes the Decision and Order of this Court.

Dated: May 7, 2020
Riverhead, New York

WILLIAM G. FORD, J.S.C.

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