Matter of Sutton v Southold Town Zoning Bd. of Appeals
2024 NY Slip Op 35160(U)
October 28, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 628841/2023
Judge: Joseph C. Pastoressa
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SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY

PRESENT:
HON. JOSEPH C. PASTORESSA

Mot Seq: #001: MD; CDISPSJ

x

In the Matter of the Application of
TRACY SUTTON and ALEXANDER SUTTON,

Petitioners,

For a judgment under article 78 of the Civil Practice Law and Rules and for declaratory and injunctive relief

-against-

SOUTHOLD TOWN ZONING BOARD OF APPEALS,

Respondent.

x

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This CPLR article 78 proceeding concerns a variance application submitted by petitioners, Tracy Sutton and Alexander Sutton, regarding the premises at 25500 Main Road in Orient, New York. The premises consist of a three-story residential building that was used as a group home for several decades until the early 2000s.[1] In 2003, a prior owner of the premises applied for a special exception to operate them as a bed and breakfast. Respondent, Southold Town Zoning Board of Appeals (the ZBA), granted the application. As pertinent here, the ZBA noted that "[t]here is a third floor with a small apartment[,] probably used by the prior owners on a seasonal basis." The zoning regulations of the Town of Southold (the Town) do not allow livable space on the third floor of a building in the premises' zoning district (Southold Town Code art 280, attachment 3).

Petitioners purchased the premises in 2021 and applied for a special exception to operate them as a bed and breakfast. At a hearing on the application, as relevant here, one of the ZBA's members "remind[ed] [petitioners] that the third floor is non-habitable space and it's not to be used for any guests or any other residential purposes it's an attic [sic]." Petitioners did not object or otherwise respond to this comment. The ZBA granted the application with certain conditions,

[1] The third floor is sometimes referred to, in both this decision and in the record, as an attic.

one of which was that "[t]he third floor 'attic' is not to be used as living space by the owner nor by B&B guests and is to remain unheated and unconditioned, for 'storage' use only." Petitioners did not challenge this determination in a CPLR article 78 proceeding. To the contrary, they "begrudgingly accepted this condition."

Petitioners thereafter began a renovation of the attic without a building permit, resulting in a 2023 stop work order from the Town Building Department. Petitioners then applied for a building permit, which was denied.

Petitioners then applied for an area variance to convert the third floor of the premises to conditioned living space including a bathroom, storage space, an office, and two closets. After a public hearing, the ZBA denied the application and granted alternative relief allowing petitioners to renovate the third floor into an office/studio, closets, and storage areas. The alternative relief was subject to the conditions that petitioners "shall NOT install plumbing or a half-bathroom on the third floor," that petitioners conform to the New York State Building Code and install a fire suppression system on the third floor, that there be no sleeping quarters on the third floor, that there be no permanent heat source or air conditioning on the third floor, and that bed and breakfast guests not have access to the third floor. The ZBA noted that petitioners wanted to convert the attic to living space despite the condition in the 2021 special exception permit that the attic could not be used as living space and was to remain as storage space.

The ZBA then analyzed the factors enunciated in Town Law § 267-b (3) (b) for the determination of area variances. The ZBA stated that there would be no undesirable change in the character of the neighborhood or to nearby properties. It explained that petitioners had an alternative method to obtain office space by converting an existing bedroom or other space or by obtaining a permit to finish the basement. The ZBA decided that the variance was "mathematically substantial, representing 100% relief from the Code," and that no evidence suggests a negative impact on the neighborhood's physical or environmental conditions. It held that petitioners' "difficulty has been self-created" because they purchased the premises with actual or constructive knowledge of the zoning regulations then in effect and were aware of the conditions in the 2021 special exception permit, which they never challenged in a CPLR article 78 proceeding.

Petitioners then commenced this CPLR article 78 proceeding, contending that the ZBA's 2023 determination was arbitrary, capricious, and affected by an error of law. They claim that the premises contain a nonconforming building, and that renovation of the third floor to residential use is a conforming use that is lawful under Southold Town Code § 280-122. Petitioners further allege that the ZBA's variance analysis was arbitrary and capricious because it was irrational to order the installation of a fire suppression system while also barring a bathroom on the third floor, it was unreasonable to suggest that petitioners could convert a bedroom to office space, and respondent violated section 280-122. Petitioners do not posit that using the

third floor space for residential use is a pre-existing nonconforming use.

"In a proceeding pursuant to CPLR article 78 to review a determination of a zoning board of appeals, judicial review is limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion" (***Matter of Sid Jacobson Jewish Community Ctr., Inc. v Zoning Bd. of Appeals of the Inc. Vil. of Brookville***, 192 AD3d 693, 694 [quotation marks and citations omitted]; *see* ***Matter of Andes v Zoning Bd. of Appeals of the Town of Riverhead***, 217 AD3d 671). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (***Matter of Peckham v Calogero***, 12 NY3d 424, 431; *see* ***Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County***, 34 NY2d 222). When a rational basis exists for a zoning board of appeals determination, "a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record" (***Matter of Labate v DeChance***, 189 AD3d 838, 840 [quotation marks and citations omitted]; *see* ***Matter of Margulies v Town of Ramapo***, 226 AD3d 783). A 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 C & B Realty #3, LLC v Van Loan***, 208 AD3d 778, 780 [quotation marks and citations omitted]; *see* ***Matter of Andes***, 217 AD3d 671). In addition, "the principles of res judicata and collateral estoppel apply to quasi-judicial determinations of administrative agencies, such as zoning boards, and preclude the relitigation of issues previously litigated on the merits" (***Matter of Voutsinas v Schenone***, 166 AD3d 634, 636 [quotation marks, citations, and alterations omitted]; *see* ***Matter of Calapai v Zoning Bd. of Appeals of Vil. of Babylon***, 57 AD3d 987).

In its 2021 determination, the ZBA granted petitioners' application for a special exception, with a condition that "[t]he third floor 'attic' is not to be used as living space by the owner nor by B&B guests and is to remain unheated and unconditioned, for 'storage' use only." That condition, which petitioners opted not to challenge in a CPLR article 78 proceeding or otherwise, must be given preclusive effect (*see* ***Matter of Kogel v Zoning Bd. of Appeals of Town of Huntington***, 58 AD3d 630, *lv denied* 13 NY3d 701; ***Town of Wallkill v Lachmann***, 27 AD3d 724). Thus, the challenged portions of the ZBA's 2023 determination, which all concern the use of the third floor as living space in violation of the 2021 condition, were not irrational.

Petitioners' claims fail even in the absence of the 2021 determination. They argue that although the building is non-conforming, the use of the third floor as residential space conforms with the Town's zoning regulations, and the alterations are therefore permissible under Southold Town Code § 280-122. That section provides that "[n]othing in this article shall be deemed to prevent the alteration or enlargement of a nonconforming building containing a conforming use, provided that such action does not create any new nonconformance or increase the degree of nonconformance with regard to the regulations pertaining to such buildings." Petitioners' argument that the alterations were conforming and permissible under this section was not preserved before the ZBA and cannot be considered (*see* ***Matter of Bray v Town of Yorktown***

Zoning Bd. of Appeals, 151 AD3d 720; ***Matter of Blanchfield v Town of Hoosick***, 149 AD3d 1380; ***Matter of Kearney v Village of Cold Spring Zoning Bd. of Appeals***, 83 AD3d 711). In any event, and contrary to their argument that the alterations were conforming, petitioners' variance application stated that "the relief requested will simply allow the third floor to have a current CO for work that was pre-existing and *non-conforming*" (emphasis added). And in Appendix B (Short Environmental Assessment Form) to the application, when asked "[i]s the proposed action . . . [a] permitted use under the zoning regulations?", petitioners checked "NO."

The ZBA's determination, which analyzed the statutory factors in Town Law § 267-b, was otherwise rational (*see* ***Matter of Patrick v Zoning Bd. of Appeals of Vil. of Russell Gardens***, 130 AD3d 741; ***Matter of John Hatgis, LLC v DeChance***, 126 AD3d 702; ***Matter of Ram v Town of Islip***, 21 AD3d 493). The Court notes that petitioners admitted at the hearing that they could convert a bedroom to office space. Thus, the petition is denied and the proceeding is dismissed.

DATED: OCTOBER 28, 2024

HON. JOSEPH C. PASTORESSA, J.S.C.