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MEMORANDUM

COPY

SUPREME COURT - SUFFOLK COUNTY
PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

I.A.S. PART 36

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In the Matter of the Application of
ALFRED V. SFORZA,

Petitioner,

-against-

CHRISTOPHER MODELEWSKI, SCOTT M. FRAYLER, CAROL GAUGHRAN, JEFFREY N. NANESS, ED PEREZ, JAMES ROGERS and ROBERT F. SLINGO, constituting the Zoning Board of Appeals of the Town of Huntington, Suffolk County, New York,

Respondents.

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By: Baisley, J.S.C.

Dated: April 18, 2012

INDEX NO.: 22446/2011
MOT. NO.: 001 MOT D

PETITIONER'S ATTORNEY:
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Petitioner commenced this Article 78 proceeding for a judgment vacating, annulling and setting aside the determination of the respondent Zoning Board of Appeals (the "Board") of the Town of Huntington (the "Town") dated June 30, 2011 and filed June 22, 2011 which conditionally granted petitioners' application to legalize an existing two-family dwelling, garage and shed, and directing the respondent Board to issue a decision granting the relief sought in the application of petitioner.

Petitioner Alfred V. Sforza is the owner of residential premises at 32 Barrow Court, which he acquired by deed dated March 21, 2003 from his parents, Alfred A. Sforza and Lena Sforza, subject to his parents' retained life estate. The property, which is located in the R-7 Residence District of the Town of Huntington, is improved with a non-conforming two-story, two-family dwelling where only one-family dwellings are permitted, a detached garage, and a shed that is located too close to the property line. Lena Sforza died on September 5, 2008, and Alfred A. Sforza (the "senior Mr. Sforza") is the surviving life tenant. After attempting to rent the second-floor apartment in 2010 and subsequently receiving notices of violation in May and July 2010 for maintaining an illegal two-family house, and after his request for a Letter in Lieu of a Certificate of Occupancy was denied by the Town of Huntington Building Department on August 25, 2010, petitioner applied to the Board to legalize the nonconforming two-family dwelling, garage and shed.

A public hearing was held on March 17, 2011 and continued on June 9, 2011. Various witnesses, including the 71-year-old petitioner and petitioner's 96-year-old father, testified that the premises had been continuously used and occupied as a two-family dwelling by various family members and/or unrelated tenants from the time of its construction, prior to the enactment of the Town of Huntington Zoning Code (the "Code") in 1934, to the present. Petitioner's father testified that the property was

purchased by his wife's mother in 1916 and that she continuously occupied the first-floor apartment from 1916 until she died in 1970 and that the second-floor apartment was continuously occupied by a succession of family members (including the witness and his wife); and that in 1966 he and his wife purchased the property from her family, and thereafter lived in the first-floor apartment until his wife's death in 2008 while a succession of family member and/or tenants continuously occupied the second-floor apartment. Petitioner and his father both testified that the senior Mr. Sforza continues to live in the first-floor apartment, and that Sharon Sforza, petitioner's daughter and the senior Mr. Sforza's granddaughter, lived in the second-floor apartment from 1988 to 2010, when the apartment was vacated in order to make necessary repairs. Petitioner confirmed his father's testimony of the history of the property based on his own personal knowledge starting from the 1940s. He further testified that after receiving notices of violation in May and July 2010 he was told by a Town of Huntington Code enforcement officer that he was not permitted to rent the second-floor apartment until he obtained a permit legalizing the apartment.

Affidavits dated May 8, 1992 by two individuals attesting to their personal knowledge that the house had been a two-family house continually occupied as such since 1919 or 1920 were entered into evidence before the Board. Evidence was also presented establishing that there are separate entrances to the first- and second-floor apartments and separate electric and gas meters for the two apartments. The Board also heard expert testimony from a real estate appraiser that the property is located in an older section of the Village of Huntington containing homes that were for the most part developed prior to the enactment of the Code in 1934, many of which were constructed as two-family homes. The expert testified that upon the enactment of the Code, the subject premises were located in an R-7 Residence district where two-family homes are not permitted, although a small portion of the property is located in an R-5 Residence district where two-family homes are permitted. The expert testified that based upon his inspection of the property, the house appeared to have been set up as a two-family home for many, many years, and further testified that the two apartments are completely separate from one another, and that there is no common doorway connecting the two units. The expert testified that granting the application to legalize the non-conforming two-family dwelling, garage and shed would not result in a detriment to neighboring properties, an undesirable change in the character or pattern of development of the neighborhood, and that the relief sought by petitioner could not be achieved by pursuing some other feasible method.

Three witnesses, all residents of Barrow Court, testified in opposition to the application. Kay Smith testified that the subject house had been vacant for at least a year and a half. She testified that the senior Mr. Sforza had moved out shortly after his wife died. Ms. Smith testified that there were "relatives from Northport" living there within the last year while their house was being reconstructed, but testified that no one had lived in the upstairs apartment within the last year. Susan Tully testified that the subject house has been vacant "well over a year and a half" and denied that the senior Mr. Sforza has been living there. Victoria Bruno also testified that the house has been vacant for a year and a half, and stated that she has "not seen a tenant in there for over eight years."

In light of the conflicting testimony, the Board elicited further testimony from petitioner's attorney and then from petitioner himself. Upon further questioning, petitioner admitted that after suffering a heart attack shortly after his wife died in 2008, his father had actually been staying with petitioner in his home on nearby Oakwood Road because "he has to be taken care of." Petitioner testified that the senior Mr. Sforza still visits the subject house, where his apartment on the first floor is still maintained together with all of its furnishings, and that "he likes to stay there mainly because the

memories are in this house." He testified that his father's car is still in the garage, and that he "left everything the way it is so he can walk back there any time he wants to." Although there was testimony that the senior Mr. Sforza occasionally stays there overnight, petitioner admitted that his father has not spent two consecutive nights in the house since his heart attack. Petitioner conceded that it has been approximately three years since his father lived there continuously. Petitioner also confirmed Ms. Smith's testimony that relatives from Northport used the first-floor apartment from August 2010 through December 2010 while their house was being built.

Also on follow-up questioning from Board members, petitioner admitted that his daughter Sharon had actually moved to California in 2000, but testified that the family continues to maintain the second-floor apartment so that she has a place to stay when she comes to visit, which he testified she does three or four times a year for a week at a time. He testified that his daughter was there most recently in October 2010. Petitioner's follow-up testimony further reflects that at the time he received the first notice of violation in May 2010, he was preparing the second-floor apartment for rental.

In light of the petitioner's after-the-fact revision of his initial testimony regarding the nature of the occupancy of the two apartments, the Board directed petitioner's attorney to submit a memorandum of law addressing the legal issues regarding a nonconforming two-family use in the context of intermittent utilization of the premises, and with respect to the senior Mr. Sforza's intent regarding the utilization of the premises. Petitioner submitted the requested memorandum of law dated April 19, 2011, and on June 30, 2011 the Board issued its decision which was thereafter filed on July 22, 2011. The Board's decision provides, in relevant part, as follows:

> "The applicant submitted testimony and evidence to support a finding that the subject property had previously been used as a two-family dwelling. However, it is clear that due to a change in family circumstances, largely health-related, that serious questions exist regarding whether such use has lapsed. Applicant, however, testified that his father continues to occasionally visit the property and that there remains an attachment to the dwelling in which he resided for many years. The Board finds that continued permission to use the property as it currently is being used subject to the conditions noted herein will not have any adverse impacts upon area properties and will be consistent with the current use of the property.
>
> "This grant is subject to compliance with the following condition:
>
> **"Grant will lapse upon any transfer of an ownership interest in the property, death of the father, Alfred V. Sforza [sic], or if he ceases to occupy dwelling, on the occurrence of any of these events.**
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> "As to the dwelling and the shed, after hearing all of the evidence and examining the exhibits, the Board finds that the structures have existed on the subject property without causing devaluation of surrounding property values or altering the pattern of development of the community. As such, no undesirable change will result by a grant of the requested variance.
>
> "Accordingly, this application is granted and we direct the applicant/owner to apply to the Department of Engineering Services to issue the necessary building permits and certificate of occupancy to legalize the dwelling and conditional use as two family and to legalize shed as more fully described on the survey annexed hereto and made a part hereof as Exhibit #3 at the public hearing."

Petitioner timely commenced the instant Article 78 proceeding on August 12, 2011.

A nonconforming use is defined in the Code as "[a]ny building, structure or use of land lawfully existing at the time of enactment of this chapter or any amendment thereto which does not conform to the zoning regulations of the district in which it is located by reason of the enactment of this chapter or subsequent amendment...." (Code §198-2(B)). A lawful nonconforming use of a building, structure or land that predates the enactment of the zoning regulations may be continued (Code §198-102), but "[i]f active and continuous operation of a nonconforming use is not carried on for a period of one (1) year, the building or land on which such use was conducted shall thereafter be used only in conformance with the regulations of the district in which the premises is situated" (Code §198-105)). The Code does not define the terms "active and continuous operation" or "carried on," but provides, with respect to the use of land, that "casual or intermittent use...shall not establish the existence of a lawful nonconforming use" (Code §198-105)).

The Board found that the evidence presented by petitioner established the existence of a non-conforming use of the dwelling as a two-family house that predated the enactment of the Code. Thus, petitioner was presumptively entitled, as of right, to the issuance of the requested letter in lieu of a certificate of occupancy for a two-family dwelling (Code §198-102) unless the "active and continuous operation" of the two-family use had lapsed for a period of one year (Code §198-105). The Board, citing a "largely health-related" "change in family circumstances," noted the existence of "serious questions regarding whether such use has lapsed," but did not make any explicit finding as to whether such lapse had in fact occurred or the duration of any such lapse. It did not determine, as a matter of fact or law, that "active and continuous operation" of the two-family use had not been carried on for a period of one year (Code §198-105).

Rather, the Board cited petitioner's follow-up testimony regarding the senior Mr. Sforza's occasional visits to the property and his continued "attachment to the dwelling in which he resided for many years" in support of its conditional grant of "continued permission to use the property *as it currently is being used*" (emphasis added). The Board authorized petitioner to apply for and the Department of Engineering Services to issue necessary building permits and certificate of occupancy to legalize the conditional use of the dwelling as two family, thus implicitly finding that the property is currently being used as a two-family house. Moreover, in so finding, the Board also implicitly determined that there had not been a lapse in the two-family use for a period of one year (Code §198-105).

This determination is supported by the evidence in the record. The record of the hearing reflects that the conflicting testimony, not only between the petitioner and the objecting witnesses, but between petitioner's initial and follow-up testimony, was fully explored by the Board, which appears to have fully credited petitioner's "clarification" regarding the use of the property since 2008, as evidenced by its decision granting petitioner permission to "use the property as it currently is being used" (*Squire v Conway*, 256 AD2d 771 [3d Dept 1998]). The record further reflects that the physical condition of the property continues to be that of a two-family house. There continue to be two separate apartments with separate entrances and separate gas and electric meters. There is no doorway connecting the two apartments, and no one occupies the entire house. The furnishings continue to be maintained as they were when the senior Mr. Sforza was living with his wife in the downstairs apartment, which his testimony indicates he still regards as his residence.

Unless a "lapse" ordinance on its face demonstrates a clear intent to equate "something less than discontinuation of the entire nonconforming use" for the prescribed period with abandonment of the use,

courts have generally required proof that the entire nonconforming use was discontinued (*Toys "R" Us v Silva, supra*, 89 NY2d 411 [1996]; *Matter of Marzella v Munroe*, 69 NY2d 967 [1987]; *Town of Islip v P.B.S. Marina*, 133 AD2d 81 [2d Dept 1987]). The "current use" of the property as found by the Board obviously represents something less than the complete abandonment of the two-family use, and, in providing for termination of the grant if, among other things, the senior Mr. Sforza "ceases to occupy dwelling," the Board implicitly acknowledged that the senior Mr. Sforza is presently "occupying" the dwelling. Moreover, the fact that the current two-family use may be "casual" or "intermittent" does not disqualify it as a lawful non-conforming use, as that qualifying language in the lapse provision of the Code is applicable only to the nonconforming use of *land* and does not apply on its face to the nonconforming use of a building (Code §198-105).

In reviewing the Board's determination, the Court is required to determine whether it has a rational basis supported by substantial evidence in the record or whether it is arbitrary and capricious (*Ifrah v Utschig*, 98 NY2d 304 [2002]; *Matter of Steiert Enters., Inc. v City of Glen Cove*, 90 AD3d 764 [2d Dept 2011]). Since the Board found that petitioner established a nonconforming use, but failed to determine as a matter of fact or as a matter of law that the non-conforming use had lapsed for failure to carry on the operations of such use actively and continuously for one year, and the evidence in the record does not conclusively establish such a lapse, the Court finds that the imposition of the condition under which the right to continue the two-family use will terminate upon transfer of the property, death of the life tenant, or if he "ceases to occupy the dwelling," is arbitrary and capricious and not supported by the record (*Matter of McQuade v Zoning Board of Appeals of the Town of Huntington*, 248 AD2d 386 [2d Dept 1998]). In light of the foregoing, the petition is granted to the extent that the matter is remitted to the Board for the issuance of a decision granting the application without conditions.

Settle judgment.

PAUL J. BAISLEY, JR.

J.S.C.