Matter of Edelman v Village of Westhampton Beach Zoning Bd. of Appeals
2016 NY Slip Op 31854(U)
September 22, 2016
Supreme Court, Suffolk County
Docket Number: 18139/15
Judge: Paul J. Baisley
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[* 1]

Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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In the Matter of the Application of
ANDREW EDELMAN and LYNNE EDELMAN,

Petitioners,

For a Judgment under Article 78 of the Civil Practice Law and Rules

-against-

VILLAGE OF WESTHAMPTON BEACH ZONING BOARD OF APPEALS,

Respondent.

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INDEX NO.: 18139/15
MOTION DATE: 4/4/16
MOTION NO.: 001 CASEDISP

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Upon the following papers numbered 1 to 23 read on this Article 78 petition ; Notice of Motion/ Order to Show Cause and supporting papers 1-11 ; Notice of Cross Motion and supporting papers__; Answering Affidavits and supporting papers 12-20 ; Replying Affidavits and supporting papers 21-23 ; Other___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

Petitioners Andrew Edelman and Lynne Edelman (the "Edelmans") commenced this Article 78 proceeding for a judgment annulling the September 15, 2015 determination of the Village of Westhampton Beach (the "Village") Zoning Board of Appeals (the "Board") which denied petitioners' appeal from the January 5, 2015 determination of the Building and Zoning Administrator denying petitioners' application to partially demolish and reconstruct their home.

The record reflects that in January 1984, petitioners (who are husband and wife) jointly purchased Lot 6 in a waterfront subdivision in the Village of Westhampton Beach. Lot 6 was already improved with a two-story, single-family dwelling and, pursuant to a variance granted in 1980, was located 20 feet, rather than the 30 feet required by the zoning code then in effect, from the boundary of adjoining subdivision Lot 4. In October 1987, Andrew Edelman purchased Lot 4, which was then vacant property, in his own name.

In February 1987 the Westhampton Beach Village Code (the "Code) was amended to exclude tidal wetlands from the calculation of "lot area" for zoning purposes, which rendered Lot 6 nonconforming as the majority of its total lot area comprised tidal wetlands (Code §197-1). Lot 4, which contains 11,525 square feet of wetlands, has a "lot area" of 54,855 square feet and remains a conforming lot under the zoning code amendment.

In 1989, the Edelmans applied jointly for a building permit to construct an addition to the original dwelling located on Lot 6 and for the construction of new walks and decks and accessory buildings. A portion of the new construction extended onto Lot 4, and petitioners' permit application included the total lot area of both Lot 4 and Lot 6, reciting "combined lot dimensions" of "437.28' x 523.67' irregular."

The application was approved and granted without conditions and a building permit was issued on March 22, 1989 authorizing the construction on the combined lot described in the application. The record reflects that the construction was completed, although petitioners never sought or obtained a certificate of occupancy for the expanded dwelling (a certificate of occupancy for the original dwelling was issued in 1983).

In September 2014, petitioners submitted an application for a building permit to remove the addition to the dwelling on Lot 6 that was constructed pursuant to the 1989 building permit, including the portion of the dwelling and decking that encroaches on Lot 4, essentially seeking to restore the house and setbacks to their original condition, in conformity with the variance and certificate of occupancy granted in 1980 and 1983, respectively.

By letter dated January 5, 2015, the Village's Building and Zoning Administrator denied petitioner's request to partially demolish and reconstruct the dwelling on Lot 6 so as to remove the encroachments onto Lot 4. His letter stated that the issuance in 1989 of a building permit to construct an addition on Lot 6 which extended over the lot line of Lot 4 "effectively merg[ed] those two lots with the intent to merge." He noted that the application identified the owners of the two lots as Mr. and Mrs. Edelman and that the lot description on the application encompasses both Lot 6 and Lot 4. He also noted that the Village's assessment records reflect the separate ownership of Lot 6 and Lot 4 and that "therefore the two lots are not currently under the same ownership as was required by Permit 38-89 issued in 1989 for the addition to the dwelling." Finally, he noted that Lot 6 is a nonconforming lot with respect to lot width and lot area and "cannot stand on its own as a separate lot." He concluded, "Therefore I am denying this application until I receive proof of ownership which shows both lots under the same ownership as a conforming lot in the R-1 Zoning District."

Petitioners appealed the denial to the Board on the ground that no merger of the two separately owned lots ever occurred, and that the denial prevents petitioners from removing the encroachments on Lot 4 and further prevents Andrew Edelman from developing his separately owned and taxed property. On September 18, 2015 the Board issued a decision denying the appeal and upholding the January 2015 determination of the Building and Zoning Administrator, without prejudice to petitioners' continuance of the variance application it filed as alternative relief in the event the appeal was unsuccessful. The instant Article 78 proceeding ensued.

In its decision, the Board agreed with the "inescapable conclusion" of the Building and Zoning Administrator that the petitioners "intentionally merged tax lots 33.6 and 33.4 into a single 'lot' for zoning purposes in 1989" and that by their deliberate course of conduct they "maintained

and ratified that merged status and accepted the benefits from that merger until they attempted to unmerge the lots." The Board relied on the definition of "Lot" in §197-1 of the Code: "A parcel of land occupied or capable of being occupied by a main building and accessory buildings, structures or uses in accordance with the provisions of this chapter, including such open spaces as are required by this chapter." The Board determined that once petitioners combined the two lots and erected a house on what was formerly the common boundary between the two lots, the two individual lots ceased to satisfy the definition of "lot," and "the only 'parcel of land occupied or capable of being occupied by a main building and accessory buildings, structures or uses in accordance with the provisions of this chapter' was the combined, merged 'lot' that included both tax lots 33.6 and 33.4."

The Board rejected petitioners' arguments that their intent and actions in developing the two lots as a combined lot for at least 20 years is "irrelevant" because they maintained record title in separate ownership. The Board stated that the Building Department relied on petitioners' "representations" that they were intentionally merging the two lots, and that it could not have issued a building permit for a dwelling straddling the common boundary between the two lots without one or more variances because the location of the proposed expanded dwelling eliminated the setbacks on both lots. The Board noted that the Code does not contain an applicable single-and-separate provision protecting the separate status of petitioners' two lots because of their separate ownership. The provision on which petitioners rely, Code §197-1, the Board says, is nothing but a definition of "non-conforming lot," and that there is no other Code provision that provides continuation or grandfathering or automatic relief for a nonconforming lot.

The Board concluded that irrespective of title, "from a zoning standpoint, there can be no question that the two original tax lot parcels have merged into one zoning 'lot.'" Accordingly, it denied the appeal, upheld the January 5, 2015 determination of the Building and Zoning Administrator, and concurred with his conclusion that "the two former parcels...have been intentionally merged into a single 'lot' for purposes of the Village zoning code."

In their petition to annul the Board's determination, the Edelmans argue that the determination is erroneous as a matter of law as there is no provision in the Code that requires the merger of single and separately owned lots into one building parcel based on the "intent" of the parties. The further argue that there is no provision in the Code that prevents them from restoring their two single and separate lots to their prior legal status by removing the encroachments on the undeveloped lot. Petitioners argue that there is only one provision in the Code that addresses the issue of single and separate lots and their merger, which is Code §197.1 which defines a "nonconforming lot" as follows:

> "[a]ny lot lawfully existing in single and separate ownership at the effective date of this chapter or any amendment thereto affecting such lot, which does not conform to the dimensional regulations of this chapter for the district in which it is situated. If such lot shall thereafter be held in the same ownership as an adjoining parcel, it shall lose its status as a "nonconforming lot," except to the extent that the lot created by the merger of the two parcels shall remain nonconforming in the same respect."

Petitioners conclude that because there is no provision in the Code to support respondent's finding that their single and separately owned lots merged, the Court should annul the Board's determination.

The Court's role in reviewing the determination of the Board is "limited to ascertaining whether the action taken is illegal, arbitrary and capricious, or an abuse of discretion" (*Association of Friends of Sagaponack v Zoning Board of Appeals*, 287 AD2d 620 [2d Dept 2001]). The Board's interpretation of a zoning ordinance is entitled to "great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute" (*id.*). "Since zoning regulations are in derogation of the common law, they must be strictly construed against the municipality which has enacted and seeks to enforce them," and "any ambiguity in the language used in such regulations must be resolved in favor of the property owner" (*Allen v Adami*, 39 NY2d 275 [1976]). The Court will not read into the zoning ordinance provisions that are not expressly set forth therein (*Incorporated Village of Old Field v Hickey*, 225 AD2d 666 [2d Dept 1996] ("[z]oning ordinances must be read and given effect as … written" and "are not to be extended by implication" [citation omitted]).

Applying the foregoing standards, the Court is constrained to agree with petitioners that the Board's determination was arbitrary and capricious and erroneous as a matter of law.

As conceded by the Board in its decision, the only reference to "merger" of lots contained in the Village's zoning code is that set forth in §197-1, in the definition of "nonconforming lot." That provision refers to "the lot created by the merger" of two adjoining parcels, one of which is nonconforming, but both of which are *held in the same ownership*, a condition that on its face is not applicable here.[1] Respondent has not identified any other provision in its zoning code that supports its argument that petitioners effected a merger of their separate and single lots by "intent," and the Court is satisfied by its own review that there is no such merger-by-intent provision contained therein.[2] It is well established that in the absence of an express statutory provision setting forth the conditions under which adjoining parcels may be deemed to have merged, there can be no merger (*Allen v Adami*, *supra*, 39 NY2d at 278; *Meadow v Mansi*, 282 AD2d 677 [2d Dept 2001]). The Court of Appeals has confirmed that "a merger is not effected merely because adjoining parcels come into common ownership" (*Allen v Adami*, *supra*, 39 NY2d at 278) – even less so can that be

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[1] The Court notes that the Village Code contains one other provision referring to the merger of adjoining parcels held in common ownership, §170-3 pertaining to the removal of trees: "No person and no applicant before any municipal agency or governmental agency shall destroy or remove from the soil any tree growing upon a parcel of real property in excess of 1/2 acre in area without obtaining a permit therefor. Two or more contiguous parcels of real property in common ownership are deemed, for purposes of administration of this chapter, merged, and the total area of said parcels collectively shall determine the applicability of this chapter."

[2] Other municipalities have enacted such merger provisions. For example, Town of Huntington Code §198-116.1 entitled "Merged Lots" provides that "[l]ots shall be merged by operation of law when a nonconforming parcel of land created before January 1, 1980 and an adjacent parcel are under common ownership; *or, when any parcel of land is used, in whole or in part, for the benefit of an adjacent parcel having common ownership.*"

Town of Smithtown Code §322-74 entitled "Non-Conforming Lots" provides that "[a] nonconforming lot may be used or a building or structure may be erected on such lot for use in accordance with all other applicable provisions of this chapter, upon approval of the Board of Appeals, provided that, at all times subsequent to the effective date of any ordinance making such lot nonconforming, such lot has been separately owned in good faith and:

(1) Does not or did not adjoin any lot or land in the same ownership; and

(2) Does not or did not adjoin any lot under the same practical or effective ownership, whether or not the incidents of title are or were the same."

the case where there is no common ownership and the municipality is relying solely on the "representations" and "intent" of the single and separate property owners. In any event, the Court has found no cases – and respondent has cited none – where it has been determined that when the owners of separately owned adjoining lots voluntarily undertake a common use of their adjoining properties, an irrevocable merger of the lots has occurred.

The Board's additional argument that the building permit was issued in reliance on petitioners' representations, and that it could not have been issued if the lots were not merged because it left both lots with zero setbacks, for which variances would otherwise have been required, is equally unavailing. Although the propriety of the Village's issuance of a building permit in 1989 is not before the Court, respondent's argument begs the question why the Village could not have denied the building permit in the circumstances and required petitioners to seek variances for their planned construction in light of the separate and single ownership.

The other Code provisions relied on by respondents to justify its determination, including the definition of "lot" contained in §197-1 and the "small lot" provision of §197-26(A), are either inapplicable or do not support the Board's position.

In light of all of the foregoing, the petition is granted, the determination of the Westhampton Beach Zoning Board of Appeals is annulled, and the matter is remanded to the Board for the issuance of a determination consistent with this decision and order.[3]

Submit judgment on notice.

Dated: September 22, 2016

HON. PAUL J. BAISLEY, JR.

J.S.C.

[3] The Court is constrained to note that §197-26(B) provides that "[a]fter the adoption of this chapter [in 1953], the dimensions of a lot, parcel or tract of land shall not be changed or altered without the approval of the Planning Board." Accordingly, if §197 were applicable, petitioners did not have the power to unilaterally alter the dimensions of their two separate lot to create one combined lot, and the record reflects that Planning Board approval of the supposed alteration of the dimensions of the petitioners' "lot" was neither sought nor obtained.