SCAN

MEMORANDUM

SUPREME COURT, COUNTY OF NASSAU, IAS PART 9

In the Matter of the Application of
ROBERT WEST and DENISE
VEY-VODA,

Petitioners,

for a judgment pursuant to Article 78
of the Civil Practice Law and Rules,

- against -

DAVID MAMMINA, Chairman,
DONAL McCARTHY, SONDRA PARDES,
PAUL ALOE and MILDRED LITTLE,
members, constituting the North Hempstead
Board of Zoning Appeals,

Respondent.

BY: **HON. BRUCE D. ALPERT**

MOTION SEQUENCE #1

INDEX NO: 28175/99

ACTION #1

MOTION DATE:
December 21, 2000

DATED: February 22, 2001

In the Matter of the Application of
ROBERT WEST and DENISE
VEY-VODA,

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for a judgment pursuant to Article 78
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- against -

DAVID MAMMINA, Chairman, DONAL
McCARTHY, SONDRA PARDES, PAUL
ALOE and MILDRED LITTLE, members,
constituting the North Hempstead Board
of Zoning Appeals,

Respondent.

INDEX NO: 4808/00

ACTION #2

MOTION SEQUENCE #1

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Petition pursuant to Article 78 of the CPLR for an order annulling and reversing the respondent Board's determination of October 6, 1999, which declared the Manhasset Park Civil Association's appeal of the Building Commissioner's May 8, 1998 determination to have been timely, is determined as hereinafter set forth.

Petition pursuant to Article 78 of the CPLR for an order annulling and reversing the respondent Board's determination dated February 16, 2000, which reversed the Building Commissioner's May 8, 1998 determination that petitioners' Certificate of Existing Use stood, and declared that petitioners are not entitled to a Certificate of Existing Use, is determined as hereinafter set forth.

These proceedings involve the use of premises located at 72 Park Avenue in Manhasset as a dental office on the first floor and a rental apartment on the second floor. In April, 1995, the Building Commissioner issued a Certificate of Existing Use ("CEU") for the property to then owners, Drs. Richard A. Field and Albert E. Field, Jr. The CEU stated that the premises were an "Existing Non-Conforming Use" with a medical office on the first floor and an apartment on the second floor. The CEU erroneously stated that the premises were situated in a Business A zone; they were actually located in a Residential B zone. In addition, although required by North Hempstead Code §70-223(E), notice of the application for the CEU was not given to property owners within a 200-foot radius of the property.

Following its issuance, the Fields, practicing dentists, sold the property to the petitioners in November, 1996, and obtained a building permit to renovate. Renovations were completed in November, and the petitioners began their dental practice at the premises in December, 1996.

Shortly thereafter, complaints were made to the Building Commissioner regarding the use of the property. On March 12, 1997, the CEU was unilaterally amended by the Building Commissioner via letter. The letter stated that the zoning district set forth on the CEU was incorrect; it was not a Business A district, but rather, a Residence B district, and that the first floor's medical use was limited to two doctors. There is no indication that this amendment was sent to the underlying complainant or filed with the Town Clerk.

Several months later, the Building Commissioner received a letter demanding an explanation of the amended CEU. He responded through correspondence dated December 1, 1997. Nevertheless, on December 18, 1997, the Building Commissioner advised petitioners that in view of his receipt of conflicting evidence, the CEU was being re-opened. Petitioners were then specifically required to notify adjoining property owners within 200 feet of the property that an application for a CEU was being made. The Building Commissioner informed petitioners and the prior owner Dr. Field that he would review all documents, possibly require sworn testimony, and determine whether the CEU will stand or be revised to require that the petitioners live on the second floor in order to utilize the first floor as a medical office.

By letter dated April 9, 1998, the Building Commissioner notified the petitioners and their attorney that the CEU, as amended, remained undisturbed. There is no indication that the other property owners were so notified. Indeed, the Manhasset Park Civil Association

("MPCA") later that month wrote to the Building Commissioner requesting the issuance of a formal decision regarding the CEU. Thus, on May 8, 1998, the Building Commissioner wrote to the MPCA and advised that the existing CEU stood.

The MPCA appealed to the Zoning Board of Appeals on July 1, 1998. In its appeal application, it indicated that it was appealing the Building Commissioner's determinations of May 8, 1998, April 9, 1998, December 18, 1997 and December 1, 1997. The Building Commissioner had specifically stated that the petitioners had provided evidence that the property was used in a non-conforming manner since 1938, that 1938 was the cut-off for grand fathering non-conforming uses and that evidence regarding the property's actual use prior thereto was inconclusive.

The petitioners herein opposed MPCA's appeal as untimely under Town Law §267-a(5). After a hearing on only that issue, the Board of Zoning Appeals found that the May 8, 1998 letter was the operative event, and that the MPCA's appeal was, accordingly, timely. The Board of Zoning Appeals noted that notice of the application for the CEU and its amendment had not been afforded as required, and although a determination had been made by the Building Commissioner on April 9, 1998, his letter/decision was not addressed to the MPCA – which was the party challenging the issuance of the amended CEU– nor did it otherwise indicate that it was formal notice of a determination. (see, Matter of **Pansa v Damiano**, 14 NY2d 356) The petitioners filed the first of these two Article 78 proceedings challenging that determination by the Board of Zoning Appeals.

A further hearing was held, and the Board of Zoning Appeals noted that since April 29,

1929, the North Hempstead zoning ordinance did not permit medical uses in a Residential B zone, unless the professional resided on site. To establish the right to a CEU, the property owners had to demonstrate that a medical use was made of the property prior to 1929, and that the owner/practitioner did not reside on site.

Not only does the North Hempstead Town Code obligate the Building Commissioner to consider both the application for the CEU and the objections, the CEU may issue only if the property owner establishes his entitlement thereto by "a preponderance of the evidence." (North Hempstead Town Code §70-223[E][2]) The Board of Zoning Appeals concluded that the petitioners failed to meet their evidentiary obligation. The Board of Zoning Appeals further found that assuming, arguendo, a non-conforming use had once existed, it was abandoned in 1945 when the then owner/dentist, Dr. Albert Field, Sr., resided at the property.

As for the petitioners' laches defense, the Board of Zoning Appeals found that the MPCA was not barred. The Board concluded that the MPCA had no notice that a CEU had been issued until the petitioners bought the property and commenced construction. It, thereafter, found that the MPCA acted appropriately in investigating and challenging that issue.

Upon the CEU's vacatur, the petitioners commenced a second Article 78 proceeding challenging that determination. By agreement of the parties, the two proceedings have been joined.

The MPCA, comprised of nearby property owners, has standing under Town Law §267-a[4]) to challenge the Building Commissioner's determination regarding petitioners' CEU. (see, Matter of **Douglaston Civic Association, Inc. v Galvin**, 36 NY2d 1; see also, Matter of **Prudco**

Realty Corp. v Palermo, 93 AD2d 837, affd 60 NY2d 656)

Moreover, the MPCA's appeal was timely filed. While the Building Commissioner did take action concerning the property when the CEU was issued in 1995, amended in 1997 and upheld on April 9, 1998, none of those actions complied with the Town Code's requirements which would have afforded nearby property owners with notice of the application and decision.

More specifically, notice of the application for the CEU was not afforded property owners within a 200-foot radius of the property in violation of Town Code §70-223 (E)(1) and neither the CEU itself, the amendment thereto nor the April 9, 1998 determination of the Building Commissioner were filed with the Town Clerk, as required by Town Law §267-a (5). In this regard, the evidence indicates that the April 9, 1998 Building Commissioner's communication was addressed and directed merely to the petitioners' and their attorney. Not until the MPCA demanded a formal decision and filed a FOIL request was the May 8, 1998 letter of the Building Commissioner rendered in the proper form.

As the practice commentary to Town Law §267-a provides, "[b]oth prior case law and principles of due process require that the 60-day period within which an appeal may be taken does not commence until a person learns of the determination or should have been aware of the determination." (Rice, 2001 Supplementary Practice Commentaries, McKinney's Cons. Laws of N.Y., vol 61, Town Law §267-a, p 174; see also, Matter of **Pansa v Damiano**, supra; Matter of **Kuhn v Town of Johnston**, 248 AD2d 828 [3d Dept.]; Matter of **Rebhan v Zoning Board of Appeals of the Town of Milan**, 163 AD2d 728, lv den 76 NY2d 712; Matter of **Cowger v Mongin**, 87 AD2d 932, lv den 57 NY2d 601, cert den 459 U.S. 1095) Where, as here, "[a]

person demands revocation of a permit issued to another, an appeal should not be required until his demand for revocation has been rejected with some formality and finality." (Matter of **Cowger v Mongin**, supra, at p. 933)

"To establish laches, a party must show: (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant (see, Dwyer v Mazzola, 171 AD2d 726, 727). All four elements are necessary for the proper invocation of the doctrine see, Dwyer v Mazzola, supra, at 727)." (**Cohen v Krantz**, 227 AD2d 581, 582)

Application of the governing legal principles to the facts presented militates against the doctrine's invocation, as the petitioners failed to meet the four pronged prerequisite. Critically lacking here was knowledge by the MPCA of the CEU's issuance, amendment and the rejection of its claims on April 9, 1998. Thus, the alleged delay should not be considered inexcusable. (see, Matter of **Kuhn v Town of Johnstown**, supra)

Similarly, the construction renovations undertaken by petitioners did not put MPCA's members on notice sufficient to charge them with laches. It is not the renovations that were challenged or which are at stake here; rather, what predominates is the use of the premises and the issuance of the CEU. The surrounding residents' failure to object to the use of the premises as a dental office and rental unit sooner is of no moment in that there is nothing in the record which would suggest that it was readily apparent that the property was non-conforming, i.e., that

the owner/dentist was not himself residing at the property.

In any event, even if the property was being used in violation of the ordinance, the acquiescence of others would not legalize the use. In this regard, the Court notes that "[a] municipality may not be estopped from enforcing its zoning laws either by the mistaken or erroneous issuance of a building permit or by laches." (**Scott v Manilla**, 163 AD2d 901, 902, app dsmd 76 NY2d 901) "An invalid permit vests no rights in contravention of a zoning ordinance in the person obtaining that permit (see Matter of B & G Coonstr. Corp. v Board of Appeals of Vil. of Amityville, 309 NY 730; Rollins v Armstrong, 226 App Div 752, affd 251 NY 349)." (Matter of **Cowger v Mongin**, supra, at pp. 933-934)

Turning to the merits of the second petition,

> Judicial review of a determination made by a zoning board of appeals is limited to whether the determination has a rational basis and is supported by substantial evidence *(see,* Matter of Fuhst v Foley, 45 NY2d 441; Matter of Smith v Board of Appeals, 202 AD2d 674; Matter of Saladino v Fernan, 204 AD2d 554; Matter of Clarkson Realty Holding Corp. v Scheyer, 172 AD2d 521).
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> 'It is the law of this state that nonconforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance' (People v Miller, 304 NY 105, 107). Although zoning aims at the elimination of nonconforming uses, zoning cannot prohibit an existing use to which the property is devoted at the time of enactment *(*see, Matter of Syracuse Aggregate Corp. v Weise, 51 NY2d 278). <u>However, the owner must establish that the allegedly pre-existing use was legal prior to the enactment of the prohibitive zoning ordinance which purportedly rendered it nonconforming</u> *(*see, Incorporated Vil. of Old Westbury v Alljay Farms, 100 AD2d 574, *affd* 64 NY2d 798)

(Matter of **Keller v Haller**, 226 AD2d 639,640 [emphasis supplied])

"To annul an administrative determination made after a hearing, the court must conclude that the determination is not supported by substantial evidence on the record when read as a whole (see, Matter of Lahey v Kelly, 71 NY2d 135, 140)." (Matter of **United Water New Rochelle, Inc. v Zoning Board of Appeals of Town of Eastchester**, 254 AD2d 490, 491; lv den 93 NY2d 808)

"A nonconforming use may not be established through an existing use of land that was commenced or maintained in violation of a zoning ordinance (1 Anderson, New York Zoning Law and Practice §6.10, at 213-214 [3d ed])." (Matter of **Rudolf Steiner Fellowship Foundation v DeLuccia**, 90 NY2d 453, 458)

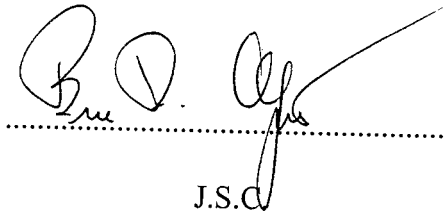
The MPCA established that a medical use of the building did not begin until 1944, a point in time well after the adoption of the applicable Town ordinance in 1929. Thus, its current use did not precede enactment of the controlling zoning ordinance. Moreover, the evidence presented by the petitioners to establish the existence of a non-conforming use was sketchy, inconsistent and inaccurate. Its rejection by the Board of Zoning Appeals, as unreliable, was neither arbitrary nor capricious, but reasonable and appropriate under the circumstances. Dr. Field's affidavit attesting to the 1938 use of the building by a health care practitioner was self-serving and suffused with inaccuracies. In any event, 1929 is the pivotal year.

Moreover, Dr. Field's statement that Dr. Wells was a chiropractor was incorrect – he was an osteopath – and his statement that Dr. Wells began practicing medicine at the premises prior to 1938 is seemingly at variance with the osteopath's subsequent graduation and licensure in 1939 and 1948, respectively. In any event, even if a non-conforming use existed, there is

evidence which indicates that Dr. Field's father, brother and he, himself, all lived at the premises while practicing dentistry thereat, thereby terminating any non-conforming use. (North Hempstead Town Code §70-208[E]).

For the reasons hereinabove articulated, each petition is denied and each proceeding is dismissed. This concludes all proceedings under index numbers 28175/99 and 4808/00. A copy of this decision is to be filed under each of the above-noted index numbers.

Settle separate judgments on notice.



J.S.C

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