SHORT FORM ORDER

INDEX NO: 7056/16

Supreme Court of the State of New York
IAS Part 43 - County of Suffolk

PRESENT: Hon. ARTHUR G. PITTS

LISA CRADIT,

Petitioner,

- against-

SOUTHOLD TOWN ZONING BOARD OF APPEALS,

Respondent.

ORIG. RETURN DATE: 8/22/16
ADJOURNED DATE: 10/27/16
MOTION SEQ. NO.: 003 - MD
004 - MG

PLTF'S/PET'S ATTY:
WILLIAM D. MOORE, ESQ.
Attorney for Petitioner
51020 Main Road
Southold, NY 11971

DEFT'S/RESP'S ATTY:
SINNREICH KOSAKOFF & MESSINA LLP
Attorney for Respondent
267 Carleton Avenue, Suite 301
Central Islip, NY 11722

Upon the following papers numbered 1 to 32 read on this motion for Article 78; and this motion to dismiss Notice of Motion and supporting papers 1-7; 8-25 Notice of Cross-Motion and supporting papers__ Affirmation/affidavit in opposition and supporting papers 26-27 Affirmation/affidavit in reply and supporting papers 28 - 32 Other memorandum of law ; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that the petitioner Lisa Cradit's application for a judgment pursuant to CPLR Article 78 and CPLR 3001 declaring that the respondent Southold Town Zoning Board of Appeals' ("ZBA") finding that the petitioner's rental of her single family dwelling was not entitled to protection as a pre-existing non-conforming use after the enactment of section 280-111(J) of the Town Code prohibiting such rentals, was arbitrary and capricious, and as such, warranting the dismissal and annulment of the Southold Town Code Enforcement Officer's Notice of Violation and Order to Remedy dated January 21, 2016, is denied under the circumstances presented. It is further

ORDERED that the respondents' cross motion to dismiss the within petition is granted.

The matter at bar is a hybrid Article 78 / declaratory judgment action. The following salient facts are not in dispute: Petitioner Lisa Cradit is the owner of a single family residence known as 560 Sound Road a/k/a 24 Sound Road, Greenport, Suffolk County, New York which is located in a R-40 Zoning District. She resides at 61 Nathan Hale Drive, Stamford, Connecticut. R-40 Zoning District permits only one-family detached dwellings although by special exception granted by the ZBA, two-family dwellings, not to exceed one such dwelling per lot and one accessory apartment in an existing one-family dwelling, may be permitted. The petitioner does not have a rental permit for any part of the premises, nor is there an approved accessory apartment there.

The petitioner has listed the subject premises on Airbnb and other internet sites for vacation and short term rentals and she acknowledges that the Suffolk County Hotel Tax is applicable as to such rentals. In August, 2015 the Town of Southold enacted a new provision to the Town Code with an effective date of October, 2015 (Southold Zoning Code sections 280-4 and 280-111 (J)) which prohibited transient rental properties: that is, short term rentals of a single family dwelling were prohibited with fines assessed up to $8,000.00 per day. In January, 2016 the petitioner was served with a Notice of Violation demanding that she cease her rental activities. In response thereto the petitioner filed an appeal with the respondent ZBA and in support thereof, she averred that she had consistently and routinely rented her house short term, such rentals were common practice in the Town for decades, and under the express provisions of the section 280-121 of the Town Zoning Code, she was allowed to continue that practice as a pre-existing, non-conforming use.

On May 5, 2016 the respondent ZBA conducted a public hearing on the plaintiff's application wherein both documentary evidence and testimony were presented and considered. The application of the petitioner was limited that " the ZBA make a determination that the applicant's prior use of the subject real property for a short term (less than 14 days) rental confers on the property a legal non-conforming use for the short term rental, thereby making the provisions of Town Code 280-4, 280-111(J) inapplicable to it for as long as the property is so use on a continuous basis....."

By decision dated June 17, 2016, the respondent ZBA determined that the use of a single-family dwelling as a transient rental property was never allowed by the Town Code in a R-40 Zoning District, where the subject property is located. In support thereof, the ZBA cites section 280-4 of the Town Code which defines a dwelling unit as "a building....of minimum living area of 850 square feet containing complete housekeeping facilities for only one family.....a hotel, motel, inn, lodging....or similar home or similar structure shall not be deemed to constitute a dwelling unit." As such, the ZBA found that, due to the short duration of the petitioner's tenancies, the rental use of the property was similar to that of a hotel/motel, a use strictly prohibited within the subject Zoning District. The petitioner failed to meet her burden to establish that short term rentals were ever legally permitted and therefore, that she would be entitled to a determination of a legal non-conforming use.

In support of the within petition, the petitioner avers that the respondent ZBA acted outside its jurisdiction, violated both state law and town local laws, and its finding and determination was arbitrary and capricious. It is well settled that " 'the courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious.' (Cohen and Karger, Powers of the New York Court of Appeals, pp. 460--461; see, also, 8 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 7803.04 Et seq.; 1 N.Y.Jur., Administrative Law, ss 177, 184; Matter of Colton v. Berman, 21 N.Y.2d 322, 329, 287 N.Y.S.2d 647, 650--651, 234 N.E.2d 679, 681). The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified * * * and whether the administrative action is without foundation in fact.' (1 N.Y.Jur., Administrative Law, s 184, p. 609). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts. " (***Pell v. Board of Education,*** 34 N.Y.2d 222, 356 N.Y.S.2d 833, 839-840 [1974])

Nonconforming uses in existence at the time of a zoning change are entitled to continue despite the contrary ordinance if the pre-existing use was legal when established. It is a factual issue for the Court to determine whether a legal pre-existing use can be established. (***Spilka v. Town of Inlet,*** 8 A.D.3d 812, 778 N.Y.S.2d 222 [3rd Dept 2004] ; ***Costa v. Callahan,*** 41 A.D.3d 1111, 840 N.Y.S.2d 163 [3rd Dept 2007]) A party who claims a nonconforming use bears the burden of establishing that the use was legally created and done prior to the enactment of restrictive zoning measure. (***Province of Meribah Soc. of Mary, Inc., v. Village of Muttontown,*** 148 A.D.2d 512, 538 N.Y.S.2d 512 [2nd Dept 1989] ; ***Jacobsen v. Town of Bedford Zoning Bd. Of Appeals,*** 59 A.D.3d622, 873 N.Y.S.2d 221 [2nd Dept 2009]) If that burden is met, it would be arbitrary and capricious for the respondent ZBA to deny the application to allow the nonconforming use to continue. (***E & B Realty, Inc., v. Zoning Bd of Appeals of the Incorporated Village of Roslyn,*** 275 A.D.2d 779, 713 N.Y.S.2d 744 [2nd Dept 2000])

Herein, the petitioner has failed to meet such burden. Town Code section 280-8 [A] provides that no land or building shall "be used, designed or arranged to be used for any purpose or in any manner, except in conformity with all regulations, requirements and restrictions specified in this chapter for the district in which such building or land is located." It is without dispute that transient rental use is not, nor has it ever been, listed as a permitted use in the subject Zoning District. An assertion by the petitioner that it was permitted because, prior to the enactment of Town Code sections 280-4 and 280-111 (J), there was no ordinance expressly prohibiting short term rentals, is without merit. Town Code section 280-8 [E] specifically provides that "any use not permitted by this chapter shall be deemed to be prohibited. Any list of prohibited uses contained in any section of this chapter shall be deemed to be not an exhaustive list but to have been included for the clarity and emphasis." Clearly, the petitioner has not established that transient rental use was legal warranting a finding of a prior nonconforming use. Accordingly, pursuant to the foregoing and under the circumstances, the respondent's cross motion to dismiss is granted and the petition is dismissed.

This shall constitute the decision and order of the Court.

Submit judgment.

So ordered.

Dated: Riverhead, New York
January 30, 2017

ARTHUR G. PITTS, J.S.C.

CHECK ONE: __XX__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION