

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF WESTCHESTER

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 In the Matter of the Application of

STUART TIEKERT,

Petitioner,

Index No. 1977/2020

for a judgment pursuant to CPLR Article 78

-against-

BOARD OF APPEALS OF THE VILLAGE OF
 MAMARONECK,

Respondent.

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 Minihan, J.

Petitioner commenced this proceeding for an order and judgment setting aside as arbitrary and capricious, and contrary to law, so much of the September 10, 2020 resolution of the Zoning Board of Appeals of the Village of Mamaroneck (hereinafter ZBA) as upheld the Code Enforcement Officer's finding of violations #19-4655, #19-4656, #19-4658, and #19-4667, and denied petitioner's application for a special permit. Respondent opposed the petition arguing that the ZBA's determination was rational and fully supported by the record. The court agrees with respondent and, thus, denies the petition and dismisses the proceeding.

Factual & Procedural History

This proceeding involves petitioner's use of the second floor of a duplex condominium (Unit B) which he owns in the Village of Mamaroneck. The subject property is located in the R-5 "One Family Residence District" and is classified as a pre-existing nonconforming use, with three dwelling units in two principal structures - - a two-family residential structure having three stories (the upper two floors being a duplex approximately 2,400 square feet known as Unit B) and a third dwelling in a garage structure. Since 1991, the three dwelling units have been held in condominium ownership. In 1986, the then-property owner STEMM Associates, a general partnership of five individuals including petitioner, made an unsuccessful appeal (#25A-1986) to the ZBA for a variance to convert the nonconforming two-family use of the building into a three-family use by separating the two floors of Unit B into two separate dwelling units to be occupied separately and eventually offered for sale.

On September 9, 2019, pursuant to a court-issued search warrant, the Village Code Enforcement Officer and the Fire Inspector inspected Unit B and found petitioner to be in violation of several provisions of the Village Code and the NYS Building Code, relating to the illegal creation of a separate dwelling on the upper floor of Unit B. Specifically, the following

violations were found on the third floor: (1) electrical installation without a permit (Complaint #19-4653); (2) plumbing (kitchen sink installed in den) without a permit (Complaint # 19-4654); (3) unlawful structure (separate dwelling unit) without permits (Complaint #19-4655); (4) alteration of Unit B from a one-dwelling unit to a two-dwelling unit (i.e., reconfiguration and addition of interior doors and locking hardware) (Complaint #19-4656); (5) certificate of compliance required for change-in-use (conversion from one-dwelling to two-dwelling unit) (Complaint #19-4657); (6) cessation of preexisting nonconforming use, permit required to return structure to conforming use (Complaint #19-4658); (7) alteration of property not in conformity with zoning code, area is zoned for one-family residences (Complaint #19-4667).

Petitioner did not respond to the notices of the violations within the stated five-day deadline, so on September 26, 2019, he was served with Orders to Remedy giving him a deadline to cure the violations by October 28, 2019. On October 28, 2019, petitioner appealed five of the seven violations to the ZBA (#19-4655, #19-4656, #19-4657, #19-4658, and #19-4667) and sought an interpretation that the violations did not apply to the configuration, use and occupancy of Unit B and asking the ZBA to grant a special permit if required (Appeal #11-2020). A public hearing commenced on January 9, 2020, and continued on March 5, April 2, May 7, and June 4, 2020. Public deliberation was held on July 23, 2020.

By resolution dated September 10, 2020, the ZBA denied the appeal as to violations #19-4655, #19-4656, #19-4658 and #19-4667, finding that the preexisting nonconforming two-family residence had been "altered without permit, authority or certificate of occupancy by [petitioner's] actions illegally creating a third, separate dwelling unit on the top floor of Unit B in contravention of NYS Building Code § 101.2.7.4.4, Village Code § 126-4, Village Code § 342-64 C and Village Code § 342.9." Citing to the affidavit of the Village Code Enforcement Officer dated January 3, 2020, and the photographs attached thereto, the ZBA found that Unit B had been altered with "walls enclosing a previously open stairway and doors with deadbolt locks" to separate the second and third floors of the duplex and to provide distinct entrances for each floor of the duplex from the second floor landing, and that a room heretofore labeled as a den on the floor plans annexed to the recorded Declaration of Condominium for the premises had been outfitted with plumbing, a kitchen sink and counter, cabinetry, and a 220 volt electrical service, to provide cooking facilities for the second floor occupant separate and apart from the cooking facilities on the first floor of Unit B. The ZBA cited to the Code Enforcement Officer's findings that (1) there was "no evidence of any permits, certificates or other approvals having been issued by the Building Department for Unit B since 1986," (2) petitioner provided no evidence that any such permits were issued, and (3) none of the previous permits, certificates or approvals were related to the alterations which resulted in the current configuration of Unit B or the addition of a third dwelling unit on the top floor. The ZBA found that a March 10, 2020 affidavit by the occupant of the top floor of Unit B supported finding that petitioner added a third, separate, dwelling unit on the top floor in violation of Village Code § 126-4 (complaint #19-4656). The ZBA cited, in pertinent part, to the occupant's statements that he "principally uses the third floor" and has "no need" to use the living area, bedrooms or bath facilities on petitioner's floor, and only occasionally accesses the first floor to adjust the thermostat when petitioner is not home or to use petitioner's kitchen "when I need to," and that he pays the electric service associated with the upper floor. Also regarding the electric service, the ZBA cited to the Code Enforcement Officer's affidavit as proof that the building is serviced by three separate electric meters, and that the upper floor has a separate meter from petitioner's space.

The ZBA rejected petitioner's claim that the occupancy of the third floor fell under the permissible uses of a "roomer" or "boarder," or a "rooming unit," and found, instead, that the upper floor constituted an illegal "dwelling unit." Petitioner cited to Village Code § 342-21(B)(6) which permits as an accessory use "not more than two roomers or boarders" in one-family residence districts. The ZBA, while acknowledging that neither roomer nor boarder is defined in the Village Code, found that the third-floor occupancy did not appear akin to that of a roomer or boarder since the occupant "clearly maintains his own household on the upper floor of Unit B in space that provides complete housekeeping and sanitary facilities separate and apart from [petitioner's] facilities." The ZBA cited to the occupant's sworn statements that he pays a "monthly fee" to petitioner to live on the upper floor, considers their arrangement to be a tenancy, and considers his space to be self-sufficient such that he has no need to regularly obtain access to or use appellant's space. The ZBA pointed out that they "only regularly and actively share common space in the Building consisting of the landing outside of their respective locked doors on the second floor landing, the stairway to the ground floor entrance to the Building, and the laundry and shared storage area in the basement." Petitioner argued that the third floor use amounted to a "rooming unit" as defined in NYS Property Maintenance Code as "[a]ny room or group of rooms forming a single habitable unit occupied or intended to be occupied for sleeping or living, but not for cooking purposes." However, the ZBA pointed out that "rooming unit" is not listed as a permissible principal or accessory use in an R-5 zoning district and that there was no evidence that there was a rooming unit at the premises when the non-conforming use was established. The ZBA concluded that, as altered by petitioner in violation of NYS Building Code (complaint #19-4655) the upper floor of the duplex met the definition of "dwelling unit" in Village Code § 342-3, in that it was an "entirely self-contained portion" of a building "containing complete housekeeping facilities," and that the addition of this dwelling unit violated Village Code § 126-4 (complaint #19-4656).

The ZBA approved the appeal as it related to complaint #19-4657, noting "as long as [petitioner] remedies the illegal alterations to eliminate the separate dwelling unit he retains his non-conforming use status." The ZBA denied petitioner's request for a special permit finding no provision in the Village Zoning Code, or elsewhere, to issue a special permit to legalize the alterations to Unit B which resulted in the unlawful addition of a third dwelling. The ZBA noted that petitioner "offered no testimony or evidence in support of his request for a special permit" and that his request that the Board "offer zoning guidance" and his conclusion that the remedy for the unlawful alteration "would appear to be a 'special permit'" was without basis, authorization or justification in the law.

By letter dated October 22, 2020, the Village's Building Inspector informed petitioner of particular steps that were required to return the condo unit to legal nonconforming use status. Those steps included, among other things, restoring an area now used as a kitchen back to a den (including removing the kitchen sink, cabinetry, countertops and backsplash outlets), removing an electric line and the separate third floor meter and associated wiring, removing "the complete walls that enclosed the previously open stairwells," and removing "the doors and deadbolt locks at entrance to the third-floor stair."

Present Proceeding

On or about October 27, 2020, petitioner commenced this article 78 proceeding to annul the ZBA's September 10, 2020 resolution insofar as it upheld the violations #19-4655, #19-4656, #19-4658, #19-4667 and denied petitioner's application for a special permit. The central argument in the petition is that the third floor of the subject property is not a separate dwelling unit and that, rather, the occupant of the third floor was a roomer, which is permitted under Village Code.¹ By verified answer, respondent denied the material allegations in the petition.

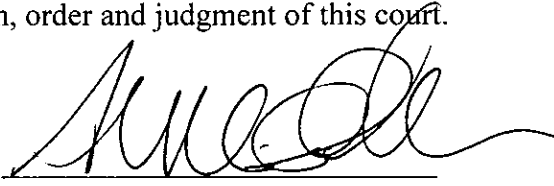
Analysis

The court denies the petition for failure to demonstrate that the actions of the ZBA in upholding the violations and denying the special permit were illegal, arbitrary or capricious, or an abuse of discretion. "Judicial review of a determination by a zoning board is generally limited to reviewing whether the action taken by the zoning board was illegal, arbitrary and capricious, or an abuse of discretion" (*Matter of Voutsinas v Schenone*, 166 AD3d 634, 636 [2d Dept 2018]). "A determination is arbitrary if it is made 'without sound basis in reason... without regard to the facts'" (*Matter of Trump on the Ocean, LLC v Cortes-Vasquez*, 76 AD3d 1080, 1083 [2010], quoting *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Here, the ZBA's determination to uphold the building violations and deny the special permit was rational and supported by the record. Thus, the court denies the petition insofar as it seeks to annul the ZBA's determination as arbitrary and capricious. Moreover, finding that petitioner failed to show that the ZBA's action was illegal or an abuse of discretion, the court declines to annul the ZBA's determination on those grounds.

Based on the foregoing, it is ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

The foregoing constitutes the decision, order and judgment of this court.

Dated: White Plains, New York
April 12, 2021



Honorable Anne E. Minihan
Acting Justice Supreme Court

¹On March 22, 2021, the court declined to sign a proposed order to show cause e-filed by petitioner seeking a temporary restraining order to stop respondent from enforcing the ZBA's September 10, 2020 resolution, and advised the parties that the court considered the matter fully submitted. On March 26, 2021, petitioner e-filed an "amended petition" seeking the same relief as the original petition except for adding a request for a temporary restraining order. Inasmuch as the court already declined to grant a temporary restraining order on March 22, 2021, the court sees the amended petition as a nullity, and herein decides the matter on the original petition.