SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

JAMES C. CORNELL, JR. and LEA G. CORNELL,

Petitioners,

DECISION AND ORDER

For a Judgment Pursuant to CPLR Article 78, annulling and setting aside determinations by Respondents Town of Washington Zoning Board of Appeals and Town of Washington Zoning Administrator,

Index No.: 2024-51900

Motion Sequence: 1

-against-

DANIEL YADGARD, JONATHAN IALONGO, TOWN OF WASHINGTON ZONING ADMINISTRATOR and TOWN OF WASHINGTON ZONING BOARD OF APPEALS,

Respondents.

The following papers were read and considered on this petition pursuant to Article 78 of the CPLR:

Document:	NYSCEF Doc. No(s).:
SECOND AMENDED ORDER TO SHOW CAUSE	41
VERIFIED PETITION and EXHIBITS 1–24	1, 4–27
AFFIRMATION IN SUPPORT	3
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ANSWER by RESPONDENT YADGARD	78
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BACKGROUND

The background of this proceeding was set forth in detail in the Court's Amended Decision and Order dated June 18, 2024, and will not be fully reiterated herein. In brief, Petitioners' property shares a side yard with property owned by Respondent Daniel Yadgard ("Respondent Yadgard" or "Yadgard") in the Town of Washington. Both properties contain a single-family residence, and are located in an "RR-10" zoning district. In that district, the minimum lot size is 10 acres, coverage by structures may not exceed 10% of a lot's area, and single-family residences and accessory structures, such as swimming pools, are permitted uses. Respondent Yadgard's property, however, consists only of 1.74 acres, and the existing structures on the property already occupy more than 10% of the lot area.

Petitioners seek to prevent Respondent Yadgard from constructing an in-ground swimming pool on his property, with adjoining patio and fencing, which is proposed to be located near the parties' shared boundary. Construction of the pool initially began in late 2022, but was halted based upon Petitioners' prior challenges to area variances granted by Respondent Town of Washington Zoning Board of Appeals (the "ZBA"). Respondent Yadgard thereafter submitted applications for area variances to the ZBA. During the pendency of those applications, Petitioners submitted numerous written objections to the ZBA asserting, in general, that the proposed pool is not permitted by certain provisions of the Zoning Code of the Town of Washington ("Zoning Code" or "Code"). In response, Respondent Town of Washington Zoning Administrator ("Zoning Administrator" or "ZA") issued several written determinations in favor of Respondent Yadgard. Petitioners appealed most of those determinations to the ZBA, which issued a final written determination on those appeals on April 16, 2024 (the "ZBA Determination"). That determination rejected Petitioners' arguments that the proposed pool is not permitted under the Zoning Code, and further determined that Respondent Yadgard would be required to obtain two side yard variances, one rear yard variance, and a lot coverage variance in order to proceed with construction.

Petitioners commenced this proceeding challenging the ZBA Determination on May 8, 2024, and also moved by order to show cause for temporary and preliminary injunctive relief against any further ZBA proceedings on Respondent Yadgard's applications. On May 10, 2024 this Court issued an order to show cause containing the temporary injunctive relief. In the Court's June 18, 2024 Decision and Order, Petitioners' request for preliminary injunctive relief was denied on the basis that Petitioners failed to demonstrate any irreparable injury if the ZBA proceedings were permitted to proceed. That Decision and Order further set a briefing schedule on the merits of the petition, which is now fully briefed and submitted for decision.

DISCUSSION

CPLR 7803(3) provides, in relevant part: "The . . . questions that may be raised in a proceeding under [CPLR article 78] are . . . whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion[.]" A determination is arbitrary and capricious or an abuse of discretion "when it is taken without sound basis in reason or regard to the facts" (*Matter of Sternberg v NY State Off. for People with Dev. Disabilities*, 204 AD3d 680, 682 [2d Dept 2022] [internal quotation omitted]), or is "unreasonable, irrational or indicative of bad faith" (*Matter of Zutt v State*, 99 AD3d 85, 97

[2d Dept 2012] [internal quotation omitted]). "In general, the petitioner has the burden of proving the allegations of his or her petition in a CPLR article 78 proceeding" (*Matter of Poster v Strough*, 299 AD2d 127, 138 [2d Dept 2002], citing *Bergstein v Bd. of Educ.*, 34 NY2d 318, 323 [1974]).

Pursuant to Town Law § 267-b, a zoning board of appeals "may reverse or affirm, wholly or partly, or may modify the . . . interpretation or determination . . . by the administrative official charged with the enforcement of the [zoning] ordinance" (Town Law § 267-b[1]). "In a proceeding pursuant to CPLR article 78 to review a determination of a zoning board of appeals, a zoning board's interpretation of its zoning ordinance is entitled to great deference, and judicial review is generally limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion" (*Matter of Cradit v Southold Town Zoning Bd. of Appeals*, 179 AD3d 1058, 1060 [2d Dept 2020] [internal quotation marks omitted]).

Initially, while Petitioners raise challenges to the ZBA Determination and to the Zoning Administrator's determinations, the Court will only consider the challenges to the ZBA Determination, as any determination by a code enforcement officer is subject to appeal to the Zoning Board (Town Law §§ 267-a[4], 267-b[1]; Zoning Code § 420[1]). Such interpretations are, therefore, not final and not subject to article 78 review (*Matter of E. Ramapo Cent. Sch. Dist. v King*, 29 NY3d 938 [2017]).

Petitioners' First Cause of Action Regarding the Interpretation of Town Code § 391.7

Petitioners assert in their first cause of action that Town Respondents' interpretation of Zoning Code § 391.7 as applied to Respondent Yadgard's proposed pool was arbitrary, capricious, not supported by substantial evidence, and clearly affected by an error of law. The ordinance, entitled "Nonconforming uses, buildings, and structures," provides:

> A nonconforming use of land, buildings, and other structures may be continued in accordance with the following provisions and limitations:
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> . . .
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> 7. Nonconforming structures or structures containing nonconforming uses may be enlarged, extended, reconstructed, or altered by a maximum of twenty-five percent (25%) of the aggregate gross floor area of the structure sought to be enlarged as it existed on May 13, 1971, or up to the maximum lot coverage allowed in the zoning district in which the nonconforming structure is located, as provided in Appendix B, whichever is less. Such extension or enlargement of a nonconforming building or other structure must be by special permit from the Zoning Board of Appeals pursuant to Section 470, Special Permits, of this Local Law and subject to Site Plan approval from the Planning Board.

Additionally, Code § 390, entitled "Nonconforming uses, buildings, and lots," states, in relevant part: "It is the intent of this [Zoning Code] that nonconformities should not be expanded except as indicated herein."

In the ZBA Determination, the ZBA found, in relevant part:

> We find no ambiguity in the reading of Code §391.7 as it applies to this case. The Code only restricts the expansion of "nonconforming uses, buildings, and structures", as plainly stated in the title. This section of the Code plainly provides a restriction that applies to the existing nonconforming structure, not new structures. Cornell's counsel would be correct if Yadgard was looking to expand the house. In that case, the Town would need to reference the size of the structure as it existed on May 13, 1971 ("1971") and the Code would prohibit expansion by more than 25% of the aggregate gross floor area. This Code section does not restrict the construction of new structures. As the pool is a new structure, the restrictions provided for in Code §391.7 do not apply.
>
> Does this mean that an owner of a nonconforming structure has carte blanche, as Cornell counsel suggests, to build a separate structure as big as the property owner desires? Certainly not, the property would still be restricted by the bulk regulations of Appendix B pertaining to lot coverage, along with all the other zoning restrictions that apply. Moreover, the argument that a 2-foot expansion to an existing structure would require a special use permit and site plan while a 1000 square feet new structure would not ignores the fact that the new structure here is an "accessory" use permitted "as of right" under the Code in a RR-10 district. Any property owner in an RR-10 district would be required to obtain a variance, if the permitted accessory structure resulted in lot coverage beyond the 10% restriction.
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> . . .
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> We find that Code §391.7 does not apply because the existing "nonconforming structure" is not what is being "enlarged, extended, reconstructed, or altered". And since the Code §391.7 look back only applies to the enlargement of an existing structure, what was out there in 1971 is irrelevant.

Petitioners assert that this interpretation was erroneous, arguing that this ordinance "does not permit the addition of new structures" and "allows [only] limited changes to what already exists, provided allowable [lot] coverage is not exceeded, and other important requirements are

met." Petitioners argue in the alternative that the proposed pool is, in fact, an expansion of the existing residence, since it will be connected by a patio and surrounded by a fence; and that as a result, the ZBA was required to determine the lot coverage as of May 31, 1971 and assess whether the proposed improvements would exceed a 25% expansion of the gross floor area.

As applied in this matter, Town Respondents' interpretation of Zoning Code § 391.7 was rational insofar as it was determined that the ordinance does not strictly prohibit the addition of a permitted accessory structure on a nonconforming lot, such as Respondent Yardgard's proposed swimming pool. Town Respondents properly relied on the language of §§ 390 and 391 of the Zoning Code, including references to limitations on existing structures only, and the absence of any specific prohibition against new structures. Town Respondents also rationally determined that the proposed pool and related improvements constituted a new structure and not an expansion of the existing residence, regardless of whether the improvements would be in contact with the residence, as "structure" is defined in the Zoning Code as: "Any building or thing constructed or erected on the ground *or by attachment to something on the ground*" (Code § 610, "STRUCTURE"). Finally, Town Respondents properly determined that because the proposed pool would be a nonconforming structure due to the pre-existing exceedance of the lot coverage limitation in the Zoning Code, a variance from that limitation was necessary.

Petitioners further argue in their supporting memorandum of law and reply submissions that other provisions of the Zoning Code prohibit the proposed pool, and that Respondents have failed to address those arguments, essentially representing a concession by Respondents of the validity of those arguments. However, the cited Code provisions are not applicable here, and therefore cannot be the basis for annulling the ZBA Determination. Subsections 1 and 2 of Code § 391, by their plain terms, apply only to nonconforming *uses*, not structures—and for the reasons discussed herein, a swimming pool is a permitted (*i.e.*, conforming) use. Petitioners rely in the alternative on Code § 392.5, to argue that this ordinance eliminates the ZBA's authority to grant lot coverage variances. Such reliance is also misplaced, as that subsection states, in relevant part, that the ZBA has "the authority to modify the *lot setback requirements*," *i.e.*, the overall dimensional requirements for lot setback distances as set forth in Appendix B: Schedule of Area and Bulk Regulations. The subsection does not mention the word "variance," nor does it imply that it eliminates or limits the ZBA's authority to grant area variances from any existing or modified setback requirements (*cf.* Code § 420; Town Law § 267-b[3]). Rather, read together with the rest of the Zoning Code, as the Court must (*see Peyton v New York City Bd. of Standards and Appeals*, 36 NY3d 271, 279 [2020]), Code § 392.5 grants the ZBA *additional* authority to modify a lot's entire setback, consistent with the ZBA's authority to issue area variances from setback requirements for specific land use applications. Thus, while the foregoing Code provisions may not have been specifically addressed in Respondents' opposition memoranda, nor addressed in the ZBA Determination, Petitioners have failed to meet their burden of proof to demonstrate that these provisions entitle them to the relief sought (*Matter of Poster*, 299 AD2d at 138).

Accordingly, the Court is required to defer to the ZBA's interpretation and application of Code § 391.7 here, as well as its and overall interpretation that Respondent Yadgard's proposed pool is not strictly prohibited by the Zoning Code. Petitioners' first cause of action must therefore be dismissed (*Peyton*, 36 NY3d at 285–286; *Matter of Jacoby Real Prop., LLC v Malcarne*, 96

AD3d 747 [2d Dept 2012]; *Matter of Scarsdale Shopping Ctr. Assoc. v Bd. of Appeals on Zoning for New Rochelle*, 64 AD3d 604 [2d Dept 2009]).

Petitioners' Second Cause of Action Regarding the Zoning Administrator's Finding on May 3, 2023 that the Property Was in Violation of the Zoning Code

Petitioners assert in their second cause of action that Town Respondents unlawfully reversed the Zoning Administrator's determination, set forth in a letter dated May 3, 2023 that Respondent Yadgard's property was "in violation of the [lot coverage restrictions] of the Zoning Code, and that no building permit could be issued for the proposed swimming pool." Petitioners argue that because Respondent Yadgard did not appeal that determination, Respondents were bound by that determination going forward. Petitioners further argue that because the property was found to be in violation of the Zoning Code, the ZBA was prohibited from considering Respondent Yadgard's variance applications pursuant to Code § 403.

In the ZBA Determination, the ZBA held with respect to this issue:

> The ZA clarified in the December 15, 2023 determination that the use of the term "violation" in the May 3, 2023 determination was meant to convey that the property already exceeds the permitted lot coverage, not that the existing structures are unlawful as the existing structures predate the enactment of zoning and are legal nonconforming.
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> . . .
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> There is no "violation" because, according to the ZA, the structures on the property predate zoning. The question is whether the current lot coverage is unlawful. We answer that question in the negative. This conclusion is supported by the fact that the ZA "stated two municipal record searches were made in 2019 and 2022, each by a different ZA, state that no violations are known to exist." See ZA December 15, 2023 determination. The ZA further acknowledged that his use of the word "violation" was imprecise and then clarified in his December 15, 2023 determination that the existing nonconformity is not unlawful. *Id.*

The ZBA further held that, regardless of the wording used by the Zoning Administrator, Code § 403 only prohibits the ZBA from considering applications for properties subject to a written cease and desist order, and it is undisputed that no such order was ever issued to Respondent Yadgard.

As it is undisputed that Respondent Yadgard's property exceeded the lot coverage limitation in the Zoning Code prior to the Code's adoption, that exceedance represents a lawful pre-existing nonconformity (*see, e.g.*, *Matter of Dawson v Zoning Bd. of Appeals of Town of Southold*, 12 AD3d 444, 445 [2d Dept 2004] [pre-existing nonconforming building entitled to certificate of occupancy]). As a result, Town Respondents could not be bound in further

proceedings by the Zoning Administrator's prior erroneous determination that the exceedance represented a violation of the Zoning Code (*Parkview Assoc. v New York*, 71 NY2d 274, 282 [1988] [City may revoke a building permit issued in error, notwithstanding lack of prior challenge to its issuance]; *see also Matter of Perlbinder Holdings, LLC v Srinivasan*, 27 NY3d 1, 7 [2016]). Accordingly, Petitioners' second cause of action is without merit and must be dismissed.

Petitioners' Third Cause of Action Regarding Town Respondents' Failure to Determine Lot Coverage as of May 13, 1971

As set forth above with respect to Petitioners' first cause of action, Town Respondents rationally determined that Zoning Code § 391.7 did not apply to the proposed pool. As a result, Town Respondents also properly determined that they were not required to make any determination under that ordinance as to the "aggregate gross floor area of the structure sought to be enlarged as it existed on May 13, 1971." Accordingly, Petitioners' third cause of action is without merit and must be dismissed.

Petitioners' Fourth Cause of Action Regarding the Requirement for a Use Variance

Petitioners assert in their fourth cause of action that "[t]he ZBA improperly decided that [Respondent Yadgard's] application[s] present[ ] issues of area variances, not a use variance," based upon Petitioners' arguments that the Zoning Code does not permit the construction of new structures. Town Respondents correctly argue in opposition, however, that single-family residences and accessory structures such as swimming pools are expressly permitted uses under the Zoning Code, and that no variance is required (*see* Town Law § 267[1][a] ["'Use variance' shall mean the authorization by the zoning board of appeals for the use of land *for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations*"] [emphasis added]; *see Rte. 17K Real Estate, LLC v Zoning Bd. of Appeals of Town of Newburgh*, 168 AD3d 1065, 1066 [2d Dept 2019], *lv to appeal denied* 33 NY3d 905 [2019]; *Matter of Jacoby Real Prop., LLC v Malcarne*, 96 AD3d 747 [2d Dept 2012]). Accordingly, Petitioners' fourth cause of action is without merit and must be dismissed.

Petitioners' Fifth Cause of Action Regarding Town Respondents' Failure to Properly Calculate Existing Lot Coverage

In their fifth cause of action, Petitioners assert that Town Respondents unlawfully adopted a computation of lot area coverage by the Zoning Administrator which did not include measurements of a second driveway on the property. This claim bears only on the issue of whether the existing structures on Respondent Yadgard's property exceed the maximum allowable lot area coverage of 10%, which, as discussed above, is not disputed regardless of whether any other purported structures are included in the calculation. Based on this finding, the ZBA properly held that a variance from the lot area coverage limitation would be necessary, regardless of whether any other structures may have been omitted from the calculation. Since including the second driveway in the lot coverage calculation would not have changed the ZBA's determination, Petitioners' fifth cause of action is without merit and must be dismissed.

Petitioners' Sixth Cause of Action Regarding Town Respondents' Finding of a Violation on the Property as Precluding ZBA Consideration of the Applications

In their sixth and final cause of action, Petitioners assert that the ZBA was and remains precluded from considering Respondent Yadgard's variance applications, due to the Zoning Administrator's prior determination that the property was in violation of the lot coverage limitation in the Zoning Code. This is essentially the same claim as raised in Petitioners' second cause of action, and is without merit for the reasons discussed above.

Based on the foregoing, it is hereby

ORDERED that the petition is dismissed in its entirety.

The foregoing constitutes the decision and order of the Court.

Dated: August 28, 2024
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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