

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 22-01151

PRESENT: WHALEN, P.J., CURRAN, BANNISTER, AND OGDEN, JJ.

IN THE MATTER OF MARGUERITE A. ROSS,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

VILLAGE OF FAYETTEVILLE, VILLAGE OF FAYETTEVILLE ZONING BOARD OF APPEALS, MICHAEL JONES, IN HIS CAPACITY AS CODE ENFORCEMENT OFFICER OF VILLAGE OF FAYETTEVILLE, FOUBU ENVIRONMENTAL SERVICES, LLC, NORTHWOOD REAL ESTATE VENTURES, LLC, RESPONDENTS-RESPONDENTS, AND VILLAGE OF FAYETTEVILLE PLANNING BOARD, INTERESTED OR NECESSARY PARTY.

KNAUF SHAW LLP, ROCHESTER (JONATHAN R. TANTILLO OF COUNSEL), FOR PETITIONER-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR RESPONDENTS-RESPONDENTS VILLAGE OF FAYETTEVILLE, VILLAGE OF FAYETTEVILLE ZONING BOARD OF APPEALS AND MICHAEL JONES, IN HIS CAPACITY AS CODE ENFORCEMENT OFFICER OF VILLAGE OF FAYETTEVILLE.

BARCLAY DAMON LLP, SYRACUSE (KEVIN G. ROE OF COUNSEL), FOR RESPONDENT-RESPONDENT FOUBU ENVIRONMENTAL SERVICES, LLC.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (KATHLEEN M. BENNETT OF COUNSEL), FOR RESPONDENT-RESPONDENT NORTHWEST REAL ESTATE VENTURES, LLC.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered June 27, 2022, in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul a determination of respondent Village of Fayetteville Zoning Board of Appeals (ZBA) that adopted the interpretation of respondent Michael Jones, in his capacity as Code Enforcement Officer of the Village of Fayetteville (CEO), that the zoning code of respondent Village of Fayetteville (Village) permits an alteration, renovation, or redevelopment of a lawfully nonconforming

structure that results in a smaller, but still nonconforming, structure without loss of the structure's lawfully nonconforming status. Supreme Court denied the petition and petitioner appeals.

The present matter concerns the proposed redevelopment of a vacant 137,000-square-foot die casting facility by respondent Northwood Real Estate Ventures, LLC, on property owned by respondent Foubu Environmental Services, LLC (collectively, developers), into a 56,550-square-foot grocery store. The existent die casting facility is located on the portion of the property zoned for industrial uses, and the die casting facility has been certified as a lawful nonconforming structure within the meaning of the zoning code inasmuch as it preexisted the zoning code's current prohibition of buildings in excess of 10,000 square feet in industrial zones. Under section 187-14 of the Fayetteville Zoning Code, prior lawful nonconforming structures may continue to be "used, repaired and maintained" and, under certain circumstances, even be enlarged without losing their status as lawfully nonconforming. Section 187-14 is silent, however, with respect to any reduction in the size of the lawful nonconforming structure.

Here, the ZBA adopted the CEO's rationale that the significant alteration and redevelopment of the die casting facility proposed by the developers, including the demolition of the existent walls and floors down to all or part of a concrete slab foundation, constituted a use, repair, or maintenance of that structure such that the resulting grocery store remained a lawful nonconforming structure within the meaning of the zoning code. Initially, as the ZBA noted in its resolution, the terms " 'used,' 'repaired,' and 'maintained' " are not expressly defined in the Fayetteville Zoning Code. Contrary to petitioner's contention, the ZBA's interpretation of those undefined terms is not a matter of "pure statutory construction," but rather the ZBA's interpretation of those terms and application of them to the subject property is a determination that would benefit from the expertise of specialists in land use planning (*Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 419-420 [1998]; see *Cleere v Frost Ridge Campground, LLC*, 155 AD3d 1645, 1648 [4th Dept 2017]). In concluding that the proposed grocery store would be the result of the use, repair, and/or maintenance of the existent lawful nonconforming structure, the CEO opined, among other things, that those terms included more than just incidental painting or landscaping but also encompassed more significant changes, such as alterations required to ensure the structure's continued compliance with applicable building and property codes. Further, the modification of the existent lawful nonconforming structure from one permitted industrial zone use (here, the prior use of die casting) to another permitted use (the retail grocery store) would require significant alterations to the structure even absent a change in the overall square footage. The proposed redevelopment here also included a significant brownfield remediation, which the CEO characterized as the ultimate repair of the existent lawful nonconforming structure (see generally ECL 27-1403). As the ZBA expressly noted in its resolution, although the proposed grocery store would remain nonconforming, the redevelopment would reduce the degree

of that nonconformity by over 50%, thereby improving the overall property pursuant to the intent of the zoning code. Inasmuch as that interpretation of section 187-14 "is neither 'irrational, unreasonable nor inconsistent with the governing statute' " (*New York Botanical Garden*, 91 NY2d at 419), we affirm.