**SUPREME COURT – STATE OF NEW YORK**
**COUNTY OF NASSAU**

**PRESENT: HON. EILEEN C. DALY-SAPRAICONE**
**JUSTICE OF THE SUPREME COURT**

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**FRAN BIONDI, JAMIE NICHOLLS, AND VICTORIA GREENLEAF KEMPNER,**

**Petitioners/Plaintiffs,**

**For An Order Pursuant To Article 78 Of The Civil Practice Law And Rules**

**-against-**

**THE BOARD OF ZONING APPEALS OF THE INCORPORATED VILLAGE OF MILL NECK, ANNE BARNES AND JACK BARNES,**

**Respondents/Defendants.**

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**TRIAL/IAS PART 19**
**INDEX NO.: 622567/2024**

**Motion Seq. No.: 001, 002, 003**
**Motion Submitted: 04/09/2025**

**DECISION AND ORDER**
**XXX**

The following papers were read on this motion — NYSCEF DOCUMENT NUMBERS

| | |
|---|---|
| Notice of Petition, Petition, First Amended Petition, Exhibits ..... | 1 – 25, 34, 35 |
| Notice of Motion, Affirmation, Exhibits, Statement of Facts, Memorandum of Law, Affirmation ..... | 36 – 49 |
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| Affirmations, Memorandum of Law in Opposition, Affirmation, Response to Statement of Material Facts, Exhibits ..... | 55 – 61, 63 |
| Memorandum of Law in Opposition ..... | 62 |
| Reply Memorandum ..... | 65 – 66 |
| Affirmation in Opposition, Exhibits, Response to Statement of Material Facts ..... | 67 – 76 |
| Notice of Cross-Motion, Affirmation, Exhibits Memorandum of Law .... | 77 – 87 |
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The Court also held oral argument on April 23, 2025.

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Upon the foregoing e-filed documents, the within hybrid proceeding commenced by the petitioners, Fran Biondi, Jamie Nicholls and Victoria Greenleaf Kempner [hereinafter collectively the Petitioners], for a judgment pursuant to Article 78 of the CPLR annulling the decision issued by respondent, the Board of Zoning Appeals for the Incorporated Village of Mill Neck [hereinafter the BZA], together with related declaratory relief (Sequence #001), the Petitioners' application for an order pursuant to CPLR 3212 granting summary judgment in their favor on the Third, Fourth, Fifth and Sixth causes of action in the petition (Sequence #002) and the cross motion interposed by the respondents, Anne Barnes and Jack Barnes [hereinafter collectively the Barnes], for an order pursuant to CPLR 3212 granting summary judgment dismissing the Petitioners' Third, Fourth, Fifth and Sixth causes of action (Sequence #003), are consolidated for disposition and determined as set forth below.

The Barnes are the owners of the real property situated at 59 Private Road located in the Village of Mill Neck [hereinafter the Village], which consists of a 5.21 acre parcel [hereinafter the Property] improved by a two story single family dwelling regarding which a certificate of occupancy was issued with a rear yard setback of 66.2 feet notwithstanding the Village Code requiring a rear yard setback of 75 feet (NYSCEF Doc No. 17 at ¶¶6-9). In 2020, the Barnes' predecessors in title to the Property requested and received a variance "to permit the construction of a one-story addition to the rear of the dwelling to have a rear yard setback of 55 feet rather than the required 75 feet" [hereinafter the 2020 Variance] (NYSCEF Doc No. 2 at p. 4).

On or about March 22, 2024, the Barnes filed an application for a permit to build a detached 3 car garage and a second story addition which was denied by the Village Building Department [hereinafter the Denial] (NYSCEF Doc No. 17 at ¶ 34;NYSCEF Doc No. 22). The Barnes thereafter appealed the Denial to the BZA simultaneously seeking area variances to construct the afore-noted detached three car garage "which would have a rear yard setback of 53 feet rather than the required 75 feet" and to add a "proposed second story addition over the pre-existing, non-conforming dwelling to have a rear year setback of 66.2 feet rather than the required 75 feet" (NYSCEF Doc No. 2 at p. 6). On November 20, 2024, after a series of public hearings convened on May 29, July 24 and September 23, 2024, the BZA, having balanced the factors set forth in Village Law 7-712-b (3)(b), granted the requested variance as to the garage and resolved that the totality of the contemplated actions were "Type II" requiring "no further environmental review" under SEQRA [hereinafter the Decision] (NYSCEF Doc No. 2 at pp. 3,6). The BZA further found that "the proposed additions to the dwelling", would "result in a 63,078 cubic foot increase in cubic volume . . . , or 21.8% where the maximum permitted is a 25% increase" and "[a]ccordingly, no variance of Section 129-79-C . . . [was] required" (*id.* at p. 5).

On December 17, 2024, the Petitioners, all of whom are neighboring landowners, commenced the within hybrid proceeding asserting six causes of action (NYSCEF Doc No. 17). The First and Second causes of action seek judgment annulling the Decision as arbitrary and capricious and in contravention of Village Law 7-712-b (3)(b) and Village Code 127-79, with the Third cause of action relatedly demanding judgment declaring the Decision was rendered in violation of Village Code 129-79 (*id.*) The Petitioners' Fourth cause of action seeks judgment declaring that the Decision violated SEQRA, with the Fifth and Sixth causes of action further demanding judgment declaring that the BZA lacked the authority and jurisdiction to grant the

variances until such time that the Village Planning Board and Village Building Inspector reviewed the work referable to the proposed garage and issued the requisite permits for steep slope land (*id.*).

As relevant here, Village Code 129-79 (A) provides "[t]he repair or alteration of a nonconforming building lawfully existing at the effective date of this chapter is permitted, subject to this § 129-79 and to § 129-80, provided that such repair or alteration shall not increase the degree of nonconformity of the building or extend a nonconforming use" (*id.* at ¶20). Additionally, Village Code 129-79 (C) provides that "[a] nonconforming building containing a conforming use and lawfully existing at the effective date of this chapter may be altered, subject to § 129-79A, provided that such alteration will result in a conforming building or such alteration is required by law or any addition to a nonconforming dwelling shall conform to all applicable requirements of this chapter and that such addition shall not increase the cubical content of the altered dwelling by more than 25% in any case" (*id.* at ¶21).

In seeking hybrid relief, the principal contention posited by the Petitioners, in their moving papers, as well as at oral argument, is that in granting approval referable to an already non-conforming dwelling, the BZA incorrectly interpreted Village Code §§ 129-79 (A) and (C) and concomitantly violated same effectively creating "an ever-expanding universe from which" nonconforming uses can be continually augmented (tr at 9, line 16, through 19, lines 6-7; NYSCEF Doc No. 44 at pp. 3-10). More specifically, the Petitioners maintain that in bestowing its approval, the BZA improperly neglected to include the dwelling's prior expansion as permitted by the 2020 Variance when concluding that the proposed additions would only result in a 21.8% cubic foot increase and thus were within the 25% maximum as provided in the Village Code (NYSCEF Doc No. 44 at pp. 6-10,16). The Petitioners stress that the BZA squarely rejected considering the prior additions and in direct contravention of the Village Code improperly concluded that with each successive variance application, "there is an additional reset" and "a new baseline to start from" in determining compliance with the Village Code (*id.* at p. 7).

In opposing the relief herein requested, the Village and the Barnes, who also cross move seeking dismissal of the plenary claims, argue, inter alia, that the Petitioners have failed to exhaust their administrative remedies and that the BZA properly interpreted the provisions of Village Code § 129-79 (C) which "explicitly measures volume from each subsequent addition to the previously altered dwelling" (NYSCEF Doc Nos. 60, 87).

"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 Brancato v Zoning Bd. of Appeals of City of Yonkers, N.Y.*, 30 AD3d 515, 515 [2d Dept 2006] [internal citations omitted]). "Nevertheless, a narrow but well recognized exception to this rule exists where 'the question is one of pure legal interpretation of statutory terms,' in which case deference to the zoning board is not required" (*151 Rte. 17M Assoc., LLC v Zoning Bd. of Appeals of Vil. of Harriman,* 19 AD3d 422, 424 [2d Dept 2005] quoting *Matter of Toys R Us v Silva*, 89 NY2d 411, 419 [1996]). In the matter *sub judice*, the central dispute between the parties centers around whether the provisions embodied in Village Code § 129-79 (C) contemplate measuring the 25% cap on "cubic content" by either starting de

novo with each newly proposed addition or by including any prior additions to the subject dwelling. Thus, as the main issue herein is one directly implicating the interpretation of Village Code § 129-79 (C), it falls within the exception and the deference that would normally be accorded to the BZA's Decision is not required (*id.*).

Of particular relevance herein, in its Decision, the BZA explicitly found that "the [Barnes'] dwelling is pre-existing, [and] non-conforming with respect to the now required 75 foot rear yard setback" (NYSCEF Doc No. 2 at p. 4). "'A use of property that existed before the enactment of a zoning restriction that prohibits the use is a legal nonconforming use, but the right to maintain a nonconforming use does not include the right to extend or enlarge that use'" (*Matter of Sand Land Corp. v Zoning Bd. of Appeals of Town of Southampton,* 137 AD3d 1289, 1291-92 [2d Dept 2016] quoting *Matter of McDonald v Zoning Bd. of Appeals of Town of Islip*, 31 AD3d 642, 642-643 [2d Dept 2006]). "Indeed, '[b]ecause nonconforming uses are viewed as detrimental to zoning schemes, public policy favors their reasonable restriction and eventual elimination'" (*id.* at 1292 quoting *Matter of 550 Halstead Corp. v Zoning Bd. of Appeals of Town/Vil. of Harrison*, 1 NY3d 561, 562 [2003]). Guided and informed by the foregoing, to adopt the interpretation of Village Code §§ 129-79 (A) and (C) as urged by the Respondents [the Barnes and the Village] and undisputably employed by the BZA would be to contravene the "public policy of eventually extinguishing all nonconforming uses" (*Steiert Enterprises, Inc. v City of Glen Cove*, 90 AD3d 764, 768 [2d Dept 2011] quoting *Matter of McDonald v Zoning Bd. of Appeals of Town of Islip,* 31 AD3d at 643 [internal quotation marks omitted];*Matter of Sand Land Corp. v Zoning Bd. of Appeals of Town of Southampton,* 137 AD3d at 1292).

Additionally, in interpreting a statute, it "must be given 'a sensible and practical over-all construction, which ... harmonizes all its interlocking provisions'" (*Bank of Am., N.A. v Kessler,* 39 NY3d 317, 325 [2023] quoting *Matter of Long v Adirondack Park Agency*, 76 NY2d 416, 420 [1990]). Moreover, "[i]t is a well-settled principle of statutory construction that a statute or ordinance must be construed as a whole and that its various sections must be considered together and with reference to each other" (*People v Mobil Oil Corp.*, 48 NY2d 192, 199 [1979]). To embrace the construction advocated by the Respondents [the Barnes and the Village] that § 129-79 (C) "explicitly measures volume from each subsequent addition" would effectively nullify 129-79 (A), the latter of which is expressly incorporated into the former and provides that a "repair or alteration shall not increase the degree of nonconformity of the building or extend a nonconforming use" (*id.*;*Bank of Am., N.A. v Kessler,* 39 NY3d at 325).

Further, in considering the requested variances for the garage, the BZA specifically stated that it weighed the factors articulated in Village Law § 7–712–b(3)(b) which requires it to "consider whether: (1) an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance, (2) the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance, (3) the requested area variance is substantial, (4) the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district, and (5) the alleged difficulty was self-created" (*Matter of Nathan v Zoning Bd. of Appeals of Vil. of Russell Gardens,* 95 AD3d 1018, 1018-1019 [2d Dept 2012]). However, consistent with the foregoing, given the BZA's misinterpretation of the Village Code, the Court finds that it did not appropriately consider the impact on nearby properties in permitting

the expansion of an already nonconforming dwelling (*id.*). Moreover, in ultimately granting approval as to the proposed garage, the BZA found that "[t]he attached garage that was originally a part of the dwelling had been converted to habitable space by a prior owner, leaving the [P]roperty without a garage" (NYSCEF Doc No. 2 at p. 4). However, such factual finding is in stark contradiction to that set forth in the decision granting the 2020 Variance where the BZA particularly acknowledged that "[t]he existing family room is on the eastern end of the dwelling and will be reconverted into a 2 car garage as it was originally designed when the dwelling was built" (NYSCEF Doc No. 3 at p. 4).

Finally, to the extent that the Respondents [the Barnes and the Village] assert the Petitioners failed to exhaust their administrative remedies by not appealing the Denial issued by the Building Department prior to seeking judicial review, such contention is unavailing as they were not the aggrieved party
(*Matter of Kaufman v Inc. Vil. of Kings Point*, 52 AD3d 604, 607 [2d Dept 2008]).

Based upon the foregoing, it is hereby

**ORDERED and ADJUDGED,** that the Petitioners' proceeding on petition seeking judgment pursuant to Article 78 of the CPLR on the First and Second causes of action annulling the BZA's Decision issued on November 20, 2024 as arbitrary and capricious in violation of Village Law 7-712-b (3)(b) and Village Code §§ 129-79 (A) and (C) is **GRANTED** and the Decision is annulled (Sequence #001); and it is further

**ORDERED and ADJUDGED,** that the Petitioners' application made pursuant to CPLR 3212 granting summary judgment on their Third plenary claim declaring that the BZA's Decision violated Village Code §§ 129-79 (A) and (C) is **GRANTED** (Sequence #002) and this Court declares that the BZA's Decision dated, November 20, 2024, violated the provisions set forth in Village Code §§ 129-79 (A) and (C); and it is further

**ORDERED and ADJUDGED,** that the Petitioners' application for an order pursuant to CPLR 3212 granting summary judgment on their plenary claims denominated Fourth, Fifth and Sixth is **DENIED** as moot (Sequence #002); and it is further

**ORDERED and ADJUDGED,** that the Barnes' cross motion for an order pursuant to CPLR 3212 granting summary judgment dismissing the Petitioners' Third, Fourth, Fifth and Sixth causes of action is **DENIED** as moot (Sequence #003).

This constitutes the Decision, Order and Judgment of this Court.

Dated: June 13, 2025
Mineola, New York

ENTER:

**HON. EILEEN C. DALY-SAPRAICONE, J.S.C.**

ENTERED
Jun 20 2025
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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