

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D20954
W/hu

_____AD3d_____

Argued - October 14, 2008

ROBERT A. LIFSON, J.P.
FRED T. SANTUCCI
RUTH C. BALKIN
ARIEL E. BELEN, JJ.

2007-07597
2008-00264

DECISION & ORDER

In the Matter of Scott J. Straub, et al., respondents,
v Christopher Modelewski, etc., et al., appellants.

(Index No. 22759/06)

John J. Leo, Town Attorney, Huntington, N.Y. (James F. Matthews of counsel), for appellants.

Margolin & Margolin, Huntington, N.Y. (James S. Margolin of counsel), for respondents.

In a proceeding pursuant to CPLR article 78 to review a determination of the Zoning Board of Appeals of the Town of Huntington dated July 13, 2006, made after a hearing, that the petitioners' use of an existing cottage on their real property is not a continuation of a preexisting nonconforming use, the Zoning Board of Appeals of the Town of Huntington appeals from (1) an order of the Supreme Court, Suffolk County (Whelan, J.), dated June 19, 2007, and (2) a judgment of the same court dated October 24, 2007, which, upon the order, granted the petition and annulled the determination.

ORDERED that the appeal from the order is dismissed, without costs or disbursements; and it is further,

ORDERED that the judgment is affirmed, without costs or disbursements.

November 5, 2008

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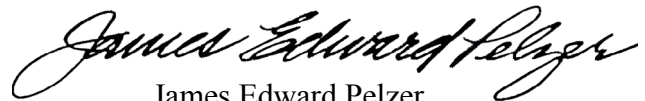
MATTER OF STRAUB v MODELEWSKI

The appeal from the order must be dismissed since an order made in a CPLR article 78 proceeding is not appealable as of right (*see* CPLR 5701[b][1]; *see Matter of Petrocelli v Zoning Bd. of Appeals of Vil. of Kings Point*, 281 AD2d 423).

The Supreme Court properly annulled the determination of the Zoning Board of Appeals of the Town of Huntington that the petitioners failed to establish that the continuous nonconforming use, as a residential dwelling, of a cottage in the rear of their property began prior to the 1934 enactment of the relevant zoning code, since the determination was without a rational basis and was not based on the evidence in the record (*see Matter of Piesco v Hollihan*, 47 AD3d 938; *Matter of O-Co 'Nee Civic Assn. v Scheyer*, 288 AD2d 386; *Matter of Doyle & Doyle v Rush*, 241 AD2d 494; *cf. Matter of RJA Holding Inc. v Town of Wappingers Zoning Bd. of Appeals*, 37 AD3d 724; *Matter of Mohan v Zoning Bd. of Appeals of Town of Huntington*, 1 AD3d 364; *Matter of McQuade v Zoning Bd. of Appeals of Town of Huntington*, 248 AD2d 386).

LIFSON, J.P., SANTUCCI, BALKIN and BELEN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court