

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

D12986
C/cb

_____AD3d_____

Argued - November 2, 2006

HOWARD MILLER, J.P.
GABRIEL M. KRAUSMAN
STEVEN W. FISHER
MARK C. DILLON, JJ.

2005-09281

DECISION & JUDGMENT

In the Matter of 1491 Richmond Road, LLC,
petitioner, v New York City Board of
Standards and Appeals, et al., respondents.

(Index No. 8425/04)

Stuart A. Klein, New York, N.Y. (Heather C. Petralia of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Larry A. Sonnenshein,
Sharyn Rootenberg, and Grace Goodman of counsel), for respondents.

Proceeding pursuant to CPLR article 78 to review a determination of the respondent New York City Board of Standards and Appeals dated October 26, 2004, which modified the certificate of occupancy issued by the respondent New York City Department of Buildings to provide that a nonconforming retail use may not be maintained on the first floor of the subject premises.

ADJUDGED that the determination is confirmed, the petition is denied, and the proceeding is dismissed on the merits, with costs.

The Supreme Court erroneously transferred this proceeding to this court pursuant to CPLR 7804(g) (*see Matter of Sasso v Osgood*, 86 NY2d 374; *Matter of Halperin v City of New Rochelle*, 24 AD3d 768). Nonetheless, this court will decide the case on the merits in the interest of judicial economy (*see Matter of Halperin v City of New Rochelle, supra; Matter of Carlucci v Board of Zoning Appeals of Town of Philipstown*, 205 AD2d 688).

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The determination of the respondent New York City Board of Standards and Appeals that the nonconforming use had been discontinued for a period of more than two years, and thus, that the petitioner had no legal right to operate a retail store use on the premises, had a rational basis and was neither arbitrary nor capricious (*see* NY City Zoning Resolution § 52-61; *Matter of Cowan v Kern*, 41 NY2d 591, 599; *see also Matter of Toys “R” Us v Silva*, 89 NY2d 411, 418-419, 421-422; *Matter of Ponte Equities v Chin*, 284 AD2d 283, 284; *Matter of Pica v Bennett*, 164 AD2d 859, 861-862).

MILLER, J.P., KRAUSMAN, FISHER and DILLON, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court