

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

D18406
G/kmg

_____AD3d_____

Argued - February 19, 2008

PETER B. SKELOS, J.P.
ROBERT A. LIFSON
FRED T. SANTUCCI
RUTH C. BALKIN, JJ.

2006-10212

DECISION & ORDER

In the Matter of Atlantic Ready Mix, Inc.,
et al., appellants, v John Macedo, etc., et al.,
respondents; Windsor Fuel Corp., Inc.,
intervenor-respondent.

(Index No. 20621/05)

Joseph R. Sanchez, Great Neck, N.Y., for appellants.

Spellman Rice Schure Gibbons McDonough & Polizzi, LLP, Garden City, N.Y. (John P. Gibbons, Jr., and Peter Trentacoste of counsel), for respondents.

Murphy, Bartol & O'Brien, LLP, Mineola, N.Y. (Kevin J. O'Brien of counsel), for intervenor-respondent.

In a proceeding pursuant to CPLR article 78 to review a determination of the Zoning Board of Appeals of the Incorporated Village of Mineola, dated December 1, 2005, which, after a hearing, denied so much of the petitioners' application as sought a use variance to operate a concrete ready-mix plant in an M-district zone, and denied, as academic, so much of the application as sought an area variance, the petitioners appeal, as limited by their brief, from so much of a judgment of the Supreme Court, Nassau County (Brandveen, J.), entered October 3, 2006, as denied the petition and dismissed the proceeding.

ORDERED that the judgment is affirmed insofar as appealed from, with costs.

We agree with the Supreme Court that the determination of the respondent Zoning

March 11, 2008

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Board of Appeals of the Incorporated Village of Mineola (hereinafter the ZBA) denying so much of the application as sought a use variance was rational and not arbitrary and capricious, as the petitioners failed to establish a basis for the granting of such a variance (*see Matter of Ifrah v Utschig*, 98 NY2d 304). The ZBA also properly denied, as academic, so much of the application as sought an area variance.

The petitioners' contentions that they had been using the subject property lawfully before the enactment of the applicable zoning law, and that the ZBA acted coercively in requiring them to apply for a use variance (*see Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330; *Matter of Grogan v Zoning Bd. of Appeals of Town of E. Hampton*, 221 AD2d 441, 442; *Matter of Clowry v Town of Pawling*, 202 AD2d 663, 665; *Matter of Berbenich v Schoenfeld*, 149 AD2d 505, 508) are improperly asserted for the first time on appeal.

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

ENTER:



James Edward Pelzer
Clerk of the Court