SHORT FORM ORDER

INDEX No. 21478-2004

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY

PRESENT:
Hon. MELVYN TANENBAUM
Justice

MOTION #002, 003 - CASE DISP
R/D:
S/D

PLTF'S/PET'S ATTY:
DELBELLO DONNELLAN WEINGARTEN
One North Lexington Avenue
White Plains, New York 10601

THE FAIRCHILD CORPORATION and STEW LEONARD'S FARMINGDALE, LLC

Petitioners,

- against -

JOSEPH H. BOARDMAN, as COMMISSIONER OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF NEW YORK,

DEFT'S/RESP'S ATTY:
NEW YORK STATE DEPT OF LAW
300 Motor Parkway, Suite 205
Hauppauge, New York 11788

Respondent.

Upon the following papers numbered 1 to 1-71 read on this motion for an order pursuant to CPLR § Notice of Motion/Order to Show Cause and supporting papers 1-32; Notice of Cross Motion and supporting papers 33-34 Answering Affidavits and supporting papers 35-37 Replying Affidavits and supporting papers 38-39 Other 40-56, 57-71; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this CPLR Article 78 petition by petitioners The Fairchild Corporation and Stew Leonard's Farmingdale, LLC seeking an order in the nature of mandamus annulling respondent's May 26, 2004 determination denying petitioners highway work permit application and compelling respondent to issue the highway permit is granted.

Petitioner Stew Leonard's Farmingdale, LLC ("Leonard's") is the May 13, 2002 contract vendee of a 19.26 acre vacant lot owned by petitioner The Fairchild Corporation ("Fairchild"). The site has an approximately 750 foot frontage on the west side of New York State Route 110 and approximately 457 foot frontage on the south side of Conklin Street. The site lies partially within the runway protection zone ("RPZ") for runway 14 at the Republic Airport.

"Leonard's" intends to develop the parcel as a retail and office complex containing a farmer's market, a garden store, an office building, a petting zoo and other retail facilities. The "Leonard's"/"Fairchild" contract is contingent upon site plan approval from the Town of Babylon Planning Board and land use approvals required for the development of the site.

On December 3, 2002 petitioner filed a site plan review application together with an environmental assessment form and a traffic impact study. The proposed site plan contained two vehicular entrances. The main entrance on the west side of Route 110 opposite an existing entrance is bisected by land approximately 25 feet by 210 feet owned by New York State. Petitioner would require an easement over this parcel to use the main entrance. The second access entrance is approximately 510 feet north of the proposed main entrance.

By letter dated December 19, 2002 the Town requested lead agency status during the environmental review process. Respondent New York State Department of Transportation ("NYSDOT") was a designated involved agency responsible for making recommendations to the lead agency. By letter dated January 28, 2003 "NYSDOT" made preliminary comments concerning petitioner's proposal:

1. The proposed Stew Leonard's building is located directly under the approach to the precision instrument runway, Runway 14-32 at Republic Airport. At the proposed building location, an aircraft on the approach to the runway would be approximately 140 foot above ground level. The development is also located within the Runway Protection Zone ("RPZ") for Runway 14. The Federal Aviation Administration recommends in F.A.A Advisory Circular 150/5300-13 that the following land uses be prohibited in the "RPZ" residences and places of public assembly (i.e. churches, schools, hospitals, office buildings, shopping centers), and other uses with similar concentration of persons. It is strongly recommended that Avilas reconsider the location of proposed buildings on the property. There appears to be an acceptable alternative to the specific location of the buildings, still on the parcel, that would essentially mitigate our concern.

2. New York State ("NYS") owns property abutting Route 110 where the Route 110 ingress-egress has been proposed. Without "NYS" approval the proposed access on Route 110 is not viable.

Public hearings were conducted before the Town Planning Board on May 5, 2003 and before the Town Zoning Board of Appeals on July 31, 2003 and January 8, 2004. On July 22, 2003 the Federal Aviation Agency ("FAA") issued a determination of no hazard to air navigation pertaining to non-interference with aircraft on the landing approach to Runway 14. On August 18, 2003 the Town Planning Board issued a negative declaration with respect to petitioner's site plan and granted site approval. The Town Zoning Board of Appeals approved the variances and special use permits required on August 21, 2003 and reapproved them on January 29, 2004.

On February 3, 2003 petitioners submitted a highway work permit application to "NYSDOT" seeking approval for access to its proposed developments from two entrances on Route 110. By letter dated October 10, 2003 "NYSDOT's" permit unit manager responded to petitioner's application:

> "In reviewing the plans submitted by Savik and Murray on behalf of Avilas, the Department has several comments below for your review. None appear to be difficult to resolve.
>
> There are however, issues that appear to be significant. They need to be resolved before proceeding. They relate to the Department's role as the owner of Republic Airport, the busiest general aviation facility in New York and the 27th busiest in the United States. The FAA has objected to the proposal to construct a Stew Leonard's store directly on the centerline of the approach to runway 14 and completely within the runway protection zone ("RPZ"). The FAA stated, in their letter of January 21, 2003 that "...this store will promote a congregation of people within the Runway Protection Zone ("RPZ") which is what the "RPZ" is specifically intended to preclude." Thus, the first significant issue is that lands owned by the State of New York, including but not limited to lands on which the MALSR is located would require an easement to be granted to Fairchild (Avilas) by the Department. The Department in turn must ask the FAA for a release of land to allow such an easement to be granted. We are in the process of determining the FAA's position and will provide it to you as soon as it is available.
>
> A second issue, also involving the FAA, relates to the Determination of No Hazard to Air Navigation which was issued on July 22, 2003. While this study has been widely quoted as showing the FAA does not object to the project, the study was appealed by the Long Island Business Aviation Association on August 20, 2003 and has resulted in withdrawal of the determination pending disposition of LIBAA's petition. Until such time as the Department is notified that the original determination stands, there is no assurance that "...the proposed structure would have no substantial adverse effect on the safe and efficient utilization of the navigable airspace by aircraft or on the operation of air navigation facilities."
>
> In light of these two significant issues being open it is inappropriate for the Department to progress this application further at this time.

"NYSDOT's" letter continued listing (26) comments concerning petitioner's proposed site plan.

By letter dated January 14, 2004 petitioner's engineers responded to "NYSDOT's" October 10, 2003 letter:

> "We are in receipt of and have reviewed your comment letter on the above referenced project. This letter sets forth comments concerning the Traffic Impact Study and Site Plans as well as issues relating to the FAA and Republic Airport. Please be advised that on Dec. 17, 2003 the U.S. Department of Transportation, Federal Aviation Administration reaffirmed the Regional's Officer Determination of No Hazard to Air Navigation. They stated that "...the Regional Office properly followed all of the necessary procedures in making the subject determination." FAA, Washington closed there letter to the petitioner with "Accordingly, your request for discretionary review is denied and the above reference Determination of No Hazard is final." The letter from FAA Washington is attached for the State's records.

In addition to this letter addressing the technical concerns set forth in your October 10, 2003 letter we are also forwarding 8 sets of revised and new drawings. The sets are broken down into 3 subsets. They are the site plans for the development of the 19+ acre site prepared by Savik & Murray, LLP, the Route 110 plans prepared by Savik & Murray, LLP and the signal plans for all involved intersections prepared by Dunn Engineering.

Our responses to comments are presented below. For ease of review your comments are repeated by our responses.

Comment No. 1: Comments pertaining to the site across the Airport Plaza will be made once easement issues are resolved.

Response No. 1: As noted previously, the easement issues are being resolved through the appropriate methods. We do not feel that the review of our submittal should be delayed. We would expect that once the easements are resolved the construction of the project should be able to proceed without further delay of beginning a review at that time".

The letter continued in response to each of the (26) comments made by "NYSDOT".

On May 26, 2004, "NYSDOT" denied petitioner's work permit application permitting access to its proposed project from Route 110. The letter from "NYSDOT's" work permit manager provides:

"This is in regard to the site plans and Traffic Study for the referenced project which were submitted to us for review.

In our October 10, 2003 letter, we raised two issues relating to your traffic plan in connection with the proposed siting of a retail facility adjacent to Route 110. The first was the question whether New York State would grant necessary easements for access to the site from Route 110 given that your proposed retail facility would be located on the centerline approach to Runway 14 at Republic Airport and in that runway's Runway Protection Zone ("RPZ"). As we noted, New York State is the owner of Republic Airport. The second was the issue of the Federal Aviation Administration's Finding of No Hazard to Air Navigation in connection with your proposal, which was not final at the time.

In your resubmittal of January 14, 2004, you cited the FAA's determination dated December 17, 2003 which upheld the Finding of No Hazard to Air Navigation. By letter dated April 5, 2004, however, the FAA clarified the Finding and New York State's obligations in connection with RPZs. The letter is attached hereto for easy reference. The letter states, "If the airport sponsor can control uses of the RPZ, then it is obligated under its Airport Improvement Program (AIP) grant assurances to prevent land uses in the RPZ that are inconsistent with AC 150/5300-13. The obligation is not advisory; it is a legal obligation under the State's AIP grant agreement with the Federal Government." The letter further clarifies that the State

"must use its powers and assert its real property interests to maintain the Republic Airport RPS consistent with FAA standards."

Our October 10, 2003 letter quoted the FAA's advice on your proposal to site a Stew Leonard's within the RPZ of Runway 14 as follows, "The FAA stated, in their letter of January 21, 2003 that "... this store will promote a congregation of people within the Runway Protection Zone (RPZ) which is what the RPZ is specifically intended to preclude."

Given the State's legal obligation, and the express direction of the FAA, this letter notifies you that the State may not and will not grant easements over property it acquired for aviation purposes because such grant of easements would act to facilitate the location of a retail establishment within the RPZ for Runway 14. Please note that many uses are permitted within an RPZ and the State will consider any request for easements which will not facilitate incompatible prohibited uses within the RPZ.

In addition, the proposed Route 110 access further to the north is also unacceptable. Although the latest submitted plans show in more detail the proposed operation of this access, the fact still remains that a mix of trucks and cars will use this access. Storage length is a concern due to the close proximity of the traffic signal and we question your claim that it will be a free flowing movement. We maintain our position that this is an unacceptable access due to the volume of traffic and the lack of sufficient storage. We feel that this would create hazardous conditions and delays along Route 110.

The Department policy states that we may restrict access to a property fronting a State highway and also fronts and has access to another public street if we determine that the access would be detrimental to the safety and operation of the State highway. Route 110 currently operates at a level of service (LOS) "F" and with the additional developments along the route, the added volume of traffic would further worsen the LOS. This would seriously disrupt the flow of traffic resulting in severe congestion and unsafe conditions in the future. Based on the above, the Department denies any access to your proposed site to and from Route 110."

This CPLR Article 78 petition seeks to compel respondent "NYSDOT" to issue the highway work permit claiming respondent's determination was arbitrary, capricious, unreasonable and not supported by substantial evidence in the record. In support petitioners submit a verified petition together with an affidavit from a professional engineer and an attorney's affirmation. Petitioners claim respondent "NYSDOT" has defaulted by failing to file a certified record which would provide an evidentiary basis for its permit denial. Petitioners assert that absent submission of a certified record movant is deprived of full disclosure of the records and documents used by respondent in making its decision. Petitioner asserts that "NYSDOT's" refusal to permit access to the public highway deprives "Fairchild"/"Stew Leonard's" from its fundamental right to reasonable ingress and egress from their property. It is petitioner's position that "NYSDOT's" determination must be nullified since "NYSDOT" failed to establish that the denial was a necessary highway safety measure and failed to provide a suitable alternate access. Petitioners maintain that respondents determination lacks a rational basis since the only traffic study considered showed that the proposed main access route would improve traffic conditions on the highway and therefore make travel

safer. Petitioners assert that there is no evidence in the record to support respondents claim that the traffic level of service ("LOS") on Route 110 near the intersection is "LOS" F (the lowest level of service). Petitioners claim that "NYSDOT's" denial is not sustainable since it was not based upon consideration of highway "traffic safety" guidelines set forth in Highway Law §52, "NYSDOT" regulations or Driveway Design Policy but was premised upon consideration of irrelevant factors including the flow of air traffic at Republic Airport and use of the State's real property interests. Petitioner claims that absent access approval onto Route 110 for its project, there is no suitable alternative access route and that any alternative means of access would require petitioners to reopen the SEQRA process. It is petitioners contention that "NYSDOT's" determination must be annulled since its denial was primarily based upon improper consideration of the impact the access proposal would have on Republic Airport. Petitioners claim that they are unable to present alternative access solutions since "NYSDOT's" denial clearly denied petitioners "any access to Route 110". Petitioners also claim that the affidavit submitted by the Director of Republic Airport in opposition to the petition must be stricken since the Director had no role in making "NYSDOT's" decision to deny the highway permit and therefore the information provided by the airport director is irrelevant to the issue of whether "NYSDOT's" determination which must be based on traffic-related considerations was arbitrary, capricious and irrational without basis in law.

In opposition respondent submits a verified answer together with an affidavit from the managing engineer responsible for issuing highway permits and an affidavit from the director of Republic Airport. Respondent claims that "NYSDOT" is not required to file a certified transcript of the record in this CPLR Article 78 proceeding since petitioner's application is in the nature of a writ of mandamus where no hearing has been held prior to the respondent's determination. It is respondent's position that "NYSDOT" is required to submit material and evidence to show the rationality of its decision but is not required to submit a certified return. Respondent asserts that "NYSDOT's" determination was rationally based and took into consideration safety concerns surrounding this unique section of the Route 110 corridor. Respondent claims that "NYSDOT's" permit denial was based on the applicant's failure to respond to "NYSDOT's" concerns that the proposed development was within a runway protection zone and would create a danger to persons and property on the ground. Respondent argues that "NYSDOT" is required to consider all transportation issues during its decision-making process including air and ground traffic, access, safety and security as it relates to the proposed location of the main signalized access for petitioner's property since the location is within the runway protection zone for runway 14 at Republic Airport. Respondent claims that the affidavits of "NYSDOT's" managing engineer and Republic Airport's director provide sufficient evidence to establish a rational basis for denying petitioner's permit application since the denial was based on safety considerations involving the placement of a shopping center with a runway protection zone and on hazards likely to result from traffic congestion. Respondent claims no basis exists to strike the Republic Airport director's affidavit since the affidavit provides relevant information concerning legitimate airport safety concerns which can be considered by "NYSDOT's" permit unit. Respondent asserts that petitioner still has reasonable use of its property since development of the property at a safer location on the 19 acre parcel remains a possibility. It is respondent's position that the developers were informed from the inception of their proposal that there was a significant problem with the application due to the location of the shopping center beneath the runway approach within the "RPZ". Respondent claims "Fairchild"/"Stew Leonard's" has not addressed this issue and has never submitted a second application addressing "NYSDOT's" concerns. Respondent contends that petitioners attempt to have the "highest and best use" standard applied to this permit application is inapplicable since that standard is only relevant to situations seeking consequential damages involving appropriation of land for highway purposes thereby interfering with a claimants access to the highway. It is respondents contention that since "NYSDOT" has provided proof of a rational basis for its permit denial based upon overall safety concerns surrounding the location of the shopping center no basis exists to annul "NYSDOT's" determination.

In a proceeding seeking judicial review of administrative action, the court must determine whether there is a rational basis for the decision or whether it is arbitrary and capricious (MATTER OF WARDEN v. BOARD OF REGENTS, 53 NY2d 186, 194, 440 NYS2d 875, 881 (1981)). The determination of responsible local officials in the affected community will be sustained if it has a rational basis and is supported by substantial evidence (MATTER OF FUHST v. FOLEY, 45 NY2d 441, 410 NYS2d 565 (1978)).

Although respondent has not submitted a certified return the underlying application is one seeking a writ of mandamus and therefore does not encompass a transcript of a hearing ordinarily provided for review by the Court. The submission of a verified answer together with affidavits from respondents representatives who were responsible for the actions taken by respondent "NYSDOT" provides an adequate basis upon which to determine the issues underlying this CPLR Article 78 proceeding.

Mandamus may be granted only to enforce a clear legal right (Klosterman v. Cuomo, 61 NY2d 525, 539 475 NYS2d 247, 254 (1984)); Matter of Legal Aid Society v. Sheinman, 53 NY2d 12,16, 439 NYS2d 882 (1981)). It issues to compel the performance of official duty clearly imposed by law where there is no other adequate remedy (Hamptons Hospital & Medical Center v. Moore, 52 NY2d 88, 436 NYS2d 239 (1980)). The duty must be positive and not discretionary, since mandamus does not lie to review the determination of public officers in matter involving the exercise of discretion or judgment (N.Y. State Inspection, Security & Law Enforcement Employee v. Cuomo, 103 AD2d 312, 480 NYS2d 1(2nd Dept., 1984) aff'd 64 NY2d 233, 485 NYS2d 719 (1984)).

In a proceeding seeking judicial review of administrative action, the court must determine whether there is a rational basis for the decision or whether it is arbitrary and capricious (Matter of Warden v. Board of Regents, 53 NY2d 186, 194, 440 NYS2d 875, 881 (1981)). Judicial review of an administrative determination is "limited to the grounds invoked by the agency. A reviewing court in dealing with a determination which an administrative agency is authorized to make must judge the propriety of such action solely on the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis (Matter of Scherbyn v. Wayne-Finger Lakes Board of Cooperative Educational Services et al, 77 NY2d 753, 758, 570 NYS2d 474 (1991)).

Highway Law §52 provides:

> The commissioner of transportation shall establish regulations governing the issuance of highway work permits, including the fees to be charged therefor, a system of deposits of money or bonds guaranteeing the performance of the work and requirements of insurance to protect the interests of the state during performance of the work pursuant to a highway work permit. With respect to driveway entrance permits, the regulations shall take into consideration the prospective character of the development., the traffic which will be generated by the facility within the reasonably foreseeable future, the design and frequency of access to the facility, the effect of the facility upon drainage as related to existing drainage systems, the extent to which such facility may impair the safety and traffic carrying capacity of the existing state highway and any proposed improvement thereto within the reasonably foreseeable future , and any standards governing access, non-access or limited access which have been established by the department of transportation.

The May 26, 2004 "NYSDOT" letter sets forth the two grounds for denying petitioner's highway permit application:

> (1) the location of the proposed retail facility structures on the centerline approach to Runway 14 in Republic Airport's Runway Protection Zone.
>
> "NYSDOT" determined that a shopping center beneath the approach to a sensitive instrument runway would put the safety of the public at an unreasonable risk. For this reason "NYSDOT" refused to grant an easement over state owned property to facilitate petitioner's access to Route 110;
>
> (2) the proposed northerly truck access would create hazardous traffic conditions.
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> "NYSDOT" determined that the second access proposal was unacceptable due to traffic volume of trucks and cars and the lack of sufficient storage to accommodate the volume of truck deliveries to the site.

Highway Law §52 sets forth the criteria to be used by "NYSDOT" when implementing regulations for the issuance of highway entrance permits. The regulations are required to take into consideration the prospective character of the development, the traffic generated . . . , the design and frequency of access to the facility, . . . drainage, the extent to which such facility may impair, the safety and traffic carrying capacity of the existing state highway and any proposed improvements.

Respondent's concede that the primary reason petitioner's highway permit application was denied was due to the location of the proposed retail building structures on the 19.26 acre parcel and claims that Highway Law §52 permits denial on those grounds based upon a general consideration of the "prospective character of the development". Respondents claim that despite the Town Board's site plan approval of those structures on the parcel and despite the "FAA's" finding that the "Stew Leonard" facility is not a hazard to air navigation, "NYSDOT" retains authority to deny the highway permit based upon safety consideration surrounding the building site location and not potential traffic problems from the proposed primary access location.

The statute (Highway Law §52) is clearly intended to establish parameters for the Department of Transportation's implementation of regulations based upon criteria which primarily considers traffic safety issues and not issues concerning the location of buildings on a vacant lot or air safety matters. Those related issues are primarily considered by agencies specifically authorized to make responsible decisions based upon their own local or specialized rules and regulations. The question of the location of commercial buildings on vacant land is primarily the concern of local zoning and planning boards empowered to make decisions upon submission of appropriate engineering reports, surveys, maps, records and data required by such local officials. The question of air safety is primarily the function of the Federal Aviation Agency which has special expertise regarding air safety navigation issues.

In this case the Babylon Zoning Board conducted hearings and granted petitioners approval of variances and special use permits for the development of the project. Moreover, the Town Planning Board was designated the lead agency during the 'SEQRA" environmental review process for site plan approval. Respondent "NYSDOT" fully participated in the review process as an "involved agency". On August 18, 2003, the Town Planning Board granted petitioners site plan approval despite "NYSDOT's" registered comments about the location of petitioner's buildings within the Republic Airports "RPZ". Once the

Planning Board issued a negative declaration and site plan approval was granted, "NYSDOT" as an involved agency was bound by the lead agency's determination which included traffic access from Route 110 subject to mitigation measures (Matter of Gordon v. Rush, 299 AD2d 20, 745 NYS2d 183 (2nd Dept., 2002) aff'd 100 NY2d 236, 762 NYS2d 18 (2003)). Having failed to commence a timely CPLR Article 78 petition to contest the Town Planning Board's approval, respondent "NYSDOT's" involvement became limited to considerations of traffic safety pursuant to Highway Law §52.

Similarly the issue of air safety with respect to the location of petitioners proposed project came under the jurisdiction of the FAA. That agency conducted an aeronautical study and issued a specific ruling that petitioners proposal posed no hazard to air navigation. On December 17, 2003 the "FAA's" national office upheld the no-hazard determination.

The issues surrounding the location of the buildings on the vacant parcel were therefore considered by the Town's Zoning Board, the Town Planning Board and the Federal Aviation Agency with respect to land use and air navigation safety issues. Each administrative agency granted petitioners permission to build the project as proposed subject only to highway traffic access considerations which are under the jurisdiction of respondent "NYSDOT" pursuant to Highway Law §52 and "NYSDOT's" related regulations.

"NYSDOT" has authority to grant or deny petitioners a highway permit under these circumstances if the proposed access permit(s) were considered unsafe. However "NYSDOT" is without authority to deny petitioners a highway permit based upon considerations not relevant to traffic safety. In this instance respondents permit denial was primarily predicated upon the proposed physical location of petitioners buildings on the lot rather than relevant traffic safety concerns. Respondent "NYSDOT's" denial must therefore be considered irrational and without basis in law since the determination is based upon criteria beyond the scope of factors to be considered pursuant to Highway Law §52. Moreover, the May 26, 2004 denial letter denying access to the site "to and from Route 110" clearly violates petitioners right to reasonable ingress and egress from the public highway to their land where "SEQRA" review has been completed and site plan approvals granted. Under these circumstances denial of access "to and from Route 110" constitutes an irrational and capricious determination which must be vacated since petitioners must be granted a highway permit granting access to Route 110 subject to imposition of reasonable conditions. Accordingly, it is

ORDERED that petitioners motion seeking an order striking the affidavit submitted by respondents from the Director of Republic Airport is denied, and it is further

ORDERED and ADJUDGED that petitioners CPLR Article 78 petition is granted to the extent that respondent's May 26, 2004 denial is vacated. Upon service of a copy of this order/judgment respondents shall have thirty days to issue a highway entrance permit subject to reasonable conditions in accordance with the requirements set forth pursuant to Highway Law §52.

Dated: April 27, 2007

MELVYN TANENBAUM

FINAL DISPOSITION

J.S.C.