INDEX # 21928-05
RETURN DATE: **11-16-05 (001)**
**1-24-07 (002)**
MOT. SEQ. # **001 & 002**

**SUPREME COURT - STATE OF NEW YORK**
**I.A.S. TERM, PART XXIV - SUFFOLK COUNTY**

**PRESENT:**
**Hon. PETER FOX COHALAN**

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APPLICATION OF ROBIN COURTNEY,

Petitioner,

-against-

THE PLANNING BOARD OF THE TOWN OF BABYLON, PATRICIA McMAHON, CHAIRMAN,

Respondents.
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CALENDAR DATE: January 24, 2007
MNEMONIC: MD; MD; C/disp.

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Upon the following papers numbered 1 to 65 read on this Article 78 proceeding and motion for default ; Notice of Motion/Order to Show Cause and supporting papers 1-5 ; 55-60 ; Notice of Cross-Motion and supporting papers _____; Answering Affidavits and supporting papers 6-54 ; 61-65 ; Replying Affidavits and supporting papers _____; Other _____; and after hearing counsel in support of and opposed to the motion it is,

**ORDERED** that this Article 78 proceeding by the petitioner, pro se, seeking a determination annulling Resolution #2005-198 of the Planning Board of the Town of Babylon denying petitioner relief from covenants and restrictions requiring single family use and owner occupied dwelling is hereby denied in its entirety and the petition is dismissed. The petitioner's motion for a default judgment pursuant to CPLR §3215 is denied as moot inasmuch as the respondents filed a verified answer and return in response to the article 78 petition.

Petitioner, Robin Courtney, brought this Article 78 petition against the respondent Babylon Town Planning Board (hereinafter Town), seeking to annul, vacate and set aside a Planning Board determination and decision, dated August 29, 2005, set forth in Resolution #2005-198 which denied petitioner's application for relief from restrictions and covenants on his dwelling limiting the parcel to single family use and owner occupied. On August 10, 1990 the petitioner filed a formal application to approve the subdivision of a sub-standard lot in a Residence C district into a two (2) plot subdivision. A public hearing was held on September 17, 1990 and the application was approved subject to six (6) conditions and restrictions. One of the restrictions and covenants required that the proposed lot be "single family use and owner occupied." No appeal was taken from this determination made

on October 22, 1990 granting the two (2) plot subdivision noted as tax map lots 187.001 and 187.002 with restrictions.

At or about June 11, 2005 the petitioner transferred the vacant lot #187.002 to a not-for-profit corporation created and controlled by the petitioner under the name "The New Wall Street Club Incorporated" and submitted an application for a "renter's permit" which was denied on May 4, 2005 because of the covenants and restrictions. The Town, in its decision, set forth six (6) specific reasons in denying the application. Petitioner thereafter brought this Article 78 proceeding seeking relief from the Town's denial of his application. The petitioner, now pro se after dismissing his attorneys, also moved for a default judgment pursuant to CPLR §3215 which motion is denied.

For the following reasons, the petitioner's Article 78 special proceeding seeking to vacate and annul the decision of the Town on the grounds that the decision is arbitrary, capricious and not supported by substantial evidence is denied and the special proceeding is dismissed

It is well settled law "that in a proceeding seeking judicial review of administrative action the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary or capricious." ***Flacke v. Onondaga Landfill Systems, Inc.***, 69 NY2d 355, 363, 514 NYS2d 689,693 (1987).

The proper standard for a reviewing court is whether the challenged administrative ruling lacked a rational basis for the action taken and was arbitrary and capricious. As set forth by the court in ***Matter of Halpern v. City of New Rochelle***, 24 AD3d 768, 809 NYS2 98 (2nd Dept. 2005),

> "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis. Under this standard, a determination should not be disturbed unless the record shows that the agency's action was 'arbitrary, unreasonable, irrational or indicative of bad faith' (***Matter of Cowan v. Kern***, 41 NY2d 591, 599; *see* ***Matter of Pell v. Board of Educ.***, 34 NY2d 222, 231 ["Arbitrary action is without sound basis in reason and is generally taken without regard to the facts"]).

The ***Halpern***, supra, court went on to state:

> "The Court of Appeals has long recognized the 'settled rule' that 'in reviewing board actions as to variances or special exceptions the courts ... restrict themselves to ascertaining whether there has been illegality, arbitrariness, or abuse of discretion' (***Matter of Lemir Realty Corp. v. Larkin***,

11 NY2d 20, 24 [collecting cases]; see ***People ex rel. Hudson-Harlem Val. Tit. & Mtge. Co. v. Walker***, 282 NY 400, 405 [determination of zoning board of appeals 'may not be set aside unless it appears to be arbitrary or contrary to law'][collecting cases]). The Court of Appeals has continued to articulate the CPLR 7803 (3) standard of review in zoning cases, emphasizing the deference that must be afforded to local officials in making judgments concerning land use in their community (*see,* ***Matter of Pecoraro v. Board of Appeals of Town of Hempstead***, 2 NY3d 608, 613 ['courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure'] ***Matter of Ifrah v. Utschig***, 98 NY2d 304, 308 ['Local zoning boards have broad discretion in considering applications for variances and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion']; ***Matter of Cowan v. Kern***, supra at 599 ['Where there is a rational basis for the local decision, that decision should be sustained']).

Thus, the determination of the Board must be upheld if it is rational, and supported by substantial evidence. ***Khan v. Zoning Board of Appeals of Village of Irvington***, 87 NY2d 344, 639 NYS2d 302 (1996) rehearing den. 87 NY2d 1056, 644 NYS2d 148. The consideration of "substantial evidence" is limited to determining "whether the record contains sufficient evidence to support the rationality of the [Respondent's] determination." ***Sasso v. Osgood***, 86 NY2d 374, 633 NYS2d 259 (1995).

A review of the record presented establishes more than sufficient support within the record of the proceedings to substantiate the actions taken by the Town in denying the petitioner's application for relief from the covenants and restrictions imposed upon his sub-divided lot *i.e.* "single family use and owner occupied" first imposed on August 10, 1990. When the petitioner was granted a subdivision of his substandard lot into two single family use dwelling units, the Town noted its concerns that "continued development of substandard area residential parcels have significant cumulative adverse impacts on a town wide basis" in the areas of potable water, public sewer capacity, surface water quality, roadway issues, parking and quality of life issues. Notwithstanding recommendations within the Town to deny the initial subdivision because of the deficiencies in lot area and frontage, the Town granted the petitioner's application to subdivide his substandard lot into two (2) lots but imposed certain quality of life conditions including that the homes to be built be single family homes and owner occupied to avoid rentals. This determination of the Town was accepted by the petitioner at that time. The fact that the petitioner did not act on the subdivision and subdivide the parcel for two (2) residences does not relieve him of the covenants and restrictions now imposed upon the parcels. He should not now, years later, upon transfer of the second parcel as a charitable gift to his not-for-profit corporation, be heard to complain about the Town's 1990 determination that the restriction to "owner occupied" is onerous.

The petitioner now seeks relief from the covenants and restrictions imposed on the property in 1990 but provides no basis for the relief other than to escape from the charges imposed for renting the property without a permit. A review of the decision of the Town provides support in the record for the denial of the petitioner's application. It is a well reasoned, concise and thorough examination of the facts and the denial. The Town sets forth that the restriction to "owner occupancy" was a reasonable restriction placed on this subdivided substandard lot in 1990 in order to preserve the character of the neighborhood. The petitioner has submitted no proof of a change of circumstances since then which would allow the lot to be transferred to a not-for-profit corporation controlled by the petitioner which property would not be owner occupied.

The evidence presented sufficiently sets forth a reasoned review of the substandard lot and the surrounding area to substantiate the considered opinion of the Town that a relaxation of the covenants and restrictions of "single family and owner occupied" requirements on this substandard lot should be denied. There is nothing within the fact finding process or the decision of the Town to suggest that its denial of the petitioner's application was arbitrary, capricious, an abuse of discretion or lacked support in the record presented before it. It is not this Court's duty to second guess or substitute its judgment for a well reasoned analysis by the Town as to the denial of the instant application for relief from these covenants and restrictions imposed upon the property in 1990 and not addressed or appealed by the petitioner at that time. The Court finds that the respondent Town conducted and engaged in the required balancing test and found the petitioner's application wanting and properly denied the application. ***Mattiacco v. Zoning Bd. of Appeals of Village of Pleasantville***, 22 AD3d 758, 804 NYS2d 385 (2nd Dept. 2005).

The Court, having found a rational basis to sustain the Town's determination as not being arbitrary or capricious, need not reach the other arguments advanced by the respondents of statute of limitations or laches.

Accordingly, based upon the entire record before it, and balancing all the factors set forth, the Town could and did rationally conclude that relief from the covenants and restrictions on the property would have posed a negative impact to the character of the neighborhood and outweighed the benefit sought by the petitioner, and thus, its determination denying the requested relief was not arbitrary or capricious. ***Matter of Ifrah v. Utschig***, supra. Accordingly, the petition is denied and the proceeding dismissed.

**Settle Judgment**

The foregoing constitutes the decision of the Court.

Dated: July 31, 2007

J.S.C.